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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Darius T. Cathcart, #303063, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2018–CP–42–02286 **RESPONDENT'S MOTION TO RECONSIDER, ALTER, OR AMEND PURSUANT TO RULE 59(e), SCRCP**

The matter before this Court is an action for post-conviction relief (PCR) application filed on June 29, 2018, by Darius T. Cathcart (Applicant). Respondent, the State of South Carolina, filed its Return and Motion to Dismiss, on May 28, 2019, requesting Applicant's application be summarily dismissed as untimely, as barred by the statute of limitations pursuant to S.C. Code Ann. § 17-27-45 and as successive pursuant to S.C. Code Ann. § 17-27-90. A conditional order of dismissal was entered, provisionally dismissing the application as time-barred but allowing Applicant twenty days to provide a sufficient reason why the dismissal should not become final. A copy of this conditional order of dismissal is attached.

In response, Applicant filed a memorandum asserting the PCR Counsel he retained to assist him in his initial post-conviction relief action failed to timely file his first action despite being retained before the statute of limitations ran and failed to respond to Respondent's motion to dismiss or the Court's conditional order of dismissal. Thereafter, Respondent moved for a hearing on its motion to dismiss pursuant to Mose v. State, 420 S.C. 500, 511-12, 803 S.E.2d 718, 723 (2017) (holding that the statute of limitation can be equitably tolled if the reason why the application was untimely filed was due to circumstances outside the Applicant's control). Further, Respondent requested the Court instruct the Clerk of Court to appoint counsel to represent

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Applicant and requested permission to place this matter on an upcoming roster to determine if Applicant was entitled to equitable tolling as set forth in Mose.

On September 14, 2021, a Mose hearing was held before the Honorable William A. McKinnon at the Spartanburg County Courthouse. Assistant Attorney General William Ray represented Respondent. Applicant was present and represented by Susannah C. Ross, Esquire. At the commencement of the hearing, Respondent argued that the present Application was filed outside of the one-year statute of limitations and was successive, as a prior PCR application had been summarily dismissed. Applicant argued that equitable tolling is appropriate and justified in this matter due to Applicant's belief that Attorney James P. Craig had filed a timely PCR application on his behalf. Applicant argued that this PCR action should not be considered successive because the prior application was dismissed without hearing or effective legal representation, so Applicant reasonably believed Mr. Craig had properly filed that action. Judge McKinnon denied Respondent's Motion by written order, filed on November 2, 2021.

An evidentiary hearing convened at the Spartanburg County Courthouse on May 20, 2024, before the Honorable Heath P. Taylor. Applicant was present and represented by Susannah C. Ross, Esquire (PCR Counsel). Assistant Attorney General Shayla Joan Flores represented Respondent. Applicant testified on his own behalf and presented the testimony of Michael Crossley, Princess Cathcart, Monique Brown, and Tanisha Cathcart. Respondent presented the testimony of J. Roger Poole, Esquire (Trial Counsel), and Abel Orlando Gray, Esquire (Solicitor).

The Court granted relief by filed order on January 14, 2025,[1] finding Applicant established constitutional violations requiring this Court to grant his application for post-conviction relief. (Order Granting Post-Conviction Relief pp. 9-12).

[1] Respondent received notice of filing of the Order Granting Post-Conviction Relief on January 16, 2025.

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Respondent, by and through undersigned counsel, making its Motion to Reconsider, Alter, or Amend, pursuant to Rule 59(e), SCRCP, would respectfully show the Court:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In May 2010, the Spartanburg County Grand Jury indicted Applicant for assault with intent to kill (2010-GS-42-02874), murder (2010-GS-42-02875), and assault and battery with intent to kill (2010-GS-42-02876). J. Roger Poole, Esquire,[2] represented Applicant. Assistant Solicitor Able Orlando Gray of the Seventh Circuit Solicitor's Office prosecuted the case.

Prior to trial, Applicant appeared before the Honorable Roger L. Couch on or about March 28, 2011, for a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964). On May 9, 2011, Applicant proceeded to trial before the Honorable Roger L. Couch and a jury. On May 12, 2011, the jury found Applicant guilty as indicted. Judge Couch sentenced Applicant to concurrent terms of 10 years' imprisonment for assault with intent to kill, 40 years' imprisonment for murder, and 20 years' imprisonment for assault and battery with intent to kill.

Applicant filed a timely notice of appeal on May 17, 2011, pursuant to Anders v. California, 386 U.S. 738 (1967). On January 30, 2013, the South Carolina Court of Appeals dismissed Applicant's appeal in an unpublished decision. State v. Cathcart, Op. No. 2013-UP-052 (S.C. Ct. App. filed Jan. 30, 2013). The Remittitur was returned to the lower court on February 21, 2013.

FIRST PCR APPLICATION: 2015-CP-42-03695

Applicant filed his *first* application for post-conviction relief on August 31, 2015 (2015-CP-42-03695). He alleged the following grounds for relief in his application, as summarized by

[2] Applicant was originally represented by David E. Turnipseed, who is now deceased.

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the Respondent:

1. Conflict of interest, in that:
   a. "After the Defendant was sentenced and through investigation conducted by the undersigned and by his private investigator, it has been learned that the Defendant's trial attorney, Roger Poole, previously and possibly during the time of representation of the Defendant, had represented Black. Mr. Poole never advised the Defendant that he represented Black and the Defendant was never aware that his attorney represented, or had represented, the very witness who could have provided exculpatory evidence for the Defendant and/or upon whom the Defendant was basing his defense."

Respondent made its return and motion to dismiss on November 16, 2016, arguing that the application was untimely. On November 22, 2016, the Honorable J. Mark Hayes, II, issued a Conditional Order of Dismissal. Applicant did not respond to the Conditional Order. On April 3, 2017, the Honorable J. Derham Cole issued a Final Order dismissing the matter with prejudice. Applicant did not appeal.

CURRENT ACTION BEFORE THIS COURT

In his *second* and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following:

1. Conflict of Interest.

In an amended application for post-conviction relief dated May 7, 2024, Applicant, through PCR Counsel, made the following additional allegations:

1. Ineffective Assistance of Counsel – Turnipseed
   a. Setting up interviews with the solicitor and investigator Lorin Williams that provided information on Antwan Lamar Mack as third party shooter:
   b. Submitting Applicant to State administered polygraph without first securing an independent poly graph; and

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c. Moving to be relieved after the Applicant balked at continued interviews without assurances that his cooperation would not be used against him.

2. Ineffective Assistance of Counsel – Mr. Poole
   a. Proceeding with representation despite a conflict of interest because Mr. Poole and the Seventh Circuit Public Defender's Office represented Antwan Lamar Mack who Applicant said was the third-party uncharged shooter in his case and responsible for the arson of his car;
   b. Failure to conduct independent investigation or review trial strategy with Applicant;
   c. Failure to move for a severance or challenge motion to exclude third party guilt;
   d. Failure to interview and subpoena witnesses including lead investigator Lorrin Williams, Antwan Mack AKA "Black", Monique Brown, Edward Robinson, Dangelo Williams, Brandon Glenn, and Bralen Morris;
   e. Failure to present Edward Robinson's and Applicant's statements and photo affidavit as evidence that the shooter was Antwaun Mack AKA "Black";
   f. Failure to request duress instruction or take exception to the jury instructions regarding "hand of one" and inferred malice from the use of a handgun. Record on Appeal p. 556, l. 7; p. 563, l. 11; p. 571, l. 9.
   g. Failure to object to the Solicitor's burden shifting argument and reference to Applicant's burned car as evidence of a cover up Record on Appeal p. 538, l. 7; 539, l. 17; p. 540, l. 22.
3. Due process violation due to State promising the Applicant consideration for his extensive cooperation, moving to exclude exculpatory evidence of third party guilt, making burden shifting comments in closing and arguing that the Applicant tried to destroy evidence by burning his car when the State knew the Applicant was not involved in burning. Record on Appeal p. 438, l. 7.

An evidentiary hearing was held on May 20, 2024, before the Honorable Heath P. Taylor. Applicant was present and represented by Susannah C. Ross, Esquire (PCR Counsel). Assistant Attorney General Shayla Joan Flores represented Respondent. Applicant testified on his own behalf and presented the testimony of Michael Crossley, Princess Cathcart, Monique Brown, and Tanisha Cathcart. Respondent presented the testimony of J. Roger Poole, Esquire (Trial Counsel),

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and Abel Orlando Gray, Esquire (Solicitor). At the close of the evidentiary hearing, this Court took the matter under advisement.

By written order filed January 14, 2024, this Court granted the post-conviction relief and remanded the matter to the Spartanburg County Court of General Sessions for a new trial, finding Trial Counsel ineffective and a reasonable probability that, but for Trial Counsel's deficiencies regarding a conflict of interest and failure to investigate a Edward Lee Robinson's statement, the outcome of Applicant's trial would have been different. This motion to reconsider, alter, and amend pursuant to Rule 59(e), SCRCP, follows.

<u>ARGUMENTS IN SUPPORT OF RECONSIDERATION</u>

Respondent moves this Court to reverse its earlier decision and deny post-conviction relief where Applicant failed to meet his burden of establishing Trial Counsel was constitutionally deficient and Applicant was prejudiced by Trial Counsel's alleged deficiency.

To establish ineffective assistance of counsel, the 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. <u>Strickland v. Washington</u>, 466 U.S. 668, 687–88 (1984); <u>Cherry v. State</u>, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." <u>Watson v. State</u>, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To establish prejudice, the applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." <u>Cherry</u>, 300 S.C. at 117–18, 386 S.E.2d at 625.

Respondent respectfully asserts this Court's order is based on numerous legal and factual errors. Accordingly, this Court's grant of post-conviction relief should be reconsidered, and relief should be denied.

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THIS COURT'S ORDER FAILS TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING EACH AND EVERY ONE OF APPLICANT'S ALLEGATIONS

In ruling on an application for post-conviction relief, "[t]he [PCR] court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. § 17-27-80. The PCR court's general denial of all claims not specifically addressed in the PCR Court's order "does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law." Fishburne v. State, 427 S.C. 505, 512, 832 S.E.2d 584, 587 (2019) (quoting Simmons v. State, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016)).

In Fishburne, the Supreme Court of South Carolina held as follows:

> We do not place the blame on a single party below for an insufficient PCR order. The preparation and finalization of a PCR order is often a collaborative effort. We recognize the prevailing party often prepares a proposed order for the PCR court. See Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) ("[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency."). When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. [...]
>
> Once a proposed order is finalized, signed by the PCR judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues. When these steps are ignored on the front end, we find ourselves having to remand a case, as we do today.

Id., 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019). Accordingly, Respondent respectfully submits that this Court should grant Respondent's motion where specific findings of fact have not been made regarding each issue presented.

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This Court Erred in Finding Applicant was Prejudiced by Trial Counsel's Alleged Conflict of Interest

In its order granting relief, this Court found Trial Counsel ineffective for failing to investigate or pursue third-party guilt against another client that he was appointed to represent and that this failure evidenced an adverse effect on Trial Counsel's performance. Respondent respectfully submits that this Court erred in finding Applicant met his burden in proving that Trial Counsel had an actual conflict of interest necessitating relief, where there existed only a *possibility* that Trial Counsel may have had a conflict of interest.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). "A fair assessment of attorney performance requires that 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." Strickland, 466 U.S. at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690.

"To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representations, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (citing Jackson v. State, 329 S.C. 345, 495 S.E.2d 768

(1998); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984)); see also Cuyler v. Sullivan, 446 U.S. at 350 ("[A] defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.").

"When a petitioner premises his ineffective assistance claim on the existence of a conflict of interest, the claim is subjected to the specific standard spelled out in Cuyler v. Sullivan, 446 U.S. 335 (1980), instead of that articulated in Strickland." United States v. Nicholson, 475 F.3d 241 (4th Cir. 2007) (citing Strickland, 466 U.S. at 692). To establish that a conflict of interest resulted in ineffective assistance, "[m]ore than a mere possibility of a conflict ... must be shown." United States v. Tatum, 943 F.2d 370, 375 (4th Cir.1991). **The [Applicant] must show (1) that his lawyer was under "an actual conflict of interest" and (2) that this conflict "adversely affected his lawyer's performance."** Sullivan, 446 U.S. at 348 (emphasis added). Once an actual conflict of interest is shown, applicant does not have to demonstrate prejudice. Thomas, 346 S.C. 140, 551 S.E.2d 254.

In a PCR proceeding, the applicant bears the burden of proving their attorney had an actual conflict of interest necessitating relief. State v. Jordan, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005). Additionally, the fact that counsel does not advise a defendant of the potential conflict of interest does not affect the constitutionality of the conviction. Jackson v. State, 329 S.C. 345, 355, 495 S.E.2d 768, 773 (1998).

An actual conflict of interest arises where:

> [A] defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney

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owes a duty to the defendant to take some action that could be detrimental to his other client.

Jordan v. State, 406 S.C. at 449, 752 S.E.2d at 541 (quoting Duncan, 281 S.C. at 438, 315 S.E.2d at 811 (quoting Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979))).

Here, this Court found that an actual conflict of interest existed based merely on the fact Trial Counsel represented both "Mack" and Applicant at one point. However, this is not sufficient to show an actual conflict of interest, merely the possibility of a conflict. See United States v. Taft, 221 Fed. Appx. 277, 279 (4th Cir. 2007) (holding that defendant's right to effective counsel was not violated when former trial counsel also represented a government witness for a short overlapping period). The mere fact Trial Counsel represented both "Mack" and Applicant for a brief period—*in unrelated cases*—is not sufficient to show an actual conflict of interest as established in Taft, and therefore, Applicant has failed to meet his burden to show an actual conflict of interest existed. Further, this Court failed to properly consider that Trial Counsel was unaware of an existing conflict at the time, did not represent "Mack" for the entirety of the time he represented Applicant, did not do substantive work on "Mack's" case, and did not represent "Mack" during Applicant's trial. [3]

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[3] Notably, during the evidentiary hearing Applicant testified that he knew Mr. Antwan Mack by the nickname "Black." (PCR Tr. p. 21, ll. 2-5). Trial Counsel testified that towards the conclusion of his representation of Applicant, Applicant made references to an individual known to him as "Black." (PCR Tr. p. 74, ll. 9-14). Trial Counsel testified that he did not recall having any conversations with Mr. Antwan Mack, nor did he believe his name was affixed to any judicial proceeding involving Mr. Antwan Mack. (PCR Tr. pp. 74, l. 23-75, l. 1; 75, ll. 20-23). Trial Counsel testified that he never had any knowledge of Mr. Antwan Mack's case. (PCR Tr. p. 75, ll. 17-19). Trial Counsel testified that, while he had no recollection of representing Mr. Anwon Mack, he had been provided information by Michael Morin, Chief Public Defender of the Seventh Circuit Public Defender's Office, in preparation for the evidentiary hearing that his name along with another attorney's name were ascribed to unrelated cases of Mr. Antwan Mack from September of 2010 until they were transferred to another attorney in in March of 2011. (PCR Tr. pp. 74, l. 7- 76, l. 7). Applicant's trial took place on May 9 – 11, 2011. Trial Counsel testified to his belief that his appointment to unrelated cases of Mr. Antwon Mack (Did or did not constitute a conflict?)

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Second, even considering there was an actual conflict of interest, this Court's holding negates the second prong of specific standard spelled out in Sullivan, where Applicant failed to show how the conflict adversely affected Trial counsel's representation. In its Order, this Court erroneously found "the failure to investigate or pursue third party guilt against another client the trial attorney was appointed to represent, was ineffective and evidenced an adverse effect on the attorney's performance."[4] In order to establish that a conflict adversely affected Trial Counsel's representation of Applicant it must comply with the three-part standard set forth by the United States Court of Appeals for the Fourth Circuit in Mickens v. Taylor, 240 F.3d 348 (4th Cir. 2001), aff'd, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002):

> **First,** the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. **Second**, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision. In the language of Tatum, the petitioner must show that the alternative strategy or tactic was "clearly suggested by the circumstances." Tatum, 943 F.2d at 376. **Finally**, the petitioner must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

This Court found that, under the current circumstances, Trial Counsel was ineffective for failing to investigate or pursue an argument of third-party guilt using Applicant's claims that Mr. Antwan Mack was that actual shooter. This Court further found that Trial Counsel's failure evidenced an adverse effect on his performance, where the individual Applicant identified as the third-party was one whom Trial Counsel had previously been appointed to represent. Using this information this Court found that an actual conflict of interest existed and therefore presumed prejudice. However, Respondent submits that it would not have been objectively reasonable for

constituted a conflict of interest nor did they hinder his representation of Applicant in any way. (PCR Tr. pp. 75, l. 24- 76, l. 7).

[4] Order Granting PCR p. 11.

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Trial Counsel to pursue a trial strategy of third-party guilt against Mr. Antwan Mack, where the State was proceeding under the accomplice liability theory of the "hand of one hand of all," and Applicant had previously given a statement to investigating officers that he was in the car with Mr. Mack during the shooting.

In State v. Gregory, the Supreme Court of South Carolina adopted the following rule regarding third-party guilt:

> **[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence**; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

198 S.C. 98, 104–05, 16 S.E.2d 532, 534–35 (1941) (emphasis added) (quotations omitted).

In State v. Mansfield, 343 S.C. 66, 85, 538 S.E.2d 257, 267 (Ct. App. 2000), the defendant attempted to argue third-party guilt where an individual who matched the physical description of the perpetrator, lived in close proximity to the victim, and was found at the home on the day in question. The Court of Appeals of South Carolina rejected Mansfield's arguments as proximity evidence casting "a mere 'bare suspicion'" on the third party, finding "[t]he fact that [the third party] generally fit the description of the perpetrator and lived in the apartment complex does not show his guilt, nor is it inconsistent with [the defendant's] guilt. Because the evidence was not inconsistent with [the defendant's] own guilt, the trial court exercised sound discretion in excluding

it." Id. at 85–86, 538 S.E.2d at 267; see also Miller v. State, 379 S.C. 108, 116, 665 S.E.2d 596, 600 (2008) (concluding similar descriptions were not enough to raise a reasonable inference of innocence), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Similarly, here, Applicant's contentions that Mr. Antwan Mack was actually the shooter are not inconsistent with his own guilt. At trial the State proceeded on the accomplice liability theory of the "hand of one, hand of all."[5] Accordingly, Applicant could still have been found guilty of murder, even if it was determined that he was not the shooter, as Applicant has admitted to being in the car with Mr. Antwan Mack during the time frame of the shooting[6] and has now further testified that Mr. Mack was responsible for the shooting. However, gunshot residue tests support the theory that the Applicant was the shooter. (Trial Tr. pp. 327, l. 1- 329, l. 24).

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[5] Under the "hand of one is the hand of all" 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. State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999). "It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (citations omitted); see also State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987). Under an accomplice liability theory, "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." State v. Langley, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (quoting State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)). A formally expressed agreement is not necessary to establish the conspiracy. State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980); State v. Fleming, 243 S.C. 265, 133 S.E.2d 800 (1963); State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct.App.1995). It may be shown by circumstantial evidence and the conduct of the parties. Oliver, 275 S.C. at 80, 267 S.E.2d at 530; Fleming, 243 S.C. at 274, 133 S.E.2d at 805; Bultron, 318 S.C. at 334, 457 S.E.2d at 622. The law to be charged is determined from the evidence presented at trial. State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct.App.2000), cert. denied. A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence. Id. If any evidence exists to support a charge, it should be given. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999).

[6] On the night of the shooting, while he and his co-defendant were in the hospital, Applicant gave a statement to Officer Leslie Harrell in which he informed them that, once he and his co-defendant were dropped off at Spartanburg Regional, Antwan Mack, whom he only knew by the name "Black" at the time, took the car. The information regarding Mr. Mack was recorded in Officer Harrell's incident report, but not in the testimony that they stated at trial, presumably to avoid admitting evidence of third-party guilt.

Importantly, Trial Counsel testified that that he did not see the argument of third-party guilt as important in Applicant's case. (PCR Tr. pp. 79, l. 17 – 80, l. 2). Trial Counsel's testimony is consistent with the record, as he did not object to the State's motion to keep out any evidence concerning a potential third party's guilt in the case. (Trial Tr. pp. 59, l. 12 – 60, l. 16). This would have been a valid trial strategy where Trial Counsel testified that severing Applicant's trial from his co-defendant's did not seem likely and the State was proceeding with the accomplice liability theory of the "hand of one, hand of all." (PCR Tr. p. 79, ll. 10 – 16).

Accordingly, Respondent respectfully requests this Court reconsider its grant of post-conviction relief and deny Applicant's application for failing to meet his burden in establishing that an actual conflict of interest existed, and that Trial Counsel's performance was adversely affected by an existing conflict. Additionally, or in the alternative thereof, Respondent requests this Court alter or amend its Order to include pertinent testimony provided by Trial Counsel at the evidentiary hearing and from Applicant's trial cited by Respondent in this argument and make specific findings concerning the second and third factor in the three-part standard provided in Mickens.

THIS COURT FAILED TO INCLUDE PERTINENT FACTS TESTIFIED TO BY TRIAL COUNSEL IN ITS FINDING THAT TRIAL COUNSEL WAS DEFICIENT AND ERRONEOUSLY FOUND APPLICANT WAS PREJUDICED BY TRIAL COUNSEL'S FAILURE TO PRESENT EDWARD LEE ROBINSON'S EXCULPATORY STATEMENT

In its order granting relief, this Court found Trial Counsel was ineffective for failing to utilize or investigate the exculpatory statement of Edward Lee Robinson (Robinson). This Court held that the failure to utilize and present exculpatory evidence of this magnitude is unquestionably deficient under the Strickland standard. (Order Granting Post-Conviction Relief pp. 11-12). However, this Court failed to include pertinent testimony from Applicant and Trial Counsel in its finding Trial Counsel was deficient. Further, this Court erroneously found that Robinson's

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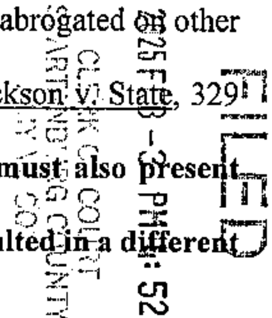
statement was exculpatory, in failing to provide how the statement would have changed the outcome of Applicant's trial. Respondent respectfully submits that this Court's holding is erroneous where, even if Trial Counsel had been aware of the existence of Mr. Robinson's statement and made the conscience decision not to use it, Applicant cannot meet his burden of establishing prejudice.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an **applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different**



outcome. Id. (emphasis added) (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Trial Counsel testified to investigating Applicant's case to the best of his knowledge. (PCR Tr. pp. 78, l. 8 – 79, l. 4). Trial Counsel testified to receiving and reviewing with Applicant all of the discovery in Applicant's case. (PCR Tr. pp. 76, l. 14 – 77, l. 10). Trial Counsel testified that he did not recall receiving Mr. Robinson's statement in November of 2009. (PCR Tr. pp. 76, l. 14 – 77, l. 10).[7] Trial Counsel's contentions are supported by Applicant's own testimony at the evidentiary hearing, that he himself was unaware of the statement's existence until after his trial had concluded and while incarcerated on these charges. (PCR Tr. p. 23, ll. 14-16). Applicant testified that the statement was brought to his attention by a private investigator named Christopher Watkins, whom his family hired to investigate his case after the conclusion of his trial. (PCR Tr. p. 23, ll. 16 – 19). Notably, Mr. Watkins did not appear at the evidentiary hearing to testify on Applicant's behalf about how he uncovered Mr. Robinson's statement. Additionally, Mr. Edward Robinson failed to appear at the evidentiary hearing to testify on Applicant's behalf or authenticate his statement.

During the evidentiary hearing, Applicant introduced Trial Counsel's witness list as Applicant's Exhibit #5 to support his theory that Trial Counsel had knowledge of the existence of the statement of Mr. Robinson, who was listed as Witness Number 9 therein. (PCR Tr. pp. 85, l.

[7] During Applicant's evidentiary hearing, Applicant introduced the statement of Edward Robinson as Applicant's Exhibit #3 in support of his prejudice claim, wherein Mr. Robinson identified Antwan Mack as the person who drove Cathcart' s car, burned the car, and shot the murder victim. (PCR Tr. pp. 21, l. 14 – 22, l. 14).

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10 – 86, l. 6). However, this is the sole evidence Applicant put forward to indicate whether Trial Counsel was ever made aware of the existence of Mr. Robinson's statement. Mr. Robinson also identified Mr. Antwan Mack from a lineup of individuals, meaning that aside from his voluntary statement, Trial Counsel could have placed Mr. Robinson's name on the witness list based on the affidavit of photograph identification. When asked about the appearance of Mr. Robinson's name on that list, Trial Counsel testified that he did not recognize the affidavit of photograph identification for Mr. Robinson as he had no memory of it. (PCR Tr. pp. 85, l. 10 – 86, l. 6).

The testimony of Applicant and Trial Counsel clearly established that neither Applicant nor Trial Counsel has any knowledge of this statement, and the mere fact Mr. Robinson's name was on the witness list does not support that Trial Counsel should have been aware that Mr. Robinson made the statement. Further, as mentioned *supra*, Applicant failed to call the alleged private investigator who discovered the statement and Mr. Robinson himself to authenticate his statement and be available for cross-examination. "It is black letter law that evidence must be authenticated or identified in order to be admissible." State v. Brown, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018); see also State v. Rich, 293 S.C. 172, 173, 359 S.E.2d 281, 281 (1987) (noting prior to the adoption of the rules of evidence that an exception to the hearsay rule does not "absolve the offering party from the usual requirements of authentication").

Further, this Court erroneously found that Trial Counsel's failure to utilize and present exculpatory evidence, where Mr. Robinson's statement reflects that Robinson identified Antwan Mack as the person who drove Cathcart's car, burned the car, and shot the murder victim in line with Applicant's version of events, is unquestionably deficient under the Strickland standard and creates a reasonable probability that, but for Trial Counsel's error, the result of Applicant's trial would have been different. Applicant contends, and this Court has held, that the difference in the outcome of Applicant's trial would have arisen from Applicant's ability to bring a defense of third-

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party guilt wherein he alleged Mr. Antwan Mack was the shooter. Notably, however, Applicant gave a substantially similar statement to investigating officers, wherein he identified Mr. Antwan Mack as the victim's shooter, which was introduced at the evidentiary hearing as Applicant's Exhibit #1. (PCR Tr. pp. 19, l. 9 – 20, l. 8).

The record reflects that, following an in chambers discussion on the topic, the court refrained from making a ruling on the State's motion to exclude evidence concerning third-party guilt where both Trial Counsel and Counsel for Applicant's Co-Defendant indicated that they did not intend to offer any evidence of that nature. (Trial Tr. pp. 59, l. 12 – 60, l. 16). In its holding in Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), while specifically discussing the constitutional parameters of the law surrounding the application of rules regulating the admission of third-party evidence proffered by criminal defendants, the Supreme Court of the United States stated as follows:

> A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. See, e.g., 41 C.J.S., Homicide § 216, pp. 56–58 (1991) ("Evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded"); 40A Am.Jur.2d, Homicide § 286, pp. 136–138 (1999) ("[T]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged .... [Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial" (footnotes omitted)). Such rules are widely accepted, and neither petitioner nor his amici challenge them here.

Id.

In State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), the Supreme Court of South Carolina adopted the following rule regarding third-party guilt:

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> **[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence;** evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

Id. at 104–05, 16 S.E.2d at 534–535 (emphasis added) (quotations omitted).

While Mr. Robinson's statement may have opened the door to the potential of some sort of argument regarding third-party guilt, if it could have been discovered, the evidence offered by way of the statement from Mr. Robinson is not inconsistent with Applicant's guilt. Especially where Applicant gave a statement to investigating officers that was substantially similar to Mr. Robinson's statement wherein he identified Mr. Antwan Mack as the victim's shooter.[8]

During the evidentiary hearing, Trial Counsel testified that that he did not see an argument of third-party guilt as being important in Applicant's case. (PCR Tr. pp. 79, l. 17 – 80, l. 2). Trial Counsel's testimony is consistent with the record as he did not object to the State's motion to keep out any evidence concerning a potential third party's guilt in the case. (Trial Tr. pp. 59, l. 12 – 60, l. 16). This would have been a valid trial strategy where Trial Counsel testified that severing Applicant's trial from his co-defendant's did not seem likely and the State was proceeding with the accomplice liability theory of the "hand of one, hand of all." (PCR Tr. p. 79, ll. 10 – 16).

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[8] Applicant's Statement was introduced at the evidentiary hearing as Applicant's Exhibit #1. (PCR Tr. pp. 19, l. 9 – 20, l. 8).

Testimony was presented during Applicant's trial to indicate that there were at least two guns shot on the night of the crime,[9] which indicates that there were two shooters in the car with Applicant and his co-defendant. Applicant gave a statement to Officer Leslie Harrell on the night of the shooting while he and his Co-defendant were in the hospital in which he stated that, once he and his co-defendant were dropped off at Spartanburg Regional, Antwan Mack, whom he only knew by the name "Black"[10] at the time, took the car.[11] The totality of the evidence complied from Applicant's own statements suggests that on the night of the shooting there were three individuals in the car himself, his co-defendant, and Mr. Antwan Mack.

Accordingly, as the jury was presented with and the State proceeded on the accomplice liability theory of the "hand of one, hand of all," Applicant could still have been found guilty of murder, even if it was determined that he was not the shooter, as Applicant has admitted to being in the car with Mr. Antwan Mack during the time frame of the shooting and has now further testified that Mr. Mack was responsible for the shooting. However, gunshot residue tests support the theory that the Applicant was the shooter. (Trial Tr. pp. 327, l. 1- 329, l. 24).

Further, in so far as Applicant has alleged and this Court has determined that Trial Counsel was ineffective for failing to utilize the statement and/or testimony of Mr. Robinson at trial, Respondent submits that it would not have been reasonable for Trial Counsel to do so under the circumstances. For the purposes of the claim of ineffective assistance, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has a duty to

[9] Trial Tr. p. 356, ll. 4-20.

[10] Applicant testified during the evidentiary hearing that he knew Mr. Antwan Mack by the nickname "Black." (PCR Tr. p. 21, ll. 2-5).

[11] The information regarding Mr. Mack was recorded in Officer Harrell's incident report, but not in the testimony that they stated at trial, presumably to avoid admitting evidence of third party guilt.

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interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). However, see Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), which found that counsel was not ineffective for failing to interview victim where she made a statement unfavorable to petitioner at time of crime and her testimony at the PCR hearing did not establish she would have been favorable to petitioner at the time of trial. See also Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (holding Applicant was required to present the witness he alleges Counsel did not properly investigate or subpoena). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result. Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

While Trial Counsel did not have an independent recollection of receiving the statement or interviewing Mr. Robinson, Applicant testified that Trial Counsel did mention Mr. Edward Robinson to him as a potential witness before informing him that he was not going to call Mr. Robinson to testify. Applicant testified that Trial Counsel made the decision not to utilize "his" witnesses because he was proceeding to a joint trial. (PCR Tr. p. 30, ll. 9 – 18). Applicant's testimony further supports the finding that Trial Counsel exercised a reasonable trial strategy in omitting the testimony of Mr. Robinson, which would have further implicated him in the crime where the State was proceeding under the accomplice liability theory of the "hand of one hand of all."

Accordingly, Respondent respectfully requests this Court reconsider its grant of post-conviction relief and deny Applicant's application for failing to meet his burden in establishing any ineffective assistance on the part of Trial Counsel or any prejudice flowing therefrom. Additionally, or in the alternative thereof, Respondent requests this Court include and make

findings as to the pertinent testimony concerning this allegation from Applicant and Trial, include pertinent testimony from trial, and make specific findings concerning the exculpatory nature of Mr. Robinson's statement.

Conclusion

For all the foregoing reasons, the State asks this Court to reconsider its prior ruling, alter or amend its judgment pursuant to Rule 59(e), SCRCP, and find Applicant failed to meet his burden of proving he was entitled to a grant of relief and deny and dismiss his application.

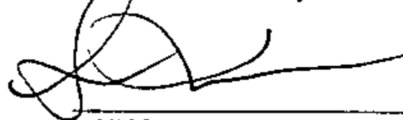
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General

SHAYLA J. FLORES
Assistant Attorney General



ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-0386

January 27, 2025

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

DARIUS CATHCART, #303063,

Applicant,

v.

STATE OF SOUTH CAROLINA

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

CASE NO. 2018-CP-42-02286

CERTIFICATE OF SERVICE BY MAIL

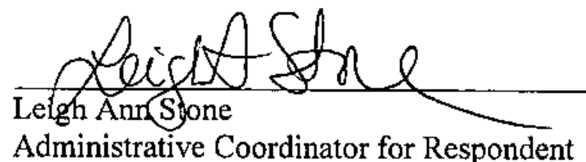
1. I am an employee of the Respondent in the above-captioned action.

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 the Respondent's Motion to Reconsider, Alter, or Amend Pursuant to Rule 59(e)s in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Susannah C. Ross , Esquire
Ross & Enderlin, PA
330 East Coffee Street
Greenville, SC 29601

DATED this 27th day of January, 2025.



Leigh Ann Stone
Administrative Coordinator for Respondent

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ALAN WILSON
ATTORNEY GENERAL

January 27, 2025

The Honorable Amy W. Cox
Spartanburg County Clerk of Court
Post Office Box 3483
Spartanburg, SC 29304-3483

Re: **<u>Darius Cathcart, #303063 v. State of South Carolina</u>**
Case No.: 2018-CP-42-2286

Dear Ms. Cox,

Enclosed please find the original Respondent's Motion to Reconsider, Alter, or Amend Pursuant to Rule 59(e), SCRCP, with its accompanying attachments, in the above-captioned case, for filing in your office.

If you have any questions regarding this matter, please let me know.

Sincerely,

Shayla J. Flores
Assistant Attorney General

SJF/ls
Enclosure

cc: Susannah C. Ross , Esquire

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