

LAW OFFICE OF  
**TRICIA A. BLANCHETTE**

**RECEIVED**

September 29, 2017  
VIA HAND DELIVERY

SEP 29 2017

S.C. SUPREME COURT

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

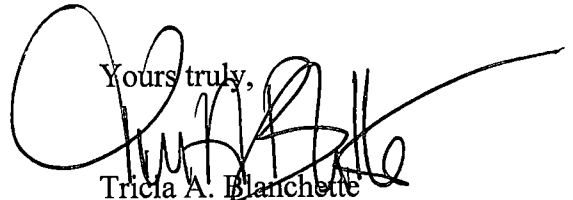
RE: Rashaun Jamine Sobers v. State

Dear Sir:

For filing, attached please find a Notice of Appeal, Certificate of Service and copies of the Order from the underlying PCR Application. I have not been retained to assist Mr. Cook with this Appeal. By copy of this letter, I am providing these document to the Office of Appellate Defense, along with a completed Affidavit of Indigency.

Thank you for your assistance with this matter. Please contact me if any additional information is needed.

Yours truly,



Tricia A. Blanchette  
Attorney at Law

cc: Spartanburg County Clerk of Court (without Orders)  
Office of Appellate Defense  
Valerie G. Giovanoli, Office of the Attorney General  
Rashaun Sobers

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

RECEIVED

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
Post Conviction Relief

SEP 29 2017

S.C. SUPREME COURT

Honorable Robin B. Stilwell, Circuit Court Judge

---

Case No.: 2014-CP-42-0640

---

Rashaun Jamine Sobers, 342645,

Petitioner,

vs.

State of South Carolina

Respondent.

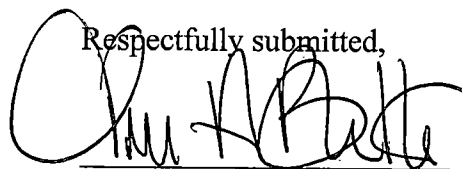
---

NOTICE OF APPEAL

---

Rashaun Jamine Sobers, Petitioner, appeals the Order of Dismissal issued by the Honorable Robin Stilwell on August 2, 2017, which was filed on August 7, 2017. Petitioner also appeals the Order Denying Applicant's Motion Pursuant to Rule 59(a) & (e), issued by the Honorable Robin Stilwell on August 29, 2017. Petitioner, through counsel, received notice of the entry of the Order on September 5, 2017.

Respectfully submitted,



Tricia A. Blanchette  
S.C. Bar No. 74904  
PO Box 2147  
Leesville, SC 29070  
(803) 908-3266

September 29, 2017

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

SEP 29 2017

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
Post Conviction Relief

S.C. SUPREME COURT

Honorable Robin B. Stilwell, Circuit Court Judge

Case No.: 2014-CP-42-0640

Rashaun Jamine Sobers, 342645,

Petitioner,

vs.

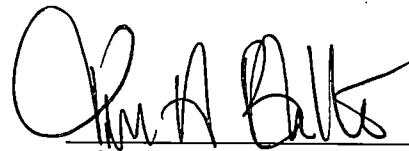
State of South Carolina

Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, hereby certify that a copy of the Notice of Appeal, and accompanying Orders, were hand delivered to Valerie G. Giovanoli, Assistant Attorney General, this 29<sup>th</sup> day of September 2017 at the following address:

Office of the Attorney General  
ATT: Valerie G. Giovanoli, Ast. AG  
1000 Assembly Street, 5<sup>th</sup> Floor  
Columbia, SC 29201



Tricia A. Blanchette  
S.C. Bar No. 74904  
PO Box 2147  
Leesville, SC 29070  
(803) 908-3266

September 29, 2017

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 Rashaun Jamine Sobers, #342645, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 IN THE SEVENTH JUDICIAL CIRCUIT

**RECEIVED**

Case No.: 2014-CP-42-0640 SEP 29 2017

S.C. SUPREME COURT

**ORDER OF DISMISSAL  
 WITH PREJUDICE**

2017 AUG -7 AM 11:15  
 CLERK OF COURT

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Rashaun Jamine Sobers (Applicant) on February 21, 2014. The State (Respondent) made its return on September 8, 2014, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on June 27, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by Tricia A. Blanchette, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant also called Dr. Marjie T. Britz and N. Douglas Brannon (Counsel), Esquire, to testify. Additionally, Respondent called Solicitor Barry J. Barnette, Esquire, to testify. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's direct appeal records, the PCR application, Respondent's return, Applicant's PCR exhibits 1-12 and Respondent's PCR exhibit 1.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the

*AS 7*

November 2009 term of the Spartanburg County Grand Jury for murder (2009-GS-42-6427). Applicant was represented by N. Douglas Brannon, Timothy Ryan Langley, and the late Brac Hylton Turnipseed, Esquires. The former Solicitor for the Seventh Judicial Circuit, Harold W. Gowdy, III, and current Solicitor for the Seventh Judicial Circuit, Barry J. Barnette prosecuted the case. Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. On September 9, 2010, he was found guilty of murder. Judge Cole sentenced the Applicant to imprisonment for a term of life.

A timely notice of appeal was filed. Chief Appellate Defender for the South Carolina Commission on Indigent Defense, Robert M. Dudek, perfected the appeal. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Sobers, Op. No. 5146 (filed June 26, 2013). The Remittitur was returned on July 15, 2013.

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

1. Ineffective assistance of trial counsel, in that;
  - a. Counsel failed to properly object to the prosecution's prejudicial and continued attempts to mislead the jury with references to implied malice,
  - b. Counsel failed to object to the burden shifting jury instructions regarding inferring malice from use of a deadly weapon,
  - c. Counsel failed to fully investigate and present evidence for self-defense,
  - d. Counsel failed to properly object and preserve for appellate review the court's refusal to allow defense's expert to testify,
  - e. Counsel failed to properly object to State's evidence,
2. Ineffective assistance of appellate counsel, in that;
  - a. Appellate counsel failed to present issues of trial counsel's ineffectiveness in the appeal,
  - b. Appellate counsel failed to act as the State's adversary at a critical state of the proceedings,
3. Denial of due process, in that;
  - a. "Prosecutorial Misconduct for shifting the burden and misrepresenting the facts to the court,"
  - b. "Allowed the state to lesson burden or shift the burden to prove elements of crime."

On August 12, 2016, Applicant filed an Amendment to his PCR application to include the

following allegations:

1. Ineffective assistance of trial counsel for failure to conduct a reasonable investigation prior to trial.
2. Ineffective assistance of trial counsel for the handling of the motion to dismiss related to and the admissibility of the video evidence obtained from the State's witness's phone.
3. Ineffective assistance of trial counsel for failure to present a reasonable defense at trial.
4. Ineffective assistance of trial counsel for failure to properly prepare Applicant to testify both in camera and in front of the jury at trial.
  - a. Ineffective assistance of trial counsel for failure to utilize Applicant's testimony at the Jackson v. Denno hearing and during the in camera hearing regarding the gang testimony and evidence.
  - b. Ineffective assistance of trial counsel for failure to properly prepare and utilize Applicant while on the stand at trial.
5. Ineffective assistance of trial counsel for failure to utilize witnesses and/or request a continuance to locate all necessary witnesses.
6. Ineffective assistance of trial counsel related to matters concerning the testimony and evidence related to gang activity and/or gang affiliation of the victim and the State's witnesses, including but not limited to:
  1. Ineffective assistance of trial counsel for failure to obtain a duly qualified expert to assist both pre-trial and during the trial on matters related to gang affiliation, evidence of gang activity and the specific evidence and/or testimony in the case at hand.
  2. Ineffective assistance of trial counsel for failure to properly prepare Applicant to testify to matters related to his knowledge of the gang activity and gang affiliation as it related to self-defense.
  3. Ineffective assistance of trial counsel for failure to make the use of the term "gang" or the testimony and evidence regarding gang activity and gang affiliation relevant through the in camera or direct testimony of Applicant. Specifically, failure to establish that Applicant was "more fearful because the mob was part of a gang," as held by the South Carolina Court of Appeals.
7. Ineffective assistance of trial counsel for failure to object to the Court's opening comments to the jury and closing charge. Transcript p. 90, lines 16-21, 561, lns. 16-20, 568, lns. 14-18. See State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012).
8. Ineffective assistance of trial counsel for failure to fully cross-examine and impeach the State's witnesses.
9. Ineffective assistance of trial counsel for failure to request all reasonable jury charges in favor of the defense.
10. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal.

1. Motion for Dismissal regarding the phone video evidence. Transcript pp. 45-55.
  2. Objection to burden shifting during the State's closing argument. Transcript pp. 551-2.
11. Pursuant to Rule 15(b), SCRCF, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

On September 8, 2016, Applicant made another Amendment to his PCR application to include the following allegation:

1. Ineffective assistance of trial counsel for failure to object to the State's closing argument.

At the evidentiary hearing, Applicant proceeded on all of his claims except he withdrew the allegation of ineffective assistance of trial counsel for failure to utilize witnesses and/or request a continuance to locate all necessary witnesses on the basis that Applicant could not locate or present the testimony of the alleged witness, Greg \*\*\*\*\*, for the PCR hearing.

#### **FACTS ADDUCED AT TRIAL**

On April 21, 2009, a group of young adults were gathered at Catina Smith's home. Ms. Smith's son, Ricky, and her nephew, Phoenix Fielder, lived in her home.<sup>1</sup> Phoenix testified that friends Travoiris "Trey" G\*\*\*\*\*, Shaquila "Quita" G\*\*\*\*\*, Jayquan Hardy, Devon D\*\*\*\*, and Sebastian Jaramillo were at the Smith home along with Phoenix and Ricky. (R. p. 37, line 23- p. 39, line 15). Phoenix testified that Devon hit Sebastian "in a playful way," then a short chase ensued with several people in the Smith car driving to a nearby cul-de-sac in the same general area. (R. p. 39, line 20 - p. 41, line 9). (See also State's Exhibit 4). Devon and Sebastian, now near the cul-de-sac, decided to "tap box." Phoenix used his cell phone to video record what he considered a harmless fight. (R. p. 41, line 9 - p. 42, line 22; p. 45, lines 21 - 24; p. 67, lines 18 - 25). A crowd of approximately fifteen (15) people gathered to watch the fight. (R. p. 69, lines

---

<sup>1</sup> Because there are individuals such as the Smiths who share a last name, Respondent will liberally use first names hereafter for the young adults to avoid confusion and identify the individuals clearly while also remaining in compliance with court redaction rules.

15 - 22). Applicant Rashaun Jamine Sobers, a/k/a "RaRa," was in a burgundy Impala parked in the cul-de-sac. (R. p. 47, lines 4-11). Applicant was not involved with the fight, and did not participate in the fight. (R. p. 47, lines 12-21; p. 72, lines 17-22). Devon and Sebastian's fight began to turn "a little serious," with Sebastian besting Devon, (R. p. 46, line 10; p. 67, lines 1-3), but no one was "knocked down." (R. p. 72, lines 4-8). The two boys walked away from each other, but some members of the group encouraged both Devon and Sebastian to shake hands to put the fight behind them, and they did. (R. p. 46, line 18 - p. 47, line 3; p. 72, lines 2 - 15). Phoenix testified that after the expression of no-hard feelings and reconciliation, and in the midst of everyone laughing and leaving, he, Ricky, Sebastian, Quita and Trey got in the Smith car. Again according to Phoenix, as he was adjusting the music in the car, he heard a gunshot. Ricky "said to get down," prompting Phoenix to look up. Phoenix saw Applicant pointing a gun at the car. Phoenix testified that he ultimately heard "[t]hree to four" shots. Phoenix also testified that he knew Applicant prior to the shooting and was "a hundred percent" sure that it was him in the Impala, and that it was Applicant who fired a gun at the Smith car. (R. p. 47, line 25 - p. 49, line 25). Sebastian was hit just above the left ear, and "slumped over behind ... the driver's seat." (R. p. 51, lines 4-12; p. 238, line 2 - p. 239, line 17).

Phoenix's video was shown to the jury. (See State's Exhibit 4). In addition to the fight, the video shows that someone sat on Applicant's car prior to Sebastian and Devon's scuffle, but there was no incident from that action. (R. p. 65, lines 3-7). Further, Phoenix testified (and the video demonstrates) that Sebastian and Trey approached Applicant, while Applicant was in his car, prior to the scuffle between Sebastian and Devon. Testimony established that Trey asked why Applicant had called Trey's sister a name "a week or two weeks before...." (R. p. 44, line 25 - p. 45, line 20; p. 65, line 23 - p. 67, line 10; p. 340, lines 16-25). However, both Trey and

Sebastian walked away without incident, the scuffle between Sebastian and Devon occurred, and both Sebastian and Trey were in the Smith car before Applicant began shooting. (R. p. 44, line 25 - p. 45, line 20; p. 48, lines 9-25; p. 72, line 23 - p. 73, line 7). (See also State's Exhibit 4).

"Quita" also testified that there were no threats to defendant. She testified that the group in the car was simply talking among themselves when she heard Applicant shout "bust what, ask what," then he began shooting at them. Just prior to the shooting she had heard Jayquan "say now I'm ... going to ask him." R. p. 86, line 2 - p. 89, line 17).

Devon testified that he saw Jayquan walk up to Applicant's car after the scuffle between Trey and Sebastian, but before the shooting. Devon testified that Jayquan "was talking to him for a second. And then he walked back... then I seen - - I just seen fire coming out of" the burgundy vehicle. (R. p. 101, lines 2-23).

Trey testified that, prior to the fight between Sebastian and Devon, he and Sebastian walked over to Applicant's car and questioned Applicant about comments to Trey's sister. Trey testified that he saw Applicant had a gun in his car. Trey testified that Applicant denied calling Trey's sister a name, so the two shook hands and Trey and Sebastian walked away. Applicant was not involved at all in the subsequent scuffle between Sebastian and Devon. (R. p. 114, line 10 - p. 115, line 16; p. 134, lines 16-25). Trey testified that, after the fight, while the group was in the car, he saw Applicant actually back up and shoot toward the car. Applicant fired three or four times. (R. p. 115, line 17- p. 117, line 20).

Jayquan testified that he approached Applicant after the scuffle between Sebastian and Devon, and just before the shooting. Applicant was in his car. Jayquan asked "what was up with him and Trey getting into it. And he told me there wouldn't be any fighting." (R. p. 150, lines 21-25). Jayquan testified that he saw Applicant "reach[] to his right." Applicant stated for a

Handwritten signature or initials, possibly "RA", in black ink.

second time that “there wouldn’t be fighting ... then he pulled a gun out.” Jayquan ran. Applicant fired several times. Jayquan testified he “heard about three gunshots.” Jayquan did not believe the initial exchange with Applicant to be confrontational, and, in fact, thought they were “cool.” However, according to Jayquan, “it just led from that to a bad situation quickly.” (R. p. 151, line 1 - p. 153, line 23).

Ricky also testified that Applicant was not involved in the scuffle between Sebastian and Trey, and that Sebastian and Trey were already in the car before the shots were fired. He also confirmed that Applicant was the only one with a weapon, and that Applicant fired the shot that killed Sebastian. Further, he testified he heard Applicant’s “car speed off” after the shooting. (Rr. p. 165, line 3 - p. 170, line 16)

Sebastian’s body was still in the back seat of the Smith car when officers arrived. (R. p. 22, lines 1-6; p. 191, lines 7-20; State Exhibits 12 and 13). He had been shot “just above the external” canal of his left ear, indicating he was likely not even looking at the gun when he was shot. (R. p. 238, line 2 - p. 239, line 17). Officers found no evidence of any weapon in the Smith car. (R. p. 192, lines 9-16). There was no gunshot residue detected on Sebastian’s hands. The lack of particles indicated he was not close to the weapon when Applicant fired the shot. (R. p. 228, line 9-p. 229, line 17). Examination of the Smith car and scene revealed indications that multiple shots were fired, including markings on the driver’s side of the vehicle and on the asphalt near the car on the same side. (R. p. 204, line 9 - p. 207, line 13; p. 185, line 16 - p. 187, line 16). (See also State Exhibits 8, 9, 15, 16, 20, 21, 23, 24).

Applicant fled the jurisdiction after the shooting. He was apprehended by federal marshals several days later in Charlotte, North Carolina. (R. p. 224, line 10 - p. 225, line 7).

Applicant testified at trial and admitted the shooting. He testified, however, that after the Sebastian/Devon scuffle, Trey approached his car and attempted to engage him in a fight. Applicant testified that Trey “grabbed his shirt” through the driver’s side window and others swarmed the car, opening the passenger side doors. He testified he shot out the front passenger door “because Trey had me.” He denied shooting at anyone. (R. p. 258, line 6 - p. 263, line 22). Applicant testified that he was not scared of Trey after the initial confrontation about Trey’s sister, and did not leave the cul-de-sac. He testified: “I didn’t think they were going to do anything. Greg told them to leave me alone the first time ... They walked away. So I thought maybe everything was okay.” (R. p. 264, lines 14-19; p. 275, lines 12-17). Greg was a friend of Applicant’s who was also in the cul-de-sac. (R. p. 253, line 4 - p. 256, line 14). Applicant admitted speaking with officers after he was apprehended in Charlotte. He did not, however, tell them that he was mobbed or that Trey attempted to pull him from the car. Instead, he, admittedly, falsely stated to the officers that Trey had a gun. He also admitted in his testimony at trial that he made up that story “trying to protect” himself. (R. p. 272, line 9 - p. 274, line 22). (See also R. p. 317, line 12 - p. 318, line 20).

### **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 had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every decision of trial counsel. Rather, the

Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient. Applicant has failed to do so.

### **I. Ineffective Assistance of Counsel**

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). 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 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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 (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.



## A. Gang Evidence

Applicant has made various allegations revolving around Counsel failing to get evidence of gang activity admitted at trial. The Court will address all the “gang” claims in this section:

- 1. Ineffective assistance of trial counsel for failure to obtain a duly qualified expert to assist both pre-trial and during the trial on matters related to gang affiliation, evidence of gang activity and the specific evidence and/or testimony in the case at hand.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Counsel called sixteen-year veteran, retired law enforcement officer, Rocky Watts, who had experience in the field as an undercover narcotics officer, working alongside Spartanburg gangs, and as an officer in the violent crimes unit. Watts also ran his own private investigation company since retiring from law enforcement. It was reasonable for Counsel to believe Watts was qualified to testify as an expert on Spartanburg gang activity. See State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006) (Law enforcement investigator qualified as expert in area of gangs and gang activity.); State v. Liverman, 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009), *aff'd*, but criticized (on unrelated grounds), 398 S.C. 130, 727 S.E.2d 422 (2012) (Law enforcement investigator and officer qualified as experts in field of gang activity); United States v. Thomas, 490 Fed.Appx. 514 (4th Cir. 2012) (Law enforcement detective qualified as an expert in gang history); United States v. Palacios, 677 F.3d 234 (4th Cir. 2012) (Law enforcement sergeant qualified as expert in field of gang activity). Even if Watts had never before been qualified as an expert in gangs, there is a first time for every expert witness and attempting to have him qualified for the first time does not constitute deficient performance.

Additionally, the trial judge did not allow for the qualification of Watts as an expert in gangs because he did not believe gang activity was relevant to the case. Regardless, Watts was

still allowed to proffer his testimony regarding gangs as a lay witness. This proffered testimony, in conjunction with that of five other witnesses, still did not establish the relevancy of gang activity to Applicant's shooting of the victim. Therefore, even if Counsel had been successful in qualifying Watts as an expert to testify on gang matters at the *in camera* hearing, the gang evidence was still inadmissible as not relevant.

At the PCR hearing, Applicant presented Dr. Marjie T. Britz. Dr. Britz testified as an expert, over Respondent's objection, in the general area of gangs. Based on her review of the entire record, including photos from the autopsy and Facebook photos of the victim and eye witnesses who testified for the State, she concluded, similar to Watts's conclusion, that the victim and eye witnesses were members or affiliated with a gang. This Court does not believe Dr. Britz was any more qualified to testify as an expert on gangs in this case than was Rocky Watts. Both possessed an increased knowledge of gangs, albeit from different methods and sources. Regardless of their qualifications, gang evidence was simply not relevant to Applicant's shooting of the victim and therefore was properly excluded. This Court finds Counsel was not deficient in offering Rocky Watts as an expert witness. Even assuming *arguendo* Counsel was deficient in this regard, Applicant has failed to prove any prejudice.

**2. Ineffective assistance of trial counsel for failure to properly prepare Applicant to testify to matters related to his knowledge of the gang activity and gang affiliation as it related to self-defense.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. While preparation of a defendant's testimony is important, it is incumbent upon a defendant to testify to the truth. In this case, Counsel testified he spent much time discussing Applicant's testimony with him. However, once a defendant takes the stand, Counsel cannot control his testimony. Counsel was not permitted to

present evidence of gang activity, and therefore, no amount of preparation on that topic would have benefitted Applicant or affected the outcome.

It was also reasonable not to use Applicant's testimony during the *in camera* hearing in light of the six other witnesses from whom Counsel proffered gang testimony. Counsel thoroughly argued the relevancy of the gang activity to Applicant's self-defense claim and on Applicant's behalf, but the trial court disagreed. Furthermore, it is unlikely that Applicant's self-serving testimony on gang membership during the *in camera* hearing, in addition to the six other witnesses, would have established relevancy or circumvented other evidentiary rules against character evidence and overly prejudicial evidence. See Rules 403 and 404, SCRE. Lastly, Applicant testified in support of his self-defense claim, that a "mob" attacked him, which the jury did not find credible. It is a stretch to say that had Applicant vilified the mob and victim as "gang members," the self-defense claim would have been more credible and thus resulted in a different outcome. Therefore, Applicant has also failed to prove prejudice.

**3. Ineffective assistance of trial counsel for failure to make the use of the term "gang" or the testimony and evidence regarding gang activity and gang affiliation relevant through the *in camera* or direct testimony of Applicant. Specifically, failure to establish that Applicant was "more fearful because the mob was part of a gang," as held by the South Carolina Court of Appeals.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Counsel testified he had been instructed multiple times by the trial judge that he was not permitted to say or elicit from a witness the word "gang" before the jury and doing so would result in a mistrial. Under this order, it was reasonable for Counsel to advise his client to use the word "mob" in lieu of "gang" during his testimony. Counsel was not deficient in this regard. Furthermore, this Court disagrees with Applicant's assertion that membership in a gang would have strengthened his testimony in

support of self-defense that he was attacked by a mob of people. The jury was still presented with evidence that:

- After firing his gun, Applicant immediately fled the scene of the shooting, never calling 911.
- Applicant fled South Carolina to Charlotte, North Carolina.
- Applicant claimed he lost his cell phone at the scene of the shooting. Applicant's phone was turned off and never located after a search of the scene. Applicant did not help law enforcement locate the phone either.
- Applicant testified that he used the phone of a friend's neighbor to call his friend after the shooting. Applicant did not know the name of the owner of the phone he used. Therefore, law enforcement did not have the ability to corroborate this story with phone records.
- Applicant did not know the name of the two men who he claimed chauffeured him to Charlotte, North Carolina. Nor did he remember what kind of car he rode in to North Carolina.
- Applicant testified he turned himself in, but was impeached during cross examination based on the fact that the US Marshall Service and Spartanburg County Police went to North Carolina, found and arrested him on the street.
- Applicant testified he threw the murder weapon out the window of his friend's uncle's car somewhere in Charlotte, North Carolina. However, he never helped law enforcement locate it or show them where he threw it out.
- Applicant testified that he left his car, from which he fired the fatal shot, in a restaurant parking lot with the keys in the ignition. The car was found by law enforcement in a desolate power line field, abandoned with no license plate. Applicant testified that he assumed someone stole it and took it to the field, however, the only thing missing from his abandoned car was the license plate and not his aftermarket stereo or 22" chrome rims.
- Applicant gave an inconsistent statement to law enforcement following his arrest. At the time of the statement, Applicant instructed the investigator to draw a diagram of the scene to his specifications. When the investigator began to ask why his story and diagram did not match the evidence, Applicant requested an attorney.
- Applicant's first story to law enforcement was that Trey attacked him with a gun and the gun accidentally went off.
- At trial, Applicant testified that a "mob" attacked him so he reached for his illegally purchased gun and fired through his passenger door, which had been opened by a member of the mob. The bullet did not hit a member of the mob that presumably would have been coming into the passenger side or around his vehicle, but travelled out his passenger side door, across the cul-de-sac, into the car in which the victim sat and into the victim's head.

- Applicant claimed his friend, Greg \*\*\*\*\* (Little Greg) was there and had witnessed everything. However, Little Greg, could not be located to testify at trial.<sup>2</sup>
- Applicant admitted, numerous times, that he lied to law enforcement to avoid going to jail.
- Applicant testified the victim accompanied Trey in approaching his vehicle to confront Applicant about calling Trey's sister a bad name. Thereafter, the two walked away and the victim proceeded to have a physical fight with another boy. Applicant testified he was not part of this other fight. Applicant claimed the same mob surrounding the fight then attacked his car as Trey tried to pull him out of his car. However, the victim, who showed a propensity for violence in confronting Applicant the first time and engaging in a physical fight with someone else, then went back to sit in the car while the rest of mob attacked Applicant.
- Six eye-witnesses testified Applicant shot at the car in which the victim sat with no provocation. Applicant was the only person who testified he reacted in self-defense from an attack.

Applicant's self-defense claim was simply not credible. Applicant has failed to prove how presenting evidence that the members of the mob were in a gang would have made his self-defense story more credible. Applicant asserts that the gang membership strengthened the reasonableness of his fear of being attacked, however, this argument is not persuasive. The mob attack was not credible, regardless of gang membership or affiliation. Applicant has failed to prove prejudice resulting from any alleged deficiency.

This Court notes that not only was Counsel not deficient in his attempts to admit gang evidence, he scrupulously attempted to admit gang evidence on three separate occasions during the trial. First, he made a pre-trial argument for admitting evidence of gang activity. (Trial Tr. pp. 71-81). Second, on the following day, Counsel submitted a "Memo in Opposition to the State's Motion in Limine Regarding Gang Activity and Specific Instances of Gang Character Evidence of the Victim"<sup>3</sup> with supporting case law and a brief argument to the trial court. (Trial Tr. pp. 157-158). Third, Counsel requested an *in camera* hearing in which he proffered the

---

<sup>2</sup> Likewise, Little Greg could not be located to testify at the PCR hearing.

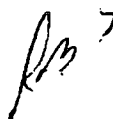
<sup>3</sup> This memo was admitted during the PCR hearing as one of Applicant's exhibits.

testimony of six witnesses, including an attempt to qualify a very qualified witness as an expert in gangs, and further argued for the admission of gang evidence. (Trial Tr. pp. 430-492). Counsel fought long and hard on this issue and went above and beyond the representation that is minimally required of a criminal defense attorney.

Applicant complains that Counsel did not establish relevancy for the introduction of the “gang element.” The record demonstrates that Counsel clearly articulated the basis for relevancy. The trial judge simply disagreed that it was relevant in the matter. This Court takes note of the Court of Appeals’ language in affirming the conviction. That language does not suggest that Counsel was deficient in establishing relevancy. That language simply suggests that one basis for argument was not before the appellate court. However, Applicant has failed to establish that additional proffered testimony would have changed the trial or appellate courts’ rulings. In fact, given the amount of evidence proffered, the amount of evidence entered, and the attempts to establish relevancy by Counsel, it is dubious to suggest that the trial judge would have allowed the evidence under any argument.

#### **B. Failure to object**

Applicant has made a number of allegations revolving around Counsel failing to object at various times during the trial. Counsel’s failure to make any conceivable objection is not deficient *per se*. Objections are calculated to achieve a tactical end in keeping with a party’s theory of the case. Counsel, on the whole, reasonably calculated his objections to achieve the stated end. In any trial, decisions of Counsel can be, and will be, questioned. However, tactical trial decisions that do not serve to acquit the defendant do not, by definition, prove deficiency. In this matter, Counsel’s performance was more than adequate and clearly within the standards



of professional conduct. The Court will specifically address all the “failure to object” claims in this section:

**1. Ineffective assistance of trial counsel for failure to object to burden shifting jury instructions regarding inferring malice from use of a deadly weapon.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant has failed to prove, either by presentation of evidence or from support of the record, that Counsel was ineffective for failing to object to a jury instruction regarding inferring malice from the use of a deadly weapon. No such jury instruction was given in this case.

**2. Ineffective assistance of trial counsel for failure to properly object to the prosecution’s prejudicial and continued attempts to mislead the jury with references to implied malice.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Nothing presented at the PCR hearing or in the record supports the assertion that Counsel was deficient, or Applicant was prejudiced by any deficiency, for not objecting to attempts to mislead the jury with references to implied malice by the prosecution, as no such attempts were made by the prosecution.

**3. Ineffective assistance of trial counsel for failure to object to the Court’s opening comments to the jury and closing charge. Transcript p. 90, lines 16-21, 561, lines 16-20, 568, lines 14-18. See State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012).**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. As an initial matter, State v. Daniels, was decided in 2012 – approximately two years after Applicant’s trial. Our Courts have “never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.” Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993).



“While our preservation rules require that objections to the admissibility of evidence be specific, see State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011), they most certainly do not require clairvoyance.” State v. Tapp, , 385-86, 728 S.E.2d 468, 473 (2012), reh'g denied (July 27, 2012). Counsel is not required to be clairvoyant to be effective, and therefore this Court finds Counsel was not deficient in not objecting to the trial court’s comments about giving both parties a fair and impartial trial. Similarly, trial counsel in State v. Daniels did not object to the “truth and justice for all parties” comment made by the trial judge. Daniels at 255. The Court found the issue was unpreserved, but instructed the trial judge to remove any suggestion that the jury’s duty is to return a “just” or “fair” verdict to all parties in *future* instructions. Id. at 256.

**4. Ineffective assistance for failure to object to State’s closing argument, Transcript p. 558, ln. 18 – p. 559, ln. 15.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant alleges Counsel failed to object when the State violated the Golden Rule in its closing argument. “A Golden Rule argument asking the jurors to place themselves in the victim’s shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice.” State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006) overruled on unrelated grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). It is this Court’s opinion that the State’s closing argument did not rise to the level of a Golden Rule argument. The State did not ask the jurors to put themselves in the shoes of the victim. Rather, the State discussed facts about the victim and commented on how the jurors knew little about the victim, but given their own life experiences, they could imagine what hopes and dreams the victim had at 17 years old. These comments did not “tend to completely destroy all sense of impartiality of the jurors [...or] arouse passion and

RB 7

prejudice. Id. The comments were simply not objectionable. Therefore, Counsel was not deficient by not objecting.

Applicant also failed to prove how any alleged deficiency from not objecting could have prejudiced him. It is unlikely that had Counsel objected to this part of the State's closing, that the result of the trial would have been different, as there was overwhelming evidence of guilt.

**5. Ineffective assistance of counsel for failure to properly object and preserve for appellate review the court's refusal to allow defense's expert to testify.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. As an initial matter, the trial court did not allow the defense's expert to be qualified as an expert or to testify about gang related matters. This ruling occurred during an *in camera* hearing in which Counsel proffered testimony from Watts regarding local gangs. Watts could not testify as an expert witness in gangs because the trial court found gang association or activity was not relevant. Unless and until that ruling was reversed, whether the expert may have been qualified to testify on gang activity is of no consequence. Despite this, Counsel did preserve the issue of inadmissibility of gang evidence and the refusal to allow Watts to testify as an expert. In fact, these two issues were precisely the ones briefed on appeal and addressed by the Court of Appeals. Therefore, Applicant has failed to prove Counsel was deficient in failing to preserve this issue for appellate review.

**6. Ineffective assistance of counsel for failure to object to the State's evidence.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Additionally, this Court finds this allegation is overly broad and vague. To the extent Applicant includes this allegation as a "catch-all" claim, this Court finds such a claim inappropriate for PCR. The Uniform Post-



Conviction Procedure Act requires applicants to "*specifically* set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985). (Emphasis added.) Applicant's trial lasted three days; the State presented a copious amount of evidence. Applicant fails to prove Counsel was deficient or that Applicant was prejudiced for not objecting to any specific part of the State's evidence.

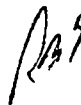
### **C. Trial Preparation**

Applicant has made several allegations revolving around Counsel's preparations for trial. The Court will address these "trial preparation" claims in this section:

**1. Ineffective assistance of trial counsel for failure to conduct a reasonable investigation prior to trial.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant's claim that Counsel failed to investigate the case is contradicted by the record of the trial. Three attorneys represented Applicant at trial, and all were well-prepared. Counsel Turnipseed's opening argument at the start of Applicant's trial coincided with the version of the facts as given to him by Applicant. (Trial Tr. p. 100). Counsel Brannon testified he met with Applicant dozens of times in which they reviewed discovery, discussed Applicant's version of events, discussed trial strategy, and prepared Applicant to testify. Counsel Brannon also went to the scene of the crime with his investigator, Pete Hice. The record is replete with demonstrations of just how well Counsel had investigated and how well-prepared they were.

Applicant claims that Counsel waited until the last minute to send his investigator to the scene of the shooting, during trial, to reenact Applicant's car exiting the cul-de-sac. Counsel also asked the judge to allow the jury to go to the scene. (Trial Tr. p. 431). That request was denied, so Counsel sent Investigator Hice to the scene to perform the cul-de-sac turn. Counsel testified



that his reason for doing this was because Investigator Lorin Williams was asked about how a car could exit out of the cul-de-sac as Applicant had described. Investigator Williams testified that a vehicle would not be able to exit out of the cul-de-sac as Applicant described he did without backing up at least once. (Trial Tr. pp. 426-427). Investigator's mid-trial re-enactment was able to disprove this assertion. Sending his investigator out to the scene during trial was not a sign of lack of preparation, but rather scrupulous advocacy to cover all bases despite a difficult case to try. Therefore, Applicant has failed to show Counsel was deficient in his preparation and investigation of Applicant's case.

**2. Ineffective assistance of counsel for failure to properly prepare Applicant to testify both *in camera* and in front of the jury at trial.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant claims Counsel was ineffective because he failed to utilize Applicant's testimony at the Jackson v. Denno hearing. At the Jackson v. Denno hearing, Investigators Bryant and Williams testified that Applicant was advised of his Miranda rights and signed a waiver form. Applicant proceeded to give a statement to investigators and instructed them to draw a diagram of the scene. The investigators testified that when they started asking for more detail and pointing out inconsistencies in Applicant's story, Applicant requested an attorney and the questioning ceased. Applicant did not testify during the hearing. Counsel testified at the PCR hearing that he did not put Applicant on the stand to testify because Counsel never had any indication that Applicant's statement to law enforcement was not voluntary. Counsel also testified that he wanted the diagram made with Applicant's statement because he believed the diagram supported Applicant's trial testimony about the mob attack and the manner in which he shot toward the victim's car.



This Court finds Counsel was not deficient in not calling Applicant to testify during the Jackson v. Denno hearing. Counsel had no reason to offer Applicant's testimony nor has Applicant shown how his testimony would have changed the outcome of the case, or even the Jackson v. Denno hearing. Furthermore, Counsel made a strategic decision that he wanted the statement admitted because the diagram supported Applicant's version of events. This Court also finds Applicant was not prejudiced by this strategic decision.

Applicant also contends Counsel was ineffective for failing to properly prepare him for cross examination. At trial, Applicant testified he had never been in trouble before. This allowed the State to impeach Applicant based on a 2007 arrest. At the PCR hearing, Applicant testified he had been arrested, but not convicted. Counsel testified he met with Applicant dozens of times. In those meetings, Counsel prepared Applicant as best as he could. Counsel testified that he cautioned Applicant on multiple occasions not to bring up anything about his criminal history. Unfortunately, Counsel cannot control the witness's testimony once he or she takes the stand. No amount of preparation can avoid any potential, damaging testimony. Applicant's assertion to the contrary is without merit. Applicant also admitted multiple times during cross examination that he lied to law enforcement to avoid jail. Counsel admitted that no amount of preparation can prepare a defendant for a cross examination by Trey Gowdy. Counsel also testified he did not object when Solicitor Gowdy was hammering on the fact that Applicant lied to the police, because objecting to the State's revelation that Applicant lied looks bad to a jury. This is an accurate assessment and a sound strategic decision not to have objected. Counsel was not deficient for withholding his objection.

Handwritten signature or initials, possibly "R. B. S.", written in black ink.

#### **D. Trial Performance**

Applicant has made various allegations revolving around Counsel's performance at trial.

The Court will address all the "trial performance" claims in this section:

**1. Ineffective assistance of trial counsel for the handling of the motion to dismiss related to and admissibility of the video evidence obtained from the State's witness' phone.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant claims Counsel was ineffective in his handling of the pre-trial motion to dismiss based on videos recovered from an eye-witness's cell phone where the cell phone was never provided to the defense to analyze. Counsel testified that he was provided with two videos in discovery that were taken from the State's witness's cell phone. Counsel testified, and the record demonstrates, that Counsel argued he was entitled to the entire cell phone so that he could retain an expert to analyze the phone for additional videos that could potentially exonerate Applicant. Counsel cited to State v. Jackson<sup>4</sup> in support of his argument. The trial judge found the cell phone itself was not evidence and that Applicant could not establish there was any exculpatory or material evidence on the phone and denied Applicant's motion. (Trial Tr. pp. 54-55).

Counsel made the best argument possible and cited the only favorable case available to him. However, this Court agrees with the trial court in that the cell phone used to record the videos was not evidence. The videos recorded were the evidence and were provided to Applicant. Counsel was not deficient in his handling of the motion to dismiss. Furthermore, the videos actually strengthened Applicant's self-defense claim in that they showed the victim beating up another young man minutes prior to the shooting.

---

<sup>4</sup> 302 S.C. 313, 396 S.E.2d 101 (1990).

**2. Ineffective assistance of counsel for failure to present a reasonable defense at trial.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Once again, this Court finds this allegation is overly broad and vague. At the PCR hearing, Applicant claimed this allegation was a “catch-all” claim; this Court finds such a claim inappropriate for PCR. The Uniform Post-Conviction Procedure Act requires applicants to “*specifically* set forth the grounds upon which the application is based.” S.C. Code Ann. § 17-27-50 (1985). (Emphasis added.) Counsel presented the best defense based on the version of facts as told to him by Applicant – self-defense. Based on Applicant’s testimony, there is no other valid defense for the shooting. Counsel would have had to alter Applicant’s story to support any other defense. Additionally, Applicant has failed to present evidence of any other reasonable defense Counsel failed to pursue.

**3. Ineffective assistance of counsel for failure to properly prepare and utilize Applicant while on the stand at trial.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. At trial, Applicant testified on direct that he shot the victim with an illegally purchased gun. Counsel asked questions to Applicant on direct examination to reveal that Applicant had purchased the gun because of multiple burglaries to his home and other homes within the neighborhood. Counsel testified the reason for bringing out the fact that Applicant owned an illegal gun during direct examination was his way of getting “out in front of the bullets,” instead of that fact coming out on cross-examination. Counsel’s proactive approach was indeed sound and not deficient.

Handwritten signature or initials, possibly "RB" with a flourish.

**4. Ineffective assistance of counsel for failure to fully cross-examine and impeach the State's witnesses.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. There is no indication from the record or the evidence presented at the PCR hearing that Counsel failed to fully cross-examine and impeach any of the State's witnesses. Additionally, Counsel testified that he spent days going over discovery and statements made by the State's witnesses for the purpose of cross-examining and impeaching them. Counsel testified that cross-examination is the most fun part of a trial. This testimony was credible and was clearly demonstrated at trial. This Court finds Counsel was well prepared to cross-examine and impeach the State's witnesses and executed those tasks with precision and professionalism.

**5. Ineffective assistance of counsel for failure to request all reasonable jury charges in favor of the defense.**

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant claims Counsel was ineffective for not requesting a jury charge on "prior difficulties." On the record, Counsel requested a charge on self-defense and the lesser included offenses of voluntary and involuntary manslaughter. At the PCR hearing, Counsel recalled including a written prior difficulties charge request to the court, but no such request was made on the record. As to prior difficulties, Applicant testified at trial that there were no prior difficulties between him and the victim or the rest of the group present at the shooting. He testified that the victim and Trey approached his car and Trey simply asked Applicant why Applicant called Trey's sister a name. (Trial Tr. p. 340, lines. 24 – 25). Applicant testified that Trey and the victim did not threaten him and he was not



scared because Trey simply asked about his sister and then Little Greg calmed<sup>5</sup> the situation. (Trial Tr. p. 341, lines. 6 – 20; p. 360, lines. 12 – 17; p. 360, lines 25 – p. 361, lines 3; p. 371, lines 21 – p. 372, lines 3). Applicant did not feel the need to leave after the harmless encounter. (Trial Tr. p. 361, lines 4 – 8; p. 372, lines 4 – 16).

It was Applicant's own testimony at trial that revealed no basis for a jury instruction on prior difficulties. According to Applicant, Trey and the victim non-threateningly asked Applicant why he called Trey's sister a name weeks before. Prior to this encounter, Applicant did not personally know either Trey or the victim. Because the facts did not support a charge on prior difficulties, whether Counsel actually made such a request off the record is irrelevant. This Court finds Counsel was not deficient in this regard. Furthermore, Applicant cannot prove he was prejudiced by a lack of a prior difficulties jury instruction.

#### **E. Appellate Counsel**

Applicant has made allegations revolving around Appellate Counsel's performance. The Court will address these "appellate counsel" claims in this section:

- 1. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal; specifically the motion to dismiss regarding the phone video evidence and the burden shifting during the State's closing argument.**

This Court finds that Applicant has failed to meet his burden in proving Appellate Counsel was deficient or that he was prejudiced by any deficiency.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Appellate counsel has a professional duty to choose among potential issues

---

<sup>5</sup> The transcript reflects that Greg "calmed" the situation, though Applicant admitted in his testimony that there were no threats or acts of violence, and further admitted that he did not fear that "they were going to do anything."

according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Ibid.

Applicant claims Appellate Counsel was ineffective for failing to brief the issue of the denial of Applicant's pre-trial motion to dismiss. As discussed above, Counsel made a pre-trial motion to dismiss based on the State failing to turn over a cell phone used by an eye witness to film events leading up to the shooting. The trial judge found the cell phone itself was not evidence and that Applicant could not establish there was any exculpatory or material evidence on the phone and denied Applicant's motion. (Trial Tr. pp. 54-55). In his affidavit<sup>6</sup>, Appellate Counsel explains his reasons for not briefing the issue of the motion to dismiss. These reasons include the likelihood of success on that issue, the defense had not shown bad faith as to the returning of the cell phone to its owner, that any assertion the phone contained exculpatory evidence was speculative, the phone owner who filmed the videos was present to testify, the consideration of the ultimate penalty of dismissal and the reasonableness of the judge's denial of

---

<sup>6</sup> State's Exhibit I admitted at the PCR hearing was an affidavit by Appellate Counsel, Robert Dudek.

the motion. This Court agrees with Appellate Counsel that the issue was not likely to be successful. Therefore, Appellate Counsel was not deficient for not raising the issue on appeal.

Applicant also claims Appellate Counsel was ineffective for failing to raise the issue of burden shifting during the State's closing argument. Counsel objected when the State commented on Applicant's failure to present Little Greg as a witness to support Applicant's version of events. (Trial Tr. p. 552). Appellate Counsel stated in his affidavit that this would have been improper argument had the defense not put up witnesses in its defense. See State v. Bamberg, 270 S.C. 77, 81, 240 S.E.2d 639, 640 (1977) ("While this Court has indicated "grave doubt" about the propriety of a charge on the drawing of an adverse inference from failure to produce a material witness, we have held it to be proper argument for an attorney") (citations omitted). Appellate Counsel elaborated he did not believe it was improper commentary since it was not commenting on Applicant's right to remain silent or his right to put the state to its burden of proof without putting up a defense. Appellate Counsel further claims the standard for reversal of even a very bad closing is high. This Court finds Appellate Counsel's reasoning for not briefing this issue not only reasonable, but sound. Therefore, Appellate Counsel was not deficient.

### CONCLUSION

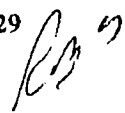
The remainder of Applicant's allegations are without merit. Applicant essentially questions each and every action or inaction of trial counsel. A Post-conviction relief application is not a venue for second-guessing decisions of trial counsel. Applicant has the burden of proving by a preponderance of the evidence that Counsel was deficient and that the deficiency was prejudicial. Applicant has failed to do so.

This Court finds that Applicant has failed to prove any deficiencies on the part of trial or appellate counsel and further, Applicant has failed to prove any prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations 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 also finds that Applicant failed to present evidence as to the other allegations, and thus, this Court deems the other allegations abandoned.

*[Remainder of page left blank intentionally]*

2017 AUG -7 AM 11:16  
11 HOPE BLAQUILL  
CLERK OF COURT

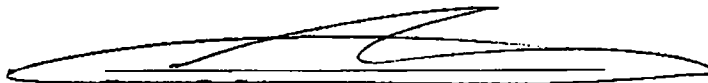


This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRPC. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 2 day of Aug, 2017.



ROBIN B. STILWELL  
Presiding Judge  
Seventh Judicial Circuit

GREENVILLE, South Carolina

2017 AUG -7 AM 11:16  
CLERK OF COURT  
JAMES C. BLACKALL

# Spartanburg County

Spartanburg County Court House  
180 Magnolia Street  
P. O. Box 3483  
Spartanburg, SC 29304-3483

Phone (864) 596-2591  
Fax (864) 596-2239



**M. Hope Blackley**  
Clerk of Court

August 7, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7<sup>TH</sup> JUDICIAL CIRCUIT

Rachana Janine Sobers  
# 342645  
Applicant

CASE # 2014CP42-640

VS  
State  
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Ord. Dismissal w/ prejudice  
in this action dated 8-2-2017 on 8-7-17

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Bessina Puruse  
Celina Oliva  
Tricia Blanchette  
\_\_\_\_\_

8-7-17  
(Date)

Corrie Searcy  
(Signature)

LAW OFFICE OF  
**TRICIA A. BLANCHETTE**

August 16, 2017

Spartanburg County Clerk of Court  
ATT: Common Pleas  
180 Magnolia Street, Ste. 500  
Spartanburg, SC 29306

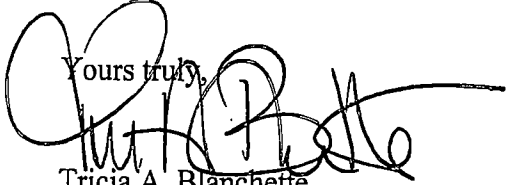
RE: Rashuan Sobers v. State, Docket No.: 2014-CP-42-0640

Dear Sir or Madam:

For filing, I have enclosed an original and one copy of a Motion Pursuant to Rule 59, SCRPC. Upon filing, please return the copy to my office in the enclosed envelope.

By copy of this letter, I am sending a copy of this Motion directly to the Honorable Robin B. Stilwell.

Thank you for your assistance with this matter, and please feel free to contact me if you need any additional information.

Yours truly,  
  
Tricia A. Blanchette  
Attorney at Law

cc: Honorable Robin B. Stilwell  
Valerie Garcia Giovanoli, Assistant Deputy Attorney General  
Rashaun Sobers

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SPARTANBURG )  
 )  
Rashaun Jamine Sobers, )  
 )  
Applicant, )  
 )  
vs. )  
 )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

**ORDER DENYING APPLICANT'S  
MOTION PURSUANT TO  
RULE 59(a) AND 59(e)**

C. A. No.: 2014-CP-42-0640

This matter comes before the Court pursuant to the Applicant's Motion dated on or about August 16, 2017, pursuant to Rule 59(a) and 59(e) of the South Carolina Rules of Civil Procedure. After having had the opportunity to carefully review the Motion, this Court respectfully denies the same.

**AND IT IS SO ORDERED.**

  
ROBIN B. STILWELL

August 29, 2017  
Greenville, South Carolina

