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October 2, 2017

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

Re: Jerry L Scantling 259057

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: Ruston Neely, Jerry L Scantling 259057.

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

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OCT 10 2017
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable R. Scott Sprouse, Circuit Judge

Case No.: 2015-CP-07-2010

Jerry L Scantling 259057.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Jerry Scantling appeals the Honorable R. Scott Sprouse's, September 14, 2017 Order of Dismissal. Undersigned counsel received notice of entry of the order on September 28, 2017. A copy of the order on appeal is attached hereto.

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

October 2, 2017

Ruston Neely, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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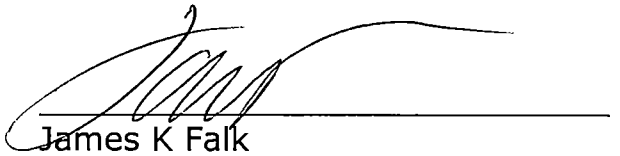
PROOF OF SERVICE

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, Ruston Neely, 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.



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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
THE FOURTEENTH JUDICIAL CIRCUIT

Case no. 2015-CP-07-2010

Jerry L. Scantling, #259057,

v.

State of South Carolina,

Applicant.

ORDER OF DISMISSAL

This Court convened an evidentiary hearing into the matter on February 15, 2017, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Applicant.

Applicant's trial counsel, Matthew L. Walker Counsel, Esquire, and Applicant were present and testified. This Court also had the opportunity to listen to their testimony and rule on their credibility. This Court had before it a copy of the trial transcript, the records of the Beaufort County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter. This Court finds as follows:

I. PROCEDURAL HISTORY

Applicant was indicted by the June 2010 term of the Beaufort County Grand Jury for Possession, Concealing, or Disposing of a Stolen Vehicle 2010-GS-07-1315. Applicant was indicted by the July 2011 term of the Beaufort County Grand Jury for Murder, Possession of a Weapon During the Commission of a Violent Crime, and Armed Robbery. The State was represented by Deputy Solicitor Sean Thornton, Esquire, of the Solicitor's Office for the Fourteenth Judicial Circuit. On February 25, 2013, the Applicant proceeded to a jury trial

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pursuant to which he was found guilty as indicted. The Honorable Carmen T. Mullen sentenced the Applicant to confinement for 5 years for Possession, Concealing, or Disposing of a Stolen Vehicle, life without parole for Murder, 5 years for Possession of a Weapon During the Commission of a Violent Crime, and life without parole for the count of Armed Robbery. The sentences run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v California 378 U.S. 738, 87 S. Ct. 1396 1967. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Scantling, O No. 2015-UP-363 filed on July 15, 2015. The Remittitur was issued on August 3, 2015.

II. ALLEGATIONS

Applicant alleged the following grounds in his application:

1. "Ineffective Assistance of Counsel"
    a. "Abuse of Discretion"
    b. "Plain error"
    c. "Perjury"
    d. "Misrepresentation"
    e. "Failed to investigate"
2. "Prosecutorial Misconduct"
    a. "Shifting the burden of proof, vouch sic"

III. SUMMARY OF FACTS

On the early morning of May 23, 2010, Jerry Scantling Applicant shot and killed the victim, Leonard Green, near the Pinckney Island landing in Beaufort County.

The victim suffered two gunshot wounds. R. 596. The first entered on the left side of the abdomen, went through portions of the small and large intestines, then into the muscle and fractured the right hi R. 596-97. The bullet was recovered from the right hi R. 597. The second gunshot wound was almost in the middle of the back. R. 597. It struck the kidney, the small intestine, and went through the stomach. R. 597-98. The forensic pathologist testified that it

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appeared the victim suffered two scrapes on the head, one on the upper left side of the back of the head, and the other kind of on the back left side of the head. R. 598. There were also abrasions to the victim's nose. R.598-99. Several other lacerations were located on the victim's scalp and in the face. R.599. The pathologist indicated that some of the abrasions and lacerations could have been caused by blunt force trauma from a sharp object or a blunt object with an edge. R. 599.

Several witnesses testified that Applicant was driving a red or burgundy Ford F-150 sometime after the shooting. William Barnes testified that on May 23, 2010, a man stopped by his apartment and offered to sell him the truck. R. 188-89, 195. Barnes noted the man told him that he got the truck from Savannah. R. 192. Barnes also noted that the man requested that Barnes throw some clothes that were in a briefcase into the trash for him, but Barnes refused. R.190-91. In the courtroom, Barnes identified Applicant as the man who attempted to sell him the truck. R. 193-94.

Ishmil Frazier, another resident at the apartment complex, testified that on May 23, 2010, he saw a guy at the complex in a truck that he recognized. R. 202. Frazier also indicated that it was a red Ford truck. R.203-04. In the courtroom, Frazier also identified Applicant as the man he saw driving the truck. R. 205-06.

Derik King testified that he was at the apartment complex on the early morning of May 23, 2010. R. 213-14. He indicated that a red truck pulled in recklessly into the complex. R. 215. King noted that the man driving the truck also attempted to sell the truck. R. 215-16. In the courtroom, King also identified Applicant as the person who was driving the red truck that morning. R. 216-17. King also testified that he saw Applicant driving a black Monte Carlo at a later date. R. 217-18.

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Altovise Green also lived in the same apartment complex as Barnes and Frazier. See R. 228. She saw Applicant cleaning out a big pickup truck in front of a dumpster at the apartment complex around 2:30 a.m. on May 23. R.229-30, 233. Green also noted that she saw Applicant later that morning in a black Monte Carlo that kept breaking down. R. 230. Green also testified that she recalled Applicant had flashed a pistol when he was around a group at some other date. R. 231-32.

Frazier, King, and Green also identified Applicant in photo lineups. R. 394-97. The victim's cell phone records indicated that calls from the phone were placed to a number associated with Donald Cooper and Ramona Coleman between 11:57 m. on May 22 and 2:37 a.m. on May 23. R.390-91, see R. 407-08.

A Hi-Point .45 caliber pistol was recovered from the scene. R. 90, 92. It was stipulated that the gun was stolen from the home of its owners. R. 70, 93. Blood on the firearm was determined to belong to the victim. R. 495-98. The projectile recovered from the victim's body was consistent with being fired by a Hi-Point .45 firearm, but could not be conclusively matched to the firearm that was recovered from the scene. R. 485-86, 487-90.

Several items with the victim's name were recovered from the dumpster at the apartment complex. R. 262-64. A pair of black headphones with Applicant's DNA was recovered from the murder crime scene. R. 171, 257-59, 298, 499-501. The victim's cell phone was located at a Wal Mart in Savannah. R. 266, 338-39. The victim's truck was also found in Savannah. R. 270.

Applicant was arrested in a stolen Monte Carlo from Savannah. R. 299, 379-81. A 1986 Monte Carlo average retail value was $5150. R. 591-92.

Applicant made several statements to both law enforcement and to two individuals at the Beaufort County Detention Center.

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Captain Robert Bromage testified that he interviewed Applicant three times. R. 410. During the first interview, which occurred on May 27, 2010, Applicant initially denied knowing the victim. R.412-13. Applicant eventually admitted to running into the victim twice on the Saturday the victim disappeared, once in the late morning and once between 11 and 12 that night. R. 413. He asserted that he saw the victim at the Wal Mart on Hilton Head. R. 413. The second time would have been within a couple hours of the victim's murder. R. 414. Applicant had suggested the victim was gay and that the victim had made an advance on Applicant. R. 414. Applicant eventually admitted that he had asked for a ride from the victim in the morning meeting, but he did not get a ride from him. R. 414. According to Bromage, he later admitted that he did receive a ride from the victim to an apartment complex. R. 416.

Applicant indicated that when he saw the victim on the night of May 22, the victim was trying to get Applicant to go with him to Ridgeland. R. 415, 417. Applicant also admitted to using the victim's cell phone. R. 417. He did not provide law enforcement with the name of the person he called. R. 417, 418. Applicant did admit to stealing the Monte Carlo in Savannah. R. 416.

In the second interview, conducted on May 28, 2010, Applicant identified the victim's truck in a photograph. R. 419. Applicant also identified the victim in a photograph. R. 419. Applicant again admitted that he stole the car from Savannah, but he also denied using the victim's cell phone and denied being in the victim's truck. R. 420. According to Bromage, during the second interview, Applicant maintained that he saw the victim between 11 and 12 on May 22. R. 421. Applicant stated that he and the victim had a three to five minute conversation in which the victim attempted to convince Applicant to go to the victim's house with him. R. 421. Applicant indicated that he declined the victim's invitation. R. 421.

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In the third interview, which was done on the day Applicant was charged with the murder, Bromage showed Applicant a print made from a still from a surveillance video of the outside of a Wal Mart in Savannah on May 23, 2010. R. 421-22. Bromage indicated that he knew the individual in the print was Applicant. R. 422-23. Applicant would not identify the individual in the still. R. 423.

Brittany Raines, Applicant's ex-girlfriend who was being held at the Beaufort County Detention Center in May 2011, testified that she communicated with Applicant through a vent in a wall between her cell and Applicant's cell. R. 533-35. She testified that Applicant told her that he killed a gay man with a Highpoint .45 caliber gun. R. 535. Applicant stated that he shot the man twice, and that he pistol whipped the man. R. 535. According to Raines, Applicant admitted to her that he also stole the man's truck and went to Savannah. R. 535. Raines also indicated Applicant stated he had used the victim's cell phone to make a few phone calls, including one to Donald Cooper. R. 536. Raines also testified that Applicant informed her that he stole a Monte Carlo to return to Beaufort. R. 535-36.

Cynthia Padgett, Brittany Raines' mother who was also incarcerated at the Beaufort County Detention Center in May 2011, testified she also talked with Applicant through a vent in the wall at the detention center. R. 545-47. Padgett noted that Applicant told her that he met the man he shot through Donald Cooper. R. 549. Applicant had indicated that the man worked with Donald Cooper at Pizza Hut. R. 549. Applicant had stated the man was shot, and Applicant took the man's truck to Savannah to sell it. R. 549-50. Applicant also stated that he stole a car to come back to South Carolina, and he had the man's cell phone. R. 550. According to Padgett, Applicant had told her that the altercation between him and the man occurred on Joe Frazier Road, and the police found the man's body at Pinckney Island between the bridges. R. 550.

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IV. SUMMARY OF TESTIMONY

Counsel testified he spoke with Applicant numerous times. Although he could not recall with specificity how many. He believed the solicitor's comment during his closing argument was a Doyle violation, but the court ruled it was not preserved. The timing of his objection on the alleged Doyle violation was a matter of trial strategy. He wanted to object outside the presence of the jury. The defendant's statements to law enforcement, combined with the forensic evidence, provided overwhelming evidence of guilt.

Applicant testified the State offered a 30 year plea offer. He wanted a better strategy from Counsel. Applicant wanted the owner of the gun to testify. Applicant agreed Counsel properly impeached the jailhouse informant.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that Applicant has failed to satisfy his burden to prove that Counsels were deficient or that he was prejudiced by Counsels' alleged deficiencies. Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 1985. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 1984. The proper measure of performance is whether Counsels provided representation within the range of competence required in criminal cases. Id.

This Court finds Applicant's testimony lacked credibility. This Court finds that Applicant has failed to satisfy his burden to prove that Counsel's actions were deficient. Applicant also failed to prove he was prejudiced by the alleged deficiencies. This Court finds Counsel properly

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prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant. This Court finds Counsel rendered adequate assistance and exercised professional judgment his decisions at trial. This Court dismisses Applicant's application for the reasons set out below:

A. Ineffective Assistance of Counsel

In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 1989. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsels' deficient performance must have prejudiced 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. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 1992.

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1. Failure to investigate.

Applicant failed to show how further investigation by Counsel would have benefited Applicant at trial. Applicant's assertion Counsel should have investigated the bedroom being messed up and bruises is spurious. Applicant did not prove what Counsel would have found if Counsel had investigated. 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. "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." State v. Glover, 318 S.C. 496, 498–499, 458 S.E.2d 538, 540. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). The only evidence Applicant presented regarding witness testimony or further investigation was speculation on the part of Applicant.

Accordingly, this Court finds Applicant failed to prove Counsel failed to properly investigate or that Applicant was prejudiced by Counsel's lack of investigation. Accordingly, this Court denies and dismisses this allegation.

2. Doyle violation.

The solicitor's comment was not improper. Therefore, this Court finds Counsel was not deficient for failing to properly preserve the objection for appeal. The court has previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404

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S.C. 465, 475, 746 S.E.2d 41, 47 (2013). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. "Since the [issue] was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in [applicant's] PCR claim. When the defendant claims counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded." Id. at 465, 746 S.E.2d at 47. Therefore, this Court must determine whether the underlying claim was meritorious and there was a reasonable probability it would have resulted in reversal and a new trial.

During his closing argument, the solicitor stated:

> Who else is seen at Wal-Mart? **I ain't going to say it's me and I ain't going to say it's not.** Is this picture fantastic? No, it's blurry. Did Jerry Scantling tell Bob Bromage, no, man, I wasn't in Savannah; that's not me. No, he didn't. What did he say? **I ain't going to say it's me and I ain't going to say it's not.** What does he tell Captain Bromage?

R. 629, ll 11-17.

This Court finds the statements made by the solicitor were not comments on the Applicant's exercise of his right to remain silent. In Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 1976, the United States Supreme Court reversed a drug conviction where the state impeached a defendant using his post-arrest silence. 426 U.S. at 619-20. In reaching this conclusion, the Court premised its ruling on preserving the safeguard Miranda warnings place on one's Fifth Amendment rights, stating, "while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." Id. at 617-18 emphasis added. Further explaining their ruling, the Court,

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in footnote ten, noted the error in Doyle stemmed from a fear that one's exercise of their right to silence could, via subsequent impeachment at trial, be perceived by the jury as evidence of guilt. Id. at 619 n.10. It was in this context that the Court found "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Id. at 618.

In footnote eleven of Doyle, the Court illustrated other uses of post-arrest silence which, it explained, did not violate Due Process:

> It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.

Id. at 620.

Unlike the case in Doyle, the comment made by the solicitor here were not a comment on the defendant's exercise of his right to remain silent. Instead, the solicitor was commenting on the statement made by Applicant after he was given his Miranda warnings.

> While Doyle bars the use against a criminal defendant of silence maintained after receipt of government assurances, Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 1976, a defendant who voluntarily speaks after being given Miranda warnings has not heeded the admonitions of the government and has not in any way relied on governmental assurances, but to the contrary, has chosen not to remain silent.

State v. Kimsey, 320 S.C. 344, 346, 465 S.E.2d 128, 130 Ct. Ap 1995.

Applicant's contention the statement was an invocation of his right to remain silent is not supported by the record. As noted by the trial court and the solicitor, the statement itself is ambiguous as to whether Applicant wanted to end the interrogation or invoke his right to silence. It merely reflected that Applicant did not want to identify the person in the still he was shown

from the surveillance video. Since Applicant's statement was not an invocation of his right to remain silent, it was fair for the solicitor to comment on the statement during his closing argument because it was evidence presented at trial. See Copeland, supra noting solicitor's closing argument must be confined to evidence in the record.

Applicant never denied that he was in Savannah. To the contrary, Applicant admitted that he stole the Monte Carlo in Savannah. R. 416. Second, the question that prompted the statement from Applicant was not whether he was in Savannah; it was whether he could identify the person in the still photo. In light of the testimony regarding the statements already made by Applicant regarding the fact that he was in Savannah, this Court finds the solicitor's comment was a fair comment based upon the evidence presented at trial.

This Court also finds any error was harmless pursuant to the standard set forth in Brecht v. Abrahamson, 507 U.S. 619 1993 and the factors announced in State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 1996. In particular, the comment during closing argument on the statement at issue was very limited. Furthermore, the evidence supporting Applicant's guilt was overwhelming.

In Brecht v. Abrahamson, 507 U.S. 619 1993, the United States Supreme Court held that Doyle violations squarely fit into the category of Constitutional violations termed by the Court as "trial error." 507 U.S. at 529. Trial error "occur[s] during the presentation of the case to the jury," and is subject to harmless-error analysis because it "may ... be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." Arizona v. Fulminante, 499 U.S. 279, 307-308 1991. Accordingly, on direct review, an alleged Doyle violation is subject to the harmless error standard first laid out in Chapman v. California, 386 U.S. 18 1967 that the error in question must be "harmless beyond a reasonable doubt."

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Brecht, 507 U.S. at 630; see State v. Pickens, 320 S.C. 528, 530, 466 S.E.2d 364, 366 1996holding in the context of a Doyle violation, the Court applies a harmless-error analysis. In Pickens, our Supreme Court elaborated on the relevant factors a court should consider when reviewing whether a Doyle violation is harmless, stating, "[t]he record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming. Id. at 531, 466 S.E.2d at 366.

Based on the factors outlined in Pickens, this Court finds the alleged Doyle violation was harmless. First, there was only one reference with respect to Petitioner's invocation of his right to remain silent, specifically the reference by Captain Bromage. Additionally, the State never commented upon or alluded to Petitioner's invocation of his right to remain silent in argument. Instead, the solicitor only commented on the statement that Applicant did make during his third interview. Petitioner's guilt was overwhelming. First, he admitted to law enforcement on several occasions that he stole the Monte Carlo while he was in Savannah. R. 416. Thus, there is no question that he was guilty of possession of a stolen vehicle. Second, there was overwhelming evidence establishing Applicant was guilty of murder, armed robbery, and possession of a weapon during the commission of a violent crime. Two witnesses testified that Applicant admitted to them that he shot and killed the victim. Ms. Raines testified that Applicant had told her that he shot the man twice, and that he pistol whipped the man. R. 535. The pathologist testified that the victim suffered from two gunshot wounds, and that he had abrasions and lacerations on his face that was consistent with being struck by a sharp object or a blunt object with a sharp edge. R.596-99. Ms. Raines also testified that Applicant told her that he shot the

victim with a Hi-Point firearm. R. 535. The firearms analyst testified that the projectile recovered from the victim was shot by a Hi-Point firearm, and that the projectile was consistent with being fired by the Hi-Point firearm that was found at the scene. R. 485-86, 487-90. According to Raines, Applicant admitted to her that he also stole the man's truck and went to Savannah. R. 535. The victim's truck was found in Savannah. Raines also indicated Applicant stated he had used the victim's cell phone to make a few phone calls, including one to Donald Cooper. R. 536. Law enforcement also found the victim's cell phone, and they were able to determine that calls were placed to a phone number associated with Donald Cooper between 11:57 m. and 2:33 a.m. R. 390-91. Raines also testified that Applicant informed her that he stole a Monte Carlo to return to South Carolina. R. 535-36. Applicant was caught in a Monte Carlo that he admitted to law enforcement was stolen.

Ms. Padgett testified Padgett noted that Applicant told her that he met the man he shot through Donald Cooper. R. 549. Applicant had indicated that the man worked with Donald Cooper at Pizza Hut. R. 549. The victim did, in fact, work with Donald Cooper at a Pizza Hut. R. 403-04. Applicant told Padgett the man was shot, and Applicant took the man's truck to Savannah to sell it. R. 549-50. Applicant also stated that he stole a car to come back to South Carolina, and he had the man's cell phone. R. 550. According to Padgett, Applicant had told her that the altercation between him and the man occurred on Joe Frazier Road, and the police found the man's body at Pinckney Island between the bridges. R. 550. The victim was found at the Pinckney Island landing.

Four eyewitnesses testified that they saw Applicant in a truck that fit the description of the victim's pickup truck very early in the morning after the shooting was believed to have occurred. R. 188-94, 202-06, 213-16, 228-30, 233, 394-97. All four eyewitnesses identified

Applicant as the driver of the truck, and items belonging to the victim were found in a dumpster where one of the eyewitnesses saw Applicant cleaning out the truck. R. 188-94, 202-06, 213-16, 228-30, 233, 262-64, 394-97. Applicant was also caught on surveillance video outside a Wal-Mart in Savannah where the victim's cell phone was located, and also near where the victim's truck was located. Headphones with Applicant's DNA were found at the murder scene. R. 171, 257-59, 298, 499-501.

Therefore, this Court finds Applicant has failed to prove the underlying claim was meritorious or there was a reasonable probability it would have resulted in reversal and a new trial. Accordingly, this Court denies and dismisses this allegation.

B. Prosecutorial Misconduct and False Testimony

Applicant's allegation that there was prosecutorial misconduct and false testimony is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20b 2003. Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 1974. A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 1993. Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 1989. Further, Applicant also failed to provide any credible evidence the State offered any evidence in bad faith or elicited perjury testimony. Applicant's own assertion a witness failed to tell the truth is not sufficient evidence on which to base this allegation. No evidence was presented or testimony elicited proving the State used false testimony in convicting Applicant.

Therefore, this Court finds Applicant has failed to show why this allegation is appropriate for PCR. Further, this Court finds Applicant failed to prove the State presented any false testimony. Accordingly, this Court dismisses this allegation.

C. Abuse of Discretion and Plain Error

Applicant's claims of Abuse of Discretion and Plain Error must be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. An applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20.

"Abuse of Discretion" and "Plain Error" are not cognizable claims, but are instead are appropriate for direct appeal. Even if the facts alleged by Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). These issues are improper for post-conviction relief because they could have been raised on direct appeal and are procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a

substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised these issues on appeal. His failure to do so has waived this allegation as a ground for relief.

Accordingly, this Court denies and dismisses these allegations for failing to state a cognizable claim for which relief can be granted.

VI. CONCLUSION

Based on 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 30 days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 1991, Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1g, SCRCP, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

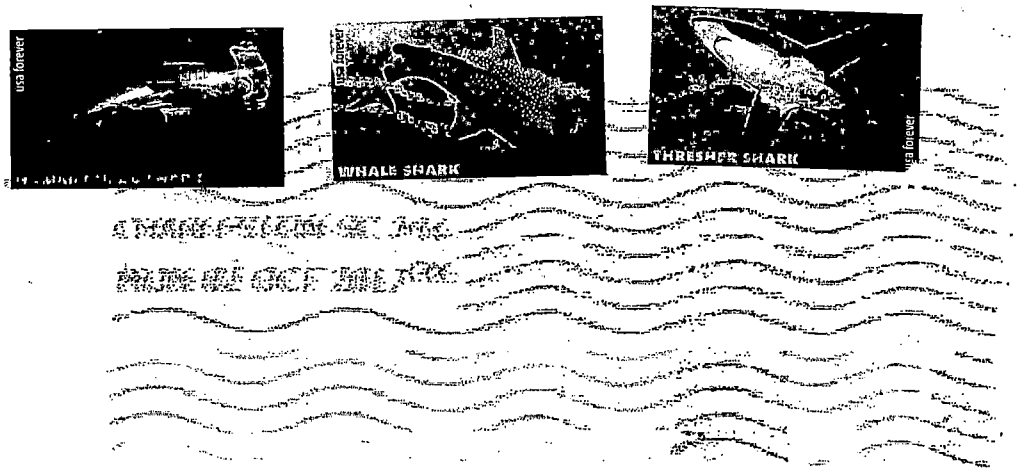
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 14 day of September, 2017.

R. SCOTT SPROUSE
Presiding Judge
14th Judicial Circuit

Walhalla, South Carolina



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