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September 30, 2017

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: James R Rose, 2015-CP-10-3795

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Horry County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc: Megan Harrigan Jameson, Esq. James R Rose 293938.

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable William H. Seals Jr., Circuit Judge

Case No.: 2015-CP-10-03796

James R. Rose 293938.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner James R. Rose appeals the Honorable William H. Seals, Jr's. September 6, 2017 Order of Dismissal. Undersigned counsel received notice of entry of the order on September 25, 2017. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

August 30, 2017

Megan Harrigan Jameson, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

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APPEAL FROM CHARLESTON COUNTY

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PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Megan Harrigan Jameson , Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this October 2, 2017.

James K Falk
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Charleston, SC 29402

CC
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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
James R. Rose, SCDC No. 293938, Applicant, v. State of South Carolina, Respondent.	Case No.: 2015-CP-10-3796 **ORDER OF DISMISSAL**

FILED
2017 SEP 15 AM 11:11
JULIE J. ARENDS
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed July 7, 2015, by James R. Rose (Applicant) alleging claims of ineffective assistance of trial and appellate counsel, prosecutorial misconduct, and violation of due process. Respondent made its Return on February 18, 2016, requesting an evidentiary hearing be held. Thereafter, on January 4, 2017, Applicant, through counsel, filed an amended application.

An evidentiary hearing into the matter was convened January 10, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Assistant Attorney General Alicia Olive of the South Carolina Attorney General's Office appeared on behalf of the State. Applicant testified on his own behalf and testimony was presented from trial counsel and appellate counsel.

This Court had before it Applicant's trial transcript, Applicant's appellate records, Charleston County Clerk of Court's records regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the Charleston County Clerk of Court records for this current proceeding. After reviewing the record in its entirety, along with the testimony and evidence presented at the evidentiary hearings, this Court finds Applicant has

failed to establish any constitutional deprivations or other grounds entitling him to relief and is denying and dismissing this application with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its June 2012 term of court, the Charleston County Grand Jury indicted Applicant for murder (2012-GS-10-3312). Martha Kent Runey, Esquire and Megan Ehrlich, Esquire, represented Applicant.

On December 9, 2013, Applicant proceeded to a jury trial in the Charleston County Court of General Sessions before the Honorable Stephanie P. McDonald, circuit court judge. Assistant Ninth Circuit Solicitors Jennifer Shealy and Jessica Baldwin prosecuted the case. On December 12, 2013, the jury convicted Applicant and Judge McDonald sentenced Applicant to a term of life imprisonment.

Thereafter, Applicant filed a timely notice of appeal. Applicant was represented by Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense—Division of Appellate Defense. Following the submission of briefs, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. James Rose, 2015-UP-286 (Ct. App. filed June 17, 2015). The Remittitur was returned to the circuit court on July 6, 2015.

FACTUAL HISTORY

Applicant James Rose, a/k/a "Onyx," a/k/a "O," a/k/a "Black," visited the victim's mobile home three times on January 23, 2012, attempting to buy marijuana. (Tr. 163-64, 191-92). Clarence Hush, a/k/a "Unk," drove Applicant and a third person to the victim's home for the

second attempted buy. (Tr. 341). At the end of the second visit, Applicant became heated and stated he would be back. (Tr. 163-164; 191- 193; 363-364). Testimony shows Applicant did return a third time that night in a gray, white or silver four-door sedan, later described as a Dodge Neon. (Tr. 194-196; 251; 261). Upon the third visit, which Applicant denies,[1] the victim died as a result of in-home gunfire. (Tr. 203; 525-526; 577). In addition to the victim, his daughter Joy Hill, cousin Antoine "Rick Ross" Aiken, girlfriend Tawana "Nikki" Alston, and neighbor Ishmal Weston were at the home throughout the evening to witness the course of events. (Tr. 191).

At trial, Antione Aiken testified Applicant stayed for a short visit and exited from the back door of the mobile home. (Tr. 197-198). The victim followed behind to lock the door and Aiken heard a gunshot. (Tr. 198). Aiken then saw the victim with a tall male dressed in black with a ski mask covering his face. (Tr. 198-199). Aiken reached for a gun he had stored in the corner, but discovered it was not in its usual place. (Tr. 200). He heard two more gun shots and watched the victim fall. (Tr. 200). Aiken then ran outside, where he heard Applicant state "go to the back room, everything in the back room" and "ya'll hurry up, come on, you're taking too long." (Tr. 202-203). Lastly, he saw the tall masked male exit from the back door and drive away in the car with the Applicant, who was in the driver's seat. (Tr. 204-205). Shortly thereafter, Aiken reported the victim's injuries to a 911 operator. (Tr. 206-207).

Tawana Alston also testified at Applicant's trial. She testified he exited the back door of the trailer to smoke a cigarette and Applicant exited behind him. (Tr. 250). She observed Applicant get into the driver's side of the car. (Tr. 251-252). The man in the ski mask pointed a

[1] Applicant testifies as to staying at his girlfriend Amber's trailer the remainder of that night. (Tr. 564, lines 3-8).

gun at her face told her to freeze. (Tr. 251). She saw a man that she described as "short" and "chunky" run upstairs shooting, and then the tall man with the shotgun also ran up the stairs. (Tr. 252-253). Alston heard three gunshots as she ran away from the trailer to the neighbor's house for assistance. (Tr. 253-254).

Ishmal Weston also testified at Applicant's trial. He testified he was at the trailer when Applicant arrived for the final time. (Tr. p. 166). He testified Applicant got what he wanted and exited through the back door. (Tr. 166-67). Shortly thereafter, he heard Alston scream and saw people enter the house and cause a commotion. (Tr. 168, 170). Weston then saw a black shadow resembling a shotgun pointed at him, then at the victim, and heard a "fuss" while the victim and man fought over the gun. (Tr. 168-169). He tried to exit the house and eventually went into a back bathroom to hide, heard gunshots, and locked the door. (Tr. 170-173). He then heard people ransacking the kitchen and living room area in an apparent search for something. (Tr. 173). He then heard muffles voices asking where the money was located. (Tr. 175). Thereafter, he heard people rummaging through the back room, run out of the house, and speed off in a car. (Tr. 176).

Victim's daughter Joy Hill also testified. She testified she saw Applicant at her father's house earlier in the evening and the two were discussing the rising prices of marijuana, which upset Applicant. (Tr. 363-364). She testified Applicant returned later that same evening and she went to her bedroom to lie down and talk on the phone. (Tr. 365-367). A little while later, she heard scuffling followed by gunshots and then two people ran past her room to the back of the trailer. (Tr. 367-368). She testified she jumped into her bed, pulled up the sheets, and pretended to be asleep. (Tr. 368-369). She testified Applicant and his associates came into her room with two shotguns, pointed one at her head and one at her chest and demanded to tell them where

something was located. (Tr. 370). She testified Applicant was wearing a red shirt, navy blue jacket, dark-colored jeans and a ski mask. (Tr. 370). She testified they then left her room. (Tr. 371). She testified she found her father in the kitchen covered in blood. (Tr. 371-372).

Alston, Aiken, and Hill all provided statements to law enforcement which identified Applicant. (Tr. 210, 376, 378-84). Aiken and Alston also identified Applicant in a photo lineup. (Tr. 214; 259-260). Alston identified the car parked outside the victim's home at the time of the crime as a gray or silver Dodge Neon and provided a description of Applicant's clothing as a "red T-shirt, blue jeans, [and] blue or black Nikes." (Tr. 256, 259, 261).

ALLEGATIONS RAISED

In his *pro se* application, Applicant alleged he is being held in custody unlawfully based on the following allegations:

1. Ineffective assistance of trial counsel for:
    a. failing to argue the insufficiency of proof
    b. failing to request an alibi charge
    c. failing to call witnesses
    d. failing to impeach witnesses
    e. failing to object to the State's impugning of Applicant's character
    f. failing to present an alibi defense
    g. failing to investigate
    h. failing to present evidence to counted State's contention that Applicant was present at the scene of the crime
2. Ineffective assistance of appellate counsel for failing to brief preserved issues on appeal.
3. Prosecutorial misconduct for knowingly using perjured testimony
4. Due process violation for violating Applicant's right to a speedy trial.

In his amended application, Applicant alleges the following additional allegations:

1. Trial counsel failed to object, move to quash the indictment, or include in her motion for directed verdict that there was a material variance between the offense charged in the indictment and the State's proof.

a. The indictment alleged that applicant "did kill and murder Leland Shannon by means of shooting the victim"
b. At the preliminary hearing James Perkins, the reporting officer testified that applicant shot and killed the victim.
c. The State based its entire case against applicant on a "hand of one hand of all" theory.
d. The indictment did was fatally flawed in that it did not provide applicant with notice of the charges against him.

2. Trial counsel failed to call witnesses whose testimony could have exculpated defendant or provided reasonable doubt of Applicant's guilt, namely Sofia Wiley and Everlina Brickman.
3. Trial counsel failed to call alibi witness, Amber Wiley.
4. Trial counsel failed to effectively impeach the direct testimony Tawana Alston. Additionally trial counsel failed to challenge Tawana Alston's story through her cross examination of the investigating officers.
5. Trial counsel failed to object to the Solicitor's improper closing argument at page 636 lines 8-9. The Solicitor's statement misrepresented the witnesses' testimony at page 346 lines 22-24.

In its return, the State moved to dismiss Applicant's allegation that his due process rights were violated by a lack of a speedy trial. At the start of the evidentiary hearing, the State moved to dismiss this allegation as a direct appeal issue improper for post-conviction relief. Applicant consented to the dismissal of this allegation and this Court dismissed this allegation.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant presented testimony from trial counsel, Martha Kent Runey (trial counsel). She testified she has been a public defender for fourteen years. (PCR Tr. 24). She testified she met with Applicant at the jail or by video conference thirteen times and also met with him when he came to the courthouse for various hearings. (PCR Tr. 24-25). Counsel testified Applicant was intelligent and very engaged in his defense. (PCR Tr. 25, 30). She testified they reviewed the elements of murder and the State's burden of proof. (PCR Tr. 25). She testified they reviewed all discovery materials together and she provided him with a

copy. (PCR Tr. 26). She testified she worked with an investigator who attempted to locate and interview all witnesses who had previously spoken to law enforcement and subpoenaed them for trial. (PCR Tr. 26). She testified she discussed possible defenses, including an alibi defense, with Applicant. (PCR Tr. 27). She testified an alibi defense was not viable based on her review of the evidence and her investigation, and accordingly, she did not request a jury instruction on alibi. (PCR Tr. 31-32).

Counsel testified she represented Applicant at his preliminary hearing prior to the grand jury's issuance of an indictment. (PCR Tr. 4-5). She testified at the preliminary hearing, a detective testified Applicant was the shooter based on the statement of eyewitness Tawanna Alston, but his testimony was different at trial. (PCR Tr. 5-8). She testified she was able to cross-examine the detective on these inconsistencies between his preliminary hearing testimony and trial testimony with the use of the preliminary hearing transcript. (PCR Tr. 6-8). Counsel also testified the first responder to the scene did not list Alston as a person present at the scene and that she elicited this testimony on cross-examination. (PCR Tr. 18-19). She testified she also highlighted inconsistencies with Alston's statement and testimony at trial. (PCR Tr. 32-33).

Counsel testified she spoke with the prosecutor by phone in November of 2013 and the prosecutor acknowledged that many of the witnesses' stories did not match up and that it was unclear whether Applicant was the shooter. (PCR Tr. 8-9, 29-30, 34-35). She testified Applicant was indicted for several offenses, but the State only went to trial on the murder indictment. (PCR Tr. 9). Counsel testified she met with Applicant often and spent a lot of time preparing for trial, but that she has no specific recollection of advising Applicant about the "hand-of-one, hand-of-all" theory the State might pursue at trial, but acknowledged she did review all of the elements of

the offense with Applicant. (PCR Tr. 9-10, 32-33). She testified she did not see any reason to challenge the indictment. (PCR Tr. 30).

Counsel testified she used an investigator and one of the witnesses her investigator spoke with was witness Sophia [Amber] Wiley, who had previously given a statement to law enforcement and was included in discovery materials. (PCR Tr. 10-11). She elaborated that Wiley was a roommate of Applicant's and gave a statement to law enforcement that on the night of the shooting, Applicant was at home when she went to bed and when she woke up the next morning. (PCR Tr. 11-12). However, she testified Wiley had taken a Tylenol PM at approximately 11:00 p.m. and then went to bed shortly thereafter. (PCR Tr. 27-28). She testified Wiley would not cooperate with the defense team and said she was out of town on the night of the incident in direct contradiction to her earlier statement. (PCR Tr. 12-14). She testified she did not call Wiley as an alibi witness based on her second statement and her refusal to cooperate with the defense. (PCR Tr. 14-15, 31).

Counsel testified the State presented evidence that the people that shot the victim arrived at the trailer in a silver Neon sedan. (PCR Tr. 15-16). She testified the State presented evidence the Neon belonged to Everlina Brickman, who previously provided a statement to law enforcement. (PCR Tr. 16-17). She testified she tried to contact Brickman numerous times and also sent her investigator to locate Brickman, but was unsuccessful. (PCR Tr. 16-17).

Counsel testified Clarence Hush testified at Applicant's trial and stated he was in a car with Applicant at BP purchasing gas until 11:30 p.m., then dropped Applicant off at his home. (PCR Tr. 19-20). Counsel acknowledged she did not argue alibi in her closing and did not remember why. (PCR Tr. 20-21). She acknowledged the State's theory of the case was that

Applicant later returned to the victim's trailer in retribution for perceived disrespect. (PCR Tr. 21-23). She testified her defense theory was to acknowledge that Rose had been at the victim's home earlier in the day but never came back after he left. (PCR Tr. 30-31). She testified Applicant took the stand and testified accordingly at trial. (PCR Tr. 31). Counsel testified she moved for a directed verdict at the close of the State's case, citing a lack of direct evidence (including DNA or GSR). (PCR Tr. 32).

Applicant testified next. Applicant testified he thought the State would be presenting evidence that he was the shooter and not proceeding forward under a "hand-of-one, hand-of-all" theory until he heard the State's opening argument. (PCR Tr. p. 37-30). He testified he attended the preliminary hearing and heard the investigating officer say Alston reported Applicant shot the victim multiple times after shooting at her. (PCR Tr. p. 38). He denied being at the scene or shooting the victim. (PCR Tr. p. 39, 42). He testified he filed a motion to relieve counsel and for a speedy trial and the trial court granted his speedy trial motion but denied his motion to relieve counsel. (PCR Tr. p. 40). He testified counsel spoke with Wiley and counsel told him Wiley would be available to testify at trial. (PCR Tr. p. 39-40). He testified law enforcement spoke with Wiley, his girlfriend's roommate, in an attempt to confirm his alibi. (PCR Tr. p. 40-42). Applicant testified he did not have a car at the time of the incident, and therefore, Wiley's testimony that he was home before she went to bed and when she woke up the next morning establishes that he was home during the time the crime was committed at approximately 11:30 p.m. (PCR Tr. p. 40-41). He testified he knew Wiley did not want to testify, but he asked for her to be subpoenaed because he felt like he had no other choice. (PCR Tr. p. 42). Applicant testified he reviewed discovery with counsel, but does not think he reviewed a complete copy of

discovery because he kept getting more materials as the case progressed. (PCR Tr. 43). He testified that he took the stand at trial and told his version of events. (PCR Tr. 43).

He testified he wanted appellate counsel to brief preserved issues pertaining to the directed verdict and the "hand-of-one, hand-of-all" jury instruction. (PCR Tr. 48-49). He testified he asked appellate counsel to brief these issues and she responded she did not think they had been properly argued by trial counsel and were meritless. (PCR Tr. 49-50).

Appellate counsel Susan Hackett testified next. She testified she filed a merits brief on Applicant's behalf. (PCR Tr. 53-54). She testified she received a letter form Applicant on October 6, 2014, asking her to brief whether the trial court erred in denying his directed verdict motion and by instructing the jury on "hand-of-one, hand-of-all." (PCR Tr. 53-54). She testified based on her review of the transcript, both of these issues were preserved by trial counsel. (PCR Tr. 54-55). However, she testified she decided not to raise either issue on appeal, explaining:

> Certainly. I will start with the "hand of one is the hand of all". In fact, my notes, and I reviewed those when I received the subpoena, I wrote a note around page transcript 200 through 203. This was the testimony of Antwan Aiken where he talks about specifically hearing Mr. Rose yell, it's in the back room. And then hearing Mr. Rose yell, hurry up.
>
> Those, to me, seem you negate the argument against "hand of one is the hand of all". Additionally, the other circumstantial evidence that seemed to indicate that Mr. Rose may have been involved in some sort of plot to at least robbery an individual in the home involving these other people, I believe that Mr. Aiken also testified to seeing Mr. Rose get in the driver's side of the car in which the tall gentleman, who was masked and had a gun, also got in. And so that was on about page 205 of the transcript. So I did not think that that issue had much merit in light of particularly Mr. Aiken's testimony.

> Concerning the other issue of the directed verdict, I believe my letter laid out exactly why I did not think that issue had merit. Again, going to the standard, any direct evidence or substantial circumstantial evidence tending to show the defendant's guilt, I thought that there was direct evidence in the record, particularly the deceased daughter's testimony. Her first name was Joy. Her last name escapes me at the moment. But she had testified to recognizing the defendant's voice as being the voice coming from one of the masked men inside the home.
>
> And then the circumstantial evidence came from Mr. Aiken and Ms. Alton, who were present in the home and witnesses. And while they never indicated that Mr. Rose had a gun or that, you know, that he shot anyone, their testimony seemed to indicate that Mr. Rose may have been involved in setting up what was going on.

(PCR Tr. p. 55-56). In sum, appellate counsel testified she did not raise either issue because she did not believe either had merit. (PCR Tr. p. 56).

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 hearings. 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 finds 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, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume 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. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. Below are this Court's specific finding regarding each of Applicant's allegations of ineffective assistance of counsel:

Allegation: Failure to challenge the indictment or argue there was a material variance between the indictment and the State's proof

Applicant alleges trial counsel was ineffective for failing to challenge the indictment or argue there was a material variance between the indictment and the State's proof. Specifically, Applicant alleges trial counsel was ineffective for failing to argue the sufficiency of proof, failing to move to object or quash the indictment or include in her motion for directed verdict that there was a material variance between the offense charged in the indictment and the State's proof. Applicant alleges the indictment and preliminary hearing testimony indicated he was the shooter, but at trial the State presented evidence that he participated in the crime and was guilty under a "hand-of-one, hand-of-all" theory alongside other co-defendants. Applicant argues he

was not on sufficient notice of the charges against him or able to prepare a defense because he was unsure what evidence the State would produce against him at trial.

This Court finds this allegation is without merit and must be denied and dismissed with prejudice. The arrest warrant and accompanying affidavit clearly refute this allegation. In this affidavit from Detective J. Perkins signed January 25, 2012, Detective Perkins states as follows:

> The first witness reported that James Reginald Rose came to the residence along with two unknown black male subjects who were waiting in a gray in color vehicle. Witness #1 stated that when she was outside on the porch she saw Rose walk to the vehicle and return wife a gun and pointed it at her head. Rose and the other subjects were brandishing firearms as they entered the residence and that is when she heard three gunshots. The second witness reported that he saw a black male subject dressed in black clothing enter the residence and then shoot the victim. The second-witness reported that he then heard Rose state, 'come on hurry up' and saw Rose along with the other black male enter a gray in color vehicle and leave the scene.
>
> That on January 24, 2012, while at the Charleston County Sheriff's Office both witnesses were separately shown six (6) picture photographic lineups and they positively identified the defendant, James Reginald Rose, as one of the armed assailants who entered the residence at the time of the shooting.

This arrest warrant and accompanying affidavit clearly put Applicant on notice that the State alleged he and two other black males entered the victim's home with firearms brandished and shot and killed the victim. Moreover, Counsel testified she spoke with the prosecutor nearly a month before Applicant's trial and was aware the State would be presenting evidence that Applicant was guilty under a "hand-of-one, hand-of all" theory. This Court finds Applicant had failed to meet his requisite burden of proof and this allegation must be denied and dismissed with prejudice.

Allegation: Failure to call witnesses whose testimony could have exculpated defendant or provided reasonable doubt of Applicant's guilt

Applicant alleges trial counsel was ineffective for failing to call witnesses on his behalf, specifically, Sofia Wiley and Everlina Brickman. However Applicant failed to present either of these witnesses at his evidentiary hearing or otherwise offer any evidence as to what their testimony would have been. Therefore, any assertion that they would have provided favorable testimony is purely speculative.

Consequently, this Court finds Applicant has failed to meet his requisite burden of proof as to this allegation. See Smith v. State, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (Ct. App. 2012) (finding an applicant failed to meet his burden of proof where he failed to present any testimony from the alleged character witnesses at the PCR hearing in order to establish prejudice from the lack of testimony of these witnesses at trial); Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (noting our courts have "repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial"); Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) (holding a PCR applicant's mere speculation as to what the witnesses' testimony would have been cannot, by itself, satisfy the burden of showing prejudice). As Applicant failed to present either Wiley or Brickman, this allegation is denied and dismissed with prejudice.

Allegation: Failure to present an alibi defense, call witnesses in support of an alibi defense, and failure to request an alibi jury instruction

Applicant alleges trial counsel was ineffective for failing present an alibi defense, failing to call Amber Wiley as a witness in support of this defense, and failing to request a jury instruction on alibi. Applicant asserts he was at his girlfriend's home during the time of the murder and roommate Wiley provided a statement to law enforcement that supported this.

Counsel testified she used an investigator that spoke with Wiley, who had previously given a statement to law enforcement and was included in discovery materials, but that Wiley was uncooperative, denied being home on the night in question, and refused to cooperate. Additionally, she testified Wiley's original statement to law enforcement indicated she had taken a Tylenol PM at approximately 11:00 p.m. and then went to bed shortly thereafter. She testified she ultimately elected not to call Wiley as a witness because of her conflicting statements and refusal to cooperate with defense counsel.

"To be successful, [a defendant's] alibi must cover the entire time when his presence was required for accomplishment of the crime." State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (internal citations omitted). "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." Id.

When an applicant alleges counsel was ineffective for failing to present an alibi witness, counsel has a reasonable duty 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) (citing

Strickland, 466 U.S. at 691; Grooms v. Solem, 923 F.2d 88, 90 (8th Cir.1991)). Moreover, when an applicant claims counsel was ineffective for failing to call an alibi witness at trial, the applicant must present the witness at the evidentiary hearing to establish his requisite burden of proof. See Glover v. State, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995) ("In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.").

In the present case, counsel investigated the purported alibi witness identified by Applicant, and after obtaining a second statement from her and determining she was uncooperative and did not establish an alibi, elected not to call her as a witness. Counsel performed effectively regarding Applicant's claims of an alibi. Additionally, Applicant failed to present testimony from Wiley at the hearing, and therefore, cannot meet his requisite burden of proof of establishing any purported prejudice. This allegation is denied and dismissed with prejudice.

Allegation: Failure to effectively impeach witnesses, particularly Tawana Alston

Applicant alleges trial counsel was ineffective for failing adequately impeach State's witness Tawana Alston, the girlfriend of the deceased. Applicant asserts Counsel should have cross-examined her about inconsistencies between her statement to law enforcement and her trial testimony, and should have challenged Alston's statement through the cross-examination of investigating officers.

At the evidentiary hearing, Counsel testified she also highlighted inconsistencies between Alston's statements and testimony at trial. (PCR Tr. 32-33). The record supports this. During trial, Counsel vigorously cross-examined Alston about her initial and subsequent statement to law enforcement and inconsistencies with her trial testimony, such as whether Applicant placed a shotgun in her face, who was the first person she saw on the porch, the number of and descriptions of the men with Applicant, whether Applicant told her to freeze, whether Applicant shot at her, whether or not Applicant's brother was involved in the shooting, and whether she went back into the trailer. (Tr. 263-278). Counsel also got Alston to admit she was not in the trailer at the time of the shooting, was not sure what happened inside the trailer, and did not see the victim get shot. (Tr. 276). This Court finds Counsel effectively handled Alston's cross-examination and was not deficient. This allegation must be denied and dismissed with prejudice.

Allegation: Failure to object to the solicitor's improper closing argument

Applicant alleges trial counsel was ineffective for failing to object to the Solicitor's improper closing argument that misrepresented the testimony of Clarence Hush. Specifically, during closing argument, the Solicitor argued, "But [Clarence] is the one who told you James Rose said I am going to go back and get my respect." (Tr. 636 lines 8-9). At trial, Clarence Hush testified as follows:

Q. But James Rose intended to get his respect back?

A. That's what he said.

Q. Did he say he was going back out there to get his respect back?

A. No, he didn't never say that to me.

(Tr. 346 lines 20-24). Applicant argues the State's closing argument misrepresented Hush's testimony and counsel was ineffective for failing to object.

Closing arguments are a basic element of the adversarial fact-finding process in a criminal trial. Herring v. New York, 422 U.S. 853, 858 (1975). Such arguments serve "to sharpen and clarify the issues for resolution by the trier of fact in a criminal case" and provide both the prosecution and the defense with an opportunity to advocate for their respective positions, to argue for certain inferences to be drawn from the evidence and testimony presented, and to identify the weaknesses in their opponents' positions. Id. at 862. As a result, closing arguments are crucial towards achieving the ultimate objective of the adversarial system of justice in the United States, which is for the correct verdict to be reached in each case. Id.; see also Gardner v. Florida, 403 U.S. 349, 360 (1977) ("[T]he debate between adversaries is often essential to the truth-seeking function of trials[.]").

In presenting a closing argument to the jury, a solicitor—and any other party—must confine the argument to the evidence in the record and the inferences to be drawn from that evidence. State v. Tubbs, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). However, the solicitor is unquestionably permitted in a closing argument to state and discuss the State's version of the testimony, to comment on the weight given to such testimony, and to point out the matters that the jury should and should not consider in arriving at a verdict. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); see State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (" '[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.' " (citations omitted)).

Additionally, the statements of a solicitor at trial "must be carefully tailored so as not to appeal to the personal biases of the jury." Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) (citing Von Dohlen v. State, 360 S.C. 598, 609 S.E.2d 738, 744 (2004)). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. A prosecutor may not urge jurors to convict a defendant in order to protect community values, preserve order, or deter future law breaking. State v. Liberte, 336 S.C. 648, 654, 521 S.E.2d 744, 747 (Ct. App. 1999) (internal citations omitted). In considering the propriety of a closing argument, "[i]t is sometimes difficult to draw the line between proper and improper argument, but counsel's remarks must be confined within the record." State v. Edgeworth, 239 S.C. 10, 14, 121 S.E.2d 248, 250 (1961).

When a challenge is raised to the propriety of a closing argument, the burden rests upon the party raising the challenge to establish that the allegedly improper argument rendered the trial fundamentally unfair. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). On appeal, appellate courts will review the alleged impropriety in the context of the entire record and must determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of the defendant's due process rights. State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003); see State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) ("The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."). In making that determination, " 'it is not enough that the [challenged] remarks were undesirable or even universally condemned.' " Darden v. Wainwright, 477 U.S. 168, 181 (1999) (citation omitted).

In the present case, the challenged portion of the assistant solicitor's remarks, amounting to one sentence, only consisted of a small portion of a lengthy closing argument that properly focused on the testimony and evidence establishing Applicant's guilt. When considered as a whole, the State's closing argument remarks did not render Applicant's trial fundamentally unfair. See Darden, 477 U.S. at 181 ("The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." (internal citations omitted)). See also State v. Plath, 281 S.C. 1, 17, 313 S.E.2d 619, 628 (1984) ("[A]ppellants complain of rhetorical flourishes engaged in by the Solicitor in his summation . . . . An inelegant turn of phrase or momentary lapse of good taste will rarely constitute prejudicial error, nor does robust language necessarily inject an arbitrary factor into a trial such as this one."); cf. Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) ("[T]he prosecutor's remark here, admittedly an ambiguous one, was but one moment in an extended trial and was followed by specific disapproving instructions. Although the process of constitutional line drawing in this regard is necessarily imprecise, we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process."). Accordingly, the State's closing argument was not fundamentally unfair and did not deprive Applicant of his right to a fair trial. See State v. Greene, 255 S.C. 548, 558, 180 S.E.2d 178, 184 (1971) ("[The appellant] was not entitled to a perfect trial, only a fair one."). Therefore, Counsel was not ineffective for failing to object. This allegation is denied and dismissed with prejudice.

Allegation: appellate counsel failed to brief preserved issues

Applicant alleges appellate counsel was ineffective for failing to brief preserved issues on appeal, specifically, whether the trial court erred in denying his directed verdict motion and by

instructing the jury on "hand-of-one, hand-of-all."

Appellate counsel Susan Hackett testified at the evidentiary hearing that she did not brief either issue because she did not believe they were meritorious. Specifically, she testified as follows:

> Certainly. I will start with the "hand of one is the hand of all". In fact, my notes, and I reviewed those when I received the subpoena, I wrote a note around page transcript 200 through 203. This was the testimony of Antwan Aiken where he talks about specifically hearing Mr. Rose yell, it's in the back room. And then hearing Mr. Rose yell, hurry up.
>
> Those, to me, seem you negate the argument against "hand of one is the hand of all". Additionally, the other circumstantial evidence that seemed to indicate that Mr. Rose may have been involved in some sort of plot to at least robbery an individual in the home involving these other people, I believe that Mr. Aiken also testified to seeing Mr. Rose get in the driver's side of the car in which the tall gentleman, who was masked and had a gun, also got in. And so that was on about page 205 of the transcript. So I did not think that that issue had much merit in light of particularly Mr. Aiken's testimony.
>
> Concerning the other issue of the directed verdict, I believe my letter laid out exactly why I did not think that issue had merit. Again, going to the standard, any direct evidence or substantial circumstantial evidence tending to show the defendant's guilt, I thought that there was direct evidence in the record, particularly the deceased daughter's testimony. Her first name was Joy. Her last name escapes me at the moment. But she had testified to recognizing the defendant's voice as being the voice coming from one of the masked men inside the home.
>
> And then the circumstantial evidence came from Mr. Aiken and Ms. Alton, who were present in the home and witnesses. And while they never indicated that Mr. Rose had a gun or that, you know, that he shot anyone, their testimony seemed to indicate that Mr. Rose may have been involved in setting up what was going on.

(PCR Tr. 55-56). In sum, appellate counsel testified she did not raise either issue because she did not believe either had merit. (PCR Tr. 56). This Court finds that Applicant has failed to establish his burden of both deficiency of appellate counsel and requisite prejudice entitling him to relief and that this allegation must be denied and dismissed with prejudice.

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

"Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is 'difficult to demonstrate that counsel was incompetent.'" United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, "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) (citing Jones v. Barnes, 463 U.S. 745 (1983). "For judges to second-guess

reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith v. Robbins, 528 U.S. at 288 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

"To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal." United States v. Mason, 2012 WL 5845807 at *1 (citing Smith, 528 U.S. at 285-86).

This Court finds that Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds that Applicant has failed to show that appellate counsel's performance was deficient, where there is no standard requiring appellate counsel to brief every possible meritorious issue and counsel appropriately raised issues on appeal that she believed were stronger and meritorious on Applicant's behalf. Second, this Court finds Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal had these two issues been raised. As appellate counsel raised meritorious issues on appeal, her performance was in accordance with professional norms and this Court finds that this allegation must be denied.

Allegation: failure to object to the impugning of Applicant's character

Applicant alleges trial counsel was ineffective for failing to object to the State's impugning of his character. Applicant failed to present any testimony to support this allegation. Additionally, a review of the record finds this allegation is without merit. This allegation is denied and dismissed with prejudice.

Allegation: failure to investigate

Applicant alleges trial counsel was ineffective for failing to adequately investigate his case. At the hearing, Counsel testified she worked with an investigator who spoke with or attempted to speak with all potential witnesses. Applicant failed to specifically allege what additional investigation counsel should have undertaken or what the results of such additional investigation would have yielded. Therefore, this allegation must be denied and dismissed with prejudice. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). This Court finds plea counsel's performance was reasonable according to professional standards and his allegations that plea counsel was ineffective must be denied and dismissed with prejudice.

Allegation: prosecutorial misconduct for knowingly using perjured testimony

Applicant alleges the State committed prosecutorial misconduct by using knowingly perjured testimony. Specifically, Applicant contends the investigating officer perjured himself at his preliminary hearing when he testified Applicant was the shooter.

"A conviction obtained by the knowing use of perjured testimony is fundamentally unfair

and must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's judgment. Simpson v. Moore, 367 S.C. 587, 601, 627 S.E.2d 701, 708 (2006) (citing United States v. Bagley, 473 U.S. 667, 678 (1985)). "The knowing use of perjured testimony is subject to the materiality standard of review: 'evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " Id. (citing Bagley, 473 U.S. at 682).

This Court finds Applicant has failed to meet his burden of establishing the State presented or used perjured testimony against him. Moreover, Applicant has failed to show the result of the proceeding would have been different absence the investigating officer's testimony that Applicant was the shooter rather than involved in the murder under a "hand-of-one, hand-of-all" theory. Therefore, this allegation is denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes 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 Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record 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 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:

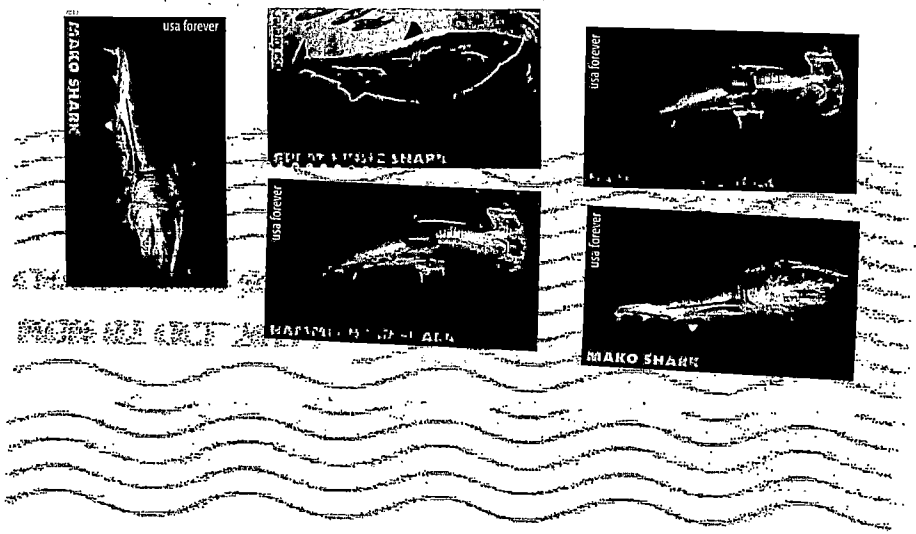
1. This application for post-conviction relief must be denied and dismissed with prejudice; and

2. The Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 6 day of Sept., 2017.

WILLIAM H. SEALS, JR.
Presiding Judge
Ninth Judicial Circuit

Marion, South Carolina



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