

STATE OF SOUTH CAROLINA  
COUNTY OF SUMTER

Devan Dwyer, #302693,

Applicant,

v.

State of South Carolina,

Respondent.

RECORDED  
IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT  
2015 MAY 15 PM 3:56  
Case No. 2011-CP-43-2412  
JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

**ORDER OF DISMISSAL**

CERTIFIED TRUE COPY  
OF ORIGINAL FILED

*Sherry H. Hunt*  
DEPUTY CLERK OF COURT  
SUMTER COUNTY  
SOUTH CAROLINA

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on January 30, 2012. Respondent made its return on May 31, 2013. An evidentiary hearing in to the matter was convened on December 17, 2014, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Willie H. Brunson, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

**PROCEDURAL HISTORY**

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 Sumter County Clerk of Court. Applicant was indicted during the February 2009 term of the Sumter County Grand Jury under indictment 2006-GS-43-00553 for the following counts: (1) Burglary - 1st degree; (2) armed robbery; (3) assault and battery with intent to kill, (4) assault and battery with intent to kill; and (5) possession of firearm/knife during the commission of a violent crime. Lauren Stevens, Esquire, represented him. Applicant proceeded to trial on April 13 and 14, 2009. On April 14, 2009, the Applicant was found

guilty on all counts. The Honorable R. Ferrell Cothran, Jr., sentenced Applicant to thirty years imprisonment for burglary, twenty-five years imprisonment for armed robbery, twenty years imprisonment for one count of assault and battery with intent to kill; fifteen years imprisonment for the second count of assault and battery with intent to kill, and five years imprisonment for possession of a firearm. All sentences were to run concurrently.

A timely notice of appeal was filed. The South Carolina Court of Appeals affirmed the lower court's conviction. State v. Dwyer, Op. No. 2011-UP-010 (S.C. Ct. App. Filed January 24, 2011). The Remittitur was sent on February 10, 2011.

### ALLEGATIONS

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

1. Ineffective Assistance of Counsel
  - a. "Trial counsel was ineffective for failing to pursue a alibi defense."
  - b. "Trial counsel was ineffective for not notifying the courts within (10) days prior to trial of a alibi defense which completely destroyed applicant chances of presenting this alibi defense at trial."
  - c. "Trial counsel was ineffective for failing to subpoena witness/victim Rohan Anderson, being that Attorney Stevens based her whole defense trial strategy on inconsistencies of the victim's statement."
  - d. "Trial counsel was ineffective for failing to suppress the evidence of victim Mr. Anderson, when accuser wasn't allow to confront witness which violated applicant constitutional right of the 6th amendment of the United States."

At the PCR hearing Applicant proceeded on the following claims:

1. Ineffective Assistance of Counsel
  - a. Failing to present Cassandra Davis as an alibi witness.
  - b. Failing to put the State on notice for a possible Alibi notice.
  - c. Promising Applicant that the case would be dismissed.
  - d. Failing to subpoena Rohan Anderson for trial.
  - e. Failing to request a continuance to locate Rohan Anderson.
  - f. Failing to introduce latent print.
  - g. Failing to preserve appealable issue for review.

## SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from Lauren Stevens. (hereinafter "Trial Counsel"). This Court also had before it a copy of the trial transcript, the Sumter County Clerk of Court records, Applicant's South Carolina Department of Correction records, appellate records, the PCR application, and return.

During the evidentiary hearing, Applicant testified that he expected to be released in 2033. Applicant stated that he understood the PCR process and wanted to move forward with his PCR. Applicant stated that he felt he received ineffective assistance of counsel for counsel's failure to pursue an alibi witness. Applicant further stated that Trial Counsel promised him that the charges were going to be *nol prossed*.

Applicant stated that he spoke with Trial Counsel once or twice about the case. Applicant stated that he felt she was not preparing for trial and felt that the charges were going to be dropped. Applicant stated that he told Trial Counsel that he had an alibi, Cassandra Davis. Applicant stated Cassandra Davis was his girlfriend at the time. Applicant stated that he was living with Cassandra Davis. Applicant stated that the alleged robbery occurred around four or four thirty in the morning. Applicant stated that he was in bed asleep when the robbery was alleged to have occurred. Applicant stated Trial Counsel was aware that he was asleep at the time. Applicant stated Cassandra Davis was available as a witness to testify. Applicant stated that he asked Trial Counsel to use Cassandra Davis as a witness. Applicant stated that he was aware of the ten day notice rule for alibi. Applicant stated Cassandra Davis was present in the courtroom during trial. Applicant stated that a subpoena was not necessary.

Applicant stated that Rohan Anderson was the victim in the case. Applicant stated Sara McKenzie and Robinson gave inconsistent statements. Applicant stated only one of the two

witnesses testified at trial. Applicant stated it would have made a difference if Robinson had testified at trial. Applicant stated Rohan Anderson did not testify at trial. Applicant further stated there were latent prints collected. Applicant stated Trial Counsel failed to introduce the finger print into evidence.

Applicant recalled the State informing the trial court that they went through great lengths trying to contact or subpoena Rohan Anderson. Applicant recalled the State was unable to track Rohan Anderson down or get Rohan Anderson subpoenaed for trial. Applicant recalled Trial Counsel making several objections or motions during trial regarding the State's inability to produce Rohan Anderson at trial. The basis for one objection was that the failure to produce Rohan Anderson amounted to a violation of Applicant's 6<sup>th</sup> Amendment rights under the confrontation clause. Applicant recalled that all of Trial Counsel's motions and or objections were overruled by the trial court. Applicant stated that he has not been in contact with Rohan Anderson and that he was not present to testify during his PCR hearing.

Following Applicant's testimony, Trial Counsel was called to testify by the State. Trial Counsel stated she has been practicing law since 1996 and was appointed to represent Applicant in his case. Trial Counsel stated she had approximately 100-150 case load. Trial Counsel stated she was on the case for three and a half to four years. Trial Counsel stated she filed Brady and Rule 5 motions and reviewed the material with Applicant. Trial Counsel stated that she could not recall the amount of times she met with Applicant due to the numerous roll call's and switch with solicitor's. Trial Counsel stated the Solicitor Office would always send a list the Friday before the case would be called for trial. Trial Counsel stated she learned the case would be going to trial the Friday before it was set.

Trial Counsel stated that the former Assistant Solicitor Hugh Ryan told her that the charges would be dropped because the victim had a significant record and had been shot recently. Trial Counsel said the Assistant Solicitor Hugh Ryan did not feel compelled to prosecute Applicant because of the victim. Trial Counsel stated Assistant Solicitor Hugh Ryan went through some personal issues and left the Third Circuit Solicitor's office. Trial Counsel stated Assistant Solicitor Hugh Ryan did not *not* *prossed* the charges as he had promised. Trial Counsel stated she did not have anything in writing from Assistant Solicitor Hugh Ryan. Trial Counsel stated she relied on Assistant Solicitor Hugh Ryan's word and felt it was a done deal. Trial Counsel stated the case was transferred to Assistant Solicitor Catherine Fant. Trial Counsel stated Assistant Solicitor Catherine Fant planned to take the case to trial.

Trial Counsel stated she discussed strategy and statements with Applicant. Specifically, Trial Counsel stated their strategy was "best to go last" in closing arguments. Trial Counsel stated that she felt it was important to not put up a defense. Trial Counsel stated she wanted last closing argument. Trial Counsel stated she did not call Cassandra Davis as a witness because her testimony would have conflicted with Applicant's statements. Specifically, Trial Counsel stated Applicant's statement put him with a co-defendant. Trial Counsel further stated Cassandra Davis did not say how long Applicant had been home in bed. Trial Counsel stated Cassandra Davis statement was not an effective alibi.

Trial Counsel noted that Cassandra Davis had a pending domestic violence case and intimidating witness case against Applicant. Specifically, Trial Counsel stated Cassandra Davis alleged that Applicant threatened to burn her house down if she did not testify at his trial. Trial Counsel stated Cassandra Davis was present for trial despite her not being subpoenaed. Trial Counsel concluded that it would be risky to put her on the stand. Trial Counsel stated she did not

file an alibi notice, but felt she could have “finagled” it if she needed to get an alibi defense into trial. Trial Counsel stated it was a strategic decision not to put Cassandra Davis up.

Trial Counsel stated she did not seek out Rohan Anderson. Trial Counsel stated she felt state would be able to produce him. Trial Counsel was of the opinion that she would not be able to find Rohan Anderson because the State went through great efforts to locate him and was unable to find him. Trial Counsel stated she made a motion to dismiss the charges concerning Anderson due to a confrontation clause issue. Trial Counsel stated she made a post trial motion based on Rohan Anderson’s absence. Trial Counsel stated she did not think a continuance would produce Rohan Anderson.

Trial Counsel stated that it was a strategic decision not to put in the latent fingerprint found. Specifically, Trial Counsel stated the fact that the police found a print was not worth giving up last argument. Trial Counsel stated it was a random fingerprint and not important enough to give up last closing argument. Trial Counsel stated she felt it was important to have last closing argument because the State did not produce Rohan Anderson. Trial Counsel stated she was fully prepared for trial. Trial Counsel stated when Rohan Anderson was not present the strategy changed. Trial Counsel stated Cassandra Davis would not have been called as a witness, regardless of whether Rohan Anderson appeared at trial.

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#### **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. Specifically, this Court finds Trial Counsel’s testimony credible

and Applicant's testimony not credible. 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).

### INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; 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, (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.

*Ineffective Assistance of Counsel for failing to call Cassandra Davis as an alibi witness.<sup>1</sup>*

This Court finds Applicant's allegation that he received ineffective assistance of counsel for trial counsel's failure to call Cassandra Davis as a potential alibi witness to be without merit. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. 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 v. Washington, 466 U.S. 668, 688-689 (1984). "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 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Trial Counsel stated it was her strategic decision not to call Cassandra Davis as a witness for two reasons. First, Trial Counsel stated it was their decision to not put up any evidence and reserve the last closing argument. Trial Counsel stated it was her opinion that last closing argument was extremely important in this case because the State failed to produce Rohan Anderson. Trial Counsel stated calling Cassandra Davis as a witness was not worth losing

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<sup>1</sup> This Court notes allegation a and b are similar in nature and will be addressed as one general allegation of ineffective assistance of Trial Counsel for failing to produce Cassandra Davis as an alibi witness during Applicant's trial.

closing argument. Second, Trial Counsel stated Cassandra Davis was not a credible witness. Specifically, Trial Counsel stated Cassandra Davis statement contradicted Applicant's statement that he was with a co-defendant. Additionally, Trial Counsel stated Cassandra Davis had filed criminal domestic violence charges and intimidating a witness charge against Applicant. Trial Counsel concluded that Cassandra Davis would not have been a credible witness. The trial strategy articulated by trial counsel in this case was held to be reasonable in Stokes v. State<sup>2</sup>. In Stokes, trial counsel stated that he chose not to use certain witnesses at trial because, "in his judgment at the time, their testimony would not have been of value to the Petitioner's case". Stokes, 308 S.C. at 548, 419 S.E.2d at 779. The Supreme Court affirmed the lower court's ruling that "trial counsel adequately put forth a defense by calling the only witness whom he believed to be credible and supportive of the defense strategy." Id.

In Edwards v. State, this Court held that "[a] witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions." Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011). In Jackson v. State, this Court held that counsel was not deficient for failing to call a witness at trial when corroboration of the defendant's statement was more credible through the testimony of another witness and the witness' credibility would have been an issue if he testified. Jackson v. State, 329 S.C. 345, 351-52, 495 S.E.2d 768, 771 (1998). Based on the foregoing, this Court finds Trial Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

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<sup>2</sup> 308 S.C. 546, 419 S.E.2d 778 (1992).

Furthermore, Applicant can show no prejudice as a result of Trial Counsel's alleged deficiency for failing to call Cassandra Davis as an alibi witness at trial because Applicant failed to produce Cassandra Davis at the PCR hearing. To qualify as an alibi, a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012). In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witness's testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id. Applicant can show no prejudice because he did not present any testimony from her during the PCR hearing. Based off of the foregoing, this Court finds Applicant's allegation must be denied and dismissed with prejudice.

*Ineffective assistance of counsel for promising Applicant that the charges would be dismissed.*

This Court finds Applicant's allegation that he received ineffective assistance of counsel for counsel promising him that his charges would be dismissed is meritless. Trial Counsel stated that the former Assistant Solicitor Hugh Ryan told her that the charges would be dropped because the victim had a significant record and had been shot recently. Trial Counsel said the Assistant Solicitor Hugh Ryan did not feel compelled to prosecute Applicant because of the victim. Trial Counsel stated Assistant Solicitor Hugh Ryan went through some personal issues and left the Third Circuit Solicitor's office. Trial Counsel stated Assistant Solicitor Hugh Ryan

did not *nolle prosequere* the charges as he had promised. Trial Counsel stated she did not have anything in writing from Assistant Solicitor Hugh Ryan. Trial Counsel stated she relied on Assistant Solicitor Hugh Ryan's word and felt it was a done deal. Trial Counsel stated the case was transferred to Assistant Solicitor Catherine Fant. Trial Counsel stated Assistant Solicitor Catherine Fant planned to take the case to trial. Based on the foregoing, this Court finds Trial Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117; 385 S.E.2d at 625 (citing Strickland).

Additionally, this Court notes Applicant has failed to present sufficient evidence as to how he was prejudiced. Trial Counsel stated met with Applicant, reviewed the discovery material with Applicant, and discussed strategy with Applicant. Trial Counsel stated she was prepared to try the case. Therefore, this Court finds Applicant has failed to provide sufficient evidence as to how he was prejudiced. Based off of the foregoing, this Court finds this allegation should be denied and dismissed with prejudice.

*Ineffective assistance of counsel for failing to request a continuance and/or subpoena Rohan Anderson for trial.*<sup>3</sup>

This Court finds Applicant's allegation that he received ineffective assistance of counsel for failing to subpoena Rohan Anderson or in the alternative request a continuance to locate Rohan Anderson is without merit. Trial Counsel stated she did not seek out Rohan Anderson. Trial Counsel stated she felt the State would be able to produce him. Trial Counsel stated she was of the opinion that she would not be able to find Rohan Anderson because the State went through great efforts to locate him and was unable to find him. A review of the trial transcript reveals that the State went through great efforts to attempt to locate Rohan Anderson. (p. 32 line

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<sup>3</sup> This Court notes Applicant's allegations d and e are similar and shall be addressed as one claim of ineffective assistance of counsel for failing to request a continuance to locate Rohan Anderson or in the alternative to subpoena Rohan Anderson for trial.

22—p. 33 line 9; p. 189 line 7—p. 191 line 9). Based on the foregoing, this Court finds Trial Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

Furthermore, this Court finds Applicant can show no prejudice as a result of Trial Counsel's alleged deficiency because Applicant failed to present any testimony from Rohan Anderson during the PCR hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witness's testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An 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. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

*Ineffective assistance of counsel for failing to introduce a latent print during trial.*

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to introduce a latent fingerprint during trial is without merit. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. 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 v. Washington, 466 U.S. 668, 688-689 (1984). "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 691. Therefore, judicial scrutiny of counsel’s performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Trial Counsel stated that it was a strategic decision not to put in the latent fingerprint found. Specifically, Trial Counsel stated the fact that the police found a print was not worth giving up last argument. Trial Counsel stated it was a random fingerprint and not important enough to give up last closing argument. Trial Counsel stated she felt it was important to have last closing argument. Based on the foregoing, this Court finds Trial Counsel’s actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

Additionally, this Court notes Applicant can show no prejudice as a result of Trial Counsel’s alleged deficiency because he failed to present any evidence at the PCR hearing to show how the introduction of the latent fingerprint would have had any possible effect on the result of trial. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Based off of the foregoing, this Court finds this allegation should be denied and dismissed with prejudice.

*Ineffective assistance of counsel for failing to preserve an  
appealable for review.<sup>4</sup>*

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to preserve the issue of whether the trial court erred in allowing the State to prosecute the second ABWIK in violation of Applicant's constitutional right to confront victim's boyfriend is without merit. Under the second prong of the analysis in Strickland, the PCR applicant "must show that 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, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Id. In order to prove prejudice, Applicant must show that the judge erred in denying his suppression motion. See generally Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is *meritorious* and that the verdict would have been different absent the evidence that should have been excluded." (emphasis added)).

This Court finds Applicant can show no prejudice as a result of Trial Counsel's failure to preserve the issue for appellate review because the issue falls on its merits. On the merits, the State has the right to prove its case with the evidence of its choice. See State v. Hamilton, 327 S.C. 400, 446-447, 486 S.E.2d 512, 515 (1997) (finding it is a "fundamental principle that the prosecution is entitled to prove its case with evidence of its own choosing"). The State does not have to put forth Rohan Anderson's testimony or statement in order to prove the required elements of ABIK if those elements can be proven by other competent testimony and evidence.

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<sup>4</sup> This Court assumes Applicant's allegation references the fact that the South Carolina Court of Appeals found the issue of whether the trial court erred in allowing the State to prosecute the second ABWIK in violation of Applicant's constitutional right to confront victim's boyfriend was not preserved for review.

Further, it is absurd to believe the victim must testify in order for the State to proceed on an indictment. Such a holding would make prosecution for any type of homicide, crime against an infant, or crime against an incompetent person impossible.

Furthermore, the State proved the required elements of ABIK beyond a reasonable doubt. ABIK is defined as an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied. State v. Wilds, 335 S.C. 269, 275, 584 S.E.2d 138, 141 (Ct. App. 2003). Murder is the killing of a person with the malice aforethought, either express or implied. Id. With the exception of the death of the victim, each and every element of murder must be proven beyond a reasonable doubt in order for a jury to convict a defendant of ABIK. Id.

This Court notes, Sarah McKenzie testified she and Rohan Anderson were both present when Applicant burgled her residence with the intent of robbing her. She testified Applicant shot both her and Rohan Anderson before fleeing. Further, Detective Lyons testified Rohan Anderson suffered a gunshot wound to his left arm. (p. 141). Detective Culick also testified two individuals were during the burglary. (p. 223-223). Finally, Dr. Stanford testified Rohan Anderson suffered "two circular wounds, anterior left should consistent with gunshot wound by appearance." (p. 219). Based off of the foregoing, this Court finds the State proved its case with overwhelming evidence demonstrating Applicant's guilt of ABIK against Rohan Anderson. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent

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failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt). Based off of the foregoing, this Court finds this allegation should be denied and dismissed with prejudice.

**ALL OTHER ALLEGATIONS**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

*[signature to follow]*

## CONCLUSION

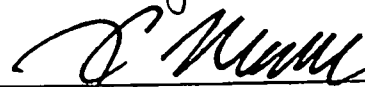
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant 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 8 day of May, 2015.



J. CORDELL MADDOX, JR.  
Presiding Judge  
Third Judicial Circuit

Anderson, South Carolina