ATTY
SOL
GS
AG

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Darrell L. Goss, SCDC #305517, Applicant, v. State of South Carolina, Respondent.	Case No. 2011-CP-10-03782 **ORDER OF DISMISSAL**

This matter comes before this Court by way of post-conviction relief action commenced by Applicant Darrell L. Goss on May 27, 2011. An evidentiary hearing into the matter convened before the undersigned on December 8, 2021. Applicant was present and proceeded with the hearing as a *pro se* litigant, and this Court is satisfied that the requirements of *Faretta v. California* 422 U.S. 806 (1975) and *Hilton v. State*, 422 S.C. 204, 810 S.E.2d 852 (2018), have been met[1]. Assistant Attorney General Samantha J. Weidauer represented the State. Applicant testified on his own behalf at the hearing, as did Applicant's cousin, Sharon Goss. Applicant's trial counsel, James W. Smiley, IV, Esquire, also testified.

This Court had before it a copy of the Charleston County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections;

[1] At the outset of the evidentiary hearing, this Court inquired about Applicant's motion to relieve counsel and entered into a colloquy regarding whether Applicant still wished to relieve counsel. (PCR Tr. 2). Applicant stated his PCR counsel, Christopher L. Murphy, had failed to inform him of the scheduling change for his hearing – this matter was continued from December 7, 2021, until the next day, December 8, 2021. (PCR Tr. 2-3). Applicant represented to this Court that his out-of-state witness, Felicia Henderson, could have been present to testify on the prior date, but because of the scheduling change was now unavailable. (PCR Tr. 2). Applicant stated he believed he had suffered prejudice as a result of Mr. Murphy's failure to inform him or his family about the change in schedule and therefore wished to relieve Mr. Murphy as counsel. (PCR Tr. 2-4). When questioned by this Court whether Applicant wished to proceed forward with the hearing without his aforementioned witness, Applicant unequivocally responded yes. (PCR Tr. 5). Applicant informed this Court he had other claims he was willing to raise at this evidentiary hearing that did not require the unavailable witness to be present. (PCR Tr. 5-6). Therefore, this Court granted Applicant's motion to relieve counsel, but requested Mr. Murphy remain as stand-by counsel (PCR Tr. 11).

JBM/1

the records from Applicant's direct appeal, including the trial transcript; and the pleadings and records in this post-conviction relief action including: Applicant's initial 2011 post-conviction relief application, the transcript from Applicant's 2011 evidentiary hearing the Honorable Deadra L. Jefferson, the Order of Dismissal signed by Judge Jefferson in December 2011, and the documents from the subsequent post-conviction appeal, including the Supreme Court Order remanding this matter back to the circuit court for a *de novo* post-conviction relief hearing.

After hearing the testimony and evidence presented at the post-conviction relief hearing and upon full review of the record, this Court finds Applicant's allegations regarding ineffective assistance of counsel and due process violations are without merit. Therefore, for the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted at the September 2007 term of the Charleston County Grand Jury for armed robbery (2007-GS-10-10805), assault and battery with intent to kill (ABWIK) (2007-GS-10-10806), and kidnapping (2007-GS-10-10807). James W. Smiley, IV, Esquire (Counsel), represented Applicant. Trip Lawton, Esquire and Kevin Hales, Esquire, prosecuted the case. On February 23-26, 2009, Applicant proceeded to trial before the Honorable J.C. Nicholson, Jr. and a jury. At the conclusion of the trial, the jury found Applicant guilty as indicted. Judge Nicholson sentenced Applicant to concurrent sentences of twenty years for each offense.

Applicant filed a notice of appeal which was perfected by Appellate Defender Robert M. Pachak of the South Carolina Commission on Indigent Defense—Office of Appellate Defense. On appeal, Applicant raised two issues:

I. Whether the trial court erred in overruling defense counsel's objection to the solicitor's burden shifting closing argument?

JBM/2

II. Whether the trial counsel erred in refusing to allow defense counsel to impeach the victim with a pending charge of counterfeiting goods?

Following further briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. *State v. Goss*, Op. No. 2011-UP-214 (Ct. App. filed May 17, 2010). The Remittitur was returned to the circuit court on June 9, 2011.

On May 27, 2011, Applicant filed a *pro se* application for post-conviction relief alleging trial counsel was ineffective for failing to present an alibi; for failing to properly investigate the facts and circumstances of the case; for failing to present witnesses; and for failing to provide Applicant with discovery. The State filed a return to the application requesting an evidentiary hearing be held on Applicant's allegations. On September 16, 2011, an evidentiary hearing was convened at the Charleston County Courthouse before the Honorable Deadra L. Jefferson. Applicant was present at the hearing and represented by Charles T. Brooks, III, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office, represented the State. At the outset of the hearing, Applicant requested Judge Jefferson allow him to proceed pro *se.* Judge Jefferson apprised Applicant of the pitfalls of self-representation and suggested Applicant allow counsel to represent him. Applicant testified on his own behalf. Counsel also testified at the hearing. During the hearing, Applicant entered into evidence a visitor's log from the jail, a memorandum of law, and two letters addressed to Counsel. Present at the hearing were witnesses, Angelique Gaskins, the mother of Applicant's child; Lucretia Douglas, a friend; Bernard Godfrey, Applicant's uncle; and Felicia Henderson, a friend. Also, present were Clifford Hartwell, Applicant's brother, and Sharon Goss, Applicant's cousin. Judge Jefferson took judicial notice of each witness's testimony.

TBM/3

On December 1, 2011, Judge Jefferson signed an Order of Dismissal finding Applicant had failed to establish any constitutional violations or deprivations. Specifically, Judge Jefferson found Counsel's testimony credible while also finding Applicant's testimony not credible. Regarding Applicant's claims of ineffective assistance of counsel, the court found Applicant failed to meet his burden of proof, and Counsel's representation did not fall below an objective standard of reasonableness. Additionally, the court found Counsel made a valid strategic decision to only call Applicant's mother as a witness at trial, and was not ineffective for failing to call Sharon Goss or other named witnesses. Similarly, the Court found Counsel was not ineffective for failing to pursue the alibi witnesses where neither Applicant nor Applicant's mother informed counsel of a potential alibi defense. Lastly, the court found Applicant failed to prove the prejudice prong of *Strickland.*

Applicant filed a notice of appeal from the Order of Dismissal on December 5, 2011. On July 23, 2012, Applicant filed his petition for writ of certiorari and accompanying appendix in the Supreme Court of South Carolina. Thereafter, the Court transferred Applicant's case to the Court of Appeals pursuant Rule 243(1), SCACR. On November 21, 2014, the Court of Appeals granted certiorari. Following briefing and oral argument, the Court of Appeals affirmed the PCR court's decision in an unpublished opinion. *State v. Goss*, Op. No. 2016-UP-382 (Ct. App. filed July 27, 2016). Applicant filed a petition for rehearing, which was denied on September 26, 2016.

On November 14, 2016, Applicant filed a petition for writ of certiorari and accompanying appendix with the Supreme Court of South Carolina. On October 19, 2017, the Court granted certiorari and ordered additional briefing. Following further briefing and oral argument, the Supreme Court of South Carolina remanded the matter to the circuit court for a *de novo* PCR hearing, instructed Applicant it would be incumbent for him to secure the attendance of his witnesses for the *de novo* hearing, and emphasized that neither party may rely upon testimony

JBM 1/4

presented at the initial hearing. (*Goss v. State*, 425 S.C. 101, 820 S.E.2d 373 (2018). After this matter was remanded back to the circuit court by Supreme Court Order on October 17, 2018, Applicant filed a Motion to Stay Proceedings on January 7, 2019. On January 29, 2019, an Order was filed staying this post-conviction relief matter for one year while Applicant's federal habeas case existed. This hearing followed.

II. Factual Summary

In the Supreme Court's opinion remanding this PCR matter back to the circuit court for a *de novo* hearing, the facts of the case were summarized as follows:

> Goss was charged in connection with the armed robbery of Urban Wear, a clothing store in North Charleston. The store owner, Andy Ayazgok, reported that five unmasked black males entered the store through the main storefront door at about 7:30 p.m., just before closing time, and proceeded to beat him, tie him and his employee up, and flee after stealing merchandise and cash. Of the five assailants, Andy was able to identify only Joy Mack as one of the assailants. Goss and Mack were tried jointly. Andy did not identify Goss as a perpetrator but identified him as having been in the store the week before the robbery.[2]
>
> Sergeant Al Hallman was a member of the crime scene unit that processed the scene and was qualified by the trial court as an expert in fingerprint identification. He testified that when he arrived on the scene, he observed what he described as "wet" prints on the exterior of the glass storefront door; specifically, Sergeant Hallman testified the prints were a "simultaneous impression" of three fingers and a palm. The door from which the prints were lifted was the door through which the perpetrators gained entry and was also the door used by customers. Sergeant Hallman testified the prints were wet from either sweat or some other substance, which indicated to him the prints were fresh. He waited until the prints were dry and lifted them for possible later comparison. Andy testified at trial that he customarily cleaned the inside and outside of the storefront door each morning, and he testified he did so when he opened the store on the morning of the robbery.
>
> Within hours after the robbery, a man named Lorenzo Johnson advised lead detective O.J. Faison that [Applicant] Goss

[2] Andy's proffered trial testimony detailing his recollection of seeing Goss in the store the week before the robbery was that Goss was shoplifting and Andy ran him off. The trial court granted Goss's motion to exclude these details from Andy's testimony before the jury.

JBM/5

and his brother, Benjamin Goss, were two of the perpetrators. Detective Faison relayed this information to Sergeant Hallman. Hallman compared the prints he lifted from the storefront door to inked impressions from [Applicant] Goss; he testified the prints matched. After the prints were matched to Goss, law enforcement obtained a warrant to search Goss's residence and any vehicles on the premises. The warrant was executed at approximately 9:30 p.m. the night following the robbery. A .357 Magnum handgun with blood on the barrel was found in a car parked in the yard of the residence occupied by Goss and eight or nine other people, including several black males. DNA testing established the blood was Andy's. Clothing with tags was found in a bedroom in the residence, and Andy identified some of the clothing as being part of the merchandise stolen during the robbery. Goss's mother, Thomasina Goss, was trial counsel's primary contact prior to trial because trial counsel had known her for many years and because Goss was in jail the entire twenty months before trial. She was the only defense witness called at trial and testified to the following: Goss lived in the house with her and eight other people, she bought the stolen clothing from some unidentified men in the street in front of her house on the same day law enforcement searched her home, she knew the clothes were likely stolen, she had never seen Goss drive or ride in the car in which the bloody gun was found, and everyone who lives in the house uses the bedroom in which the stolen clothing was found. The State impeached her with a shoplifting conviction and two convictions for giving false information to the police.

III. Issues Before This Court

In his original application for post-conviction relief, filed May 27, 2011, Applicant alleges he is being held in custody unlawfully based on:

1. Ineffective assistance of counsel
    a. "Violation of the Sixth Amendment to the United States Const.";
    b. "Violation of the Fourteenth Amend. to the U.S. Const."; and
    c. "Violation of Article 1 Section 3 of S.C. Const.".

On August 6, 2020, Applicant amended his application *pro se* to include the following allegations:

1. Ineffective assistance of counsel
    a. "Trial counsel was ineffective in failing to prepare [Applicant's] case and object to the 'hands of one, hands of all' theory";

JBM/6

2. Due Process Violation
    a. The indictments did not put Applicant on notice of the charges he was facing.
        i. "[Applicant] was not informed by indictment that he allegedly conspired with Joy Mack to commit the crimes convicted for"
    b. "The State did not also indict [Applicant] on a criminal conspiracy charge, but it nonetheless, pursued a conviction against him based on that theory";
3. Subject Matter Jurisdiction

On August 4, 2021, Applicant amended his application *pro se* to include the following allegations:

1. Ineffective assistance of counsel
    a. "Trial Counsel was ineffective in failing to object to "the hand of one, the hand of all" jury charge.
2. Unfair jury trial
    a. "The State failed to prove each element of "the hand of one, the hand of all" accomplice liability theory beyond a reasonable doubt"; and
3. Due process violation
    a. "There has been excessive and unjustified delay in the disposition of [Applicant's] PCR proceedings".

At the hearing on December 8, 2021, Applicant moved to incorporate an unfiled third amendment to his application[3] to include the following allegation:

1. Ineffective assistance of counsel
    a. "Trial counsel was ineffective for failing to properly argue for a directed verdict of acquittal because the State failed to meet its burden of proof as to each element of "the hand of one, the hand of all" theory of accomplice liability. Specifically, (1) the State failed to produce any evidence – direct or circumstantial – of a prior plan or scheme between Applicant and his alleged codefendants to commit an illegal act. The State presented entirely no evidence at all proving or tended to prove that Applicant joined together with any codefendant(s) to accomplish an illegal purpose; and

[3] Though not filed prior to the evidentiary hearing, this amendment was filed on February 11, 2022. For purposes of this order, this Court incorporates this amendment with the allegations raised in Applicant's initial amended applications and addresses the claims made within as they were raised at the evidentiary hearing.

JBM 17

i. "The State failed to produce any direct or substantial circumstantial evidence of Applicant's participation in carrying out that common plan or scheme between him and his alleged codefendants. The State presented no substantial evidence proving or tended to prove that Applicant aided, abetted, or assisted the perpetrators (in any way) during the commission of a crime pursuant to a prior common plan or scheme."

To the extent the allegations set forth in Applicant's application can be construed as separate grounds for relief from the grounds stated at the PCR hearing, the Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

IV. Testimony Presented at Evidentiary Hearing

Pro se Applicant Darrell Goss Testimony

Applicant testified (and argued) on his own behalf before this Court. Applicant argued trial counsel was ineffective for failing to properly argue his directed verdict motion at trial[4]. (PCR Tr. 14). Applicant testified the basis for Counsel's motion for a directed verdict centered on the State's failure to produce enough evidence to prove Applicant was guilty as a principle. (PCR Tr. 15). Applicant testified the State argued his charges should be submitted to the jury under a hand of one, hand of all theory while conceding Applicant was an accomplice, not a principal. (PCR Tr. 15). Applicant argued that because the State identified Applicant as an accomplice, Counsel's argument was improper as it focused on the State's lack of evidence in relation to Applicant as a principle in the crimes. (PCR Tr. 15).

[4] Applicant stated Counsel argued the motion for directed verdict on pages 346-446 of the trial transcript. (PCR Tr. 14). However, this Court notes the relevant pages pertaining to the motion for a directed verdict are 438-446 of the trial transcript.

JBM/8

Applicant testified Counsel stated his case could only go forward and be brought to the jury under the hand of one, hand of all theory. (PCR Tr. 15). Applicant testified the State agreed with Counsel and the trial judge, Judge Nicholson, acknowledged the theory of hand of one, hand of all was all the State had against Applicant. (PCR Tr. 15). Applicant argued the State failed to prove all elements required under this theory, failed to produce any evidence showing a common plan or a common scheme existed, and failed to produce any evidence showing Applicant participated in the crime in any manner. (PCR Tr. 16-17).

Regarding evidence, Applicant testified there were three pieces of evidence presented in this case: a wet fingerprint found at the crime scene – specifically on the outside of the glass door of the store in which the armed robbery occurred; a gun with the victim's DNA on it[5]; and clothing items found inside the residence of his mother's house in a room Applicant did not reside in. (PCR Tr. 17-19). Applicant argued none of the State's evidence showed a common plan or showed Applicant participated under the hand of one, hand of all theory. (PCR Tr. 19). Applicant further argued the fingerprint was the only piece of evidence that "[could] be substantially used" to place Applicant at the crime scene. (PCR Tr. 19). Applicant testified the fingerprint alone is not proof Applicant was at the store at the time of the incident[6]. (PCR Tr. 19). Applicant testified no evidence was presented concerning the location of the print, the fingerprint could not be dated, and the substance that created the fingerprint (sweat) was never tested for DNA. (PCR Tr. 19-21). Applicant argued that because the victim testified he cleaned the windows every morning, the State was able argue the fingerprint had to have been made after the windows were cleaned. (PCR Tr.

[5] Applicant testified the gun in this matter was found in a vehicle located outside his residence. (PCR Tr. 18). Applicant argued the gun was not his and was found in Sharon Goss's, Applicant's cousin, car. (PCR Tr. 18).

[6] This Court inquired whether mere presence was charged to the jury, to which Applicant responded it was not. (PCR Tr. 19-20).

20-21). Applicant asserted that because the incident occurred at night, there was plenty of time in between the cleaning of the windows and the time of the incident for the fingerprint to have been placed on the door. (PCR Tr. 21). Applicant further argued there was no testimony presented regarding which way the door swung and it was left to the "pure speculation [of] the jury" to determine which way the door swung. (PCR Tr. 22-23). Applicant argued Counsel was ineffective for failing to make the above arguments at trial during the motion for a directed verdict; further Applicant asserted Counsel invited the State to charge hand of one, hand of all despite a lack of evidence to support the jury charge. (PCR Tr. 21-24). Applicant contended that the evidence presented at trial only amounted to mere suspicion of guilt and therefore, Counsel was ineffective for failing to properly argue the directed verdict motion[7]. (PCR Tr. 24-25).

Applicant also argued his due process rights and equal protection rights were violated. (PCR Tr. 27). Specifically, Applicant argued the excessive delay in the disposition of this post-conviction relief action caused him prejudice. (PCR Tr. 27). Applicant testified he filed his post-conviction relief application on May 27, 2011. (PCR Tr. 27). Applicant testified that the initial evidentiary hearing for this application was heard September 2011 by the Honorable Deadra Jefferson who denied Applicant relief on all claims raised within the application. (PCR Tr. 30). Applicant stated the matter was then appealed and sat before the Supreme Court for seven years without a final resolution. (PCR Tr. 31). Applicant testified after the case was remanded back to the circuit court for *de novo* review, it sat pending for an additional three years without a resolution. (PCR Tr. 28, 32). Applicant alleges that as a result of this delay he has lost contact with the

[7] Applicant requested this Court render a "directed verdict on [the] charges based on the lack of evidence that the State failed to produce beyond a reasonable doubt that [Applicant] committed the crime under the hand of one, hand of all theory." (PCR Tr. 25). Applicant further stated that because he believed the State had failed to meet the elements required under the hand of one, hand of all theory, the conviction should be vacated. (PCR Tr. 25-26).

JBM 1/10

witnesses who were present and willing to testify at his initial evidentiary hearing, therefore resulting in prejudice. (PCR Tr. 31). Applicant further argued, as he did during his motion to relieve counsel (Christopher L. Murphy), that this hearing was originally scheduled on December 7, 2021, and because the matter was continued to December 8, 2021, he was prejudiced. (PCR Tr. 32-33). This Court asked Applicant again, as it did at the start of the hearing, whether he wished to move forward without his alleged alibi witness. (PCR Tr. 33). Applicant stated he wanted to make his argument regardless of this alleged alibi witness's unavailability to testify. (PCR Tr. 33). Applicant testified that as a result of the continuance, his alibi witness was lost and he was denied a full and fair opportunity to present his alibi. (PCR Tr. 34). Applicant testified that he had further been denied equal protection of law because he believed the State had purposely discriminated against him by using delay tactics which caused his case to be delayed for ten and a half years. (PCR Tr. 35).

Lastly, Applicant argued Counsel was ineffective for failing to object to the hand of one, hand of all jury charge. (PCR Tr. 37-38). Applicant asserted that because Counsel argued the elements of hand of one, hand of all in his motion for a directed verdict, his failure to object to the jury charge of hand of one, hand of all, Counsel was ineffective. (PCR Tr. 38). Applicant again argued the State failed to produce any evidence supporting the hand of one, hand of all jury charge and failed to produce evidence supporting a prior plan scheme between Applicant and codefendant. (PCR Tr. 39). After the State rested its case at this hearing and over the State's objection, Applicant further testified the jury charge did not include mention of mere presence, mere knowledge, and or mere association. (PCR Tr. 66). Applicant argued there was evidence in the case to support all three. (PCR Tr. 66).

JBM 11

Trial Counsel James W. Smiley, IV Testimony

The State called Applicant's trial counsel, James W. Smiley, IV (Counsel), as a witness. Counsel testified he has been practicing law since 1993 and that one hundred percent of his practice during that time has been in criminal law. (PCR Tr. 41). Counsel testified he was retained early on in this case and felt he had adequate time to prepare for Applicant's trial. (PCR Tr. 41-42). Counsel testified that despite the age of this case, he remembered it well. (PCR Tr. 41). Counsel testified he has known Applicant from the time he was "knee-high" and talked frequently with Applicant's mother, Tomasina, prior to Applicant's trial. (PCR Tr. 49). When asked by the State to provide a brief recitation of the facts in this case, Counsel testified the State alleged Applicant, another man, and another man who was never identified, went into a clothing store in Charleston, put the owner on his stomach, and beat him with the butt of an AK-47 gun[8]. (PCR Tr. 42). Counsel stated police collected evidence from the scene and found a fingerprint on the front door of the store where the incident occurred. (PCR Tr. 42). Counsel testified law enforcement's investigation led them to Ranger Drive where Applicant lived. (PCR Tr. 43). Counsel testified law enforcement located a pistol with DNA from the victim/store owner on it in a car in the front yard of the home Applicant lived in. (PCR Tr. 43). Counsel further testified clothes from the store where the incident took place were found in the home Applicant lived in, had the tags still on them, and were being sold. (PCR Tr. 43).

When asked whether Counsel discussed possible defenses with Applicant, Counsel testified he sat down with Applicant at the beginning of his representation and told him: "Darrell, the way I do this is, I get the State's case and I look at it. If the State can't make up the allegations, you and I aren't ever going to have a talk, all right, about that if I don't need you, quite frankly."

[8] Counsel also noted he believed there was a pistol involved in the incident. (PCR Tr. 42).

TBM 12

(PCR Tr. 43-44). Counsel posited that as a result of that conversation Applicant could have believed he was not supposed to talk to Counsel at all. (PCR Tr. 44). Counsel elaborated he and Applicant did have discussions regarding specific pieces of evidence the State had. (PCR Tr. 44).

Counsel stated he focused his defense on the State not being able to meeting their burden because the State did not have any direct evidence linking Applicant to the incident. (PCR Tr. 44). Counsel testified he recalled Applicant admitting to being in the store earlier on the day of incident. (PCR Tr. 44). Counsel testified he did not allow Applicant to tell him he had nothing to do with the incident; but rather, would discuss each part of the case with Applicant. (PCR Tr. 44). Counsel stated he and Applicant discussed the print and the gun found in the front yard with the victim's DNA on it[9]. (PCR Tr. 44-45). Counsel testified Applicant maintained he had never seen the gun before. (PCR Tr. 45). Counsel testified he also spoke with Applicant's mother, Tomasina Goss, about the clothing that was found. (PCR Tr. 45). Counsel stated Tomasina told him clothes were regularly sold and traded at the house; Counsel referred to this practice as a jockey lot. (PCR Tr. 45). Counsel testified he presented each piece of circumstantial evidence to the jury and attempted to show there were other reasonable explanations for the evidence. (PCR Tr. 45). Counsel testified he believed he had a thorough, well-thought-out defense to the State's evidence. (PCR Tr. 45).

Regarding Applicant's allegation Counsel failed to properly argue the directed verdict motion, Counsel testified he argues for a directed verdict in all cases on general grounds and add specifics if there are additional points to be made. (PCR Tr. 46). Counsel testified he made an accomplice liability argument in this matter and argued the circumstantial evidence that existed did not rise to a level that allowed the matter to go to a jury. (PCR Tr. 46-47). Counsel testified he attacked the State's case by going after the circumstantial evidence and attempting to differentiate

[9] Counsel testified he believed he elicited some testimony at trial from Tomasina Goss, Darrell's mother, that the gun was Darrell's brother's gun. (PCR Tr. 45).

Applicant's case from Applicant's co-defendant's case. (PCR Tr. 47). Counsel noted he remembered specifically asking the victim whether he could identify Applicant at trial and that the victim responded he could not. (PCR Tr. 47). Counsel testified that because the victim had stated Applicant was not present, Applicant was therefore not a principal. (PCR Tr. 47). Counsel further testified the State had failed to present any evidence of a plan. (PCR Tr. 48). Counsel testified he moved for a directed verdict again after the close of evidence to preserve the record but did not bring up any additional points at that time. (PCR Tr. 48).

Regarding alibi witnesses, Counsel testified he did not hear about alibi witnesses prior to trial and if he did, did not explore any alibi witnesses. (PCR Tr. 48-49). Counsel testified he believed there was strong evidence to support the defense that there was not a common scheme or plan. (PCR Tr. 49). Counsel further testified he did not think the exploration of alibi witnesses would be congruent with his defense strategy and was leery of presenting an alibi in this case – again, reiterating he believed he had a good defense. (PCR Tr. 49). Counsel further testified he did not have a good faith belief an alibi existed and should he have believed one did, he would have investigated further. (PCR Tr. 50). Counsel testified that even if there was an alibi, he would not have pursued the defense based on the timeline of the incident and the evidence found. (PCR Tr. 51). Counsel stated he believed the case would have been "dead on arrival" should they have tried to introduce an alibi. (PCR Tr. 51). Counsel stated he has rarely used an alibi defense in career because "if your alibi doesn't work, the jury doesn't believe a damn word you say." (PCR Tr. 51). Counsel agreed the risk of presenting an alibi defense in this case outweighed the benefit. (PCR Tr. 51).

On cross-examination, Counsel testified his motion for a directed verdict was focused on the lack of evidence presented by the State to support a hand of one, hand of all theory and argued

the State had not presented substantial evidence for the question to go to the jury. (PCR Tr. 52-53). Counsel testified he argued there was no direct evidence placing Applicant at the store. (PCR Tr. 53). Counsel testified he argued that to charge Applicant under hand of one, hand of all, the State would have to show Applicant was present at the scene of the crime to be considered a principal. (PCR Tr. 54). Counsel stated that because there was no evidence placing Applicant at the scene of the crime, the State's theory could only survive if they had proven Applicant was a planner or had aided in the commission of the crime. (PCR Tr. 54). Counsel testified he argued there was no evidence of either of those things – there was nothing to show Applicant was a planner or that Applicant had conspired to commit this crime – and therefore, the State's hand of one, hand of all theory could not survive. (PCR Tr. 54-55). Counsel maintained he did not believe the State had proven Applicant planned to commit the crimes, nor did the State show any evidence of Applicant's participation in the crime. (PCR Tr. 56).

Regarding the jury charge, Applicant inquired whether Counsel, upon refreshing his recollection, saw anywhere the judge mentioned a plan as an element of the hand of one, hand of all theory. (PCR Tr. 58). Counsel testified he did not. (PCR Tr. 58). Counsel testified that in his experience, under common scheme and plan, hand of one, hand of all, it is required to show two or more person commensurate for an illegal purpose and that one or both do acts in further of that. (PCR Tr. 59). Counsel testified that the jury charge did not state anything about a plan or a scheme as an element to hand of one, hand of all. (PCR Tr. 59). Applicant inquired if Counsel believed there was anything missing from the jury charge. (PCR Tr. 60). Counsel responded that the charge given was a "bare" hand of one, hand of all charge. (PCR Tr. 60). Counsel testified that eleven years after this trial he would argue for more in the charge while noting that the charge did state "two or more people acting together, the act of one is the act of all". (PCR Tr. 60). Counsel stated

that he did not believe at the time of trial that the charge was objectionable. (PCR Tr. 61).

Regarding Sharon Goss, Applicant inquired whether Counsel was familiar with the name. (PCR Tr. 62). Counsel testified that he knew the name but was unaware of how he became familiar with it. (PCR Tr. 62). Counsel testified he did not recall if there was discovery disclosed showing the car where the gun with victim's DNA on it was found belonged to Sharon Goss. (PCR Tr. 63). Counsel did agree the car where the gun was found did not belong to Applicant. (PCR Tr. 63). Regarding investigation, Applicant questioned Counsel whether he investigated the man who owned the car in which the gun was found. (PCR Tr. 63). Counsel responded he did not. (PCR Tr. 63). Counsel stated he did not conduct an investigation because he did not believe it would be fruitful. (PCR Tr. 63). Counsel stated that any investigation would not have changed his defense that the gun was not Applicant's gun. (PCR Tr. 64). Counsel stated he did not expect to find Sharon Goss, the owner of the car, and have him testify that he bought a gun which had DNA all over it. (PCR Tr. 64).

Witness Sharon Goss's Testimony

Applicant called Sharon Goss, his cousin, to testify after the State rested their case. (PCR Tr. 67). Sharon testified that a gun was found in a car registered to him in 2007. (PCR Tr. 67). Sharon testified he obtained the pistol when he purchased some merchandise – clothes and firearms - from "some guys". (PCR Tr. 67). Sharon testified he paid around $500 dollars for all of the merchandise, including the pistol. (PCR Tr. 68). Sharon testified that after purchased the gun, he placed it in his vehicle that was parked in front of his residence. (PCR Tr. 68). Sharon testified that at the date of Applicant's trial he had been charged with possession with intent to distribute cocaine charge. (PCR Tr. 69). Sharon testified at the time of Applicant's trial he would have been willing to testify that he had purchased the gun illegally despite having a pending charge of his own. (PCR

Tr. 69). Sharon testified he did not talk to Counsel during the course of Applicant's case. (PCR Tr. 69).

V. Standard of Review

An applicant may seek PCR upon the following types of allegations:

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

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP. The reviewing court applies the two-part test outlined in *Strickland* to

determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, 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. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. *Id.*

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.'" *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, "even

if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen.*" *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24).

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. No 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 best to represent a criminal defendant. *Strickland*, 466 U.S. at 688–89; *see id.* at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." *Dunn*, 594 U.S. ___, 141 S. Ct. at 2410 (quoting *Harrington*, 562

U.S. at 106–107). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." *Id* (quoting *Harrington*, 562 U.S. at 108). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*'s deferential standard.

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see id.* at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial*." *Id.* at 687 (emphasis added). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had

no effect on the judgment." *Id.* at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Id.* at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); *cf. United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

JBM 21

VI. Findings of Fact & Conclusions of Law

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments made by counsel and Applicant, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims raised and finds each to be without merit. Therefore, pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

Allegation Counsel Failed to Properly Argue Motion for Directed Verdict

Applicant testified his attorney did not properly argue his motion for a directed verdict. Applicant testified he believed Counsel should have argued the State did not have enough evidence to support a jury charge under hand of one, hand of all, and that the State's evidence only raised a mere suspicion of Applicant's guilt. Applicant further argued Counsel invited the State to charge Applicant under hand of one, hand of all despite a lack of evidence to support the charge.

When considering a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. *State v. Larmand*, 415 S.C. 23, 30, 780 S.E.2d 892, 895 (2015) (citing *Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). The role of the trial court is only to determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *State v. Bennett*, 415 S.C. 232, 781 S.E.2d 352 (2016). If there is any direct or circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. *State v. Cherry*, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). "In deciding motions for a directed verdict. . . the evidence and all reasonable inferences which may be drawn from it must

be viewed in the light most favorable to the non-moving party. If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury." *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 611, 518 S.E.2d 591, 597 (1999). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." *State v. Nix*, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986). The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. *State v. Hernandez*, 382 S.C. 620, 625-26, 677 S.E.2d 603, 605-06 (2009). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. Ladner*, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

This Court has reviewed the relevant portion of the transcript and finds no deficiency in Counsel's handling of this motion. (Trial Tr. 438 – 446). Counsel credibly testified he argued for a directed verdict as to all three charges – assault and battery with intent to kill, armed robbery, and kidnapping – raising the issues of whether the State had sufficiently proved Applicant was present during the robbery and whether the State had proved a link to Applicant and the gun used in the incident. (Tr. p. 439 – 440). At trial during his motion, Counsel noted the victim in this case, when asked directly, testified Applicant was not present in the store during the armed robbery. (Trial Tr. 438). In response, the trial court stated it believed Counsel's interpretation of the victim's testimony was a play on words. The trial court further noted victim's testimony was not contradictory to the State's case because though victim testified he did not see Applicant in the store, he knew there were four black males who he did not know present at the time of the incident[10]. (Trial Tr. 439). Counsel further argued during his motion to the trial court that the State

[10] The trial court later inquired whether the victim stated Applicant was not in the store. (Trial Tr. 478-479). Counsel represented to the trial court he had asked victim whether he recognized Applicant from the

could only pursue this case under the hand of one, hand of all theory, and to do so, must show Applicant was a planner or some kind of accessory. (Trial Tr. 438-439). Counsel argued the State had produced no evidence to place Applicant at the store during the robbery, nor had the State shown any link between the State's evidence and Applicant. (Trial Tr. 439-440). The trial court denied the motion for a directed verdict. (Trial Tr. 446). At the close of the Defense's case, Counsel renewed the motion for directed verdict and the trial judge declined to change his ruling. (Trial Tr. 480).

When considering a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. *State v. Larmand*, 415 S.C. 23, 30, 780 S.E.2d 892, 895 (2015) (citing *Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). If there is any direct or circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. *State v. Cherry*, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). This Court finds there were clear factual issues for the jury to consider at the close of the State's case; the trial court correctly denied the motion. Therefore, this Court finds no deficiency with Counsel's handling of the motion and further finds Applicant did not suffer prejudice. Accordingly, this allegation is therefore **DENIED**.

Allegation Applicant's Due Process and Equal Protection Rights Have Been Violated

Applicant further asserted his continued incarceration is in violation of his due process and equal protection rights due to excessive delay in the disposition of this matter. At the evidentiary hearing, in support of this allegation, Applicant testified to the procedural history of this matter over all, as well as testified to the continuance occurring during this term of court and the prejudice

---

robbery, to which victim had testified he did not. (Trial Tr. 478). The trial court warned Counsel of mischaracterizing the witness's testimony in closing by stating victim testified Applicant was not in the store during the robbery. (Trial Tr. 479).

Applicant believes he has incurred. Specifically, Applicant argued post-conviction relief counsel, Christopher L. Murphy, failed to inform him of the scheduling change for this hearing from December 7, 2021, until December 8, 2021. As such, Applicant argued one of his out-of-state witnesses, Felicia Henderson, was unavailable to testify. Applicant further alleged that he has been denied equal protection because the State of South Carolina has purposefully discriminated against him by using delay tactics.

As an initial matter, this Court notes it entered into a colloquy with Applicant regarding his alleged unavailable out-of-state witness. This Court specifically inquired whether Applicant wished to proceed with the hearing without his witness, to which Applicant unequivocally responded he did. Applicant informed this Court he had other claims to raise that did not require the unavailable witness. This Court notes it again inquired into Applicant's understanding and willingness to proceed without all alleged necessary witnesses during Applicant's testimony, to which Applicant again indicated he understood and wished to proceed. Therefore, to the extent Applicant alleges he was prejudiced by the one-day continuance in this matter during the December 2021 post-conviction relief term of court, this Court finds that allegation meritless.

As to allegation alleging excessive delay in the disposition of the matter, Applicant asserted he filed this application in May 2011. Applicant testified that following his initial evidentiary hearing denying relief he filed an appeal. Applicant testified that his appeal sat pending for seven years before the Court before being remanded. Applicant testified that after this matter was remanded back to the circuit court for a *de novo* evidentiary hearing it sat for an additional three years in the circuit court without a resolution. Applicant claims that as a result of these delays he has lost contact with witnesses who were present and willing to testify at his initial evidentiary hearing.

As to the allegations of excessive delay relating to the length of time this post-conviction relief matter has been pending, this Court finds Applicant has failed to show his due process rights were violated. This matter was remanded back to the circuit court for a *de novo* evidentiary hearing on October 17, 2018. After this matter was remanded, Applicant filed a Motion to Stay Proceedings on January 7, 2019, requesting the matter be stayed for one year as Applicant had filed a federal habeas corpus action. On January 29, 2019, an Order staying Applicant's PCR matter for one year was filed. Additionally, prior to this hearing, Applicant filed a motion to appoint counsel on July 26, 2021. That motion was heard and granted during the September 2021 term of court in the 9th Circuit. Therefore, based on Applicant's procedural history, this Court finds Applicant finds this allegation meritless.

As to Applicant's allegation he has been denied equal protection because the State of South Carolina has purposefully discriminated against him by using delay tactics. This Court finds that allegation wholly meritless as Applicant has shown no evidence to support a claim his equal protection rights were violated. This Court finds Applicant cannot show prejudice as a result of the alleged delay. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

Allegation Counsel Failed to Object to Jury Charge of Hand of One, Hand of All

Applicant further alleges Counsel should have objected to the hand of one, hand of all jury charge. Applicant asserts Counsel maintained the elements of hand of one, hand of all were not met when arguing Applicant's motion for a directed verdict, and therefore was ineffective for failing to object to the jury charge as a whole.

"'Under the 'hand of one is the hand of all' theory [of accomplice liability], one who joins with another to accomplice an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.'" *State v. Thompson*,

JBM | 26

374 S.C. 257, 261-62, 647 S.E.2d 702, 704-05 (Ct. App. 2007) (quoting *State v. Condrey*, 394 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)). Though "[m]ere presence and prior knowledge that a crime was going to be committed, without more is insufficient to constitute guilt", "'presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal].'" *Id.* (quoting *State v. Hill*, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977)). "In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties." *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010).

At the evidentiary hearing, Counsel credibly testified he did not believe the hand of one, hand of all charge was objectionable at the time of trial. Counsel further testified his defense was to show the State had not met their burden – specifically, that the State did not have any direct evidence linking Applicant to the incident. Counsel testified he believed he had a thorough, well-thought-out defense and that he presented each piece of circumstantial evidence to the jury, attempting to show there were other reasonable explanations for the evidence.

This Court finds Applicant has failed to meet his burden and finds no deficiency on the part of Counsel nor prejudice therefrom in regards to this allegation. Evidence in the record supports a charge on the hand of one is the hand of all and the charge was appropriately given to the jury. Therefore, this Court finds Counsel would have had no valid basis for an objection to the instruction. Accordingly, this Court finds Counsel was not deficient for failing to object to the charge given, finds Applicant was not prejudiced by Counsel's failure to object to the jury charge, and dismisses this allegation. Accordingly, this Court finds this allegation must be **DENIED.**

BM 27

Allegation Counsel Failed to Investigate Sharon Goss as Witness

Applicant argues Counsel performed an inadequate pre-trial investigation into Applicant's cousin, the owner of the car where the gun with victim's DNA was found, Sharon Goss. A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. *Strickland*, at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). A defense attorney's "[f]ailure 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) (citing *Kibler v. State*, 267 S.C. 250, 227 S.E.2d 199 (1976)).

An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. *Skeen v. State*, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[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; *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014).

This Court finds Applicant has failed to establish any deficiency in Counsel's preparation for trial. Counsel testified he knew the car in which the gun was found did not belong to Applicant. Counsel further testified he did not investigate the owner of the car where the gun was found

TBM 28

because it would not have changed his defense strategy – that Applicant was not the owner of the gun. Therefore, this Court finds Counsel was not constitutionally ineffective and did not fail to conduct an adequate pre-trial investigation. As such, Applicant has failed to show any deficiency in Counsel's performance and any resulting prejudice. Accordingly, this allegation is **DENIED.**

Allegation Counsel Failed to Request Mere Presence, Mere Knowledge, Mere Association Jury Charges

Though Applicant did not make this allegation in his original application or amended applications, he alleged through his testimony at the evidentiary hearing Counsel was ineffective for failing to request a mere presence, mere knowledge, and/or mere association jury charge. Applicant presented no evidence regarding how he was prejudiced by Counsel's alleged failure to request these jury charges.

Mere association with another who committed a crime does not make that person an accomplice or a co-conspirator to the guilty perpetrator, nor does mere presence at the scene of the crime make a person an accomplice or a co-conspirator. *State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 77 (1998). Counsel testified at this evidentiary hearing that his defense was focused on the State's inability to meet their burden. Counsel testified the State did not present any direct evidence linking Applicant to the incident. Counsel further testified that throughout the trial he attempted to show reasonable explanations for each piece of circumstantial evidence the State presented. Counsel maintained at this hearing he did not believe the State had proven Applicant either participated or planned to commit these crimes.

Therefore, this Court finds Applicant has failed to meet his burden of showing any ineffectiveness. This Court finds Counsel's defense strategy was centered around proving Applicant was not involved in the commission of these crimes in any capacity. This Court further

finds a request for a mere presence, mere knowledge, and/or mere association jury charge wholly conflicts with Counsel's strategy.

Thus, this Court cannot find any prejudice to Applicant. Accordingly, Applicant has failed to meet his burden under *Strickland*, and his request for relief by way of this allegation is **DENIED**.

VII. Conclusion

Based on the evidence presented at the PCR hearing and a thorough review of the record before this Court, this Court finds Applicant has not proven any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203 SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 14 day of June, 2022.

JMcCoy

JENNIFER B. MCCOY
Presiding Circuit Court Judge
Ninth Judicial Circuit

Charleston, South Carolina

JBM | 30