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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

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Post-Conviction Relief Case No. 2011-CP-10-03782  
Appellate Case No. 2025-001705

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Darrell L. Goss,..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether the PCR court properly concluded Counsel was not ineffective for failing to investigate Sharon Goss as a potential defense witness where: (1) Counsel articulated a valid defense strategy and reason for not investigating Sharon; (2) Goss failed to prove Sharon would have been available as a witness at the time of trial; and (3) the failure to investigate Sharon did not prejudice Goss where it had no effect on the outcome of the trial.
2. Whether the PCR court properly concluded Counsel was not ineffective for failing to object to the jury charge on the accomplice liability theory of “the hand of one is the hand of all” and for failing to request a mere presence/mere association jury charge where the evidence presented at trial clearly supported the accomplice liability charge, did not support a mere presence or mere association charge, and a mere presence/association charge would have wholly contradicted Goss’s defense strategy.

## STATEMENT OF THE CASE

Petitioner, Darrell L. Goss (Goss), was indicted at the September 2007 term of the grand jury for Charleston County 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). He was represented by James W. Smiley, IV, Esquire (Counsel). Respondent (the State) was represented by Assistant Solicitors Trip Lawton and Kevin Hales of the Ninth Circuit Solicitor's Office. On February 23-26, 2009, Goss proceeded to a joint trial with his codefendant, Joy Mack,<sup>1</sup> before the Honorable J.C. "Buddy" Nicholson, Jr. and a jury, pursuant to which Goss and Mack were each found guilty as indicted. Judge Nicholson sentenced Goss to three concurrent terms of twenty (20) years' imprisonment. (App.p.1; p.564-p.572).

Goss timely filed a notice of intent to appeal and an appeal was perfected by Senior Appellate Defender Robert M. Pachak of the South Carolina Commission on Indigent Defense. Goss raised two issues on appeal: (1) whether the trial court erred in overruling defense counsel's objection to the solicitor's burden shifting closing argument and (2) whether the trial court erred in refusing to allow defense counsel to impeach the victim with a pending charge of counterfeiting goods. Assistant Attorney General Julie M. Thames filed a brief in response on behalf of the State and in an unpublished opinion filed May 17, 2010, the Court of Appeals affirmed Goss's convictions. *State v. Goss*, Op. No. 2011-UP-214 (Ct. App. filed May 17, 2010). The Remittitur was issued on June 9, 2011.

On May 27, 2011, Goss filed a pro se application for post-conviction relief (PCR) alleging he was being held in custody unlawfully due to:

1. Ineffective assistance of counsel
  - a. "Violation of the Sixth Amendment to the United States Const.";

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<sup>1</sup> Mack was represented by Alex Apostolou, Esquire. (App.p.1).

- b. “Violation of the Fourteenth Amend. to the U.S. Const.”; and
- c. “Violation of Article 1 Section 3 of S.C. Const.”.

(App.p.573-p.579). On August 17, 2011, the State filed a return to the application requesting that an evidentiary hearing be held on Goss’s allegations. (App.p.580-p.584). On September 16, 2011, an evidentiary hearing was convened at the Charleston County Courthouse before the Honorable Deadra L. Jefferson. Goss was present at the hearing and represented by Charles T. Brooks, III, Esquire. Assistant Attorney General Matthew J. Friedman represented the State. In an order dated November 23, 2011, and filed December 1, 2011, Judge Jefferson found Goss had failed to establish any constitutional violations or deprivations and denied and dismissed his application for PCR with prejudice. (App.p.585-p.596).

Goss timely filed a notice of appeal from the Order of Dismissal and the Court of Appeals affirmed in an unpublished decision. *State v. Goss*, Op. No. 2016-UP-382 (S.C. Ct. App. filed July 27, 2016). The South Carolina Supreme Court subsequently granted Goss’s petition for a writ of certiorari to review the decision of the Court of Appeals. Following briefing and oral argument, the Supreme Court: (1) remanded the matter to the circuit court for a *de novo* PCR hearing, (2) instructed Goss it would be incumbent upon him to secure the attendance of his witnesses for the *de novo* hearing, and (3) emphasized that neither party could rely upon testimony presented at the initial hearing. *Goss v. State*, 425 S.C. 101, 820 S.E.2d 373 (2018).<sup>2</sup> (App.p.597-p.602).

On January 10, 2019, the State filed an amended return to the original PCR application asking that an evidentiary hearing be held. (App.p.603-p.608). On August 6, 2020, Goss filed a

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<sup>2</sup> According to the Order of Dismissal which is the subject of the current PCR appeal, following remand, on January 7, 2019, Goss filed a Motion to Stay Proceedings due to a federal habeas petition he had filed in federal court that was still pending. On January 29, 2019, an Order was filed staying the PCR matter for one year while the habeas petition was under review. (App.p.675, lines 2-4; p.749).

“Motion to Amend,” an “Amended Application for Post-Conviction Relief,” and a “Memorandum of Law” with attached exhibits to include the following allegations:

1. Ineffective assistance of counsel:
  - a. “Trial counsel was ineffective in failing to prepare [Goss’s] case and object to the ‘hands of one, hands of all’ theory”;
2. Due Process Violation:
  - a. The indictments did not put Goss on notice of the charges he was facing.
    - i. “[Goss] 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 [Goss] on a criminal conspiracy charge, but it nonetheless, pursued a conviction against him based on that theory”;
3. Subject Matter Jurisdiction.

(App.p.610-p.656). On August 4, 2021, Goss filed a “2<sup>nd</sup> Motion to Amend PCR Application” 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 [Goss’s] PCR proceedings”.

(App.p.657-p.659).

On December 8, 2021, the *de novo* evidentiary hearing that had been ordered by the Supreme Court was convened at the Charleston County Courthouse before the Honorable Jennifer B. McCoy. Goss was present and was initially represented by appointed counsel, Christopher Murphy; however, as explained below, he ultimately proceeded pro se. The State was represented by Assistant Attorney General Samantha Weidauer. (App.p.663). At the outset of the hearing, Goss moved to relieve Mr. Murphy as counsel and elected to proceed without

representation. After questioning Goss on the record to ensure his decision was knowing and voluntary, the PCR court granted the motion but ordered Mr. Murphy to remain as “second chair” to answer any procedural questions that might come up along the way. (App.p.664-p.673). Goss then moved to incorporate an unfiled “3<sup>rd</sup> Motion to Amend PCR Application”<sup>3</sup> 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
  - 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.”

(App.p.660-p.662).

In a thirty-page Order of Dismissal dated June 14, 2022, and filed June 15, 2022, Judge McCoy found, based on “a thorough review of the record” that Goss had “not proven any constitutional violations or deprivations” and therefore denied and dismissed his PCR application with prejudice. The PCR court separately addressed each of the grounds raised at the PCR hearing, making findings of fact and conclusions of law before reaching the overall conclusions

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<sup>3</sup> Though the written amendment was not filed prior to the evidentiary hearing, it was subsequently filed on February 11, 2022, and the PCR court addressed the issue in its Order of Dismissal because it was orally raised at the evidentiary hearing.

described above. (App.p.745-p.774). On June 21, 2022, upon receiving a copy of the State’s proposed order of dismissal but after the Court issued its signed Order of Dismissal, Goss filed a “4<sup>th</sup> Motion to Amend PCR Application” asking that the PCR court rule on his claim of ineffective assistance of counsel for failing to properly argue for a motion for directed verdict.<sup>4</sup> (App.p.739-p.744).

On June 27, 2022, Goss filed a “Motion to Alter or Amend Judgment” pursuant to Rule 59(e), SCRCP, asking the PCR court to address his claim of an unfair jury trial and his claim of ineffective assistance of counsel for the allegedly improper argument for a directed verdict. (App.p.775-p.782). The State did not file a return and it appears Judge McCoy was unaware of the existence of the Rule 59(e) motion. (App.p.900).

On September 25, 2023, Goss filed a second application for PCR captioned “Application for Post-Conviction Relief (Austin Appeal)” [2023-CP-10-4698] which alleged ineffective assistance of PCR counsel for failing to file a PCR appeal on his behalf. (App.p.783-p.789). On June 24, 2024, Goss filed an “Amended Application for Post-Conviction Relief / Austin Appeal / Declaratory Judgment” additionally asking for a declaratory judgment that his kidnapping conviction did not include a criminal sexual offense and would not require him to register as a sex offender. (App.p.790-p.798).<sup>5</sup> On July 2, 2024, the State filed a Return and Motion to Dismiss Goss’s second PCR application, arguing it was premature and not ripe for consideration due to the pending Rule 59(e) motion. (App.p.799-p.806). On July 5, 2024, the State filed an

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<sup>4</sup> Because this motion was filed *after* the PCR court issued its Order of Dismissal, it was neither mentioned nor addressed in that Order. Nevertheless, the Order of Dismissal did rule on the allegation.

<sup>5</sup> On June 25, 2024, Goss also filed a “Petition for Declaratory Judgment and Injunctive Relief” in the original jurisdiction of the Supreme Court which similarly sought exemption from the sex offender registry. On August 6, 2024, the State filed a return agreeing with Goss’s contention and asking the Court to issue a declaratory judgment finding Goss’s conviction for kidnapping did not include a criminal sexual offense. In an Order dated September 11, 2024, the Supreme Court declined to entertain the matter in its original jurisdiction because the issue was already pending in the proper forum—the circuit court—in Goss’s PCR action. (Appellate Case No. 2024-001095).

Amended Return and Motion to Dismiss arguing Goss's second PCR application was also successive and barred by the statute of limitations. (App.p.807-p.815). On August 6, 2024, Judge McCoy, who was then serving as Chief Administrative Judge for the Ninth Circuit Court of Common Pleas, issued a Conditional Order of Dismissal based on the grounds argued by the State (App.p.817-p.825). On September 19, 2024, Goss filed a response. (App.p.826-p.830).

On December 17, 2024, a hearing on the matter was convened at the Charleston County Courthouse before the Honorable Jocelyn Newman. Goss was present and was represented by Mr. Murphy and the State was represented by Assistant Attorney General Danielle Dixon. (App.p.831). At the start of the hearing, Ms. Dixon described the procedural history, including the existence of the Rule 59(e) motion that had never been ruled upon by Judge McCoy and the pending declaratory judgment matter that had been filed in the Supreme Court's original jurisdiction. Mr. Murphy agreed the parties needed to get a ruling on the Rule 59(e) motion to be able to move forward. (App.p.831-p.842). In an Order filed January 10, 2025, Judge Newman ordered that Goss *not* be required to register as a sex offender but denying and dismissing the remainder of the PCR as not ripe because the pending Rule 59(e) motion from the first PCR had not yet been addressed. (App.p.843-p.849).

On June 25, 2025, Goss's appellate counsel, Appellate Defender Jessica M. Saxon of the South Carolina Commission on Indigent Defense, filed a motion to hold his original PCR appeal in abeyance and to remand to the PCR court for a ruling on his Rule 59(e) motion. (App.p.850-p.855). In an August 14, 2025 Order, the Supreme Court affirmed Judge Newman's order regarding ripeness. (App.p.896-p.897). In a companion Order issued the same day, the Supreme Court recalled the remittitur sent in the first PCR appeal on November 9, 2022, and remanded the matter to Judge McCoy to rule on Goss's outstanding Rule 59(e) motion. (App.p.898-p.899).

In a one-page Order dated and filed August 19, 2025, Judge McCoy denied and dismissed Goss's motion to alter or amend. (App.p.900). Goss timely filed a notice of appeal, appealing the PCR court's June 14, 2022 denial of his application for PCR and the August 19, 2025 denial of his Rule 59(e) motion. On January 28, 2026, a Petition for a Writ of Certiorari and the Appendix were filed on Goss's behalf by Ms. Saxon. This Return on behalf of the State now follows.

### STATEMENT OF FACTS

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, as presented during the 2009 trial, 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.<sup>6</sup>

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,

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<sup>6</sup> 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.

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 Goss 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 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.

At the *de novo* PCR hearing in 2021, three witnesses testified in regard to Counsel's performance: (1) Goss, (2) Counsel, and (3) Goss's cousin, Sharon Goss. Relevant portions of their testimony will be described in the Arguments below.

## STANDARD OF REVIEW

In PCR proceedings, the burden of proof is on the applicant to prove the allegations in his or her application. *Speakes v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008); *Leggette v. State*, 440 S.C. 590, 599, 892 S.E.2d 153, 158 (Ct. App. 2023). An appellate court will “defer to a PCR court’s findings of fact and will uphold them if there is evidence in the record to support them.” *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). However, an appellate court “review[s] questions of law *de novo*, with no deference to trial courts.” *Id.* at 180-81, 810 S.E.2d at 839.

## ARGUMENT

### I.

**The PCR court properly concluded Counsel was not ineffective for failing to investigate Sharon Goss as a potential defense witness because: (1) Counsel articulated a valid defense strategy and reason for not investigating Sharon; (2) Goss failed to prove Sharon would have been available as a witness at the time of trial; and (3) the failure to investigate Sharon did not prejudice Goss where it had no effect on the outcome of the trial.**

In his petition, Goss argues the PCR court erred in concluding Counsel provided effective assistance despite failing to investigate Sharon Goss (Sharon) as a possible defense witness because Counsel provided no reason for his failure to investigate. (Pet.p.8). Goss focuses on testimony elicited from Sharon at the PCR hearing, wherein Sharon claimed he had purchased the gun in question as well as some clothes and shoes from some guys who came through the neighborhood selling “merchandise.” Sharon testified he purchased the items for approximately \$500 and then placed the gun in his car because he “had to tend to [his] kids.” (App.p.729-p.730). Goss complains that Counsel offered no valid trial strategy to excuse his deficiency in

failing to investigate Sharon to determine whether he could be a trial witness for the defense. He argues that where: (1) the gun with Andy's DNA was a key piece of circumstantial evidence the State used to tie him to the robbery because it was found in a car where he resided, and (2) a large number of people lived in that same residence, Counsel had an affirmative duty to discover available mitigation evidence and all available evidence tending to rebut the connection proven by the State. Goss contends Sharon's testimony that the gun was his and had been recently acquired, constituted vital information for the jury as that weapon was found in a car linked to Goss's residence. He argues that calling Sharon as a witness would not have harmed his defense in any way and instead would corroborate the testimony of Thomasina Goss and thereby would have furthered his defense that the gun was never in his possession. (Pet.p.8-p.12). For the reasons discussed below, the State disagrees. The PCR court properly concluded that Counsel was not constitutionally ineffective for failing to investigate Sharon and that overall Counsel conducted an adequate pretrial investigation. Further, the PCR court properly concluded that if Counsel was ineffective in some aspect of his investigation, Goss was not prejudiced by Counsel's performance where Sharon's testimony would not have created a reasonable probability that the result of the trial would have been different.

### **Law / Analysis**

Where the PCR application alleges ineffective assistance of counsel as a ground for relief, the applicant is required to prove that "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). In order to prove counsel was ineffective, an applicant must show counsel's performance was deficient and the applicant was prejudiced by the deficient performance. *Id.* at 687. Counsel's performance will be deemed

deficient if it falls “outside the wide range of professionally competent assistance.” *Id.* The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight. *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). The applicant is prejudiced by the deficient performance if “there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

Trial counsel must be granted the flexibility to make strategic decisions that are both reasonable and necessary for effective advocacy. *Strickland*, 466 U.S. 690-91. “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* at 688-89. “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” *Id.* at 693. For that reason, “[j]udicial scrutiny of counsel’s performance must be highly deferential.” *Id.* at 689. Under *Strickland*, to prove a claim of ineffective assistance of counsel, “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.*

If counsel provides a valid strategic reason for their actions or inactions, his or her performance should not be deemed ineffective. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); *Underwood v. State*, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). “Courts must be wary of second-guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing certain

strategy, such conduct will not be deemed ineffective assistance of counsel.” *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Determining whether a stated reason for counsel’s conduct is a valid strategic reason depends on the circumstances of each case; therefore, courts take a case-by-case approach to decide what constitutes a valid trial strategy. *Solomon v. State*, 347 S.C. 635, 639, 557 S.E.2d 666, 668 (2001) (finding failure to request not guilty option on verdict form presented to jury was not unreasonable for strategic reasons where counsel’s strategy was to argue that defendant was guilty of only the lesser and not the greater offense).

Here, the record reflects that in all respects Counsel’s performance was objectively reasonable and did not fall outside the wide range of professionally competent assistance. The PCR court: “reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly.” After considering the evidence and arguments made, the court found each claim to be without merit. (App.p.766). In regard to the claim that counsel was ineffective for failing to investigate Sharon, the PCR court found Goss “failed to establish any deficiency in Counsel’s preparation for trial.” Relying on Counsel’s credible testimony that he knew the car did not belong to Goss and that he did not investigate the owner of the car because it would not have changed his defense strategy that Goss was not the owner of the gun, the PCR court found: “Counsel was not constitutionally ineffective and did not fail to conduct an adequate pre-trial investigation.” The court concluded: “As such, [Goss] has failed to show any deficiency in Counsel’s performance and any resulting prejudice.” (App.p.772-p.773). These findings had plenty of support in the record.

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).

At the PCR hearing, Counsel testified that despite knowing the car did not belong to Goss and instead belonged to another person in the house, he did not specifically investigate that person because he "did not believe it would be fruitful." In response to Goss's questions, he explained: "It wasn't going to change your defense. Our defense was, that wasn't your gun. I surely didn't expect to go find Sharon Goss and him say, oh, yeah, I bought a gun and it had the DNA all over it." (App.p.725-p.726). The trial transcript reveals Counsel did not just articulate this strategy, he pursued it vigorously throughout the trial, without the need to possibly gamble with trying to put Sharon on the stand.

First, in his opening statement, Counsel laid the foundation of his strategy by using language he knew would be charged by the judge at the end of the case to establish reasonable doubt. He argued that this was a circumstantial evidence case because there was no direct evidence of any involvement by Goss. Counsel noted that while there would be evidence about a fingerprint, a gun, and some of the clothing that was stolen, none of it sufficiently proved Goss was a participant in the robbery. He asked each juror to "look at the evidence to see if there is [sic] other explanations, reasonable explanations, that would cause you to doubt, to hesitate to act." (App.p.158-p.159). Next, when cross-examining North Charleston Police Department narcotics investigator Olenthil Faison, Counsel got Faison to acknowledge that despite Sharon

being the owner of the car where the gun was found, the police did not have an opportunity to find him, and that no evidence directly put the gun in Goss's hand. (App.p.371, lines 12-24). After the State rested, in arguing for a directed verdict, Counsel focused in part on Sharon's ownership of the car and the complete lack of evidence to place the gun in Goss's hands at any time in the case. He argued: "There is nothing to place Mr. Goss in the car that's been presented in this case or Mr. Goss placing the gun into the car." (App.p.439, lines 5-15). Later, Counsel called Goss's mother Thomasina as defense witness and effectively used her to establish that: (1) her nephew, Sharon, lived at her house along with several other young men, (2) the gun was found in Sharon's car, (3) she had never seen Goss drive Sharon's car, and (4) Goss could not even drive. (App.p.461-p.467). Finally, in his closing argument, Counsel reminded the jury:

So the fingerprint, on the outside of the store. Didn't find it on the inside of the store, and then we got this gun, the gun and the car outside of the residence that [Goss] lives in with a whole bunch of other boys, family members.

There is no connection between [Goss] and that car. There wasn't even an attempt made to put him in that car, to put that gun in his hand. To say he had that gun is pure speculation, pure. We don't deal with suspicion. We don't deal with maybes and possibilities. We deal with what is. What is a reasonably - - are you reasonably able to conclude, and I suggest to you, you can't reasonably conclude that [Goss] possessed that gun. There is no evidence, none, to show that he did.

(App.p.483-p.484).

Based on Counsel's testimony and his efforts to present a consistent defense strategy throughout trial, the PCR court's finding of no deficiency was amply supported by the evidence in the record. Because Counsel provided a valid strategic reason for his actions or inactions, his performance was appropriately not deemed ineffective. *Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313. As to deficiency, the PCR court also correctly realized Sharon's testimony at the PCR

hearing demonstrated it would have offered little to no value in bolstering the defense strategy at trial. Notably, Sharon's claim that he was the person who purchased the clothes and shoes found in the residence directly contradicted Thomasina's trial testimony that she was the one who had purchased the items found during the search. Thus, his testimony had the potential to significantly undermine Goss's defense. Also, Sharon never testified as to when the gun was allegedly purchased or placed in his car, so his testimony, as offered, would not necessarily preclude the possibility that Goss found the weapon in the trunk, used it to commit the robbery with Mack, and then returned the gun after the robbery. Furthermore, under cross-examination, despite saying he "would have been willing to testify," Sharon also said he would agree with the proposition that he "had purchased the gun illegally," a concession, right or wrong, that would have undermined his credibility before the jury. Finally, despite the claim that he was *willing* to testify, Sharon never claimed he was *actually available* to testify at the time of trial—a point of critical importance where other trial testimony suggested the police never had an opportunity to locate him during their investigation of the robbery. Indeed, Sharon offered no evidence that the police, Counsel, Goss, or anyone else could have located him before trial to discuss his possible testimony, much less offer him as a witness at trial. (App.p.730-p.731). Thus, the PCR court's deficiency finding is also supported by the record.

Given Counsel's articulated theory of defense and his articulated trial strategies, this is simply not a case in which it could fairly be said that Counsel's performance fell below professional norms, particularly where: (1) Sharon may not have been available to testify at trial and (2) his proffered testimony did not appreciably improve Goss's defense. Consequently, Counsel was not rendered ineffective as a result of not investigating Sharon. Furthermore, Goss failed to meet his burden of proving prejudice. The PCR court contemplated the record as a

whole in assessing whether Goss met his burden of proving prejudice and found he did not do so. As explained above, that finding is supported by evidence in the record. For all of these reasons, the PCR court properly denied relief and certiorari should be denied.

## II.

**The PCR court properly concluded Counsel was not ineffective for failing to object to the jury charge on the accomplice liability theory of “the hand of one is the hand of all” and for failing to request a mere presence/mere association jury charge because the evidence presented at trial clearly supported the accomplice liability charge, did not support a mere presence or mere association charge, and a mere presence/association charge would have wholly contradicted Goss’s defense strategy.**

In his petition, Goss argues the PCR court erred in finding Counsel was effective despite not objecting to the “hand of one is the hand of all” jury charge and not requesting a mere presence/mere association jury charge. He contends there was no circumstantial evidence that he and Mack had a common plan or arrangement prior to the incident, thus the State failed to present the necessary proof to present accomplice liability to the jury. Goss goes on to argue the prejudice from the erroneous accomplice liability charge was heightened because Counsel failed to request a mere presence charge, which “was vital to counter the state’s theory that the palm print on the outside of the store door was sufficient evidence of his participation in the incident.” He argues these combined errors constituted ineffective assistance of counsel, entitling him to relief. (Pet.p.13-p.19). For the reasons discussed below, the State disagrees. The PCR court properly concluded that Counsel was not deficient in either failing to object to the accomplice liability charge or failing to request a mere presence charge. Further, the PCR Court properly concluded that even if Counsel was ineffective in some aspect of how he handled the jury charge, Goss was not prejudiced by Counsel’s performance because the charge given did not

improperly contribute to the verdict, and because an altered charge to include a mere presence or mere association charge would not have created a reasonable probability of a different result.

### Law / Analysis

“The doctrine of accomplice liability arises from the theory that the hand of one is the hand of all.” *State v. Reid*, 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014) (internal quotations omitted). “Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.” *Id.* Accomplice liability can be proven by circumstantial evidence. *State v. Campbell*, 443 S.C. 182, 193, 904 S.E.2d 441, 446 (2024). “Under an accomplice liability theory, ‘a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.’” *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (quoting *State v. Langley*, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999)). Moreover, one combining with others to accomplish an illegal purpose is criminally liable for everything done by either him or his confederates in the execution of that common design, even that which is not intended as part of the original design or common plan but which is a probable and natural consequence of such. *State v. Harry*, 413 S.C. 534, 540, 776 S.E.2d 387, 391 (Ct. App. 2015), *aff’d*, 420 S.C. 290, 803 S.E.2d 272 (2017) (quotations omitted).

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). “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) (citing *Condrey*, 349 S.C. at 193, 562 S.E.2d at 324). Thus, under South Carolina law, the State was not required to show that Goss and Mack had an express agreement in order for the court to properly charge the jury with a hand of one hand of all instruction. Instead, the State merely had to demonstrate that “circumstantial evidence and the conduct of the parties,” tended to show an implicit agreement. *Gibson*, 390 at 354, 701 at 770 (citation omitted).

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 Goss to the incident. Counsel testified he believed he had a thorough, well-thought-out defense and that he challenged each piece of circumstantial evidence presented to the jury, attempting to show there were other reasonable explanations for the evidence. (App.p.704-p.710). Based on that testimony and the entire record, the PCR court found Goss failed to meet his burden and found no deficiency on the part of Counsel nor prejudice. The PCR court found evidence in the record supported a charge on the hand of one is the hand of all and therefore, it concluded the charge was appropriately given to the jury and Counsel would have had no valid basis for an objection to the instruction. It further found that where Counsel’s defense strategy was centered around arguing Goss was not involved in the commission of the crimes in any capacity, a request for a mere presence or mere association charge would wholly conflict with Counsel’s strategy. Consequently, the PCR court found Counsel was not deficient for failing to object to the accomplice liability charge given, was not ineffective for failing to

request a mere presence/mere association charge, and that Goss was not prejudiced by Counsel's failure to object to the jury charge as a whole. (App.p.770-p.771; p.773-p.774).

These findings were supported by the evidence in the record. As recognized by Counsel and the PCR court, the State presented ample circumstantial evidence to make the question of accomplice liability a jury issue. Appellant did not contest that the five individuals described by Andy were accomplices to the crimes. Instead, his entire defense theory was that he was not one of those five individuals. He never claimed to be present at the crime scene and to have left his palm print on the door while not participating in the crimes themselves. Instead, Goss's point of contention is that there was no direct or circumstantial evidence that he and Mack had a common plan or arrangement prior to the commission of the crimes. (Pet.p.15-p.,16). To the contrary, the State presented ample circumstantial evidence of a common design, as shown through the conduct of the parties while the crime was being committed, circumstantial evidence that went far beyond the low bar of "any evidence" required to justify a jury charge. *Gibson*, 390 S.C. at 354, 701 S.E.2d at 770. Thus, Counsel had no basis to challenge the accomplice liability charge or to request a mere presence charge. For these reasons, Counsel does not appear to have been ineffective in this regard, and the PCR court appropriately concluded he was not. Furthermore, Goss failed to carry his burden of proving prejudice from the jury charge that was given. For all of these reasons, the PCR court properly denied relief and certiorari should be denied.


## CONCLUSION

Based on the foregoing reasons, this Court should deny the petition for a writ of certiorari in its entirety and let stand the decision of the PCR court. If the Court grants the petition, the State hereby requests permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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June 15, 2026