VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Clarendon County

Honorable Diane Schafer Goodstein, Circuit Court Judge

JEREMIAH SMITH, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-001998

APPENDIX

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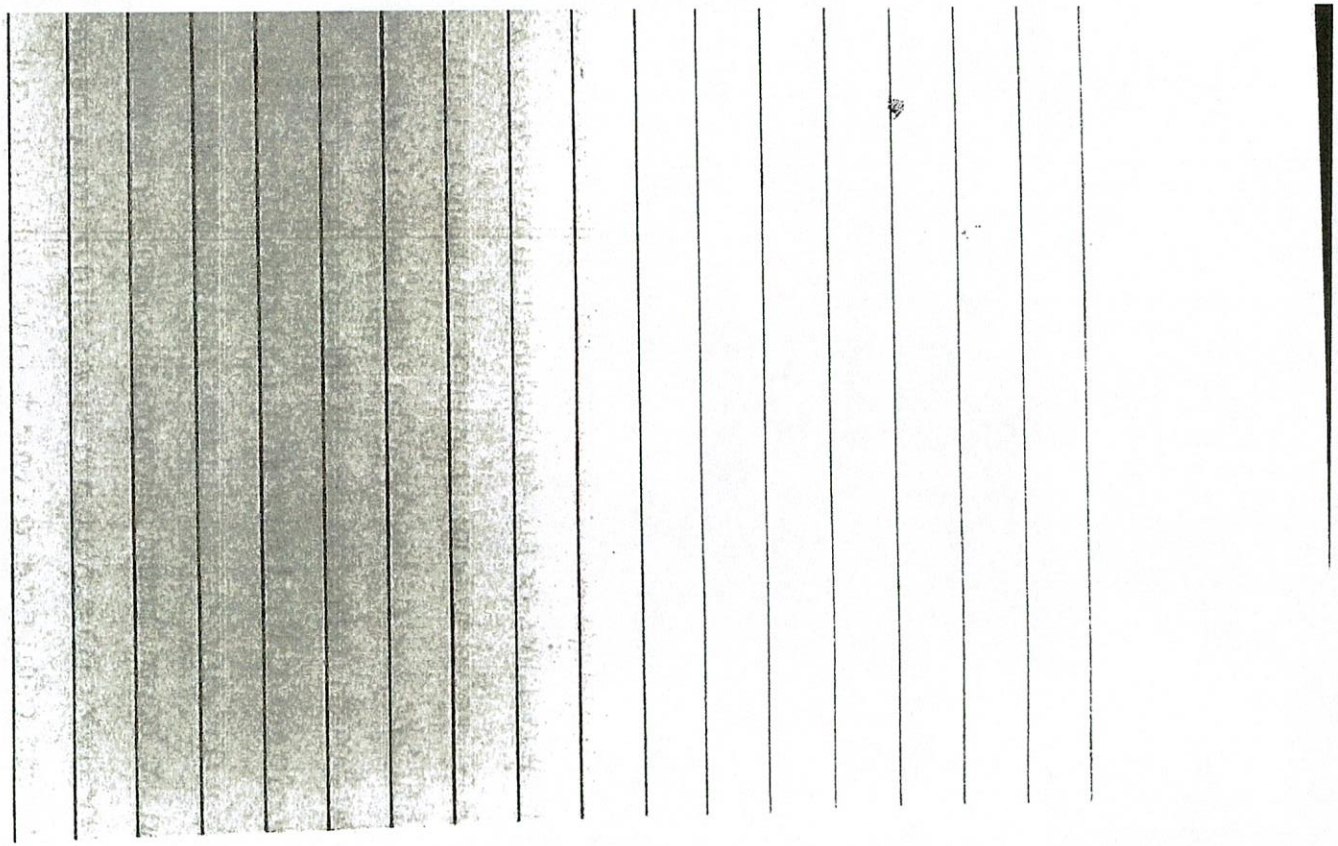

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STATE OF SOUTH CAROLINA COUNTY OF CLARENDON	)	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT
Jeremiah Smith, Jr., #336698, Applicant,	)	Case No.: 2020-CP-14-00439
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before this Court by way of Applicant's timely filed post-conviction relief application and amended application filed November 8, 2021. Respondent made its return on July 22, 2021, requesting an evidentiary hearing be convened. An evidentiary hearing was held on November 16, 2021, via Webex, which was consented to by the Applicant. James K. Falk, Esquire, represented Applicant. Assistant Attorney General Michael Neubauer, Esquire, represented Respondent. While ineffective assistance of appellant counsel was originally raised this allegation was abandoned in the hearing.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Timothy Griffith, Esquire, also testified. After reviewing the transcript and evidence before this Court and considered the credibility of the testifying witnesses this Court finds Applicant has not met his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. In July 2015, the Clarendon County Grand Jury indicted Applicant for, attempted murder, for which he proceeded to trial.

Timothy L. Griffith, Esquire represented Applicant. Chris Durant and High McMillan, Esquires, prosecuted the case. On January 16-18, 2018, Applicant proceeded to trial before the Honorable D. Craig Brown, circuit court judge, and a jury. Applicant was found guilty of attempted murder and sentenced to tweuty-five years' imprisonment.

Applicant filed a timely notice of appeal on January 19, 2018, that was perfected by Lara Caudy, Esquire, with the Court of Appeals.

The South Carolina Court of Appeals issued an unqualified per curiam opinion. *State v. Smith*, 2019-UP-388 (S.C. Ct. App. filed Dec. 18, 2019). The remittitur was issued on January 6, 2020.

Summary of Relevant Facts

The victim, Breshaun Pendergrass, arrived at Browntown Social Club a little after midnight on December 20, 2014. (Trial Transcript 147, hereinafter "T.T."). Applicant and victim were present with friends. (T.T. 150). Victim had known Applicant since childhood and described them as "childhood friends". (T.T. 147). Despite not knowing why Applicant might be upset with him personally, he believed Applicant's friends may not have been on good terms with some of his friends. (T.T. 156). The victim decided to leave between two and three in the morning. (T.T. 151). As he passed by Applicant, who was standing outside by his friends, Applicant made a "smart" comment to the victim, which the victim ignored. (T.T. 151, 157). The victim then heard a gunshot close enough it was ringing in his ear; fell down, and was aided by Cindy Calvin. (T.T. 161-162). The victim was shot in the back and paralyzed from the waist down. (T.T. 163). Applicant was three to five feet away when he shot the victim and, though the victim's back was turned, the victim believed that Applicant was the perpetrator. (T.T. 164). The victim picked Applicant out of a lineup. (T.T. 166).

Fritz Aguon accompanied Applicant to Browntown that night and testified that he saw Applicant shoot the victim in the back after an argument. (T.T. 197, 200).

Shandara Abraham testified that Applicant and the victim were the only two people in the vicinity of the shot. (T.T. 241). Cindy Calvin stated that she saw the victim's friends and Applicant's friends were arguing inside Browntown. (T.T. 248). She stated she saw the victim and Applicant talking outside, heard the shot, saw the victim fall to the ground. (T.T. 247, 249). Calvin testified that she knew Applicant by face, but not by name. (T.T. 250). She identified Applicant as the shooter when presented with a lineup. (T.T. 254-255).

Current Action Before this Court

In his current amended PCR application, Applicant proceeded forward on the following allegations:

1. Ineffective assistance of trial counsel for failure to:
    a. Object to the State's opening statement where they stating that it is the job of the State to ensure justice is done.
    b. Object to the State's "speak the truth" language in closing arguments.
    c. Object to the State's opening and closing arguments by saying that the witnesses exhibited courage in testifying.
    d. Renew his objection to the photographic lineup after pursuing a *Biggers* hearing.
    e. Better prepare Sierra Smith's testimony and request a curative instruction after she mentioned Applicant's time in jail.
    f. Object to the State bolstering the credibility of their witnesses.
    g. Object to Fritz Aguon's testimony that he knew Applicant and saw him at Browntown based on Aguon's letter stating he was not at the location and that he wanted to recant.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Counsel Testimony

Counsel testified that he did not object to the State's opening statement where he said that

it is the job of the State to ensure justice is done because he did not see anything wrong with it. (PCR Tr. 9). He stated that he makes similar arguments himself sometimes. (PCR Tr. 9). He stated that his typical response to that type of argument from the State is to say that the State's argument is not testimony.

He stated that he did not object to the State's "speak the truth" language during closing because he did not consider it to be burden shifting. (PCR Tr. 10). Counsel stated that he did not think that "speak the truth" language impacted the outcome at trial. (PCR Tr. 19).

Counsel testified that he did not think the State bolstered the credibility of its witnesses during opening and closing arguments by stating that the witnesses exhibited courage in testifying. (PCR Tr. 11-12). Instead, Counsel testified that this is common rhetoric at trial. (PCR Tr. 11-12). He stated he did not see any argument by the State that their witnesses were telling the truth crossed a line because it is the State's duty to convince the jury of their side. (PCR Tr. 13).

Counsel testified that he did not recall picking two juries in this case. (PCR Tr. 13). Counsel testified that he had a *Biggers* hearing but did not renew his objection to the lineup coming in at trial. (PCR Tr. 14). He stated he did not renew the objection because he did not think the photos were challengeable and he was sure he would not win on his objection. (PCR Tr. 15). Counsel stated that he did not think that the photo lineup made a difference at trial but acknowledged their importance. (PCR Tr. 18-19).

Counsel testified that he called Applicant's sister, Sierra Smith, to testify at trial. (PCR Tr. 16). He stated he did not know she would tell the jury that Applicant had been to prison. (PCR Tr. 16-17). Counsel acknowledged that he probably should have asked for a curative instruction on this. (PCR Tr. 17). He stated he did not think it would have made a difference at

trial. (PCR Tr. 17).

Counsel stated that he did not remember Fritz Aguon testifying at trial. (PCR Tr. 20-21). Counsel stated that he did not recall Applicant stating that he wanted Counsel to object to this testimony because he wrote a letter to the clerk stating that he was not at the location and wanted to recant. (PCR Tr. 21). He stated that if he had a letter like the one described, he would have introduced it. (PCR Tr. 21).

On cross-examination, Counsel stated that has been practicing criminal law for over a decade and that he was appointed to represent Applicant. (PCR Tr. 22). He stated that he was appointed to represent Applicant about two years prior to trial. (PCR Tr. 22). Counsel stated that Applicant was charged because he had altercations with the victim on prior occasions and they all appeared at the same club together. (PCR Tr. 23). He stated that the victim turned back around, Applicant came up behind the victim, and shot in him the back. (PCR Tr. 23). He stated that he discussed the charges and potential sentences with Applicant many times. (PCR Tr. 23). He stated that he discussed the State's burden of proof, the discovery, and the charges and evidence against him. (PCR Tr. 24). He stated that he was never given an indication that Applicant did not understand the discussions. (PCR Tr. 24). He stated that Applicant gave him the names of a couple other potential witnesses, whom he did not call because they would have been unfavorable. (PCR Tr. 24). He stated that Applicant's only defense provided was that he did not do it. (PCR Tr. 24).

Counsel stated that inculpatory evidence included the victim's identification of and prior familiarity with Applicant, as well as a couple of lay witnesses close by at the time of the shooting that identified Applicant. (PCR Tr. 25).

Counsel testified that he does not object to the State's opening and closing statements

very often and, when it does, it is because they cross a line or start speaking about something that is not in evidence. (PCR Tr. 25-26). He stated that he did not feel obligated to object to search for the truth language or to language that could be construed as improper bolstering and that a failure to object did not sway the jury. (PCR Tr. 26).

He stated that his only regret in the case was letting the sister testify. (PCR Tr. 27). He stated that he did not think she would testify about Applicant previously going to prison. (PCR Tr. 27). He stated that she testified to several things he did not know she would testify to during his prior conversations with her. (PCR Tr. 27). He stated that he did not feel the need to object to her testifying to Applicant previously being incarcerated and that he did not think the testimony impacted the results at trial. (PCR Tr. 27-28).

He stated that he objected to the Solicitor's line of questioning surrounding the incarceration. (PCR Tr. 28). He stated that he did not object to the in-court identification of Applicant by the person that picked him out of the lineup because the objection would not have been helpful. (PCR Tr. 28). He stated that multiple witnesses acknowledged that Applicant was on the scene the night of the shooting and that the victim knew Applicant personally. (PCR Tr. 29). He stated that he did not think that if he proffered the three defense exhibits in question and preserved the issue for appellate review it would have made a difference. (PCR Tr. 30). He stated that he thought he sufficiently cross-examined the State's witnesses and that he did not think further cross-examination would have made a difference at trial. (PCR Tr. 30-31). He stated that he thought he addressed any issues regarding bolstering of testimony in his closing argument by pointing out that the jury could not rely on what the Solicitor said and that they would have to look at the evidence themselves. (PCR Tr. 31). Counsel stated that the trial took place before the Court's decision in *State v. Beaty* came out. (PCR Tr. 31-32). He stated that he did not think that

the Court used "search for the truth" language. (PCR Tr. 32).

On redirect, Counsel acknowledged that Cindy Calvin testified at the *Biggers* hearing and made an in-court identification. (PCR Tr. 33-34).

Applicant Testimony

Applicant testified that he was fine with handling his evidentiary hearing virtually via WebEx. He stated that he did not know Cindy Calvin. (PCR Tr. 35-36). He said she identified him in court three years after the incident. (PCR Tr. 36). He stated he never met her before. (PCR Tr. 36). Applicant stated he thought Counsel should have objected to Fritz Aguon testifying at trial because he did not know him, and he was not at Browntown that night. (PCR Tr. 36).

On cross-examination, Applicant stated that his issue with Aguon testifying was that he was not part of the case nor be allowed to testify because he "was not a part of this case" and should not have been a co-defendant. (PCR Tr. 42). Applicant did testify he recalled Counsel with the Attorney General questioning Aguon about whether he was at the scene and Counsel bringing up the letter where Aguon wrote saying he was never there. (PCR Tr. 43). Applicant testified that he failed to have effective assistance of counsel because Aguon was not the only person testifying against him. (PCR Tr. 43). Applicant was concerned about his trial attorney's inability to prohibit that inculpatory testimony.

Applicant stated that Cindy Calvin testified that he and the victim were seen talking outside the club. (PCR Tr. 44). He stated that Aguon testified that he saw him shoot the victim and the other witnesses testified that they heard a shot, but never saw him with a gun. (PCR Tr. 44).

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the trial transcript, the PCR transcript, the

record in its entirety, has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the PCR hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of

representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. 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.

Failure to Object to State's Opening and Closing Statements – Burden Shifting

Counsel was not constitutionally ineffective for failing to object to burden shifting by the prosecutor during opening and closing statements. The Due Process Clause protects the accused

against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). Our Supreme Court has issued cautions against using "seek the truth" language, *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000), as well as use of language requesting the jury return a verdict that is "just" or "fair" to all parties. *State v. Daniels*, 401 S.C. 251, 256 S.E.2d 473, 475 (2012). However, the Court has not reversed convictions in any of those cases,

The South Carolina Supreme Court makes clear that when such language is used, context matters. Specifically, the Court looks at the entirety of the statement or jury instruction when determining whether the language prejudiced Applicant. *See e.g. State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018) (finding that upon review of the entirety of the judge's opening comments and the entire trial record, Applicant had not shown prejudice from this error); *State v. Needs*, 333 S.C. 134, 154, 508 S.E. 2d 857, 867 (1998)(affirming the conviction despite erroneous jury instructions because other portions of the charge not in question correctly emphasized that the burden was on the State).

Here, Applicant was not prejudiced by Counsel's failure to object. Throughout the Court's jury instructions, the burden of proof correctly remained on the State. Specifically, the Court made clear that Applicant was presumed innocent, that he had no obligation to prove his innocence, and that Applicant enjoyed the benefit of the presumption of innocence unless and until the State proved his guilt beyond a reasonable doubt. (Tr. 352-53). The Court also charged that if the jury thought there was a real possibility that he was not guilty, that he must be found not guilty and that Applicant was entitled to every reasonable doubt arising from the whole case. (Tr. 353). Thus, this Court finds that the State's comments did not shift the burden of proof when viewed in light of the record in its entirety. Accordingly, relief is denied on this ground.

Failure to Renew Objection to Photographic Lineup

Counsel was not constitutionally ineffective for failing to object to the photographic lineup. Counsel acknowledged he had a *Biggers* hearing but did not renew his objection. Counsel was deficient for failing to renew the objection. However, no prejudice is found because Applicant has failed to establish that renewing the objection would have caused the photographic lineup to be suppressed at trial after the motion was denied at pre-trial. Additionally, this Court declines to find prejudice in the case because there were eyewitnesses and the victim knew Applicant personally and testified to that at trial. Accordingly, relief is denied on this ground.

Failure to Request Curative Instruction

Counsel more likely than not was constitutionally ineffective for failing to request a curative instruction after Ms. Smith testified regarding Applicant's history of being in jail. Counsel concurred at the PCR hearing that in retrospect he should have sought such an instruction. Counsel failed to articulate a reason for not making the request at trial. Counsel testified one of the reasons for the failure was that Ms. Smith (Defendant's sister) was a witness called by Defendant and although Counsel met with her and prepared her for testifying at trial he was not expecting her to offer testimony regarding her brother having been in prison. Additionally, he was surprised by her testimony regarding "several matters that came out in the Solicitor's questioning of her. She had not revealed these additional matters to Counsel nor had Mr. Smith." (T.T. 27).

However, this Court declines to find prejudice in the case because of the strength of the evidence against him, direct and circumstantial, as outlined above. Accordingly, relief should be denied on this ground.

Failure to Object to Improper Bolstering

Applicant claims Counsel was ineffective for failure to object to improper bolstering. Specifically, he claims Counsel should have objected to the State's opening and closing statements where the state argued that the witness said witnesses exhibited courage in testifying. Improper bolstering occurs when statements are made for no other reason and serve no other purpose but to inform the jury that they believe the victim. *Chappell v. State*, 429 S.C. 68, 75, 837 S.E.2d 496, 499-500 (Ct. App. 2019 (quoting *Briggs v. State*, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017)). There is no other way of interpreting the language used but to conclude that the orator believes the victim is telling the truth. *Id.* Where an objection should have been made the question is one of prejudice.

Trial counsel's failure to object to improper bolstering does not abdicate the PCR applicant of the responsibility of establishing prejudice. *Chappell*, 429 S.C. at 80, 837 S.E.2d at 502. "The determination of whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim." *State v. Chavis*, 412 S.C. 101, 110, 771 S.E.2d 336, 341 (2015). "The outcome of a trial turns on the credibility of the victim when the State presents no physical evidence or 'relie[s] solely upon the victim's testimony to establish the details of the crime . . . ." *Chappell*, 429 S.C. at 80, 837 S.E.2d at 502 (quoting *Thompson*, 423 S.C. at 248, 814 S.E.2d at 494). As articulated above Defendant's conviction was not based solely on the testimony of the victim and therefore the credibility of the victim. There was testimony of various witnesses in and around the victim and Defendant's and victim providing both direct and circumstantial evidence from which the jury could have made its determination. Reviewing the record as a whole there was formidable testimony and evidence presented of the guilt of the Defendant. Prejudice is not proven on this ground.

Regarding the prosecutor's opening statement and closing argument specifically, "[i]t is

undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." *United States v. Francisco*, 35 F.3d 116, 120 (4th Cir. 1994). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no errors occur." *State v. New*, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999). "[A] closing argument may be held improper where it appeals to personal bias or arouses the jury's passions or prejudice." *Id.* In determining prejudice, a PCR Court must view the impropriety of the prosecutor's argument in the context of the entire record and the applicant maintains the burden of proving he was not provided with a fair trial because of the alleged improper argument and has been denied due process. *Fortune v. State*, 428 S.C. 545, 550, 837 S.E.2d 37, 40 (2019).

Even if counsel should have objected, Applicant failed to establish prejudice. Applicant and the victim knew each other, knew each other for a long time, and the victim testified Applicant shot him. (T.T. 64-67, 147-162, 164, 167-168). Given the immediacy of victims having passed by defendant and the firing of the weapon which struck victim, victim was adamant he had been shot by applicant. Additionally, Shandara Abraham testified that Applicant and the victim were the only two people outside of the club in the area of the shooters (T.T. 240) and she identified Applicant as shooter when presented with a lineup. (R. 24-25, 153, 166). Thus, eveo if Counsel was deficient, Applicant was not prejudiced by this deficiency. Accordingly, relief is denied on this ground.

Failure to Object to Fritz Aguon's Testimony

Applicant claims Counsel was constitutionally ineffective for failure to object to Friz Aguon's testimony and otherwise impeach his credibility. Specifically, Applicant alleges that Aguon submitted a letter to the clerk of court, dated August 22, 2016, recanting his testimony.

Applicant alleges Aguon's testimony should have been objected to because Applicant did not know Aguon and Aguon was not present that night.

While it is accurate that Aguon wrote a letter recanting his statement to law enforcement and also accurate that the letter was not admitted into evidence, the fact and details of the recantation were certainly presented to the jury. The August 22, 2016 letter was first brought up by the State in its direct of Mr. Aguon (T.T. 203-205). The letter was offered by Defendant as Exhibit 4 (T.T. 209 line 17). There is an objection by the State, a bench conference, and no ruling on the admissibility of the Exhibit because it was not admitted. It appears however from the Trial Transcript that on both direct by the State and by cross-examination by the Defense. Mr. Aguon's recanting of his prior statement to law enforcement was squarely before the jury. Even if Mr. Griffith was deficient in not making the statement an exhibit or getting the Court's ruling regarding the statement on the record, the information of the recanting contained on the letter was presented to the jury. No prejudice existed.

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies the 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. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention

is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 1st day of August, 2025.

DIANE S. GOODSTEIN
Presiding Judge
Third Judicial Circuit

Greenville, South Carolina.