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**RECEIVED**

JUL 15 2016

**SC SUPREME COURT**

July 15, 2016

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: Maurice Abrams v. The State of South Carolina  
Case No. 2012-CP-43-713

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on respondent; Office of Indigent Defense, and the Sumter County Court of Common Pleas.
- (2) A copy of the order which is to be challenged on appeal.

Sincerely,



Bradley M Kirkland  
2007 Lincoln Street  
Columbia, SC 29201  
(803)254-9007

Other Counsel of Record:  
Daniel Gourley  
1000 Assembly Street  
Columbia, SC 29209  
(803)734-5178

NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A  
POST CONVICTION RELIEF

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

JUL 15 2016

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

SC SUPREME COURT

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2012-CP-43-713

The State,.....Respondent,

Maurice Abrams,.....Appellant,

Notice of Appeal

Maurice Abrams appeals the order of the Honorable R. Ferrell Cothran, Jr., dated May 18, 2016, which affirmed his conviction in Circuit Court. Appellant received written notice of the order on June 15, 2016.

Maurice Abrams further appeals the original order of dismissal by the Honorable R. Ferrell Cothran, Jr., dated March 32, 2016, which affirmed his conviction in Circuit Court.



Bradley M Kirkland  
2007 Lincoln Street  
Columbia, South Carolina 29201  
(803) 386-1116  
Attorney for Appellant

Other Counsel of Record:

Daniel Gourley  
1000 Assembly Street  
Columbia, South Carolina 29209  
(803) 734-5178  
Attorney for Respondent

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**  
JUL 15 2016  
**SC SUPREME COURT**

\_\_\_\_\_  
APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

\_\_\_\_\_  
Case No. 2012-CP-43-713  
\_\_\_\_\_

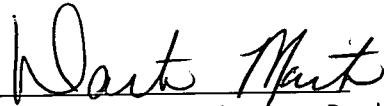
Daniel Gourley, Assistant Attorney General  
The State,.....Respondent,

Maurice Abrams,.....Appellant,

I certify that I have served the Notice of Appeal on Daniel Gourley, Assistant Attorney General by United States mail on July 15, 2016, at 1000 Assembly Street Columbia, South Carolina 29201.

I certify that I have served the Notice of Appeal on the Office of Appellate Defense by United States mail on July 15, 2016 at 1330 Lady Street Columbia, South Carolina 29201.

I certify that I have served the Notice of Appeal on the Clerk of Court of Common Pleas by United States mail on July 15, 2016 at 141 N. Main Street Sumter, South Carolina 29150.

  
Danita Martin, Assistant to Brad Kirkland  
2007 Lincoln Street  
Columbia, South Carolina 29201  
(803) 386-1116

STATE OF SOUTH CAROLINA )  
COUNTY OF SUMTER )  
)  
)  
Maurice Lionel Abrams, #00346362, )  
)  
Applicant, )  
)  
v. )  
)  
State of South Carolina, )  
)  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

Case No. 2012-CP-43-713

**RECEIVED**

**ORDER JUL 15 2016**

**SC SUPREME COURT**

This matter is before the Court pursuant to Rule 59(e) SCRCP. The Applicant seeks an Order of this Court amending or altering the Order of Dismissal dated March 31, 2016.

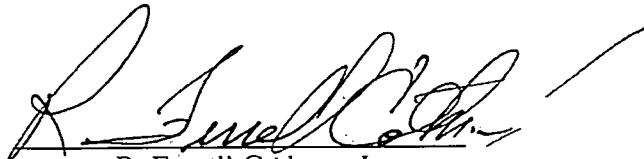
Applicant's Rule 59(e) Motion to Alter or Amend is substantially the same as Applicant's proposed order granting relief, which was denied. The Order of Dismissal was filed with the Sumter County Clerk of Court on April 8, 2016. Applicant's Rule 59(e) motion was filed on April 26, 2016.

The Order of Dismissal sets out the reasons the Court denied and dismissed with prejudice the Application for Post-Conviction Relief. Applicant's Rule 59(e) Motion offers no new grounds for reconsideration. Therefore, the motion for amendment and reconsideration is hereby DENIED.

AND IT IS SO ORDERED.

Manning, South Carolina

Dated: May 18, 2016



R. Ferrell Cothran, Jr.  
Judge, Third Judicial Circuit

FORM 4

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

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2012CP4300713

RECORDED

Maurice Abrams

2016 APR -8 AM 9:21

South Carolina State of

CERTIFIED TRUE COPY  
OF ORIGINAL FILED

JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

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

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Clerk of Court

Attorney for:  Plaintiff  Defendant  
 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.  See Page 2 for additional information.
- 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: See attached Order.

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 (List amount(s) below)

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.

2131

4/8/2016

Circuit Court Judge

Judge Code

Date

**For Clerk of Court Office Use Only**

This judgment was entered on \_\_\_\_\_, and a copy mailed first class or placed in the appropriate attorney's box on \_\_\_\_\_, to attorneys of record or to parties (when appearing pro se) as follows:

Maurice Abrams #346362 Lee Corr Inst 990 Wisacky  
Hwy Bishopville, SC 29010  
Bradley Myers Kirkland 2007 Lincoln St. Columbia, SC  
29201

*Donzi Gouky*  
~~Alan McCrory Wilson~~ PO Box 11549 Columbia, SC 29211-  
1549

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)  
*James C. Campbell*

\_\_\_\_\_  
Court Reporter

\_\_\_\_\_  
James C. Campbell - Clerk of Court

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
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\_\_\_\_\_  
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\_\_\_\_\_



Armed Robbery, and 5 years for Possession of a Weapon During a Violent Crime; all sentences were to run consecutively.

The Applicant appealed to the South Carolina Court of Appeals. An order of dismissal was issued on March 15, 2012, after Applicant notified the Court of his desire to withdraw the appeal. The Remittitur was issued on April 24, 2012.

In his original application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following allegations:

1. Ineffective assistance of Counsel
  - a. "Failure to call witnesses."
  - b. "Failure to object to evidence/Brady violations."
  - c. "Conflict of Interest/exist attorney represented victim in this case."

Through PCR Counsel, Bradley Kirkland, Applicant amended his application to include the following grounds:

1. Applicant's trial counsel, Charles Brooks, III, failed to visit Mr. Abrams a sufficient number of times prior to trial to prepare the case for trial. Applicant retained Mr. Brooks for two murder cases: the "Dubose Siding" case and the "Markeith Ford" case. The Markeith Ford case is the subject of this PCR. Applicant maintains that Mr. Brooks did not meet with him at all concerning the Markeith Ford case. Mr. Abrams became aware of a trial date on the Markeith Ford case the first day of trial. On that day he was transported to the Courthouse and informed his trial would begin that week. At that meeting Mr. Abrams made Mr. Brooks aware of issues 2-4 of this PCR application. Mr. Brooks took no steps to investigate the issues prior to trial.
2. Counsel failed to move to suppress several items introduced at the trial of Mr. Abrams. Mr. Abrams specifically asked Mr. Brooks to make the motions and Mr. Brooks failed to do so.
  - a. Mr. Brooks failed to make a motion to suppress the introduction of the items found as a result of a search of Mr. Abrams car. Mr. Abrams claims that the car was seized without a warrant. A warrant was obtained the next day to search the car.
  - b. Mr. Brooks failed to make a motion to suppress the El Cheapo's store video. Mr. Abrams claims that he is not on the video and it is impossible to see anything clearly on the video and therefore it should have been suppressed.
  - c. Mr. Brooks failed to make a motion to suppress the photo identification made by Tony Lowery.

3. Applicant's counsel failed to investigate and present an alibi defense on behalf of Mr. Abrams despite being informed of the defense by Mr. Abrams and his mother, Catherine McFadden.
  - a. The murder for which Mr. Abrams was convicted occurred on May 19, 2009. (Transcript pp. 79-80, 116)
  - b. On that night and at that time Mr. Abrams was with his mother and other family members in the Spanish Gardens Apartment complex.
4. Counsel failed to call witnesses that would have discredited the testimony of the co-defendants at Mr. Abrams' trial and failed to properly cross examine the witnesses called by the state at trial. The primary witnesses against Mr. Abrams were Tony Lowery and Frederick O'Neal Owens. Owens and Lowery claimed that they were with Mr. Abrams at the time of the murder. (Transcript 232-234, 303-306)
  - a. Both witnesses claimed that Terrance Lemon was with them during the murder and that he participated in the crime. (Transcript pp. 219-238, 261-276, 290-291, 296-299, 303-305; 322-323, 326-329, 334). Mr. Lemon was accused of setting up the robbery and providing a gun for the robbery. Mr. Lemon was never charged in the offense. Mr. Lemon denies that he was present during the offense or that he was involved in any way with the offense. Mr. Lemon was not called as a witness at Mr. Abrams' trial.
  - b. At trial, Tony Lowery claimed that Steve Witherspoon saw Mr. Abrams after the robbery with a large block of marijuana that he had stolen from Markeith Ford. (Transcript pp. 308-310). Steve Witherspoon was also with them just prior to the robbery at El Cheapo's gas station. (Transcript p. 296). Steve Witherspoon was not interviewed or called as a witness and denies being involved in the case.
  - c. Tony Lowery provided two separate written statements to the police. In the first statement Mr. Lowery claimed that Mr. Witherspoon picked him up on the way to Fred Owen's house. They went to Lee's Grocery (aka El Cheapo's) to pick up a friend of Witherspoon named JuJu. Maurice and two of his friends were there. (Presumably Terrance Lemon and Frederick Owens). Lowery went to the restroom and when he returned Maurice and the two others were gone. Moe (aka Maurice) called Witherspoon's phone and told them to meet up at Gate gas station. When they arrived at Gate Witherspoon had to leave to take his kids home. Maurice asked Lowery to ride with him because he was feeling sleepy and needed to take the two others home. They then did the robbery but Lowery was not ever told there would be a robbery. Two days later Lowery was with Witherspoon. Maurice called Witherspoon's phone and asked him to come over. They rode over to Maurice's home and showed Witherspoon a big block of marijuana in his trunk they they stole during the robbery/murder.
  - d. In the second statement by Lowery he admitted that he had not told the truth in his first statement. He claimed that Fred Owens, a co-defendant, called him to help with his computer. He walked over to Owens' house. While there Owens said he needed a ride somewhere so Lowery called Witherspoon to pick them up. Witherspoon arrived with Abrams following in his own vehicle. Witherspoon had his kid with him so Owens and Lowery got in Abrams' car and went to El Cheapo's. Lowery went to use the restroom and when he got back Witherspoon was gone. They all got in the car to pick up Terrance Lemon on Harrison Street.

They then went to do the robbery/murder and Lowery knew nothing about it. After the robbery they went down the street and Lowery jumped out the car and called Witherspoon to come get him. He told Witherspoon that, "Your stupid ass cousin just shot someone and I need to get away from him." Witherspoon picked him up. He said 2 days later he saw the brick of marijuana as indicated in his first statement.

- e. Mr. Lowery's testimony was most similar to his second statement although most of the details were omitted.
5. Counsel failed to object to the introduction of several pieces of physical evidence that had not been provided to the defense prior to trial.
    - a. Counsel failed to object to the introduction of the bullet fragments entered into evidence. (Counsel for Applicant believes these items are Exhibit Nos.: 19, 29; Transcript pp. 194-195).
    - b. Counsel failed to object to the gunshot residue and the witnesses that testified concerning the gunshot residue that was found on the jacket. (Exhibit 30, 31; Transcript pp. 376-391).
    - c. Counsel failed to object to the introduction of the red jacket on the basis that it was a Rule 5/Brady violation and it was the result of an illegal search.
  6. Counsel failed to disclose to Applicant a conflict of interest in representing Applicant. Applicant has learned that Mr. Brooks represented George Tomson in a lawsuit against Anthony Nocerino. Nocerino was the victim in the "Dubose Siding" murder case. In that case Mr. Abrams was accused of murdering Nocerino. Applicant believes that the murder of Mr. Nocerino prevented the civil suit from going forward and Mr. Brooks should have made the applicant aware of the potential conflict.

### **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.

**1. Ineffective assistance of counsel for failing to visit Applicant prior to trial.**

This Court finds Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to meet with Applicant a sufficient amount of times prior to trial is meritless. This Court finds credible Trial Counsel's testimony that he visited Applicant at jail. (Tr. p. 155 line 25—p.156 line 2; p. 155 line 7-22). Trial Counsel further testified that there was "a lot of communication" with Applicant's mother as she would call or visit Trial Counsel every day. (App. p. 154 lines 17-24; p. 155 line 18-22). This Court notes Applicant's mother,

Catherine McFadden, confirmed that she was in constant contact with Trial Counsel. (App. p. 116 lines 21-25). Trial Counsel further testified that he hired a private investigator, Benny Webb, who met with Applicant on at least one occasion, to conduct an investigation to Applicant's alleged alibi witnesses and Applicant's co-defendants. (App. p. 156 lines 2-19; p. 158 lines 2-13). Trial Counsel stated that he discussed the various aspects of the case, the strengths of the State's case, and potential trial strategy. (Tr. p. 158 line 17—p. 159 line 16).

This Court finds that Trial Counsel met with Applicant and his family members on several occasions prior to trial. This Court notes that “even if the meetings were brief, this fact along is not indicative of inadequate trial preparation.” See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008). Based off of the forgoing, this Court finds Applicant failed to prove that Trial Counsel was deficient in his alleged failure to meet a sufficient numbers of times prior to trial.

Additionally, this Court finds Applicant has failed to present any credible evidence or argument as to how Trial Counsel's alleged lack of preparation prejudiced him. This Court notes Applicant argues that additional meetings would have led to Trial Counsel more fully investigating his alibi witnesses. This Court finds Applicant's argument lacks merit. Trial Counsel stated that his investigator, Benny Webb, investigated Applicant's alibi witnesses and found them not credible. (Tr. p. 158 line 2—p.159 line 16). Trial Counsel further stated that in his experience, “family members...especially daddy's and mama's, tend to not be very credible when it comes to an alibi.” (Tr. p. 158 l ine 23—p. 159 line 2). This Court notes that this is not a situation where Trial Counsel failed to investigate potential alibi witnesses. Instead, Trial Counsel strategically chose not to call Applicant's alibi witnesses after a thorough investigation and determination that they were simply not credible. Therefore, Applicant has failed to show

~~how additional meetings would have changed Trial Counsel's opinion that his alibi witnesses~~  
lacked credibility.

Applicant further claims that additional meetings would have led to the discovery of additional witnesses who could have impeached Frederick Owens and Tony Lowery's trial testimony. In support of his allegation, Applicant presented testimony from Stephen Witherspoon (hereinafter "Witherspoon") and Mary Smith (hereinafter "Smith"). Witherspoon was named by Tony Lowery as a participant in the armed robbery and murder. Witherspoon claimed that he did not see Frederick Owens, Tony Lowery, or Maurice Abrams at all on May 19<sup>th</sup>. (Tr. p. 97 lines 9-20). Smith corroborated Witherspoon's testimony by stating that she was with Witherspoon on May 19<sup>th</sup>. (Tr. p. 101 line 15—p. 103 line 22). This Court finds Applicant's argument that Witherspoon and Smith's testimony would have undermined both Frederick Owen and Tony Lowery's trial testimony unpersuasive. A brief review of the trial transcript reveals that Trial Counsel thoroughly impeached both Frederick Owens and Tony Lowery at trial. The use of both Witherspoon and Smith as impeachment witnesses during trial would have been cumulative at best. This Court further notes that both Witherspoon and Smith are cousins of Applicant.<sup>1</sup> (Tr. p. 99 lines 4-8; p. 195 lines 21-22). Regardless, neither Witherspoon nor Smith's testimony would have had any meaningful impact on Applicant's trial as Trial Counsel thoroughly and systematically impeached both Tony Lowery and Frederick Owens during his cross-examination.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or

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<sup>1</sup> Trial Counsel opined that close family members do not make credible witnesses.

omissions to prove the second prong of Strickland – that he was prejudiced by Trial Counsel’s performance.

**2. Failure to investigate and present alibi defense.**

This Court finds Applicant’s allegation that Trial Counsel was ineffective for failing to investigate and present an alibi defense at trial is meritless. [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691, 104 S.Ct. 2052. “One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable.” Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). In the instant case, Trial Counsel credibly testified that Applicant never brought up the possibility of an alibi defense. (Tr. p. 159 lines 4-16). Trial Counsel explained that the alibi was never a serious consideration because “there was never a situation of [Applicant] saying to [Trial Counsel], hey, man, I know for sure I was at such and such place. And A, B, C, and D, know I was there. That never came across in our conversation...” (Tr. p. 159 lines 6-9). Trial Counsel explained that the only person raising an alibi defense was Applicant’s mother, Catherine McFadden. (Tr. p. 172 lines 11-19). Trial Counsel stated that he spoke with McFadden “about everything,” including the alleged alibi. (Tr. p. 172 lines 20-24).

In addition to speaking with McFadden personally, Trial Counsel stated that he hired Benny Webb to investigate into the possibility of an alibi defense. (Tr. p. 158 line 2—p.159 line 16). Both Applicant and McFadden confirmed that Webb spoke with McFadden. (Tr. p. 20 lines 12-14; p. 59 line 10—p. 60 line 2; Tr. p. 118 lines 2-25). Trial Counsel stated that he and Benny Webb both believed that Applicant’s alibi was not credible. (Tr. p. 158 line 2—p.159 line 16).

Trial Counsel opined that “family members...especially daddy’s and mama’s, tend to not be very credible when it comes to an alibi.” (Tr. p. 158 line 23—p. 159 line 2).

This Court finds Trial Counsel fully investigated the alibis and found them to be not credible. Trial Counsel reasoned that close familial relations do not make credible witness. Trial Counsel further noted Applicant himself never denied being present at the scene of the crime. This Court notes that Trial Counsel’s decision not to call various witnesses at trial because of credibility is a valid strategy. See Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (finding 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”); Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) (finding 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”).

Here, Trial Counsel conducted a thorough investigation into the alibi defense and found it not to be credible. 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). This Court finds Trial Counsel adequately investigated the alibi witnesses, determined that they were not credible, and instead chose the valid strategy of attacking the credibility of Applicant’s co-defendants. Based off of the foregoing, Applicant can show no deficiency on the part of Trial Counsel.

Additionally, Applicant still can show no prejudice as this Court finds Applicant's alibi witnesses Catherine McFadden and Michael McFadden were not credible witnesses based off of their demeanor and presentation during the PCR hearing. This Court notes that both Catherine McFadden and Michael McFadden are close relatives of Applicant. This Court finds that neither of their testimonies would have changed the outcome of trial.

**3. Failure to investigate or call witnesses to discredit the testimony of the alleged co-defendants in the case.**

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to call witnesses to discredit the testimony of the alleged co-defendants is meritless. The Applicant introduced Plaintiff's 6 and 7 into evidence. These were written statements made by Tony Lowery. In each of the statements it is alleged that Witherspoon was with Owens, Lowery, and Abrams just prior to the armed robbery and Murder. Furthermore Owens and Lowery testified at the Applicant's trial that Witherspoon was with Applicant just prior to the robbery and murder. (Tr. p. 222-223; p. 296). Lowery also testified that Witherspoon met with the Applicant and saw the marijuana and money taken during the robbery.

During the PCR hearing Witherspoon testified that on May 19<sup>th</sup>, the day of the murder, he rode with his sister Mary Smith to Manning, South Carolina to purchase a dog. (Tr. p. 92 lines 6—p. 94 line 13). After purchasing the dog, they rode back to his sister's, Mary Smith's, house, where he stayed until the early morning hours of May 20<sup>th</sup>. (Tr. p. 94 lines 14—p.96 line 18). Witherspoon claimed that he did not see Owens, Lowery, or Applicant at all on May 19<sup>th</sup>. (Tr. p. 97 lines 9-20). During the PCR hearing, Smith corroborated Witherspoon's whereabouts on May 19<sup>th</sup> into the early morning hours of May 20<sup>th</sup>.

Applicant argues that Trial Counsel should have investigated and called Witherspoon as a witness to further impeach the testimony of his two co-defendant's Owens and Lowery.

However, this Court notes Trial Counsel's strategy was to impeach and discredit Applicant's co-defendants through other available means. It is apparent from the record that Trial Counsel was able to successfully discredit both of Applicant's co-defendants, Owens and Lowery. (Tr. p. 251—p. 276; p. 321—p.348). In light of Trial Counsel's thorough cross-examination, this Court finds Witherspoon's testimony would have had little impact on the trial itself.

**4. Trial Counsel failed to advise Applicant of a conflict of interest.**

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to advise of a potential conflict of interest is meritless. Applicant explained that the victim in the Dubose Siding case was Anthony Nasareno<sup>2</sup>. Applicant testified that he believed that trial counsel had a conflict of interest because the civil suit against Mr. Nasareno was ultimately dismissed because he was murdered. Applicant stated that he believed that his counsel was upset that Nasareno was murdered and, because of the duty he owed to George Thompson, he failed to put forth the necessary effort to defend the Applicant at his trial. Applicant explained the evidence of the conflict as follows:

Q: All right. So this is a little bit tough to understand, I think, for most people. So you're saying, and I'm trying to reiterate what you just said. So what you're saying is because this person died and it was believed that you were the killer, that then Brooks could not go through with the lawsuit and so he lost money because of this?

A: He felt it was a conflict. And that's why he didn't call my witnesses. And that's why he didn't object to the Brady violations. And that's why he never made my suppressions. This is why I'm here today. (PCR Tr. p. 78)

[ . . . ]

Q: Were there any indications from the way that you and Brooks interacted that gave you the impression that he had turned on you the way you're describing?

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<sup>2</sup> For the purpose of this Order, the PCR Hearing Transcript's spelling of "Nasareno" has been adopted. However, this is the same individual referenced in Applicant's Amended Application as Anthony Nocerino.

A: In my trial, I was trying to speak to him. I was trying to speak to him. He kept throwing his hand in my face. I know he did.

Q: So you're just saying as a human being, you picked up on something concerning his attitude towards you and it changed somehow?

A: Yeah. (PCR Tr. p. 79)

[...]

A: I was prejudiced because of the conflict of interest.

Q: Okay.

A: And if he would have did those things and called my witnesses the results of the trial would have been different, hands down. (PCR Tr. p. 79-80).

Trial counsel was called by the State and he explained his relationship with George Thompson and Anthony Nasareno as follows:

What had happened was, Mr. Thompson and Mr. Nasareno, way before I even got involved with Mr. Abrams, I used to do some real estate closing. They'd asked me to do a closing where they had bought some piece of property. And we closed the transaction. This might have been a year before Maurice was ever involved or was ever even thought of or anything like that. And we did the transaction. And then -- I mean, that was basically it. And then I want to say shortly before Mr. Nasareno got killed, Mr. Nasareno's wife had asked me to look into getting a divorce against him. And Mr. Thompson had said that Mr. Nasareno owed him some money from that transaction, I guess the arrangement that they had, that I wasn't privy to had soured. But Mr. Nasareno technically was just a real estate client. In practicing in the private sector and I'm sure, the Judge probably understands what I'm talking about. You just -- people come in, you do a closing. You don't really have a whole lot of interaction or attorney/client relation with them, except for that particular transaction. That's all I had with Mr. Nasareno. And I think when I did the trial of that case, I told Mr. Abrams about it. But we put that on the record so there was no issue. (PCR Tr. p. 149-150)

Trial counsel further testified that the civil suit was ultimately dismissed because Mr. Nasareno was murdered. (PCR Tr. p. 150-151).

This Court notes that it is well established that the fact that counsel does not advise a defendant of a potential conflict of interest does not affect the constitutionality of a conviction. Jackson v. State, 328 S.C. 345, 354, 495 S.E.2d 768, 773 (1998). Furthermore, the mere possibility of a conflict of interest is insufficient to impugn a criminal conviction. State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005). Additionally, an applicant must show that his counsel actively represented conflicting interest to establish a claim of ineffective assistance of counsel. Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984). “To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance.” Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (emphasis added).

This Court finds Trial Counsel credibly testified that he advised Applicant of any possible conflict of interest. Furthermore, this Court finds that no actual conflict existed between Trial Counsel and Applicant due to Trial Counsel's prior representation of an obscure third party. This Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, this Court notes Applicant failed to present any credible evidence that Trial Counsel's prior relationship with the victims amounted to a conflict of interest. Based off of the foregoing, this Court finds Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Trial Counsel's performance. This Court finds Applicant's 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.

### **CONCLUSION**

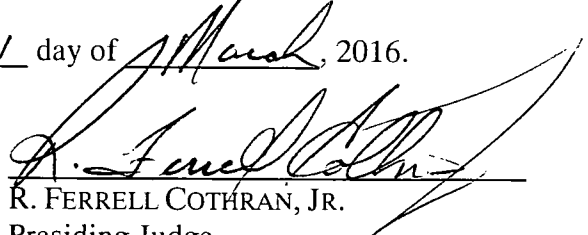
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

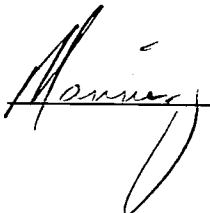
This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, 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 31 day of March, 2016.

  
R. FERRELL COTHAN, JR.  
Presiding Judge  
Third Judicial Circuit

  
\_\_\_\_\_, South Carolina

**BRADLEY M. KIRKLAND, LLC**

ATTORNEY AT LAW

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The Honorable Daniel E. Shearouse  
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