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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Horry County Court of Common Pleas
The Honorable Deadra L. Jefferson, Circuit Court Judge

Lower Case No. 2021CP2607151

Nicholas McIver, #00376157.....Petitioner,

v.

The State of South Carolina.....Respondent

NOTICE OF APPEAL

The Applicant-Petitioner, Nicholas McIver, hereby appeals the Order of Dismissal in his post-conviction relief case, issued by the Honorable Deadra L. Jefferson. Undersigned received notice of the judgment on March 24, 2025. A copy of the Order of Dismissal is attached to this notice.

This Notice of Appeal has also been forwarded to the Clerk of Court for Horry County and the Appellate Division of SCCID. Undersigned has filed this Notice of Appeal on Petitioner's behalf but has not been retained to perfect Petitioner's PCR appeal. Undersigned has advised Petitioner of his need to retain other counsel or SCCID and that Undersigned will withdraw as counsel on this appeal at the appropriate time.

Respectfully submitted,

William G. Yarborough, III
Lauren Carole Hobbis

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STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Nicholas J. McIver, SCDC #376157, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2021-CP-26-07151 **ORDER OF DISMISSAL**

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	William G. Yarborough, III, Esq.
Respondent's Attorney:	Bryan T. Hall, Esq.
Trial Counsel:	Gregory S. Bellamy, Esq.
Date of Hearing:	July 30, 2024
Court Reporter:	Sallie Beth Todd

This matter is before the Court pursuant to an application for post-conviction relief ("PCR") filed by Nicholas J. McIver ("Applicant") on October 17, 2021. On July 30, 2024, an evidentiary hearing was convened before this Court. Applicant was present and represented by William G. Yarborough III, Esquire. Assistant Attorney General Bryan T. Hall, Esquire represented Respondent. At the hearing, Applicant testified on his own behalf and called as a witness Gregory Scott Bellamy, Esquire. Respondent did not call any witnesses.[1] Following a thorough review of the trial transcript and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

[1] The Court made inquiry of Gregory Scott Bellamy, Esq. to supplement the record without objection. Counsel was given the opportunity to ask questions of the witness after the Court's questioning.

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Applicant is presently confined in the South Carolina Department of Corrections ("SCDC") serving a forty-five (45) year sentence. In December 2016, the Horry County Grand Jury indicted Applicant for Murder (Indictment 2016-GS-26-05558),[2] Grand Larceny $2,000 to $10,000 (Indictment 2016-GS-26-05556),[3] and Possession of a Weapon during the Commission of a Violent Crime (Indictment 2016-GS-26-05557).[4] On April 23-27, 2018, Applicant proceeded to a jury trial before the Honorable Steven H. John. Assistant Solicitors George DeBusk, Jr., and Seth Oskins prosecuted the case. Applicant was represented by Gregory Scott Bellamy ("Counsel").[5] These charges arose from an incident in which Applicant and his co-defendant were last seen with Amanda Fisher ("Victim") before Victim was found dead. Applicant was seen on video surveillance driving Victim's car and purchasing items with her credit cards after the murder. Applicant was also seen by a child witness burning Victim's car after the murder. The jury convicted Applicant as indicted. Judge Steven H. John sentenced Applicant to forty-five (45) years for Murder, five (5) years for Grand Larceny, and five (5) years for Possession of a Weapon during the Commission of a Violent Crime. These sentences were to run concurrently.

Applicant timely filed a notice of appeal. The Court of Appeals affirmed the Applicant's convictions and sentences, determining (1) the State presented extensive circumstantial evidence Applicant acted as the principal in shooting Amanda Fisher ("Victim"); (2) the trial court did not abuse its discretion in declining to charge the jury that evidence of flight or cover-up attempts after

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[2] The offense of murder is a violent, most serious felony punishable by death, or mandatory minimum term of imprisonment for thirty years to life. *See* S.C. Code Ann. §16-03-20.

[3] The offense of grand larceny value more than $2,000 but less than $10,000 is a felony and must be fined in the discretion of the court or punishable by imprisonment for not more than five years. *See* S.C. CODE ANN. § 16–13–30.

[4] The offense of possession of a weapon during the commission of a violent crime is a violent felony punishable by imprisonment for five years in addition to the punishment provided for the principal crime. *See* S.C. CODE ANN. § 16–23–490.

[5] Gregory Scott Bellamy, Esq. was admitted to the bar in November 1990. He further testified that he was law clerk to the Hon. Sidney M. Floyd, was an assistant solicitor for the 15th circuit from 1991-1995 and entered private practice in 1995 to the present concentrating in criminal defense.

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the crime are not alone enough to convict Applicant because the State presented more than just flight and cover-up evidence; (3) the trial court's err in prohibiting Applicant from cross-examining Detective Lynam about statements he made during interrogation was a harmless error; (4) the trial court did not abuse its discretion in admitting the identification of the minor witness ("SH"); and (5) argument regarding presentation of conflicting theories was unpreserved. *State v. McIver*, Op. No. 2021-UP-353 (Ct. App. filed Oct. 13, 2021). The Remittitur was sent on November 5, 2021.

CURRENT APPLICATION

Applicant timely commenced this PCR action on October 17, 2021, alleging he is being held in custody unlawfully for the following reasons:

Ineffective Assistance of Counsel

a. Failure to object to testimony regarding an incident in which Applicant filmed his co-defendant and Victim's cousin having sex without their knowledge.
b. Failure to object to the jury charge on hand of one, hand of all theory of accomplice liability.
c. Failure to object to the State's opening statement which contained references to the hand of one, hand of all theory of accomplice liability.
d. Failure to object to unsupported arguments and references not in evidence during the State's closing.
e. Failure to request a jury charge on cover up evidence or preserve the issue for appellate review.
f. Failure to object to a photo lineup and identification of Applicant on the basis of minor witness' (SH) age and competency.
g. Failure to argue minor witness' (SH) identification was unreliable due to witnesses' age and competency.
h. Failure to object to State's improper presentation of conflicting theories, in violation of due process.

On January 18, 2022, Respondent filed its Return. On December 20, 2022, Applicant amended his application to raise the following additional allegations:

Ineffective Assistance of Counsel

i. Failure to move for severance of the trial from Applicant's co-defendant.

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j. Made statement during opening and closing arguments that incriminated Applicant by stating to the jury that Applicant was guilty of grand larceny.
k. Making statements in opening and closing arguments that "bolstered" the State's theory of accomplice liability.

Before this Court are the Horry County Clerk of Court records of the subject conviction; Applicant's records from SCDC; the appellate records; the trial transcript; and the records of the current PCR action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. at 441, 334 S.E.2d

at 813. An applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland*, 466 U.S. at 687–88; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Applicant must prove prejudice by showing "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. *Strickland* requires that trial counsel be given leeway to make reasonable strategic decisions. *Strickland*, 466 U.S. at 688-89 (stating "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant."). Judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689.

Failure to Object to the Sex Video

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to testimony that Applicant recorded Victim's cousin and his co-defendant having sex. Failing to object does not automatically constitute ineffective assistance of counsel. *See Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800-01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue). At trial, Tabetha Oxendine, Victim's cousin, testified that Applicant filmed sexual activity between her and his co-defendant without her consent. (R. 493-94). Counsel testified at the evidentiary hearing that he did not object to this testimony because he believed the testimony was beneficial to the defense's theory that there was no plan between Applicant and his co-defendant to murder Victim,

which he believed would refute the State's theory of hand of one, hand of all accomplice liability. Counsel testified he believed the video supported his argument that Applicant's encounter with Victim was a casual encounter. Counsel further testified that this testimony corroborated the defense's theory that the parties were all getting along and depicted that the Applicant wasn't doing "anything bad." This Court finds ***credible*** Counsel's testimony that he believed the testimony was beneficial to the defense's theory of a casual encounter showing there was no plan to commit the murder. This Court finds Counsel articulated a reasonable strategic reason for not objecting to the video. Further, this Court finds Applicant failed to prove prejudice by showing a reasonable probability the result of trial would have been different but for Counsel's failure to object. Thus, Applicant failed to meet his burden.

Failed to Spend Adequate Time and Prepare

This Court finds Applicant failed to prove Counsel was ineffective for failing to prepare and spend adequate time on his case. Although not raised in his pleadings, there was testimony from Applicant that Counsel met with him a few times and Applicant did not receive discovery. In order to prevail upon a claim that counsel did not adequately prepare, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop if counsel had more fully prepared. *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998). "[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence of how additional preparation or communication would have resulted in a different outcome. *Id.*; *See Jackson*, 329 S.C. at 353-54, 495 S.E.2d at 772.

This Court finds ***credible*** Counsel's testimony that he discussed, shared, and reviewed discovery with Applicant. This Court finds ***credible*** Counsel's testimony that he reviewed videos

from discovery with Applicant. This Court finds ***credible*** Counsel's testimony that he met with Applicant a number of times prior to trial. This Court finds ***credible*** Counsel's testimony that he conducted an investigation of Applicant's case including visiting the crime scene prior to trial. This Court finds Counsel's preparation was reasonable under prevailing professional norms and thus, was not deficient. This Court further finds Applicant failed to prove prejudice by showing what other information Counsel could have discovered or what other defenses Counsel could have prepared if Counsel had spent more time. Thus, Applicant failed to meet his burden.

Failure to Object to and Challenge State's Theory of Hand of One, Hand of All

This Court finds Applicant failed to prove Counsel was ineffective for failure to object to and challenge the State's theory of hand of one, hand of all. This Court finds ***credible*** Counsel's testimony that he believed the State proceeding under inconsistent theories was beneficial to the defense's theory that the State could not prove who shot and killed Victim. Counsel testified that, in his experience, it was not his standard practice to object to opening statements. Counsel testified that in opening argument the State was merely arguing their theory of the case. Counsel further testified he could ascertain no strategic benefit in making an objection to the State's opening statement. This Court finds ***credible*** Counsel's testimony that he did not think the State could prove hand of one, hand of all because he did not believe there was evidence of a plan between Applicant and his co-defendant. This Court finds Counsel articulated a reasonable strategic decision for not objecting to the State's opening argument and alleged inconsistencies in its theory. Thus, Applicant failed to meet his burden.

Failure to Object to the Trial Judge's Jury Charge on Hand of One, Hand of All

This Court also finds Applicant failed to prove Counsel was ineffective for failing to object to the trial judge's jury charge on hand of one, hand of all. Failing to object does not automatically

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constitute ineffective assistance of counsel. *See Millidge*, 422 S.C. at 374, 811 S.E.2d at 800-01 (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue). The law to be charged must be determined from the evidence presented at trial. *See State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000).

This Court finds Applicant failed to prove prejudice by showing the result of trial would have been different but for Counsel's failure to object to the trial judge's charge. The State presented evidence at trial that Applicant and his co-defendant acted together to dump Victim's body just moments after Victim was shot. (R. 89). Applicant was seen on video surveillance placing an object from his waistband into his truck after returning with his co-defendant to the hotel in the victim's car shortly after the murder. (R. 422-25). This Court finds there was evidence in the record to support the trial judge's jury charge on the hand of one, hand of all theory of accomplice liability. Moreover, Counsel testified he had no legal or good faith basis upon which to object to the jury charge. He further testified that the instruction highlighted the defense's overall theory regarding the factual deficits in the State's case. Thus, Applicant failed to meet his burden.

Failure to Object to State's Presentation of Conflicting Theories

This Court finds Applicant failed to prove he was prejudiced by Counsel's not objecting to the State's presentation of a hand of one, hand of all theory while presenting evidence that Applicant was the principal. Failing to object does not automatically constitute ineffective assistance of counsel. *See Millidge*, 422 S.C. at 374, 811 S.E.2d at 800-01 (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue). The proper inquiry for determining prejudice for failing to object and preserve an issue for appellate review is whether there is evidence in the record to support the trial court's finding, such that "an appellate court would necessarily have affirmed the trial court's

ruling." *See id.* at 380, 811 S.E.2d at 800.

In *Bradshaw*, the Supreme Court held the state's inconsistencies in the prosecutor's arguments regarding whether the defendant or his co-defendant shot the victim did not prejudice the defendant where the defendant and his co-defendant acted together in committing an armed robbery that led to the victim's death. *Bradshaw v. Stumpf*, 545 U.S. 175 (2005). The defendant and his co-defendant committed an armed robbery that left one victim wounded and another dead. *Id.* at 178. The defendant pled guilty and admitted to participating in the robbery and shooting the wounded victim but denied shooting the deceased victim. *Id.* The defendant pled guilty under the state's theory of accomplice liability. *Id.* 178-80. In the defendant's co-defendant's trial, the state proceeded under a theory that the co-defendant was the principal. *Id.* The Court determined the state proceeding on inconsistent theories in the separate proceedings did not violate due process because the identity of the triggerman was immaterial to the defendant's conviction for murder, and the defendant failed to show how the state's inconsistent arguments affected the nature of his guilty plea. *Id.* at 186-87.

This Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object to the State proceeding under a hand of one, hand of all theory of accomplice liability while presenting evidence Applicant was the principal. This Court finds there was no good faith basis for Counsel to challenge the State's theory because State presented sufficient evidence to proceed under either a theory of accomplice liability or a theory that Applicant was the principle. Moreover, Counsel testified that as a matter of strategy he did not object because the State's inconsistent theories worked to the defense's benefit and highlighted the weaknesses of the State's case against the Applicant. This Court finds Applicant failed to show a reasonable likelihood that the result of trial would have been different but for Counsel's failure to object or that the issue would have been

successful on appeal as the Court of Appeals determined the State presented extensive circumstantial evidence that Applicant acted as the principal. *State v. McIver*, Op. No. 2021-UP-353 (Ct. App. filed Oct. 13, 2021). Thus, Applicant failed to meet his burden.

Failure to Object to the Solicitor's Comments in Opening and Closing Arguments

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to the solicitor making comments in closing arguments that were not supported by evidence in the record. This Court finds Applicant failed to specify which comments by the solicitor that Counsel should have objected to. Further, this Court has reviewed the solicitor's opening and closing arguments and finds the solicitor's opening and closing arguments did not so infect the trial with unfairness as to result in a denial of due process. *Fortune v. State*, 428 S.C. 545, 549-50, 837 S.E.2d 37, 39-40 (2019) (stating improper comments do not automatically require reversal, the inquiry is whether the solicitor's comments so infected the trial with unfairness as to result in a denial of Applicant's due process right to a fair trial). Thus, Applicant failed to meet his burden.

Failure to Move for Severance of the Trial from Applicant's Co-Defendant

This Court finds Applicant failed to prove Counsel was ineffective for failing to move for severance of the trial and seek a separate trial from his co-defendant. Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. *State v. Halcomb*, 382 S.C. 432, 439, 676 S.E.2d 149, 152 (Ct. App. 2009). There is no clearly defined rule for determining when a defendant is entitled to a separate trial, and a severance should only be granted when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt. *Id.* at 440, 676 S.E.2d at 153. A defendant that contends he should have been tried in a separate trial must demonstrate that he was prejudiced by a joint trial by showing that he would have obtained

a more favorable result in a separate trial. *Id.* at 441, 676 S.E.2d at 154.

This Court finds Counsel made a reasonable strategic decision to not seek a separate trial. This Court finds ***credible*** Counsel's testimony that he thought about moving for a separate trial and believed he would have discussed the decision with Applicant. Counsel testified that although he doesn't recall the specifics but would have advised Applicant of the positive and negative aspects of each approach. This Court finds ***credible*** Counsel's testimony that he does not recall Applicant insisting on being tried separately from his co-defendant. This Court does not find ***credible*** Applicant's testimony that Counsel failed to discuss a severance motion with him. This Court finds ***credible*** Counsel's testimony that it is not typical to put every strategic decision made in a case on the record. This Court finds ***credible*** Counsel's testimony that Applicant's co-defendant gave a statement to law enforcement that implicated Applicant as the shooter, and the statement could not be used against Applicant in a joint trial under *Bruton*.[6] Applicant testified he discussed his co-defendant's statement with Counsel, and Counsel discussed *Bruton* with Applicant. This Court find ***credible*** Counsel's testimony that Applicant's co-defendant's statement was not helpful to the Applicant. This Court finds ***credible*** Counsel's testimony that the video surveillance of Applicant using Victim's credit cards and driving her car after the murder were damaging to Applicant. Although Counsel testified that in hindsight, severance might have helped Applicant, this Court is not to evaluate Counsel's performance in hindsight. *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689) (stating the court is to evaluate counsel's decisions at the time they were made and "every effort be made to eliminate the distorting effects of hindsight"). Additionally, this Court finds Applicant failed to prove that a motion for severance would have been granted by the trial court but for Counsel's failure to request

[6] *Bruton v. United States*, 391 U.S. 123 (1968) (holding use of a co-defendant's statement in a joint trial where the co-defendant did not take the stand violated the defendant's 6th Amendment right to confront witnesses).

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a separate trial. This Court finds Counsel exercised reasonable judgment under prevailing professional norms at the time of Applicant's trial.

Further, this Court finds Applicant failed to prove he was prejudiced by being tried in a joint trial with his co-defendant. This Court does not find ***credible*** Applicant's testimony that he believed he would not have gotten convicted of murder if he received a separate trial. This Court finds there was sufficient evidence for the jury to convict Applicant of murder if he were tried separately, including evidence of Applicant driving Victim's car, using her credit cards, placing a gun-like object from his waistband into his truck, and attempting to cover-up the crime by burning Victim's car after the murder. This Court finds Applicant failed to prove he would have obtained a more favorable result in a separate trial from his co-defendant. Thus, Applicant failed to meet his burden.

Failure to Object to the Photo Lineup and the Minor Witness' Identification of Applicant on the Basis of the Minor Witness' Age and Competency

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to the minor witness' photo lineup and identification of Applicant and argue the identification was unreliable due to the minor witness' age and competency. A witness is presumed to be competent. Rule 601(a), SCRE. Disqualification of a witness is within the discretion of the trial court, and a witness may be disqualified if the trial court determines that the witness is incapable of expressing himself as to be understood, or the proposed witness is incapable of understanding the duty to tell the truth. Rule 601(b), SCRE. The party opposing a witness' competence has the burden of proving the witness is incompetent. *State v. Needs*, 333 S.C. 134, 143, 508 S.E.2d 857, 861 (1998). The proper inquiry for determining prejudice for failing to object and preserve an issue for appellate review is whether there is evidence in the record to support the trial court's finding, such that "an appellate court would necessarily have affirmed the trial court's ruling." *See Millidge.* at 380, 811

S.E.2d at 800.

This Court finds the record reflects the minor witness was a competent witness as determined by the trial court.[7] The minor witness (SH), aged 9, testified that she knew what a lie and the truth are. (R. 274). The witness testified and explained what a lie is and knew that it was bad to tell a lie. (R. 274). Counsel testified that as a matter of strategy he did not feel an objection regarding the minor's testimony was a "winning argument." As a result, Counsel did not object on the basis of the minor witness's competence and age. This Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object to and challenge the minor witness' age and competence because Applicant failed to show an objection would have been successful as the minor witness testified that she knew the difference between the truth and a lie. This Court also finds Applicant failed to prove prejudice by showing the issue would have been successful on appeal if Counsel had object to and challenged the witness' age and competence because the Court of Appeals determined the trial court did not abuse its discretion in admitting the minor witness' identification and determination the identification was reliable. *McIver*, Op. No. 2021-UP-353 (Ct. App. filed Oct. 13, 2021). Further, Applicant failed to prove prejudice by showing a reasonable probability the result of trial would have been different but for Counsel's failure to object and challenge the minor witness' age and competency. Thus, Applicant failed to meet his burden.

Counsel's Statements in Opening and Closing Arguments

This Court finds Applicant failed to prove Counsel was ineffective for making arguments in opening and closing arguments that "acquiesced" the State's theory of hand of one, hand of all, and argued the guilt of Applicant for grand larceny and other crimes. This Court finds ***credible*** counsel's testimony that he argued in opening and closing arguments that Applicant was guilty of

[7] The trial Court held an in-camera hearing to determine the minor's competency as a witness.

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grand larceny and accessory after the fact because he did not want to lose credibility with the jury by arguing against crimes in which there was overwhelming evidence such as the surveillance videos of Applicant using Victim's credit cards and driving her car. Moreover, Counsel testified he did not want to risk insulting the jury's intelligence by arguing to the contrary. Counsel testified that he discussed this approach as a matter of strategy with the Applicant prior to the trial. Counsel further testified that his was a viable strategy in light of the Court's jury instruction regarding multiple offenses. This Court also finds ***credible*** Counsel's testimony that he believed the State's inconsistencies in its theory of hand of one, hand of all highlighted deficiencies in the State's case and was helpful to Applicant, and Counsel's arguments refuted the theory. This Court finds Counsel articulated a reasonable strategic decision for making the arguments in opening and closing arguments. Although Counsel testified that in hindsight, he maybe would not have made those arguments, this Court is not to evaluate Counsel's performance with hindsight. *Edwards*, 392 S.C. at 456, 710 S.E.2d at 64. Thus, Applicant failed to meet his burden.

Failure to Request a Jury Charge on Evidence of Cover-Up

This Court finds Applicant failed to prove Counsel was ineffective for failing to request a jury charge that evidence of covering up a crime is not evidence of guilt. This Court is unaware of a jury charge on "cover-up" evidence. Moreover, it is likely that such an instruction could be an inappropriate comment on the facts analogous to that of evidence of flight. Counsel testified that he researched this issue in great detail prior to trial relying on *State v. Ballington*, 346 S.C. 262, S.E.2d (Ct. App. 2001) and realized this was a "double edged sword" that could be detrimental to the Applicant's case. However, Applicant failed to prove he was prejudiced by Counsel's failure to request a jury charge on "cover-up evidence or a cover up charge" because the Court of Appeals determined the State presented more than just flight and cover-up evidence. As a result, Applicant

failed to show a reasonable probability the result of trial would have been different but for Counsel's failure to request a jury charge on cover-up evidence. Thus, Applicant failed to meet his burden.

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice. Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty (30) days of receipt by counsel of written notice of entry of judgment. *See* Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and

2. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 10th day of March 2025.

DL Jefferson 2128

Hon. DEADRA L. JEFFERSON
Presiding Judge
Fifteenth Judicial Circuit

Charleston, South Carolina
At Chambers

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