

February 18, 2025

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SC Court of Appeals

The Honorable Jennifer B. McCoy  
Ninth Circuit Chief Administrative Judge  
100 Broad Street, Suite 348  
Charleston, South Carolina 29401

Re: James R. Rose, #293938 v. State of South Carolina  
Case No: 2023-CP-10-03190

Dear Judge McCoy:

Enclosed please find the proposed Order Granting Application For Post-Conviction Relief. For your convenience, I am enclosing a copy of the Motion For Default Judgment, the Amended Application For Post-Conviction Relief, and (1) Affidavit for your review.

If this Order meets your approval, please sign and return to me, and I will forward it to the Charleston County Clerk of Court to be filed and served.

If you have any questions, please do not hesitate to contact me.

Sincerely,

James R. Rose  
Applicant

DD/vh  
Enclosure(s)

cc: Danielle Dixon, Assistant Attorney General

PERRY Correctional Institution • 430 Oaklawn Road • Pelzer, South Carolina 29669

State of South Carolina )  
County of Charleston )  
James R. Rose, # 293938 )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

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In The Court of Common Pleas  
In The Ninth Judicial Circuit  
Case No.: 2023-CP-10-03190  
Proposed Order Granting  
Application For Post-Conviction  
Relief

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by James R. Rose (Applicant) on June 30, 2023, and amended on July 19, 2024. Respondent filed a Return and moved to summarily dismiss the application as untimely and successive on August 26, 2024. On January 6, 2025, Applicant filed a Motion for Default Judgment, asserting Respondent did not file a Return to his amended application filed with the Charleston County Clerk's Office on July 19, 2024. The motion is granted. If a party has failed to "plead or otherwise defend as provided by the South Carolina Rules of Civil Procedure and that fact is made to appear by affidavit or otherwise," the clerk of court will enter default. Rule 55(e), SCRPC. Entry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party. See Thynes v. Lloyed, 294 S.C. 152, 153-54, 363 S.E. 2d 122, 123 (Ct. App. 1987) (holding that

"whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit" of the moving party). To justify the state's failure to respond to Applicant's amended PCR application pursuant to Rule 12(a), SCRCP, Respondent relied on Guinyard v. State, 260 S.C. 220, 195 S.E. 2d 392 (1973) (holding the time limit prescribed by the statute is not mandatory, and the circuit court may exercise its discretion and extend the time for filing). However, no extension had been granted the Respondent, either by Applicant or the court. This court takes notice Applicant has been proceeding, from the litigations outset, without counsel. Therefore, documents filed by him are "to be liberally construed," Estelle, 429 U.S., at 106, 97 S.Ct. 285, and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," ibid. (internal quotation marks omitted). Cf. Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice").

On July 19, 2024, Applicant filed an amended application for post-conviction relief, which, this Court construes as a request for an evidentiary hearing to determine whether or not he knowingly and intelligently waived the right to appeal the denial of his PCR application, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991). Please see amended application.

Under Austin, a defendant can appeal a denial of a PCR application after the statute of limitations has expired if the defendant either requested and was denied an opportunity to seek appellate review, or did not knowingly and intelligently waive the right to appeal. *Id.*; See also King v. State, 308 S.C. 348, 417 S.E. 2d 868 (1992).

Respondent alleges Applicant did, in fact, appeal the denial of his 2015 PCR application, but chose to withdraw that appeal. Respondent argues, based on the fact Applicant appealed that order (but later withdrew it), Austin is not applicable...

Applicant contends he did not knowingly and intelligently withdraw the appeal from the denial of his PCR application. Applicant asserts he lacked a rational as well as a factual understanding of the proceedings against him. Applicant incompetently thought and believed, if his PCR appeal was terminated, the issues ruled upon, requiring reversal, that were abandoned by counsel, would be preserved for a subsequent proceeding. Without assistance of counsel, Applicant, unknowingly and unintelligently withdrew the PCR appeal.

Applicant argues and this Court agreed an evidentiary hearing must be granted based on Reed v. Ozmint and State v. Torrence.

In Reed, (Petitioner filed an application for PCR, which was denied after an evidentiary hearing. He then filed a Notice of Appeal. However, prior to the filing of a petition for writ of certiorari, Petitioner wrote a letter to Chief Justice Tol, . . . claiming to waive his right to all appeals . . . we remanded Petitioner's case to the circuit court for a competency hearing). 374 S.C. 19, 647 S.E. 2d 209 (2007).

In TORRENCE, (a waiver may not be found unless the Court determines the defendant is competent and his decision is knowing and voluntary. This Court . . . conducted an inquiry to ascertain the knowing / voluntary nature . . . to withdraw . . . appeal.). 317 S.C. 45, 451 S.E. 2d 883 (1994).

The RECORD before this Court contains no record of a competency hearing nor inquiry from the court to determine Applicant's state of competency when he unknowingly and unintelligently withdrew the PCR appeal.

viewed in the light most favorable to Applicant and for the reasons set forth herein, Applicant has set forth sufficient basis entitling him to an evidentiary hearing in this filing.

Applicant's Proposed Order Granting Application For Post-Conviction Relief establishes genuine issues of material facts, which is worthy of a hearing or judicial inquiry because it raises questions of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence. It is clear from the pleadings, files and records that Applicant is entitled to an evidentiary hearing.

IT IS THEREFORE ORDERED that for the reasons set forth in Applicant's Proposed Order Granting Application For Post-conviction Relief, this motion is hereby GRANTED.

AND IT IS SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2025.

\_\_\_\_\_  
JENNIFER B. MCCOY  
Chief Administrative Judge

\_\_\_\_\_, South Carolina

The Honorable Julie J. Armstrong  
Clerk of Court - Charleston County  
100 Broad Street, Suite 106  
Charleston, South Carolina 29401

Re: James B. Rose, #293938 v. State of South Carolina  
Case No.: 2023-CP-10-03190

Dear Ms. Armstrong:

Enclosed please find the Motion for Default of Judgment, Affidavit,  
and Amendment to the PCR application, for filing in your office.  
Please forward a time-stamped copy back to Applicant for his file.

Sincerely,

James R. Rose

James R. Rose  
Applicant

DD/vh  
Enclosure

cc: Danielle Dixon; Assistant Attorney General

Perry Correctional Institution • 430 Oaklawn Road • Pelzer, SC 29669

State of South Carolina )  
County of Charleston )  
James R. Rose, # 293938 )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

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In The Court of Common Pleas  
For The Ninth Judicial Circuit  
Case No. 2023-CP-10-03190

MOTION FOR DEFAULT  
JUDGMENT

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by James R. Rose (Applicant) on June 30, 2023, and amended July 19, 2024. Respondent made its return August 26, 2024 and moved to dismiss the application as untimely and successive. Respondent's motion to dismiss was granted. However, Respondent failed to respond to Applicant's amended application for post-conviction relief as provided by the South Carolina Rules of Civil Procedure Rule 12(a), SCRPC. In support of the Motion for Default Judgment, Applicant would respectfully show the Court:

A determination in this situation requires an evaluation of Rule 12(a), SCRPC, regarding responding to PCR applications. When interpreting a court rule, "we apply the same rules of construction used in interpreting statutes. Therefore, the words of [the rule] must be given their plain and

ordinary meaning without resort to subtle or forced construction to limit or expand the rule." *Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). When the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning. *Id.* at 360 S.C. 503 (2004). Rule 12(a), SCRPC: State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 90 days after service of the application, if it arises out of a trial. Unless an extension is granted, South Carolina must serve its answer within 90 days "after the service of the application." Rule 12(a), SCRPC. If a party has failed to "plead or otherwise defend as provided by the South Carolina Rules of Civil Procedure and that fact is made to appear by affidavit or otherwise," the clerk of court will enter default. Rule 55, SCRPC. Entry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party. See *Thynes v. Lloyd*, 294 S.C. 152, 153-54, 363 S.E.2d 122, 123 (Ct. App. 1987) (holding that "whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit" of the moving party). However, no judgment by default shall be entered against the State of South Carolina unless the claimant establishes his claim to relief by evidence satisfactory to the court. Rule 55(e), SCRPC. For an applicant to be granted default judgment in post-conviction relief, he must show prejudice, an applicant must show that his application has merit. *Herring*, 262 S.C. 597. Please see amended application for post-conviction relief.

The record reflects that the return to the Applicant's application for post-conviction relief was filed 14 months, (August 26, 2024) after the initial petition. (June 30, 2023). No extension had been granted the state, either by the Applicant or the court. Rule 12(a), SCRCP, requires that the State file its return within 90 days "after the service of the application." Applicant is entitled to relief not only because the return was not timely filed, but, also because, he was prejudiced by the state's failure to reply to his actual innocence claim, which, is worthy of a hearing or judicial inquiry because it raises questions of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence. The record shows that Applicant's amendment to the application for post-conviction relief was filed with the Charleston County Clerk of Court on July 19, 2024. There is no record showing a reply to said amendment filed by the state. The state's failure to reply prejudiced me because it is clear from the pleadings and the files and records that the Applicant is entitled to relief and had the state responded it would have had to state its position and admit the merit or veracity of the "actual innocence" claim, in which, would have made an evidentiary hearing mandatory. Wherefore, the state's failure to reply constitutes basis for granting the relief sought. Furthermore, the state's failure to reply is tantamount to an admission by omission. THEREFORE, based on the forgoing, Applicant's motion for Default Judgment must be granted along with the relief requested.

Respectfully submitted,

James R. Rose  
James R. Rose

State of South Carolina )  
County of Charleston )  
James R. Rose, # 293938 )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

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In The Court Of Common Pleas  
For The Ninth Judicial Circuit  
Case No. 2023-CP-10-03190

CERTIFICATE OF SERVICE  
BY MAIL

1. I am the Applicant in the above-captioned action.
2. Regular communication by mail exists throughout the State, of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of Motion for Default of Judgment, Affidavit, and Amended Application for Post-Conviction Relief on Respondent by depositing same in the United States mail, postage prepaid:

Office of the Attorney General  
Danielle Dixon, Esquire  
PCR Division - Ninth Circuit  
P.O. Box 11549  
Columbia, South Carolina 29211

Dated this 31st day of December, 2024.

James R. Rose  
James R. Rose

State of South Carolina )  
County of Charleston )  
James R. Rose, # 293938 )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )  

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In The Court of Common Pleas  
For The Ninth Judicial Circuit  
Case No. 2023-CP-10-03190

AFFIDAVIT

I, Applicant, James R. Rose, # 293938, under oath and penalty of perjury states the following:

(1) Respondent failed to Reply to Applicant's amended application for post-conviction relief filed with the Charleston County Clerk of Court on July 19, 2024; (2) Respondent "must" serve its answer within 90 days "after the service of the application." Rule 12(a), SCRPC.; (3) If a party has failed to "plead or otherwise defend as provided by the South Carolina Rules of Civil Procedure and that fact is made to appear by affidavit or otherwise," the clerk of court will enter default. Rule 55, SCRPC.; (4) Applicant's motion for default judgment is non-frivolous and proper for the Court to consider; and (5) Applicant believes in good faith that the "actual innocence" claim raised in the amended application for post-conviction relief is not frivolous.

Date: December 23, 2024

James R. Rose  
Applicant

Sworn to and subscribed before me this 23 day of December, 2024.

Lamaa Crowell (L.S.)

State of South Carolina )  
County of Charleston )  
James R. Rose, # 293938 )  
Applicant, )  
vs. )  
State of South Carolina, )  
Respondent. )

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Court of Common Pleas  
For The 9th Judicial  
Circuit  
Civil Action No.  
2023-CP-10-3190  
Amended Application  
For Post-Conviction Relief

To: Melody J. Brown, Esq., Office of Attorney General,  
PO Box 11549, Columbia, SC 29211-1549.

Applicant, amends his response to questions 10 & 11 of the previously filed application for Post-Conviction Relief. In addition to those grounds set forth in the original application, Applicant asserts the following ground to support Post-Conviction Relief:

1. Actual innocence claim based on a miscarriage of justice due to prosecutorial misconduct, ineffective assistance of counsel, and trial court error.

2024 JUL 19

On January 23, 2012, Brandon Cantrell called my cell phone to ask if I had some marijuana, and if not, could I locate some. ( App.p. 326, lines 4-5). Clarence Hush, a neighbor of mine, said that he would drive me and Brandon to Leland Shannon's mobile home in Lincolnville for some gas money. We asked Clarence for a ride because Brandon's vehicle was leaking oil and I didn't have a vehicle nor any access to one. ( App.p. 326, lines 7-9 ). When we arrived to our destination, they were celebrating Leland's cousin Samie's birthday and a lot of people were present. When I walked inside Leland's mobile home people were everywhere smoking marijuana, sniffing cocaine, and drinking beer and liquor. ( App.p. 121, lines 1-25 ). Clarence and Brandon waited for me outside in the car. When I took longer than attended, Clarence knocked on the door and a short stocky guy, wearing a green shirt answered the door. ( App.p. 331, lines 1-15 ); ( App.p. 343, lines 1-25 ). Significantly, Leland's daughter - Joy Mills, testified in trial, and provided law enforcement with a sworn statement that a short stocky guy wearing a green shirt pointed a double barrel shot gun at her head and demanded money. ( App.p. 371, lines 2-4 ); ( App.p. 372, lines 3-5 ); ( App.p. 343, lines 5-25 ); ( App.p. 382, lines 7-8 ). Law enforcement had focused the investigation on me and neglected other leads in the case. Several people were arriving and leaving while me, Clarence and Brandon were there, and even while we were leaving. ( App.p. 353, lines 3-5 ). We stopped at the BP gas station for gas on our way back to Wilmur Acres. ( App.p. 353, lines 19-24 ); ( App.p. 332, 14-25 ). Clarence and Brandon dropped me off first at my girlfriend Amber Wiley's mobile home at 11:30 pm, the same time the shooting was allegedly committed. ( App.p. 355, lines 2-22 ); ( App.p. 336, lines 1-13 ). It is undisputed that Amber provided law enforcement with an alibi that I was home with her the entire night after I was dropped off by Clarence and Brandon at 11:30 pm. Unfortunately, Amber was never called to testify at trial. On January 24, 2012, I was arrested by U.S. Marshals. ( App.p. 421, lines 20-22 ). No one else was arrested. ( App.p. 421, lines 23-25 ).

On January 24, 2012, I was interrogated by law enforcement officer detective James B. Perkins in reference to Leland Shannon being shot. Detective Perkins told me Tawanna Alston said that I was present at the crime scene and I knew who shot Shannon; and if I do not tell him who it was, he would arrest me for murder, inter alia. (App. p. 575, lines 6-21); (App. p. 601, lines 7-9). When I told Perkins that Alston was lying and I was home with my girlfriend Amber Wiley, Perkins deprived me of my liberty without lawful justification and falsely arrested me for murder, attempted murder, burglary 1st degree, and possession of a weapon. (App. p. 1). Perkins' ulterior purpose was to use the criminal process to punish me for not telling him who shot Shannon.

On March 6, 2012, at the preliminary hearing, detective Perkins knowingly and intentionally with reckless disregard for the truth, testified falsely, Alston watched me shoot Shannon repeatedly. (App. p. 716, lines 3-25); (App. p. 717, lines 1-12). Perkins improperly influenced the Court in its decision as to whether there was probable cause to believe I shot and killed Shannon. The falsity prejudiced me and the outcome of the preliminary hearing because had the Court not been presented with the false testimony, there is a reasonable probability that the Court would not have found probable cause to believe that I shot and killed Shannon. Therefore, the falsity affected the verdict, of the Charleston County Grand Jury on June 11, 2012, when I was indicted for murder, inter alia. Prosecution's conduct significantly infringed on grand jury's ability to exercise independent judgment and I was prejudiced.

Testimony by a law enforcement officer that is knowingly false or misleading "is imputed to the prosecution." U.S. v. Basham, 789 F.3d 358 (4th Cir. 2015). Even if false testimony is volunteered . . . and takes the prosecutor by surprise rather than being solicited by him, if he knows it is false his obligation is to see that it is corrected. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1950).

On December 9, 2013, during the solicitor's opening statement, prosecution presented an alternative theory that I was guilty under the doctrine 'the hand of one, is the hand of all' allegedly, because myself, a tall masked gunman and a short stocky gunman shot Leland Shannon and even though the other gunman have never been caught, the state is not bound to prove to the jury, beyond a reasonable doubt, who pulled the trigger, they are all guilty. (App. p. 152-156). "To admit evidence under 'the hand of one, is the hand of all' theory the existence of the common design and the participation of the accused against whom the evidence is offered should first be shown." State v. Langley, 334 S.C. 643, 515 S.E. 2d 98 (1999) (quoting State v. Woomer, 276 S.C. 258, 277 S.E. 2d 696 (1981)). As a general proposition, some act of commission or omission is an essential element of every crime. For an accused individual to be convicted it must be proved that he was in some way personally responsible for the act constituting the crime. U.S. v. Park, 449 F. 2d 839 (4th Cir. 1974). The United States Supreme Court recognized this in Dotterweich: 'The offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws . . .' 320 U.S. at 284.

The state's alternative theory via opening statement unconstitutionally shifted the burden of proof to me to prove my innocence. See United States v. Saint Louis, 889 F.3d 145 (4th Cir. 2018) (citing United States v. Simon, 964 F.2d 1082, 1086 (11th Cir. 1992)); It is well established that "prosecutors must refrain from making burden-shifting arguments which suggest that the defendant has an obligation to produce any evidence or to prove innocence."

The solicitor's alternative theory via opening argument unconstitutionally shifted the burden of proof in violation of the due process clause. The Supreme Court declared in In re Winship that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed. 2d 368 (1970). Additionally, the Supreme Court has held that a defendant does not have to disprove anything nor prove innocence, and state-created presumptions to the contrary are violative of due process. See Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979); Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1931, 44 L.Ed. 2d 508 (1975). U.S. v. Brockington, 849 F.2d 872 (4th Cir. 1988). "The prosecutor's opening statement should be an objective summary of the evidence reasonably expected to be produced, United States v. Wright-Barker, 784 F.2d 161, 175 (3d Cir. 1986), and the prosecutor should not use the opening statement as an opportunity to "poison the jury's mind against the defendant". • United States v. De Rosa, 548 F.2d 464, 470 (3d Cir. 1977) (quoting Government of Virgin Islands v. Turner, 409 F.2d 102, 103 (3d Cir. 1969)). Prosecution's opening statement left an indelible erroneous impression fixed in the juror's minds that I could be found guilty in the absence of wrongful action on my part. (App. p. 152-156).

Prosecution's opening statement infected the trial with unfairness so as to deny me due process under the United States Constitution. The alternative theory was made with malice and without probable cause. See Rule 407, SCAER, Rules of Prof. Conduct, Rule 3.8. (a): "The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; It is beyond question that a prosecutor's duty is to insure that justice is done, and not simply to seek convictions. Berger v. U.S., 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Therefore, prosecution's alternative theory via the opening statement prejudiced me and the outcome of my trial because had the jury not been presented with the clearly erroneously applied application of the hand of one doctrine, there is a reasonable probability the outcome of the trial would have been different.

Trial counsel was ineffective for failing to object to the solicitor's opening statement on the ground the hand of one theory was erroneously applied.

The Sixth Amendment to the U.S. Constitution guarantees that in all criminal prosecutions, the accused has the right to the assistance of counsel for his defense. See U.S. Const. Amend. VI. To show ineffective assistance of counsel, Applicant must first establish deficient performance by counsel and, second, that the deficient performance prejudiced him. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984). The deficiency prong turns on whether "counsel's representation fell below an objective standard of reasonableness... under prevailing professional norms." Id. at 688. A reviewing court "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonableness professional assistance." Harrington v. Richter, 562 U.S. 86, 104 (2011) (quoting Strickland, 466 U.S. at 689). The Strickland standard is difficult to satisfy in that the "Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." See Yarborough v. Gentry, 540 U.S. 1, 8 (2003). The prejudiced prong inquires into whether counsel's deficiency affected the judgment. See Strickland, 466 U.S. at 691.

An applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. In considering the prejudice prong of the analysis, a court cannot grant relief solely because the outcome would have been different absent counsel's deficient performance, but rather, it "can only grant relief under . . . Strickland if the 'result of the proceeding was fundamentally unfair or unreliable.'" Sexton v. French, 163 F.3d 874, 882 (4th Cir. 1998) (quoting Lockhart v. Fretwell, 506 U.S. 364, 369 (1993)). Under these circumstances, the applicant "bears the burden of affirmatively proving prejudice." Bowie v. Branker, 512 F.3d 112, 120 (4th Cir. 2008). If the applicant fails to meet this burden, a reviewing court need not even consider the performance prong. Strickland, 466 U.S. at 697.

Trial counsel's performance was deficient and counsel's deficient performance prejudiced me. Had counsel objected, the trial court and the jury would have learned that on January 10, 2017, while at my PCR hearing, trial counsel testified that the solicitor called her on November 8, 2013, approximately one month before trial, and told her that Tawanna Alston was not telling the truth. Antione Aiken and other state's witnesses were inconsistent and their stories were not matching up. (App. p. 719, lines 20-25). The solicitor then advised counsel that there was a complete lack of evidence tending to prove that I killed Leland Shannon by personally shooting him, so, she would be presenting a theory that the shooting was in concert with two to three people. (App. p. 720, lines 1-6). There was no reason given by the solicitor as to why she changed the state's theory of the case and the solicitor was not present ~~at~~ the PCR hearing although she was subpoena'd. Trial counsel failed to inform me that I was being prosecuted under the hand of one, hand of all theory. (App. p. 721, lines 7-13). I was disadvantaged from the outset because trial counsel knew the state would be prosecuting the case under an alternative theory, approximately one month before trial and never mentioned it to me nor did she challenge the state's alternative theory. Trial counsel's failure to object on the ground the hand of one doctrine was erroneously applied qualifies

as a fundamental defect which inherently results in a complete miscarriage of justice. Counsel did not act as an adversary to the prosecution's case, but instead helped to secure my unconstitutional conviction. The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed. 2d 493 (1967). Counsel failed to render reasonably effective assistance under prevailing professional norms. McKnight v. State, 378 S.C. 33 (2008). But for counsel's errors, there is a reasonable probability the result of the trial would have been different. Cherry v. State, 300 S.C. 115 (1989).

The trial court erred in failing to direct a verdict of acquittal because there was no substantial evidence to submit the case to the jury.

The trial court has a duty to submit the case to the jury where the evidence is circumstantial if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. State v. Martin, 340 S.C. 597, 533 S.E. 2d 572 (2000); State v. Williams, 321 S.C. 327, 468 S.E. 2d 626 (1996). Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error. State v. Irvin, 270 S.C. 539, 243 S.E. 2d 195 (1978). The trial judge should grant a directed verdict, however, when the evidence merely raises a suspicion that the accused is guilty. State v. Martin, supra. "suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. State v. Lollis, 343 S.C. 580, 541 S.E. 2d 254 (2001). On appeal of the denial of a directed verdict of acquittal, "we must look at the evidence in the light most favorable to the State." (quoting State v. Arnold, 361 S.C. 386, 605 S.E. 2d 529 (2004) (citing State v. Martin, supra; State v. Williams, supra)).

The state's evidence merely rose to a suspicion that I participated in the crime, and this mere suspicion was insufficient to survive a directed verdict motion, in that the state had only proven that I visited Leland's mobile home prior to when he was allegedly shot. The state had proven that Leland died from being shot. The state had not proven that I shot him, or that I participated in the shooting. The state has not presented any evidence on which the trial court could have based the denial of my motion for directed verdict with respect to the murder charge. The state had not presented substantial circumstantial evidence sufficient to submit the case to the jury. The state's evidence "falls woefully short" of the standard set by the South Carolina Supreme Court's precedents concerning the modicum of evidence constituting substantial circumstantial evidence sufficient to withstand a directed verdict. The only inference that can be drawn from the state's case is that I may have or may not have been present at the crime scene when Leland was shot, but not that I shot him or participated in the shooting. The state did not put forward sufficient direct or substantial circumstantial evidence of guilt. The South Carolina Supreme Court has repeatedly affirmed the principle that when the state fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict. State v. Odems, 395 S.C. 582, 720 S.E. 2d 48 (2011) (citing State v. Rothschild, 351 S.C. 238, 243, 569 S.E. 2d 346, 348 (2002)). THEREFORE, the state failed to present substantial circumstantial evidence of my involvement in the murder charge, and thus the circuit court erred by failing to direct a verdict of acquittal.

The trial court abused its discretion by instructing the jury on 'the hand of one, is the hand of all' because the jury charge was not warranted by the facts presented at trial.

In South Carolina the trial judge is required to charge the current and correct law. State v. Adkins, 353 S.C. 312 (Ct. App. 2003). In reviewing jury charges for error, this Court must consider the trial court's jury charge as a whole in light of the evidence and issues presented at trial. *Id.* at 318 (citing State v. Todd, 390 S.C. 212 (1986)). "To reverse a criminal conviction on the basis of an erroneous jury instruction, we must find the error was a prejudicial error." State v. Bowers, 436 S.C. 640 (2022). "Prejudicial error in a jury instruction is an error that contributed to the jury verdict." *Id.* Should an appellate court find a jury charge erroneous, the court must then decide if the charge affected the jury's deliberations, contributing to the verdict. See *id.* if the appellate court has "any reasonable doubt as to whether the erroneous charge contributed to the verdict," it must reverse the conviction. *Id.* at 647, 875 S.E.2d at 611. "The doctrine of accomplice liability arises from the theory that 'the hand of one is the hand of all.'" State v. Reid, 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014) (quoting 23 S.C. JUR. Homicide § 22.1 (2014)). "Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *Id.* "A person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act to be guilty under a theory of accomplice liability." *Id.* at 472-73, 758 S.E.2d at 910.

"Accordingly, proof of mere presence is insufficient, and the state must present evidence the participant knew of the principal's criminal conduct." *Id.* at 473, 758 S.E. 2d at 910. "[S]ome principles of law should not always be charged to the jury." State v. Johnson, 438 S.C. 110, 882 S.E. 2d 190 (2022) (quoting State v. Perry, 410 S.C. 191, 202, 763 S.E. 2d 603, 608 (Ct. App. 2014)); see also State v. Burdette, 427 S.C. 490, 503, 832 S.E. 2d 575, 583 (2019) (stating some matters allowed during jury argument should not be included in the jury charge). "Instructions that do not fit the facts of the case may serve only to confuse the jury." State v. Johnson, *supra*. (quoting State v. Blurton, 352 S.C. 203, 208, 573 S.E. 2d 802, 804 (2002)); see also *id.* at 205, 208 n.1, 573 S.E. 2d at 803, 804 n.1 (reversing a conviction even though a jury charge was a correct principle of law because it "was not warranted by the facts adduced at trial."). Before instructing the jury on the doctrine of "the hand of one is the hand of all" in a factual scenario involving a gunshot, a trial court is required to determine whether - in addition to evidence the defendant fired the shot - there is any evidence the person with whom he agreed to commit the initial crime fired the shot; if all the evidence indicates the defendant was the only shooter, an instruction on the "hand of one" theory must not be given. State v. Sellers, 442 S.C. 140 (2024). There was no evidence that myself, a tall masked gunman and a short stocky gunman entered into a mutual plan or agreement to murder Leland Shannon or that I shot Leland. There is no evidence I shot Leland, or otherwise actively participated in the shooting. The trial court allowed the jury to speculate that myself, a tall masked gunman and a short stocky gunman had a mutual plan or agreement to murder Leland. There must be some evidence suggesting the plan existed. The state put me on trial as a principal, elicited testimonial evidence that someone else was present at the scene, and argued that I was guilty

as an accomplice because the other person that was present committed the crime. In sum, evidence of a plan or agreement to commit a crime is needed to entitle the State to an accomplice liability jury charge. That evidence was not present in my case. Thus, in a murder case involving a gunshot, the trial court should charge the law of accomplice liability when there is any evidence (1) the defendant had a mutual plan or agreement with another person to commit the murder, and (2) the other person in the mutual plan or agreement fired the fatal shot. See Washington, 431 S.C. at 407, 848 S.E. 2d at 786 (holding it was ERROR to give an accomplice liability charge when - though there was evidence the defendant had a mutual plan with another person and evidence that another person fired the fatal shot, there was no evidence the other person who might have fired the shot was part of the mutual plan); Barber v. State, 393 S.C. 232, 236-37, 712 S.E. 2d 436, 439 (2011) ("[T]he question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the [crime] took place."). The accomplice liability charge was not proper because the evidence is not equivocal as to whether myself or the unidentified person was the shooter - all the evidence presented only went to the unidentified person being the shooter; no evidence was presented of me being the shooter. The record must have also contained some evidence that I was the shooter for the accomplice liability instructions to be proper; it did not. Campbell, 435 S.C. at 540, 868 S.E. 2d at 421. Neither party presented evidence that myself and the unidentified person had joined together in a common plan or scheme to carry out the shooting. The jury only found me guilty of murder due to the theory of accomplice liability. THEREFORE, the charge prejudiced me.

Appellate counsel was ineffective for failing to challenge on appeal whether the trial court erred in denying my directed verdict motion and by instructing the jury on hand of one, hand of all.

"A defendant is constitutionally entitled to the effective assistance of appellate counsel." Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel failed to render reasonably effective assistance under prevailing professional norms, and the deficient performance prejudiced the applicant's case. McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). "The PCR applicant has the burden of proving both prongs." Caprod, 338 S.C. at 109, 525 S.E.2d at 517. To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

On January 10, 2017, appellate counsel testified at my PCR hearing that she did not challenge either issue because she did not believe they were meritorious. Starting with the hand of one is the hand of all issue, appellate counsel testified that Antione Aiken's testimony talking about allegedly hearing a voice sounding like mine yell, it's in the back room and hurry up, and allegedly seeing me get in the driver's

side of the car in which the tall gentleman, who was masked and had a gun, also got in, seemed to indicate that I may have been involved in some sort of plot to at least robbery, negated the argument against "hand of one is the hand of all." Appellate counsel did not think that this issue had much merit in light of Antion's testimony. However, there was also testimony that I was at Amber Wiley's mobile home, the same time the shooting occurred, and I was not at the crime scene when Leland Shannon was shot. "[a]n alternate theory of liability may not be charged to a jury "merely on the theory the jury may believe some of the evidence and disbelieve other evidence." Barber, 393 S.C. at 236, 712 S.E. 2d at 438. Moreover, the State did not prove beyond a reasonable doubt that I joined with a tall masked gunman and a short stocky gunman to murder Leland Shannon. Additionally, appellate counsel's failure to challenge whether the trial court erred by charging the jury with the "hand of one is the hand of all" instructions was deficient performance that prejudiced me because the evidence did not warrant an accomplice liability instruction. Wilds v. State, 407 S.C. 432 (2014) (Evidence did not warrant accomplice liability instruction in trial for armed robbery and murder, and thus, appellate counsel's failure to challenge instruction on appeal was deficient performance that prejudiced defendant, as required to support claim of ineffective assistance of counsel) U.S.C. A. Const. Amend. 6. The issue of the appellate counsel's failure to challenge whether the trial court erred by charging the jury with the "hand of one is the hand of all" instructions was a meritorious one which would have entitled me to a reversal on direct appeal, and appellate counsel's patent omission in failing to raise the issue clearly establishes ineffective assistance.

Concerning the issue of the directed verdict motion, appellate counsel did not think that this issue had merit. Counsel believed that there was direct evidence tending to show guilt from Joy Mills' testimony talking about allegedly recognizing my voice as one of the masked men inside the home. Counsel said that while the state's witnesses never indicated that I had a gun or that I shot anyone, she believed that their testimony seemed to indicate that I may have been involved in setting up what was going on. (App. p. 790 - 793). There was a complete failure of competent evidence that I shot Leland Shannon. The State did not present any evidence that I was involved in his murder. "The trial judge should grant a directed verdict, however, when the evidence merely raises a suspicion that the accused is guilty." (quoting State v. Martin, 340 S.C. 597, 533 S.E. 2d 572 (2000)). "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. State v. Lollis, 343 S.C. 580, 541 S.E. 2d 254 (2001). State v. Odems, 395 S.C. 582, 720 S.E. 2d 48 (2011) (Petitioner's overall actions may appear suspicious, but mere suspicion is insufficient to support a guilty verdict.). The issue of appellate counsel's failure to challenge whether the trial court erred in denying my directed verdict motion was a meritorious one which would have entitled me to a reversal on direct appeal, and appellate counsel's patent omission in failing to raise the issue clearly establishes ineffective assistance.

The PCR judge erred in finding that I failed to establish the requisite deficiency of appellate counsel or prejudice entitling me to relief. The court committed an error of law in finding that appellate counsel raised issues on appeal that were stronger, then, erroneously ruled that there is no reasonable likelihood that I would have prevailed on appeal had these two issues been raised and counsel's performance was in accordance with professional norms. (App. p. 790 - 793). Talley v. State, 371 S.C. 535, 640 S.E. 2d 878 (2007); A PCR applicant bears the burden of establishing that he is entitled to relief. (citing Capwood v. State, 338 S.C. 103, 109, 525 S.E. 2d 514, 517 (2000)). The Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them. *Id.* at 109-10, 525 S.E. 2d at 517. The Court will reverse the PCR judge's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E. 2d 222, 225 (2000). The PCR judge abused its discretion by ruling appellate counsel's performance was in accordance with professional norms because counsel was ineffective for failing to challenge on appeal whether the trial court erred in denying my directed verdict motion and by instructing the jury on "hand of one, hand of all" because these issues were stronger than the one issue appellate counsel raised on appeal, in which, would have entitled me to relief. See State v. Rice, at 315, 652 S.E. 2d at 415 (The trial court abuses its discretion when the ruling is based on an error of law or factual conclusion that is without evidentiary support.). There are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose

and spirit of the Rules of Civil Procedure. These considerations should guide PCR courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. Trial courts are encouraged in PCR cases to use the discretion granted them on procedural matters to find reasonable ways - within the flexibility of the Rules - to reach the merits of substantial issues. As stated in Odem v. State, 337 S.C. 256, 523 S.E. 2d 753 (1999) and repeated in Robertson v. State, 418 S.C. 505, 795 S.E. 2d 29 (2016), "All applicants are entitled to a full and fair opportunity to present claims in one PCR application." Robertson, 418 S.C. at 513, 795 S.E. 2d at 33; Odem, 337 S.C. at 261, 523 S.E. 2d at 755. I received ineffective assistance both at trial and on appeal. I have a constitutional right to an effective attorney. The trial court's abuse of discretion, charging the jury with the "hand of one, hand of all" instructions prejudiced me because the erroneous instruction is the only reason why the jury found me guilty of murder. The solicitor's blatant attempt to strengthen an obviously weak case is a violation of the duty of the prosecutor and warrants relief in the interest of justice. As Chief Justice Warren aptly put it: '(our duty) is to see that the waters of justice are not polluted.' Mesarosh v. United States, 352 U.S. at 14, 77 S.Ct. at 8, 1 L.Ed. 2d 1 (1956). The prosecution had something other than attaining justice foremost in its mind. My case was not prosecuted in good faith or in the spirit of justice. THEREFORE, the waters of justice have been polluted, and relief is the appropriate cure for the pollution in this case.

The PCR court erroneously dismissed Applicant's PCR application and failed to make sufficient factual findings required of it by law. PCR counsel refused Applicant's request to file a motion to reconsider pursuant to Rule 59 (e) of the South Carolina Rules of Civil Procedure on his behalf. Appellate counsel denied Applicant's request to challenge said issue in his petition for writ of certiorari to view the decision of the PCR judge; all the while barring the issue for review in the Supreme Court or subsequently on federal habeas review. Applicant lacked a rational as well as a factual understanding of the proceedings against him and, incompetently thought that, if he were to terminate his PCR appeal, he would then, be preserving the ineffective assistance of appellate counsel issue that was intentionally abandoned. In the event, Applicant unknowingly and unintelligently waived his statutory right to an PCR appeal. Applicant avers that, at all times, he is actually and factually innocent and his unconstitutional conviction is a miscarriage of justice due to ineffective assistance of trial and appellate counsel, prosecutorial misconduct, and trial court error that rendered his trial and his appeal fundamentally unfair. Applicant begs this honorable Court under extraordinary circumstances to reach the merits of his ineffective assistance of appellate counsel issue for failing to challenge on direct appeal whether the trial court erred in denying his motion for a directed verdict and by instructing the jury on the 'hand of one hand of all', in the interests of justice.

July 13, 2024  
Pelzer, South Carolina

Respectfully submitted,  
James R. Rose  
James R. Rose  
Applicant

cc: Danielle Dixon, Assistant Attorney General