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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT
APPEAL FROM HAMPTON COUNTY
Court of Common Pleas
The Honorable Dale Van Slambrook, PCR Action Judge
2017-CP-25-00006

JAMES GARDNER, #177263,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

James Gardner appeals the denial of his post-conviction relief application. The post-conviction relief action was heard and denied by the Honorable Dale Van Slambrook, circuit court judge, on November 13, 2025, and was denied by written order issued filed on March 6, 2026. Applicant received notice of the judgement on March 9, 2026.

/s Chelsey F. Marto
Chelsey F. Marto, Esquire
Attorney for the Applicant
The Law Office of Chelsey F. Marto, LLC
P.O. Box 8795
Columbia, SC, 29201
(864)-404-5583

Other Counsel of Record:
Danielle Dixon, Esquire
Office of the Attorney General, State of SC
P.O. Box 11549
Columbia, SC, 29211-1549

STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON

COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

FILED
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MAR 06 2026
Jvonndra Brooks-Creech
Clerk of Court
Hampton County SC

James A. Gardner, #177263,

Applicant,

v.

State of South Carolina,

Respondent.

Case No. 2017-CP-25-0006

ORDER OF DISMSISAL

This matter is before the Court by way of an application for post-conviction relief filed by James A. Gardner (Applicant) on January 9, 2017. Following a remand by the South Carolina Court of Appeals, an evidentiary hearing convened before the Honorable Dale E. Van Slambrook on November 13, 2025. Applicant was present and represented by Chelsey F. Marto, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. Applicant testified at the hearing and called as a witnesses trial counsel Cory Fleming. Respondent called Assistant Solicitor Tameaka Legette. Following a thorough review of the records before this Court, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving an aggregate twenty-five-year sentence. In August 2013, the Hampton County Grand Jury indicted Applicant for three counts of attempted murder (2013-GS-25-0073, -0075, -0079) and possession of a weapon during a violent crime (-0080).[1] On February 2-4, 2015, Applicant proceeded to a jury

[1] In October 2014, Applicant was additionally indicted for pointing and presenting firearms, but the State withdrew that indictment at the close of the State's case. (2014-GS-25-374; Tr. 319).

trial before the Honorable Perry M. Buckner. Cory Fleming, Esquire, represented Applicant. Assistant Solicitor Tameaka Legette prosecuted the case. The jury convicted Applicant as indicted, and Judge Buckner imposed concurrent sentences of twenty-five years for each attempted murder and five years for the weapon charge.

Applicant filed a timely notice of appeal, which was perfected by Appellate Defender Kathrine Hudgins through the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Applicant filed a pro se response. The South Carolina Court of Appeals dismissed the appeal pursuant to Anders, and the remittitur was sent August 5, 2016.

On January 9, 2017, Applicant timely filed this PCR application along with a Motion in Support of Post-Conviction Relief Application.[2] On May 1, 2017, Applicant filed a motion to amend his application. On August 9, 2017, Respondent filed a return and partial motion to dismiss, requesting the Court dismiss an actual innocence claim as not cognizable under the PCR Act and hold a hearing on the remainder allegations.

On January 29, 2018, a hearing convened before the Honorable R. Lawton McIntosh. On April 24, 2018, Judge McIntosh issued an order denying relief and dismissing the application with prejudice. Applicant filed a timely notice of appeal, and Chief Appellate Defender Robert M. Dudek filed a petition for writ of certiorari arguing *inter alia* the PCR court erred in limiting Applicant to raising only three issues at the hearing under the threat of Rule 11, SCRCP, sanctions. After the matter was transferred to the Court of Appeals, the Court of Appeals granted certiorari. Following briefing, the Court of Appeals issued an opinion finding the PCR court erred in limiting the number of issues Applicant could present and reversing and remanding to the PCR court for a new PCR hearing. The remittitur was sent March 19, 2024.

[2] The specific grounds raised will be discussed in the next section.

ALLEGATIONS

On January 9, 2017, Applicant timely filed this PCR application along with a Motion in Support of Post-Conviction Relief alleging:

a. Ineffective assistance of trial counsel:

1. Failed to object to the jury composition because Juror Alice Scott is biologically related to alleged victim.;
2. Failed to investigate case, interview witnesses, file motions for funding for an investigator, and investigate the medical records of alleged victims to assess the extent of their claimed injuries. The radiologist wasn't subpoenaed to testify to the extent of the alleged bullet wound; the applicant was denied his substantial rights to confrontation and also compulsory S.C. Constitution Art. 1 Section 13;
3. Failed to object to the indictment being multiplicitous because it contained several counts for one firearm.
4. Stipulated to involuntary statement made by Applicant to investigators. Counsel should have requested an *in camera* Jackson v. Denno hearing because the stipulation was used when the judge instructed the jury;
5. Failed to object to the use of Applicant's prior convictions as beyond ten years and too remote; failed to investigate validity of prior convictions;
6. Failed to request instruction on lesser-included offenses of first, second, and third degree assault.
7. Applicant proceeded to trial due to a breakdown in communication; he would have pled to a lesser-included offense for a sentence under nine years, but counsel would not hire an investigator to show evidence of a lesser-included offense.

b. Ineffective assistance of appellate counsel: Did not raise court's denial of motion for directed verdict;

c. Actual innocence.

On May 1, 2017, Applicant filed a motion for leave to amend his application. Citing Gonzales v. State, 419 S.C. 2, 795 S.E.2d 835 (2017), he alleged the breakdown in communication was caused by counsel's conflict of interest. At the 2018 PCR hearing, counsel for Applicant entered an amended allegation raising the issue as follows:

> Trial counsel had a conflict of interest in his representation of Applicant in this case. Trial counsel was a close friend of Adonis Cocker who was a son of the victim. This relationship was not disclosed prior to trial counsel's representation in this case. Once Applicant became aware of the conflicting relationship, Applicant sought to have trial counsel relieved from the case.

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Following the first order denying PCR and the subsequent remand from the Court of Appeals, Applicant filed an amended application on November 17, 2025, raising the following additional allegations:

1. Ineffective assistance of counsel:
    a. Failed to object to truth-seeking language (Tr. 100);
    b. Failed to request a curative instruction regarding the mention of the relationship being abusive (Tr. 174);
    c. Failed to request a lesser-included offense jury instruction
    d. Failed to get a better plea deal.
2. Prosecutorial Misconduct: there was a connection between the victim and the prosecutor.

At the hearing, Applicant proceeded on the allegations in his original and amended applications.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the records before it, including the Orangeburg County Clerk of Court records of the underlying convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the records of this PCR action. This Court has further had the opportunity to observe the witnesses at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. After a careful review based on Strickland, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). To prove ineffective assistance of counsel, the applicant must show counsel was deficient, and the deficiency prejudiced applicant. Strickland v. Washington, 466 U.S. 668 (1984). When evaluating deficiency, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." "Counsel is strongly

presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," and a PCR applicant must overcome this presumption to obtain relief. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690); Cherry, 300 S.C. at 118, 386 S.E.2d at 625. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Strickland "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." Harrington v. Richter, 562 U.S. 86, 109-10 (2011). To prove prejudice, an applicant must prove counsel's deficiency 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." Id. at 117-18, 386 S.E.2d at 625.

Jury composition

Applicant first contends counsel was ineffective for failing to object to the jury composition because Juror Alice Scott is biologically related to the alleged victim.[3] Applicant did not prove this ground. At the PCR hearing, Applicant averred the foreman[4] of the jury was related to the victim. Trial counsel testified he did not recall any information indicating the foreman was related to the victims, but he would have inquired into it if he had been aware.

This Court finds trial counsel's testimony on this issue more credible than Applicant's testimony. Based on counsel's testimony, his performance was reasonable under prevailing professional norms and not deficient. Further, Applicant did not introduce any credible evidence of a relationship between any juror and the victims. During voir dire, the panel was informed that

[3] There were three victims in this case: Mary Etta Montouth, who had dated Applicant; Mariam Walden, Montouth's sister; and Officer Bobby Anderson. Applicant did not clarify which victim he alleges was related to a juror.

[4] Alice Scott was not the foreman.

Bobby Anderson, Mariam Walden, and Mary Etta Montouth (the victims in this case) were potential witnesses. (Tr. 53-54). The jury was then questioned about whether anyone was "related by blood, connected by marriage or a close personal friend of any of the potential witnesses." (Tr. 54-55). Although three members of the panel stood, none of them indicated they were related to or friends with the victims.[5] (Tr. 55-59). Juror Alice Scott, whom Applicant specifically named in his application, did not stand in response to that question. (Tr. 54-59). Likewise, the foreperson—Harold Ennis (Tr. 79)—also did not stand in response to that question. Applicant has failed to produce any credible evidence of any relationship between a juror and the victims and thus did not prove deficiency or prejudice.

Failed to investigate

Applicant next contends counsel was ineffective for failing to investigate the case, interview witnesses, file motions for funding for an investigator, and investigate the medical records of alleged victims to assess the extent of their claimed injuries. He further avers the radiologist wasn't subpoenaed to testify to the extent of the alleged bullet wound, which violated his right to cross-examine the radiologist. Applicant did not prove this ground. Critically, Applicant did not introduce any evidence at the PCR hearing of what an investigation would have uncovered and thus did not meet his burden of proving prejudice. For the same reason, he failed to overcome the presumption that counsel's performance in this regard was effective.

Regarding the claim related to the victim's medical records, the issue of victim Marian Walden's medical records was addressed on the record in the context of the State's Motion to Protect the Records from dissemination to Applicant. At that time, trial counsel indicated he had

[5] Juror 4—who was seated as an alternate—stated his cousin was married to Chief Smith's brother; Juror 40—who was not seated—stated he was a close friend of Officer Michael Smith; and Juror 12—who also was not seated—stated she attended church with and knew Captain Anthony Russell. Chief Smith was not one of the three victims of the offenses Applicant was convicted of.

received the records but had not disseminated them to Applicant. (Tr. 91-92). The trial court asked if there was any dispute as to whether Walden sustained an injury requiring medical treatment, and counsel replied, "I don't believe there is. I have spoken to my client about the consenting to this motion, and he has agreed. He said he doesn't need this information." (Tr. 92). Thereafter, the trial court granted the State's motion, noting Article I, Section (a)(6) of the South Carolina Constitution protected the victim's personal information from disclosure to the defendant unless relevant to the defense. This Court finds counsel's performance in this regard reasonable under prevailing professional norms and not deficient. This Court likewise finds Applicant failed to show how disclosure of Walden's medical records to *him* (when counsel already had them) would have changed the outcome of the proceeding—especially when the injury itself was not materially disputed.[6] For the same reason (that the shooting itself was not disputed), Applicant did not show counsel was deficient for not objecting to the entry of the x-rays based on the Confrontation Clause.[7] (Tr. 204). Further, because the x-rays were not testimonial, there is no reasonable probability an objection based on the Confrontation Clause would have excluded them. Finally,

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[6] The defense strategy, as reflected by the opening statement, was to argue that Applicant "had every opportunity in the world if he intended to murder somebody," but the physical evidence would show he did not intend to kill anyone. (Tr. 116-21). Counsel argued in closing that if Applicant had intended to kill Walden, he would have shot her during the time she testified she was on her knees praying while Applicant was standing next to her with the gun. (Tr. 351-52). Regarding Walden's leg injury, counsel posited:

> Instead of—with all the time in the world to shoot her, instead of doing it, he leaves the house, and that's when apparently the police are arriving and it's getting to be chaotic outside, and she says she runs. And she's running and she gets shot in her backside on the thigh. So she's running and she doesn't see who shot her because she's running looking that way. You don't run like that.
> She doesn't see who shot her. And none of the police officers testified that they saw him shoot her. They testified they were exchanging rounds is what they said.

(Tr. 352). Critically, Applicant did not submitt credible evidence that the records would have further supported the foregoing strategy or a different strategy.

[7] Counsel initially objected but withdrew his objection after a bench conference. (Tr. 204).

Applicant has not introduced any credible evidence to show how cross-examination of the radiologist would have had a reasonable probability of altering the outcome of trial. Applicant failed to meet his burden of proving deficiency or prejudice, and this claim is denied.

Indictment

Applicant contends counsel was ineffective for failing to object to the indictment being multiplicitous because it contained several counts for one firearm. Applicant did not prove this ground. At the PCR hearing, counsel credibly testified he did not see a basis to object to the indictments, explaining each attempted murder indictment dealt with a different victim. Having reviewed the indictments, this Court agrees. Applicant has not shown a valid basis to object to the indictments and thus did not prove deficiency or prejudice. This claim is thus denied.

Custodial statement

Applicant next contends counsel was ineffective for stipulating to his custodial statement. He avers counsel should have requested a Jackson v. Denno hearing because the stipulation was used when the judge instructed the jury.[8] Applicant did not prove this ground.

As a threshold matter, Applicant seems to be conflating the issue of his custodial statement with counsel's stipulation that the guns entered as State's Exhibits 10 and 11 "were in good working order on the date of January 26th, 2013." (Tr. 316-17). To the extent Applicant is alleging counsel was ineffective for agreeing to this stipulation, this Court finds that a stipulation that the guns were in good working order supported counsel's strategy that Applicant "had every opportunity in the world if he intended to murder somebody," but the physical evidence would show he did not intend to kill anyone. (Tr. 116-21). Further, in light of the stipulation, the stipulation charge was proper, and there was no basis to object. (Tr. 363, 374). Applicant thus did

[8] Applicant cites pages 85-86, 316-19, and 363-64, and 374 of the transcript in support.

not prove counsel was ineffective in this regard.

Regarding the custodial statement, counsel *did* challenge its admissibility through a Jackson v. Denno hearing. (Tr. 8-40). Although counsel challenged the voluntariness of the statement itself, counsel did not raise an issue with the Miranda warnings. (Tr. 10). This Court finds Applicant has failed to prove deficiency or prejudice in this regard. Specifically, during the pretrial *in camera* hearing, Officer Luiss Hernandez testified he advised Applicant of his Miranda rights when he arrested him, and Applicant appeared to understand. (Tr. 16). Chief Tyrone Smith testified that prior to interviewing Applicant, he asked if he had been "read his Miranda, and he said yes or he nodded. And I asked him did he understand, and he said yes." (Tr. 23). The foregoing was sufficient for admissibility purposes to show Applicant was advised of Miranda, and Applicant did not set forth any additional argument counsel could have raised that would have had a reasonable probability of excluding the statement. Further, the jury was properly instructed that the State had the burden of proving the voluntariness of the statement beyond a reasonable doubt. (Tr. 365-66). Applicant did not prove deficiency or prejudice, and this claim is denied.

Prior convictions

Applicant contends counsel was ineffective for not objecting to the use of his prior convictions as beyond ten years and too remote. He further avers counsel failed to investigate the validity of these convictions. Applicant did not prove this ground. Initially, Applicant did not testify at trial, so the State did not seek to enter any impeachable convictions against him. Further, although the State served Applicant with notice of intent to seek life without parole (LWOP), trial counsel successfully challenged the LWOP notice, and the trial court ultimately sentenced Applicant to an aggregate sentence of twenty-five years. (Tr. 395-402). Applicant thus has not shown deficiency or prejudice in this regard, and this claim is denied.

Lesser-included offense[9]

Applicant contends counsel was ineffective for not requesting a charge on the lesser-included offenses of first, second, and third-degree assault. However, counsel articulated a valid strategy in pursuing an all-or-nothing defense, and Applicant thus did not prove this ground.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 691.

At the 2018 PCR hearing, counsel testified he was able to negotiate a nine-year plea offer, but Applicant refused to consider it: "I went and told him. [Applicant] said, 'I ain't pleading to nine years.' I said, 'well, I just don't think it's going to get any better than that; this is a fairly serious case; and you've got a significant prior record.'" (2018 PCR 31). Trial counsel explained his strategy after Applicant's refusal to consider a nine year offer:

> [A]bout the only was that he was going to get a sentence less than the nine that was on the table was an all-or-nothing strategy, wherein you either – you either win it or you lose it, because James – at James' age, almost any sentence was going to be significant, like he's facing now, essentially a life sentence. And I was trying to tell him that at least at nine, there's certainly hope that you won't die in prison. And so, he wanted to significantly lower the nine. I don't recall him ever telling me anything less than nine. I didn't want to give the jury the opportunity to split the baby and give him a charge that was going to get him 20 years, anyway. I didn't think that that would give us – or give him the result that he was looking for.

[9] This section combines allegation (a)(6) of the original application and allegation (1)(c) of the November 2025 amendment.

(PCR App. 466-67). At the 2025 PCR hearing, counsel testified similarly about his strategy.

This Court finds counsel's testimony about his articulated strategy credible, and this strategy was reasonable under prevailing professional norms. From the trial transcript, it is evident counsel's strategy was to argue Applicant "had every opportunity in the world if he intended to murder somebody," but he lacked the specific intent to kill anyone. This was an especially reasonable strategy here where all three victims (two of whom lived with Applicant) identified Applicant as the shooter (Tr. 146, 158-60, 193, 199-200, 277-79); Applicant was apprehended at the scene following a shootout with police (Tr. 277-78,); and Applicant ultimately confessed on a video recording that was played for the jury (Tr. 307-08). In other words, this was not a case of mistaken identity, nor could counsel reasonably rely on the State's burden of proof for an acquittal. Thus, a strategy that embraced the evidence but asserted Applicant lacked the specific intent to kill was reasonable under prevailing professional norms. In light of this strategy, a request for a charge on a lesser-included offense would have absolutely led to a conviction on *something*. Counsel ultimately weighed Applicant's desire for a sentence of less than nine years and determined the only reasonable way to achieve that was through an acquittal—which would only be possible if he took an all or nothing approach. Here, where counsel articulated a valid strategy, Applicant has not overcome the presumption of effectiveness, and this claim is denied.

Plea offer[10]

Applicant asserts he proceeded to trial due to a breakdown in communication. He contends he would have pled to a lesser-included offense for a sentence under nine years, but counsel would not hire an investigator to show evidence of a lesser-included offense. He further contends counsel

[10] This section combines allegation (a)(7) of his original application and allegation (1)(d) of the amendment filed November 17, 2025.

was infective for not procuring a better plea offer. Applicant did not prove this ground. At the PCR hearing, counsel testified he spoke with Applicant numerous times and had sufficient time to talk to Applicant and review discovery with him. Counsel recalled relaying a nine-year-offer to Applicant—which Applicant rejected. Counsel testified he had a good working relationship with the solicitor who prosecuted this case. Based on counsel's foregoing credible testimony, this Court finds counsel's performance reasonable under prevailing professional grounds and not deficient. This Court further finds that here where Applicant engaged in a shootout with responding officers, the fact that counsel procured a nine-year offer was remarkable. To the extent Applicant alleges counsel was ineffective for not hiring an investigator to support a lesser-included offense as part of plea negotiations, Applicant failed to enter any evidence at the PCR hearing to show how any investigation could have supported a lesser-included offense and thus did not meet his burden. Finally, to the extent he contends he proceeded to trial due to a breakdown in communication, Applicant did not offer any testimony to show how further communication would have changed the outcome. Applicant did not prove deficiency or prejudice, and this claim is denied.

Failed to object – Court's preliminary comments[11]

Applicant argues counsel was ineffective for not objecting to the trial court's truth-seeking language during its preliminary comments to the jury.[12] Applicant did not prove this ground. As a matter of law, Applicant cannot show prejudice because the statements occurred during the court's

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[11] This section addresses allegation (1)(a) of the amended application filed November 17, 2025.

[12] During its preliminary remarks, the trial court stated,

> [A]n actual trial, unlike a television show, a movie or even a book, is not for entertainment. An actual trial, ladies and gentlemen, is a fundamental part of our democracy. It is a search for the truth in an effort to make sure that justice is done between the parties before the court. Searching for the truth and trying to make sure justice is done is often slow.

(Tr. 100).

preliminary remarks to the jury and not as part of the trial court's charge on reasonable doubt or circumstantial evidence. See State v. Aleksey, 343 S.C. 20, 28-29, 538 S.E.2d 248, 252-53 (2000) (finding that although truth-seeking language in a *jury charge* was inappropriate, it did not shift the burden of proof when it was not given in conjunction with the charge on the State's burden of proof or circumstantial evidence). Thus, the pre-trial comments did not prejudice Applicant, and there is no reasonable probability the outcome would be different had counsel objected. See State v. Beaty, 423 S.C. 26, 32-34, 813 S.E.2d 502, 505-06 (2018) (finding defendant not prejudiced by court's pretrial comments that trial is search for the truth and the jury's role is to render true and just verdict and determine true facts when "they were a mere statement to the jury and not a charge on the law," and they "were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in Aleksey").

Further, although Beaty subsequently admonished judges to stop using *any* truth-seeking language,[13] it came out *after* Applicant's trial, and counsel was not deficient for not anticipating that change—especially when the general sessions benchbook contained virtually similar language. Beaty, 423 S.C. at 34 n. 2, 813 S.E.2d at 506 n.2. Thus, counsel's failure to object was reasonable under prevailing professional norms and not deficient. Applicant did not prove deficiency or prejudice here, and this claim is denied.

Failed to request curative instruction

Applicant avers counsel was ineffective for not requesting a curative instruction after victim Montouth mentioned her relationship with Applicant was abusive. Applicant did not prove this ground. During the State's redirect examination of Montouth, the following occurred:

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[13] Prior to Beaty, the South Carolina Supreme Court instructed judges to "to remove any suggestion from [its] *general sessions charges* that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties. State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012) (emphasis added). Daniels, however, did not address the use of such language during preliminary comments.

Q. Okay. And did you—the things that he said to you, did you believe him?
A. Yes. Yes. I guess I've been in a abusive relationship with James—
Mr. Flening: Your Honor—
A. –all the time
Mr. Fleming: I have a matter of law to take up outside the presence—

(Tr. 174). Following a bench conference, counsel relayed he was withdrawing his objection. Neither the solicitor nor trial counsel elicited additional testimony from Montouth. (Tr. 174).

At the PCR hearing, counsel credibly testified that although he could not recall the specifics of that particular bench conference, his general practice was to evaluate the efficiency of a curative instruction. He further noted that curative instructions generally only serve to highlight the optionable testimony and make it worse, and he believed he made a calculated guess that it would be worse to have the instruction. This Court finds counsel's basis for not requesting a curative instruction reasonable and not deficient. This Court further agrees with counsel's assessment that a curative instruction would have only served to highlight the damaging testimony, especially here where counsel successfully prevented Montouth from going into further detail. Finally, because this was a mere passing statement in a trial where the State had compelling evidence, there is no reasonable probability the outcome would be different had counsel requested a curative instruction. Applicant did not prove deficiency or prejudice, and this claim is denied.

Conflict of Interest

Applicant contends he did not receive effective representation due to counsel's conflict of interest. Specifically, he avers trial counsel was a close friend of the victim's son, Adonis Cocker. He further avers this relationship was not disclosed prior to trial counsel's representation, and once Applicant became aware of the conflicting relationship, he sought to have trial counsel relieved from the case. Applicant failed to prove this ground. At the PCR hearing, counsel testified he did

not know Applicant's stepson (which is the victim's son); he went to high school in Savannah and not Hampton; and he did not go to high school with Applicant's stepson. This Court finds counsel's foregoing testimony credible. Based on the foregoing, Applicant has not shown any conflict of interest and has thus not met his burden. This claim is denied.

Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. *Southerland v. State,* 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . ." Jones, 463 U.S. at 754.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask (1) whether appellate counsel's performance was deficient, and (2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Failed to appeal denial of directed verdict

Applicant contends appellate counsel was ineffective for not appealing the trial court's denial of his motion for directed verdict. Applicant did not prove this ground. Initially, this Court

finds an appeal of the denial of a directed verdict would not have been successful. Thus, Applicant has not overcome the strong presumption that counsel was effective. Likewise, Applicant has not shown any additional preserved issue appellate counsel could have raised that would have been meritorious and thus did prove deficiency or prejudice. This claim is thus denied.

Actual Innocence

Applicant alleges he is "actually, factually, and legally innocent of attempted murder" because South Carolina laws "require the state to prove their case beyond a reasonable doubt." (PCR App. 416). He further avers the State must prove each element beyond a reasonable doubt. However, this Court agrees with Respondent that this is not a cognizable ground for PCR. See S.C. Code Ann. § 17-27-10(A)(6) (providing the PCR Act "shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction"). Thus, Respondent's motion to dismiss this claim is granted, and this allegation is denied and dismissed with prejudice.[14]

Prosecutorial Misconduct

Applicant contends the prosecutor engaged in misconduct in that she had a connection with the victim. More specifically, he alleged a victim had taught the solicitor. Applicant did not prove this ground. At the PCR hearing, Assistant Solicitor Leggette testified she did not go to school in Hampton County and was not taught by any of the victims. She further stated she did not know Ms. Walden and although she had previously met Ms. Montouth, they were not friends. This Court finds Assistant Solicitor Leggette's testimony credible. This Court further finds Applicant did not present any credible evidence that the solicitor had any type of connection with the victims that

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[14] This Court further notes counsel moved for a directed verdict—the appropriate procedure for challenging the State's lack of evidence. (Tr. 319-20).

caused her to engage in any type of prosecutorial misconduct. This claim is thus denied.

CONCLUSION

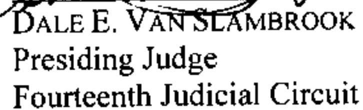
Based on the foregoing, this Court concludes Applicant has not established any constitutional violations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 26 day of February, 2016.



DALE E. VAN SLAMBROOK
Presiding Judge
Fourteenth Judicial Circuit

Moncks Corner, South Carolina