VOLUME SIX OF SIX

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

STANLEY OLIVER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002211

APPENDIX

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saying all these things together come together to show that this wasn't a fair trial, that, you know, the outcome was based on these many, many errors. They need to be looked at individually one at a time.

And, Your Honor, as far as these Crawford arguments that are made and Mr. Strickler missing some Crawford objections, the State would submit as found by Mr. Cooper -- Judge Cooper, excuse me, throughout the course of the trial. He overruled all the Crawford objections throughout all of this trial because they weren't Crawford objections. They weren't -- they weren't Crawford situations. None of these were testimonial of statements. Every single person that gave a statement to law enforcement which would have been a testimonial statement was available on the stand to cross examine.

The rest of these may have fallen -- may have been subject to a hearsay objection, but even a hearsay objection were co-conspirators carrying out statements made in furtherance of the conspiracy while they were carrying out these robberies and murders. And then the second line of hearsay could have been -- which is not hearsay, and then the second line of hearsay that could have been objected to was one of the co-defendants telling the girlfriend about it in the confidence of their home, which is a statement against interest.

I mean hearsay and Crawford don't apply to any of these statements that are made. These statements were made in the confidence of their home between a boyfriend and girlfriend as he's crying on her shoulder the next day after the crimes had -- had taken place and saying, you know, I did this terrible thing. I'm telling her. It's not a testimonial statement.

I know Your Honor is uniquely familiar with Crawford, but I would submit that that's the reason that not one single Crawford -- well, there may be one I believe. There's one throughout the entire record that's actually granted by the Court and the statement is kept out. Every single other one is overruled no matter when Mr. Strickler or Ms. LaFave made their objections under Crawford.

So I would submit that you can't prove prejudice based on Mr. Strickler's statement saying, oh, I think I might have missed a Crawford objection back there. It wasn't a testimonial statement. It's not subject to the Crawford analysis.

Your Honor, other than that, I would just -- I would reiterate Mr. Belding's sentiment that I think that the transcript is very lengthy and we just urge the Court to really take a look at -- take a look at all of it to see that the evidence that was presented and that Ms. LaFave and Mr. Strickler did an outstanding, very, very detailed job in what was a very long and fact-intensive, law-intensive trial. So

we'd ask that you deny this application for PCR, Your Honor.

THE COURT: Thank you.

MR. CORNEY: Thank you.

THE COURT: Thank you very much. I had said earlier that I'd leave the record open for me to review this. What type of time frame are you referring to that you want me to do that?

MR. CORNEY: I would, Your Honor. That would be great if I could just take a second look at it. I might've overlooked something. If it's mostly just hearsay things that Your Honor can read the record and the rules and, you know, rule upon that, then I'll certainly let you know that I won't be submitting anything. Whatever timetable Your Honor is comfortable with. Twenty days? Thirty days? Whatever it is.

THE COURT: Mr. Belding?

MR. BELDING: Anything is fine, Your Honor. Any time that Mr. Corney needs.

THE COURT: All right. Why don't I say -- what did you say, Mr. Belding?

MR. BELDING: Any amount of time he needs is fine, Your Honor. I want to give him a fair opportunity.

THE COURT: So if I say 30 days and then I'll close the door and it's 15 days after that?

MR. CORNEY: That would be perfect.

THE COURT: Okay.

MR. BELDING: Thank you, Your Honor.

MR. CORNEY: Thank you very much.

THE COURT: Thank you. Thank you very much. Thank you, Mr. Oliver. Good luck to you. All right.

(Whereupon, the proceedings end at 5:28 p.m.)

--- END REQUESTED TRANSCRIPT ---

STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF FLORENCE)

I, the undersigned, Krystal J. Smith, Official Court Reporter for the Twelfth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of all the proceedings had and evidence introduced in the hearing of the above captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 13th day of August, 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Krystal J. Smith

Court Reporter

Florence, South Carolina

January 25, 2014

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Stanley Oliver, #192110, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT 2011-CP-40-02140 ORDER OF DISMISSAL

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PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 31, 2011. An evidentiary hearing into the matter was convened on Monday, August 13, 2012, at the Richland County Courthouse. The Applicant was present at the hearing with counsel, David Belding, Esquire. The Respondent was represented by Robert D. Comey of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying was Applicant's trial attorneys, Douglas Strickler, Esquire, and Mary LaFave, Esquire (collectively referred to hereafter as "counsel"). This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, Applicant's direct appeal documents, and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the November 2005 term of the Richland County Grand Jury for Burglary – First Degree, two (2) counts of Kidnapping, two (2) counts of Armed Robbery and three (3) counts of Murder (2005-GS-40-11411 through -11417; 11582).

SCANNED

Douglas Strickler, Esquire, and Mary LaFave, Esquire, of the Fifth Circuit Public Defender's Office represented Applicant on the charges. On December 3, 2007, Applicant proceeded to jury trial before The Honorable G. Thomas Cooper, Jr. After a twelve (12) day trial, the trial judge granted Applicant's motion for directed verdict on one (1) count of Kidnapping charge. Applicant was thereafter convicted by the jury of the remaining charges as indicted and was sentenced as follows: thirty (30) years imprisonment for Armed Robbery, thirty (30) years imprisonment for the remaining Kidnapping, and life without parole for each Murder and Burglary – First Degree charge, all to run concurrently.

A Notice of Appeal was filed and an appeal perfected. After briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences by order filed December 21, 2010. State v. Oliver, Unpublished Op. No. 2010-UP-553 (Ct. App. filed December 21, 2010). The Remittitur was issued January 24, 2011.

In his current Application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

(10. State concisely and in the same order the facts which support each of the grounds set out in (9)
(a) Ineffective assistance of Counsel
(b) Ineffective assistance of counsel, denied me due process and equal protection
(c)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their

testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

As a preliminary matter, this Court would note the allegations set forth in this action have been evaluated with this Court's finding that Applicant's testimony is not credible. Further, this Court conversely finds counsel's (both Strickler and LaFave) testimony to be very credible and persuasive in the matter. These credibility findings have been applied to the Court's findings and conclusions set forth below and, therefore, will not be addressed individually regarding each allegation.

Failure to Interview/Call Witnesses at Trial

At the evidentiary hearing, Applicant first alleged counsel was ineffective for failing to investigate potential witnesses in preparation for trial that could have provided an alibi for him and explained how his fingerprint was found at the scene of the crimes. Specifically, Applicant testified he gave a list of potential witness names to counsel during their pre-trial meetings to have him interview or otherwise investigate, which counsel failed to do. Applicant listed several names of those witnesses including Donna Kohn, Monique Smith, Alfonzo Simmons, Jr., Michael Harrison, Shequitta Evans, and one of the victims' (Jim Batie) next door neighbor. Applicant testified counsel had told him an investigator, Lee Connelly (hereafter "Connelly"), was locating and speaking with the witnesses for them. Applicant said he did not believe any of the witnesses were ever interviewed other than Shequitta Evans, who testified as a state's witness at trial. Applicant alleged these witnesses could have provided an alibi for him, but he did not provide any details as to where he was at the time of these crimes. Regarding his fingerprint on the shoebox at Batie's house, Applicant stated he had been in Batie's house two days earlier to buy drugs, at which time he accidentally knocked over a stack of shoeboxes and had to pick them all up. Applicant went on to say he wanted to testify at trial to explain this to the jury, but counsel told him not to as he would present that theory to the jury in his closing argument.

Applicant conceded he was advised of the right to testify by the trial judge and he told the judge he did not want to provide testimony in his defense.

Counsel testified Applicant did supply a list of potential witnesses he wanted investigated, which counsel turned over to the investigator, Connelly, to do. Counsel noted that at least several of the names Applicant supplied were "street names" and not the alleged witnesses' actual first/last names, which made locating those people very difficult. Counsel said Connelly spoke with all of the witnesses he was able to locate after performing a diligent search for each one of them. Counsel also noted they had access to all of the witnesses and witness statements obtained by the codefendants' attorneys which helped cover most of the people on Applicant's list.

Based on a thorough review of the record and testimony presented, this Court finds Applicant has failed to carry his burden in proving counsel was ineffective in this regard. Fist, Applicant failed to present any credible evidence to establish counsel was unreasonable in locating and interviewing the witnesses whose names he gave to counsel. First, Applicant failed to establish which individuals were not interviewed by Connelly to support the allegation. Additionally, Counsel's credible testimony refuted this allegation as counsel stated that the private investigator, Connelly, in fact did undertake a thorough investigation to locate and, where feasible, speak with each of the witnesses listed. Counsel's performance is not deficient in failing to identify and locate alleged witnesses who were identified by Applicant only by a "street name", without any mention of a legal first/last name. See Strickland v. Washington at 691, 104 S.Ct. at 2066 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions [as] [c]ounsel's actions are usually based, quite properly, on...information supplied by the defendant. In particular, what

investigation decisions are reasonable depends critically on such information."). Accordingly, this Court finds no deficiency.

More notably, Applicant has failed to prove resulting prejudice as he did not present the testimony of the witnesses at the PCR hearing to show what the witnesses would have been able to testify to at trial or what other information counsel should have uncovered through interviewing the witnesses. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial."); See also Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (cannot prove prejudice for failure to investigate when only supported by mere speculation as to the result). Accordingly, this allegation is denied and dismissed.

Failure to File Motion for Severance

Applicant also alleged counsel was ineffective for failing to file a motion for severance of Applicant's case from his two (2) alleged codefendants, Dominic Gallman (hereafter "Gallman") and Kenneth Joy (hereafter "Joy"). Applicant testified he asked counsel to file such a motion, but counsel told him "there was not a judge in the state that would grant that motion".

Counsel testified he did not recall Applicant ever requesting he file such a motion and conceded that such a motion was not filed, but said had he believed such a motion was in Applicant's best interest he would have filed for one. Further, counsel said, having all three codefendants being tried simultaneously in this complex of a case can cause confusion, which is generally detrimental to the state's ability to carry its burden in convincing the jury of guilt beyond a reasonable doubt. Counsel also noted that the state's case against the three defendants

was based almost entirely on circumstantial evidence and, therefore, the state was trying to recruit any one of the codefendants to "flip" and provide testify against the other two defendants. Because of the concern this raised, all three defendants' attorneys entered into a joint defense agreement under which they agreed to proceed to trial collectively. Therefore, counsel said, filing a motion for severance would have violated the joint defense agreement and opened the door to one of the codefendants agreeing to testify against Applicant at trial. Counsel said she spent "hours" explaining the benefits of a joint trial in this situation to Applicant, after which he agreed they should proceed jointly. Counsel finished by explicitly reiterating it was in fact their "trial strategy" not to request a severance of Applicant's case as they believed it was in Applicant's best interest to proceed to trial jointly with his co-defendants.

Based on the above testimony, this Court finds this allegation to be without merit. Counsel's decision not to file for a severance from the two codefendants was an objectively reasonable decision in light of the defense theories being operated under. Ensuring the codefendants did not testify against each other to receive preferential treatment from the State was a vital concern for each of the three defendants. The joint defense agreement entered into guaranteed that would not occur so long as the parties lived up to the terms of the agreement, including the decision to proceed jointly to trial. Further, counsel articulated an objectively reasonable strategic reason for not filing such a motion as he believed the three defendant trial would only confuse the jury and burden the state's ability to provide a clear, convincing case against the defendants. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

Further, this Court finds Applicant has failed to sufficiently prove resulting prejudice as there is no reasonable probability that had the motion for severance been made, it would have been granted. "A motion for severance is addressed to the sound discretion of the trial court." State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct.App. 2002). "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct.App. 2005). "The rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime." State v. Halcomb, 382 S.C. 432, 440, 676 S.E.2d 149, 153 (Ct.App. 2009). In Applicant's case, the evidence against the three defendants was interconnected; all three defendants were charged with crimes stemming from the September 4, 2005, robbery and murders of Jim Batie, Kevin Miller and Desiree Felder; the same roughly forty (40) witnesses would be called in each of the defendant's cases by the state; and none of the codefendants gave confessions to police or statements implicating each other. While there was some evidence presented by one defendant that could have been detrimental to a codefendant, South Carolina law provides that mutually antagonistic defenses, or even the possibility that codefendants may accuse each other of the crime, does not necessarily warrant a severance. See State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999). Additionally, the trial court gave curative instructions during the course of the trial to distinguish evidence presented against particular defendants. Therefore, this Court cannot find any reasonable probability that the trial court, in its discretion, would have granted the motion had it been presented by counsel.

Failure to Timely Object to Testimony of Leticia Jones

Applicant next alleged counsel was ineffective for failing to timely object to the testimony of Leticia Jones (hereafter "Jones") at trial where Jones recounted her conversation with Gallman the morning after the crimes where he disclosed his and Applicant's involvement in the crimes.

Jones was the fiancée of Applicant's co-defendant, Dominic Gallman. Upon the state calling Jones to the witness stand, Gallman's trial attorney presented the Court with potential issues that could arise out of Jones's anticipated testimony under Bruton and/or Crawford, based on the understanding that Jones intended to testify about a conversation with Gallman in which Gallman disclosed details about the crimes and implicated Applicant as a participant. (Trial Tr. pp. 1021, l. 19 – p. 1022, l. 12). The state noted it had instructed Jones not to refer to Applicant by name in recounting her conversation with Gallman. (Trial Tr. p. 1022, ll. 19 – 22). When asked by the trial judge whether Applicant had "objections to that procedure", counsel noted her objection. (Trial Tr. pp. 1022, l. 23 – p. 1023, l. 7). The trial judge allowed Jones to testify to the conversation with Gallman over counsel's objection.

During her testimony, Jones told the jury she had known Gallman for roughly four (4) years and had been engaged to Gallman until roughly June of 2007. (Trial Tr. p. 1027, ll. 6 – 14). She went on to testify she met Applicant about a year after meeting Gallman, and met him through Gallman. (App. p. 1028, ll. 5 -9). Jones testified that on the morning of Sunday, September 4, 2005, Gallman, who at the time was no longer living with her, came to her apartment "really upset, very distraught". (Trial Tr. pp. 1029, l. 2 – p. 1031, l. 2). She went on to say Gallman told her that she had been right about "his friend", and "his friend" had made him do something he didn't want to do. (Trial Tr. p. 1031, ll. 15 – 20). From there, Jones testified

Gallman told her him and his friend had gone to a house where they robbed and shot two individuals. (Trial Tr. p. 1032, ll. 1 – 11).

At that point, counsel objected to the testimony under Crawford v. Washington[1], as Applicant would not have the ability to cross-examine Gallman as to the statements he made to Jones. The trial judge overruled the objection and allowed Jones to continue, after which counsel objected again; at that time, the trial judge granted counsel an "on-going objection" to any testimony from Jones about the conversation. (Trial Tr. pp. 1032, l. 24 – p. 1033, l. 14). At the conclusion of Jones's testimony, counsel moved for a mistrial based on his failure to object more promptly to the testimony by Jones about her conversation with Gallman. (Trial Tr. p. 1057, ll. 9 – 19). The trial court denied the motion, saying the witness never identified Applicant in her testimony as the "friend" Gallman was referring to, and the testimony was admissible non-hearsay since it was Gallman's own statement against interest. (Trial Tr. pp. 1057, l. 20 – p. 1060, l. 16).

Based on a thorough review of the record, this Court finds counsel was not ineffective in this regard. First, this Court finds no deficiency on counsel's part for failing to object to Jones's testimony in a timelier manner.[2] Prior to Jones taking the stand, counsel presented a sufficient motion *in limine* to exclude the testimony based on potential confrontation clause issues that were anticipated. While counsel did not reiterate the specific rationale for the objection after it was presented by codefendant's counsel, it is clear from the preceding colloquy and the trial judge's comments that he was well aware of the grounds for the objection. See State v. Sweet, 342 S.C. 342, 536 S.E.2d 91 (Ct. App. 2000) (Issue may be preserved for appeal without a

[1] Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004)
[2] Applicant did not raise any allegation that appellate counsel was ineffective for failing to raise this issue on direct appeal if it were properly preserved at trial.

specific objection being voiced where it is clear trial judge was aware of the grounds for objection). The trial judge, in allowing the state to call Jones to the stand immediately thereafter, clearly overruled counsel's motion. "[W]here a judge makes a ruling on the admission of evidence...immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection [and] [t]he issue is preserved [for appellate review]." State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). Therefore, counsel posed a proper motion *in limine* to suppress Jones's testimony prior to her ever taking the witness stand, thereby properly preserving the issue for appellate review.

Further, as Jones recounted Gallman's statement to her and implicated Gallman's "friend" as an accomplice, counsel reiterated his objection to the testimony. The trial court overruled the objection and allowed Jones to continue. A few sentences later, counsel again raised the objection, saying, "It's Crawford[,] [t]he whole testimony is Crawford", which lead the court to grant an "on-going objection" to the entirety of Jones's testimony about her conversation with Gallman. At the end of Jones's testimony, counsel took extreme steps to remedy what he thought was improperly admitted evidence by asking the trial judge for a mistrial, which was promptly overruled. This Court finds Applicant's assertion that counsel's objections were "insufficient" or "untimely" is without merit as the record is clear in showing counsel was diligent in noting his opposition to the testimony. See State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) ("So long as the judge had an opportunity to rule on an issue, and did so, it was 'not incumbent upon defense counsel to harass the judge by parading the issue before him again.'."). Accordingly, this Court finds counsel's performance was not deficient in this regard.

More importantly, Applicant cannot prove resulting prejudice as the testimony complained of entailed an admissible non-testimonial statement by Gallman which was not subject to the restrictions imposed by Crawford. In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), the United States Supreme Court set forth the standard under which alleged Sixth Amendment Confrontation Clause violations must be measured, saying "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy the constitutional demands is the one the Constitution actually prescribes: confrontation." Id at 69, 124 S.Ct. 1374. However, the Court said, "[w]here non-testimonial hearsay is at issue, it is wholly consistent with the Framer's design to afford the States flexibility in the development of hearsay law...as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." Id. The South Carolina Supreme Court, referencing the subsequent decision in Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), stated "Davis arguably 'declared that the Sixth Amendment simply has no application outside the scope of *testimonial* hearsay'." State v. Ladner, 373 S.C. 103, 112, 644 S.E.2d 684, 689 (2007) (emphasis added).

The Crawford Court left open for interpretation what types of statements are testimonial as opposed to non-testimonial saying, "we leave for another day any effort to spell out a comprehensive definition of 'testimonial'[, but]...it applies to a minimum of prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Crawford at 69, 124 S.Ct. at 1374. The Court then went on to set forth a vague generalized framework, saying "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Crawford at 51, 124 S. Ct. at 1364. Likewise, the South Carolina Supreme Court has held that a statement is non-testimonial where it is "much more akin to a remark to an acquaintance rather

than a formal statement to government officers." Ladner at 114, 644 S.E.2d at 689. Further, in State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006), the Court, prior to vacating the Court of Appeal's findings based on hearsay grounds, agreed that a defendant's statement "clearly...made outside of an investigatory or judicial context" is non-testimonial.

This Court similarly finds Gallman's statement to Jones to be non-testimonial in nature and, therefore, not a violation of the Confrontation Clause, nor subject to the Crawford analysis. Gallman's statement to his former fiancée in confidence is much more akin to a casual remark to an acquaintance than a formal complaint by an accuser to a government official. The conversation between Jones and Gallman bears no resemblance to the "justices of the peace" examinations which the Crawford Court explained were the driving force behind Confrontation Clause protections. Therefore, the testimony complained of was not a violation of Crawford or the Sixth Amendment Confrontation Clause.

Finally, where such nontestimonial hearsay is at issue, the standard for admission is "whether the testimony falls within a firmly rooted hearsay exception or, otherwise, bears a particularized guarantee of trustworthiness". See Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531 (1980). As to Applicant's statements to Gallman during the commission of the robbery and murders, this Court finds such testimony to be admissible non-hearsay as the statements of a co-conspirator during the course and in furtherance of the conspiracy under Rule 801(d)(2)(E), SCRE. The testimony involving Gallman's statements to Jones were likewise admissible both as non-hearsay as an admission by a party opponent under Rule 801(d)(2)(A), SCRE, as well as under the statement against interest hearsay exception set forth in Rule 804(b)(3), SCRE. Therefore, had counsel made a timely hearsay objection, the statements would have been

properly admitted under Ohio v. Roberts as they are either non-hearsay, or otherwise fall within firmly rooted hearsay exceptions as set forth by the evidentiary rules of this state.

Based on the above, this Court finds no deficiency in counsel's representation based on the alleged failure to object to Jones's testimony more quickly, nor does this Court find any reasonable probability that had such an objection been made, the outcome at trial would have been different. Accordingly, this allegation is denied.

Failure to Object to Tantanisha Robinson's Compelled Testimony

Applicant alleged counsel was failure to object to and argue for suppression of Tantanisha Robinson's (hereafter "Robinson") statement to police. Applicant specifically alleged Robinson, who was his girlfriend at the time, testified to "a bunch of lies" and should not have been compelled to provide testimony at trial through the state's grant of prosecutorial immunity.

On Monday, December 19, 2007, Robinson appeared with counsel, Bill Nettles, Esquire, before the trial court per the state's subpoena. Upon being called to testify in-camera, Robisnons invoked her Fifth Amendment right against self-incrimination pursuant to her attorney's advice, and was set aside as a witness by the state. (Trial Tr. p. 1010 – 1021). At the end of the day, the state placed on the record a formal agreement with the Fifth Circuit Solicitor's Office, South Carolina Attorney General's Office, and United States Attorney's Office granting Robinson transactional and prosecutorial immunity for the offense of providing false information to police arising out of her testimony or previously made statement to police on September 21, 2005. (Trial Tr. pp. 1171, l. 23 – p. 1183, l. 25).

This Court finds counsel was not ineffective for failing to pose an objection to Robinson's compelled testimony where the state offered her transactional and prosecutorial immunity to circumvent her invocation of the Fifth Amendment. Specifically, such a grant is not

objectionable and, therefore, counsel's actions are objectively reasonable. In Dickerson v. Coca-Cola Bottling Co., 312 S.C. 264, 440 S.E.2d 359 (1994), the Court stated:

> "Immunity from prosecution if found in both the Fifth Amendment to the Constitution of the United States, and in Article I, Section 12 of the South Carolina Constitution... For a government to excise a citizen from his basic freedom from self-incrimination, there must be either a knowing, intelligent voluntary waiver of the right to silence, or there must be a grant of immunity from prosecution."

Id. at 266 – 267, 440 S.E.2d at 361. In State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994), decided the same day, the Court reiterated this exception to invocation of the Fifth Amendment, saying:

> "If the government desires to obtain a statement from a citizen which might incriminate him, the government has two options. First, it may obtain from the citizen a voluntary waiver or his right to silence...The second option the government has if it desires to require a citizen to testify against himself is to grant the citizen immunity from prosecution."

Id. at 297, 440 S.E.2d at 349. Therefore, the state's actions in granting Robinson complete (transactional and prosecutorial) immunity were not objectionable as the state had the ability to compel such testimony from Robinson. Therefore, counsel's inaction was not unreasonable. Further, the record reflects that Robinson's testimony consisted of a continuing denial that she gave the statement to law enforcement or that she had ever said the things in the statement. In rebuttal to the state's inquiries about the statement, the defense was able to introduce a handwritten statement by Robinson setting forth what she alleged was the "truth", that Applicant never mentioned being involved in the crimes. Therefore, this Court also finds no resulting prejudice in this regard.

Failure to Object to Testimony of Ulicen "Mike" Allen

Applicant also alleged counsel was ineffective for failing to object to the testimony of Ulicen "Mike" Allen (hereafter "Allen") as it was prejudicial and a violation of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968).

Allen was called at trial as a state's witness to testify to several conversations he and Applicant had immediately following the incidents. At trial, Allen told the jury he met with Applicant the night after the murders at Applicant's girlfriend's house. Allen said when he got there, Applicant had a large stack of cash, several guns and drugs with scales set up. Allen stated Applicant said he had "done a lick", but the person he robbed would not be looking for him. The next week, Allen said, he met with Applicant, who told Allen he had robbed the victims in the murder case on the news, but had not killed them. Later, Allen said, Applicant told him he did not kill the woman.

Applicant alleged counsel was ineffective for failing to object to the entirety of Allen's testimony under Bruton and because the testimony was "prejudicial". Further, Applicant said, counsel was ineffective for failing to object to Allen's testimony that, "[n]ot to say that [Applicant] didn't kill anybody else, but...he didn't kill that woman." (Trial Tr. p. 910, ll. 18 – 20). Applicant briefly noted Allen was the biological father of his sister's baby and, according to Allen's testimony at trial, Applicant and Allen consider each other brothers.

First, the testimony of Allen does not invoke Bruton and, therefore, counsel's performance was objectively reasonable in failing to pose such an objection. "In Bruton, the Supreme Court held that a defendant's rights under the Confrontation Clause are violated by the admission of a *non-testifying codefendant's* statement that expressly inculpates a defendant, even if a cautionary instruction is given." State v. Evans, 316 S.C. 303, 306, 450 S.E.2d 47, 50 (1994)

(emphasis added). Allen was not a co-defendant in this case, nor was he unavailable to testify, nor was there any evidence introduced from Allen procured through a written statement to law enforcement. Therefore, it is clear Bruton is wholly inapplicable to this situation.

Additionally, this Court finds Applicant's generalized claim that counsel was ineffective for failing to object to Allen's "prejudicial" testimony to be without merit, as there is no bar against the admission of "prejudicial" evidence. Nearly every piece of evidence offered by the State in a criminal prosecution can be viewed as "prejudicial" to a defendant, and Allen's testimony at this trial was certainly no exception. However, it was not objectionable nor subject to suppression solely due to its generalized prejudicial nature. Under Rule 403, SCRE, evidence "although relevant...may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" to the defendant. Applicant presented no argument relating to the so-called "probative value versus prejudicial effect" balancing test and, therefore, this allegation is equally without merit. Further, a trial court has particularly wide discretion is ruling on Rule 403, SCRE, objections and Applicant has failed to convince this Court that such an objection would have been successful in keeping out the testimony or otherwise changing the result at trial. See State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).

Finally, Applicant alleged counsel was ineffective for failing to object to Allen's testimony in several other specific areas based on their speculative and prejudicial nature. The first was where Allen testified as to his understanding of Applicant's statement meant, stating "[n]ot to say that [Applicant] didn't kill anybody else, but...he didn't kill that woman". (Trial Tr. p. 910, ll. 18 – 20). Applicant also noted several other portions of Allen's testimony he believed counsel missed objections, including where Allen was asked to tell the jury what happened when Joy came to Allen's house the night of September 13th, at which time counsel for the two

codefendants lodged objections to the answer. (Trial Tr. pp. 918, l. 13 – p. 919, l. 18); where Allen recounted a conversation with Joy where Joy discussed disposing of the evidence linking the codefendants to the crime (Trial Tr. pp. 920, ll. 23 – p. 922, l. 14); and where Allen recounted a conversations he had with Gallman about how the initial break in of victim's house was carried out, after which Gallman told Allen that Applicant "was all on that cocaine". (Trial Tr. p. 928, ll. 10 – 17).

This Court finds the allegations to be without merit as counsel's performance was objectively reasonable and resulted in no prejudice. Allen's testimony in these regards was not so prejudicial to Applicant's case that had counsel objected and had the statements kept out, there is a reasonable likelihood the outcome at trial would have been different. Lay witnesses may offer testimony in the form of opinions or inferences if they are rationally based on the witness's perception, aid the judge in understanding testimony, and do not require special knowledge. See Rule 701, SCRE. Clearly, Allen's testimony in this regard was rationally based upon his personal understanding of the statement based on his perception of Applicant. Further, it caused no prejudice. During Allen's testimony, Applicant's own statement that he "did not kill the woman" was repeated numerous times as hearsay within an exception as it was offered against Applicant's interest. (Trial Tr. p. 909, ll. 13 – 17; p. 910, ll. 2 – 6; p. 910, ll. 13 – 18; p. 912, ll. 15 – 17; p. 919, l. 24). Therefore, the single statement complained of ("not to say [Applicant] didn't kill anyone else, but... he didn't kill the woman") was cumulative to the testimony presented at trial and cannot be found to have reasonably caused a difference in the outcome at trial, especially in light of Allen's unwavering assertion that Applicant was in fact innocent of the murder charge relating to Desiree Felder for which he was on trial. Allen's recitation of Gallman's statement that Applicant had been "all on that cocaine" at the time of the robbery did

not reasonably affect the outcome of the trial; as stated by counsel at the PCR, Applicant's trial was riddled with mentions of drug use and drug transactions as illicit drugs were the very foundation/premise of the case. Therefore, Allen's one comment did not reasonable affect the outcome of his trial. Of the remaining statements complained of (Joy's destruction of evidence, Gallman's statement about entering victim's residence), neither was objectionable as they were both proper lay witness testimony extremely probative of the three codefendants' guilt of the crimes. Therefore, counsel was not unreasonable in failing to object, and such an objection would have been fruitless if posed by counsel. Accordingly, this Court denies these allegations.

Phone Call Summation

Applicant alleged counsel was ineffective for failing to pose an objection to the state's introduction of telephone records in summation format.

The summation, the state argued, showed the various phone calls made directly before and after the crimes between the three codefendants, and properly summarized the calls as set forth in phone records previously introduced into evidence. After proffering the testimony of Dana Outen, who had prepared the summation, counsel posed objections to its introduction based on a failure to prove the phone numbers listed as Applicants were in fact his phones. (Trial Tr. pp. 1755, l. 7 - p. 1758, l. 5). Counsel thereafter posed an additional objection to its introduction as a Rule 5 violation as the summation was not turned over prior to trial. (Trial Tr. p. 1762, l. 11 – p. 1763, l. 24). The Court thereafter allowed the state to redact the summation and introduce it with the express limitation that no particular number be attributed solely to one defendant. (Trial Tr. p. 1770, ll. 4 – 8). Counsel renenwed its objection upon introduction of the summation. (Trial Tr. p. 1772, ll. 8 – 17).

Based on the record, it is clear counsel's performance was not unreasonable in objecting to what Applicant contends is a "prejudicial" summation of phone calls. Counsel made several objections to the summation in an attempt to have it kept out at trial, all of which were overruled after the state agreed to redact the record and limit testimony as to its application to the case. This Court finds counsel acted reasonably in attempting to challenge the state's summation of phone calls.

Further, this Court finds no resulting prejudice as the summation was admissible evidence and was properly used by the solicitor within the bounds of allowable closing argument. Under Rule 1006, SCRE, "the contents of voluminous writings...which cannot be conveniently examined in court may be presented in the form of a...summary,...provided the underlying data are admissible into evidence." In the current case, the testimony and documentation about the numbers was admitted into evidence prior to the summation's introduction; therefore, the summation was proper under the rule. Further, once the summation was in evidence, the solicitor was able to properly use that information and any "reasonable inferences" that could be drawn there-from in closing argument to highlight the alleged communication between defendants around the time of the crimes. See State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). Each of the phone numbers contained in the summation mentioned by the solicitor in closing had previously been shown, through testimony, to be a phone at least one of the defendants had access to. (Trial Tr. p. 831, ll. 11 – 23; p. 901, ll. 20 – 21; p. 1036, ll. 6 – 10; p. 1088, ll. 4 – 7; p. 1088, ll. 7 – 8; p. 1165, ll. 14 – 15; p. 1454, ll. 24 – 25; p. 1737, ll. 3 – 9). Therefore, the summation was properly admitted at trial and used in closing argument by the solicitor; counsel's continued objection to its introduction would not have been successful, nor

would it have reasonably changed the outcome of Applicant's trial. Therefore, this allegation is denied.

Erroneously Advising Applicant Not To Testify

Applicant alleged counsel was ineffective for advising him not to take the witness stand to testify in his own defense.

Applicant stated counsel should not have advised him not to testify at trial as he would have been able to explain to the jury how his fingerprint was found on a shoebox in victim's house by police after the robbery/murders. Specifically, Applicant stated he had been in victim's (Batie) house a few days prior to the robbery to purchase drugs, at which time he knocked over a stack of shoeboxes and had to pick them all up; Applicant said his fingerprints should have been "all over the house". Applicant alleged counsel told him that back story could be "raised in closing argument" and, therefore, Applicant didn't need to take the stand to give that testimony. Applicant testified he "wished the jury would have heard [his] side of the story from [him]" because it would have been "a good thing for people to hear [his] voice, sitting in a suit, looking like a person." Applicant conceded the trial judge advised him of his right to testify on the record and that he told the trial judge he did not want to testify.

Counsel testified Applicant was fully advised on the right to testify prior to trial and knew it was his decision alone whether to take the stand at trial. Counsel said Applicant made the voluntary and independent decision not to testify. Counsel noted that the chief investigator on the case, Investigator Paul James Mead, was called by the defense on Applicant's behalf as a rebuttal witness to Applicant's fingerprint found in victim's house. Through Mead, counsel said, he was able to elicit testimony to create reasonable doubt by pointing to another set of fingerprints found

in victim's car belonging to an individual whom the police did very little to investigate as a suspect in the crime.

This Court finds this allegation to be without merit. Applicant made a voluntary, informed and wholly independent decision not to testify after being fully advised by competent counsel and the trial judge as to his rights in that regard. (Trial Tr. pp. 1819, l. 5 – p.). Applicant told the trial judge he understood "exactly what [the trial judge] explained to [him]" regarding his right to testify and did not want to take the stand. Therefore, counsel's performance was not deficient in this regard. Further, this Court finds Applicant's explanation of his fingerprint at victim's house to be wholly incredible, and finds such testimony by Applicant at trial certainly would have done nothing to sway the jury's decision as to his guilt based on the testimony presented. Therefore, this Court finds no resulting prejudice.

Applicant's Additional Allegations

Finally, at the PCR hearing, nine (9) pages handwritten allegations and two (2) purported exhibits were introduced as amendments to the PCR application. Respondent posed an objection to the introduction of the amended allegations. Having reviewed the packet, this Court finds the supposed amendments to be in violation of the rule against hybrid representation under Rule 11, SCRCP. Under Rule 11, SCRCP, "every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is an active member of the South Carolina Bar." South Carolina does not recognize any right to hybrid representation at trial or on appeal. *See, e.g.*, Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989). The amendment was clearly written *pro se* by Applicant and neither signed, nor validated in any way, by PCR counsel. Therefore, the amended allegation before this Court are stricken from the record and not part of the current PCR

application. This Court would note that after reviewing the allegations in their entirety in conjunction with the record and the testimony provided at the PCR hearing, the amended allegations were wholly without merit and failed to convince this Court that Applicant is entitled to relief under Strickland v. Washington. For the reasons stated above, Applicant's amended allegations are hereby stricken from the record of this action.

CONCLUSION

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

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an

Applicant has a right to an 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 the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 25 day of Sept, 2013 ~~2012.~~

R. Knox McMahon
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.

2530

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011CP4002140

RECEIVED
OCT 14 2013
S.C. Supreme Court
FILED
OCT 10 2013
RICHLAND COUNTY, S.C.
BEFORE WE BEGIN:

Stanley #192110 Oliver	State of South Carolina
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 10th day of Oct., 20 13 to attorneys of record or to parties (when appearing pro se) as follows:

Stanley #192110 Oliver David Edward Belding
ATTORNEY(S) FOR THE PLAINTIFF(S)

Megan E. Harrigan
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED