TAYLOR & BOWLEY LLC
ATTORNEYS AT LAW
POST OFFICE BOX 1059
CHARLESTON, SOUTH CAROLINA 29402-1059
PHONE: (843) 723-4020 **FAX: (843) 723-4021**

October 6, 2017

S.C. SUPREME COURT

Clerk of South Carolina Supreme Court
PO Box 111330
Columbia, SC 29211

Re: Rogers v. South Carolina
2014-CP-26-6589

Dear Clerk,

Enclosed please find a Notice to Appeal and Proof of Service of same-on behalf of Mr. Rogers. His Petition for PCR was denied in Horry County. I have enclosed 2 copies to be returned to me.

I have contacted Appellate Defense and obtained the necessary forms from them for him to qualify for their assistance in proceeding with his appeal. Please let me know if anything further is needed from me to secure his appeal, at this time.

Feel free to use my email if necessary: donna@tbbesq.com.

Thank you for assistance in this matter.

Most sincerely,

Donna

Donna K. Taylor

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
OCT 12 2017
S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr.

Case No.: 2014-CP-26-6589

TImmy J. Rogers, SCDC No. 343260.....Applicant

State of South Carolina.....Respondent

NOTICE OF APPEAL

Timmy J. Rogers appeals the Order of The Honorable J. Cordell Maddox, Jr. of September 8, 2017, denying his application for PCR relief, attached hereto as Exhibit 1. Applicant received written notice of entry of this Order on September 14, 2017.

Respectfully Submitted by:

ATTORNEY FOR APPLICANT
Donna K. Taylor SC Bar No. 5484
Taylor & Bowley, LLC
Post Office Box 1059
Charleston, South Carolina 29402
843-723-4020 FAX 843-723-4021
donna@tbbesq.com

October 5, 2017
Charleston, SC

THE STATE OF SOUTH CAROLINA
In The Supreme Court of South Carolina

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox Jr.

RECEIVED
OCT 12 2017
S.C. SUPREME COURT

Case No.: 2014-CP-26-6589

TImmy J. Rogers, SCDC No. 343260.....Applicant

State of South Carolina.....Respondent

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing **Notice of Appeal** has been served upon counsel of record by depositing a copy of the same, postage prepaid, by U.S. Mail, on this 7th day of October 2017, to the addresses shown below:

Attorney for the Respondent:
Mr. Johnny E. James, SC Bar No. 101260
PO Box 11549
Columbia, South Carolina 29211-1549

Respectfully Submitted by:

Donna K. Taylor

ATTORNEY FOR APPLICANT
Donna K. Taylor SC Bar No. 5484
Taylor & Bowley, LLC
Post Office Box 1059
Charleston, South Carolina 29402
843-723-4020 FAX 843-723-4021
donna@tbbesq.com

October 7, 2017
Charleston, SC

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)

RECEIVED
OCT 12 2017
S.C. SUPREME COURT

Timmy J. Rogers, #343260
☐ Plaintiff

v.

State Of South Carolina
☒ Defendant.

CASE NO.
2014-CP-26-6589

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

FILED
HORRY COUNTY
2017 SEP 11 PM 2:28
RENEE E. ELDRIDGE
CLERK OF COURT
HORRY COUNTY, SC

Plaintiff's Attorney:	Defendant's Attorney:
Donna K. Taylor, Bar No. 5484	Johnny E. James Jr, Bar No. 101260
Address:	Address:
PO Box 1059 Charleston, SC 29402	Post Office Box 11549 Columbia SC 29211-1549
phone: (843) 723-4020 fax:	phone: (803) 734-3737 fax: (803) 734-4113
e-mail: other:	e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Johnny E. James Jr. August 7, 2017
Signature of Attorney for ☐ Plaintiff / ☒ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Timmy J. Rogers, S.C.D.C. No. 343260,	)	Case No.: 2014-CP-26-6589
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

FILED
HORRY COUNTY
2017 SEP 11 PM 1:28
RENEE H. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Timmy J. Rogers ("Applicant"), by and through counsel Donna K. Taylor, Esquire, on October 8, 2014. Respondent made its return and motion to dismiss on or about March 25, 2015, arguing the application was not timely filed. The Court convened an evidentiary hearing into the matter on August 9, 2016, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Donna K. Taylor, Esquire and D. Lynn Bowley, Esquire. Patrick L. Schmeckpeper and Caitlin B. Hastings, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's sister, Debbie Jean Parris, and trial counsel Kia T. Wilson, Esquire ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. Additionally, the Court has before it a transcript of the August 9, 2016, proceeding in the preparation of this Order. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the July 2008 term of the Horry County Grand Jury for murder (2008-GS-26-2450). Kia T. Wilson, Esquire, and James C. Galmore, Esquire, represented Applicant. Jimmy A. Richardson, II, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. The jury found Applicant guilty as indicted on October 14, 2010. Judge Hyman sentenced Applicant to imprisonment for a term of 35 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by David Alexander, Esquire. At issue in that appeal was:

> Whether the trial court erred in denying [Applicant's] motion for a directed verdict when the State presented substantial circumstantial evidence of [Applicant's] guilt?

Brief of Respondent at 2, State v. Rogers, 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013). By opinion decided September 4, 2013, after exhaustively exploring the sufficiency of the circumstantial evidence introduced at trial,[1] the South Carolina Court of Appeals affirmed Applicant's convictions, finding "the State presented evidence of Rogers' guilt that meets the substantial circumstantial evidence test[.]" State v. Rogers, 405 S.C. 554, 571, 748 S.E.2d 265, 274 (Ct. App. 2013). The Remittitur was issued on September 20, 2013.

---

[1] In weighing the sufficiency of the circumstantial evidence, the Court of Appeals picked out 15 discrete pieces of evidence to support the conviction. Rogers at 565-67. Additionally, the Court rejected Applicant's "attempts to isolate . . . single pieces of evidence and argue each one alone does not constitute substantial circumstantial evidence[.]" Id. at 571. The Court found that co-defendant Sherry Engel's testimony in particular, together with the other evidence, was sufficient to place Applicant at the scene of the crime at the relevant time. Id. at 569.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that:
    a. "There was a foot print found at the scene that was never tested or reviewed by counsel, and was not introduced at the trial, there was some minor testimony regarding the collection of that evidence that came out before the Jury which resulted in a Jury question during deliberation; however because it was not introduced by either party it could not be considered."
    b. "Additionally despite substance issues and mental health history no evaluation or assessment was conducted.
    c. "[I]nappropriate statement made by Solicitor in closing argument were not objected to by counsel"

As previously indicated, Respondent filed its return and motion to dismiss on March 27, 2015, arguing the application should be dismissed as untimely. The Honorable Steven H. John issued a Conditional Order of Dismissal filed April 9, 2015, granting Respondent's motion while granting Applicant 30 days to provide specific reasons why the application should not be dismissed. Accordingly, Applicant filed a response on May 15, 2015, arguing that either federal law or equitable tolling should permit his application to go forward. By e-mail dated May 27, 2015, Judge John informed the parties that he would not issue a Final Order of Dismissal and that the matter should be set for a hearing.

Respondent thereafter submitted a revised "Notice of Motion and Motion to Dismiss" on August 3, 2015, asking the Court to affirm the Conditional Order of Dismissal. Applicant filed a response thereto on August 11, 2015. That same day, the parties proceeded to a motion hearing before the Honorable G. Thomas Cooper, Jr. Applicant was present at the hearing and represented by Donna K. Taylor, Esquire. Joshua L. Thomas, of the South Carolina Attorney General's Office, represented Respondent. By order dated September 18, 2015, and filed

September 23, 2015, Judge Cooper adopted the reasoning set forth the Conditional Order of Dismissal and dismissed the matter with prejudice.

Applicant thereafter filed on December 18, 2015,[2] a motion pursuant to Rule 59(e), SCRCP, asking the Court to vacate its order on the basis that Applicant "was represented by counsel and had relied on her to file his PCR action on his behalf. Entirely through her error, the action was filed late." Motion to Reconsider, Alter or Amend Pursuant to Rule 59(e) at 1-2, Rogers v. State, 2014-CP-26-06589. More specifically, in the letter sent with the motion, Applicant's counsel emphasized that the failure to timely file was her own error, her first in a long career, and in no way the fault of Applicant. Respondent filed its return to the motion on January 7, 2016. By order dated February 1, 2016, and filed February 4, 2016, Judge Cooper granted Applicant's motion and ordered a full evidentiary hearing.

At the evidentiary hearing on August 9, 2016, Applicant proceeded forward on the second and third allegations of ineffective assistance of trial counsel quoted above. Additionally, Applicant introduced substantial testimony regarding advice he received leading to his decision not to testify at trial, but did not otherwise amend his application with this allegation.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

---

[2] Applicant's counsel asserts that she did not receive the order until December 8, 2015.

A. 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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (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 an 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; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[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 at 117, 386 S.E.2d at 625 (citing Strickland at 688). 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). 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. Strickland at 696. 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. at 696-97.

IAC Allegation #1 – Failure to Review or Introduce Footprint Evidence

Applicant's first allegation involves the investigation and utilization of certain footprint evidence that was not introduced at trial. At the evidentiary hearing, Applicant specifically withdrew this issue. Tr. p. 5, ll. 11-23. Accordingly, the Court finds this issue is **WITHDRAWN**, and it forms no part of the Court's other analysis.

IAC Allegation #2 – Failure to Evaluate Applicant's Mental Health History

Applicant's second allegation is that Counsel failed to evaluate his mental health or substance abuse history and raise that as a defense at trial. To establish counsel failed to adequately prepare for trial, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998).

Under the "M'Naughten test", an accused who lacks the capacity to distinguish moral or legal right from moral or legal wrong at the time of the crime is relieved of responsibility for his acts. S.C. Code Ann. § 17-24-10; State v. Law, 270 S.C. 664, 667, 244 S.E.2d 302, 304 (1978); State v. Cannon, 260 S.C. 537, 547-48, 197 S.E.2d 678, 682 (1973). The question of a defendant's sanity is a question of fact to be determined by the jury. State v. Allen, 231 S.C. 391, 98 S.E.2d 826 (1957).

Additionally, due process prohibits the conviction of a person who is mentally incompetent. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992) (citing Bishop v. U.S., 350 U.S. 961 (1956); Pate v. Robinson, 383 U.S. 375 (1966)). The test of competency to enter a plea or stand trial is one in the same: the accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him. Id., 417 S.E.2d at 596 (citing State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976); Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980)). An applicant alleging incompetence in fact must show by a preponderance of the evidence he was incompetent at the time of trial. Id.

An applicant alleging ineffective assistance of counsel for failure to seek a mental health evaluation must still satisfy the two prongs of Strickland: applicant must demonstrate (1) a 'reasonable probability' that he was not competent at the time of the crime or at the time of the plea or trial, and (2) that counsel's failure to seek an evaluation was unreasonable. Jeter at 233, 417 S.E.2d at 596. Counsel may reasonably rely on his own perceptions in deciding if a client is competent to stand trial. Id.

At the evidentiary hearing, Applicant did not introduce any professional evaluation of his present mental health or evaluation of his condition as it existed either at the time of trial or at

the time of the murder. Rather, Applicant testified that he "couldn't think clearly" or "function at work really well" during his divorce. Tr. 20, ll. 11-12. Applicant also testified he admitted himself to "Elizabethtown Hospital" and "Communicare" for treatment,[3] where he was prescribed anti-depression medication. Tr. 20-21. Applicant testified that co-conspirator, Sherry Engel, provided him Xanax, other unidentified pills, and "special" foods implied to be laced with medications. Tr. 22-23. Applicant claimed that he consumed "special brownies" provided by Ms. Engel the day of April 21, 2008, and lost all memory thereafter until waking in his hotel room to a mid-morning phone call on April 22, 2008, at which time he was told by Ms. Engel's brother that the victim, Mr. Fred Engel, was dead. Tr. 27-30. Applicant could not specifically remember telling Counsel about his depression diagnosis, but asserted he was sure he did so. Tr. 39, ll. 16-23. Applicant's sister, Ms. Parris, described Ms. Engel as "very in control" and testified to witnessing Applicant sleep for inordinate periods of time after consuming "special" foods provided by Ms. Engel on prior occasions. Tr. 44-46.

Counsel testified that she spent substantial time with Applicant in preparing his case and that "[h]e was very clear about the things that he was clear about." Tr. 52. Applicant very substantially assisted in the preparation of his defense. Tr. 53. Counsel indicated that nobody performed a toxicology examination on Applicant because he was not arrested until weeks after the murder and not returned to South Carolina until a number of days after that. Tr. 78.

This Court finds that Applicant has failed to meet his burden of proof as to this allegation. The Court finds credible Counsel's testimony that Applicant thoroughly assisted in the preparation of his defense and that he was cogent in the matters within his recollection. Counsel was entitled to use her judgment in determining whether Applicant was competent.

---

[3] Applicant introduced no records of this medical treatment.

Furthermore, Applicant's failure to introduce any medical records or reports is fatal to his claim given the allegation is that Counsel did not seek them. Applicant has shown neither deficiency nor prejudice. Accordingly, Applicant's request for relief as to this allegation is **DENIED.**

IAC Allegation #3 – Failure to Object to State's Remarks Implying Applicant Would Testify

Applicant alleges Counsel was ineffective for failing to object to opening remarks by the solicitor which implied that Applicant would testify at trial. Namely:

- "If Timmy Rogers wasn't laying in wait in that wood line with that string and choked him to death he would be alive today. Or they would have found some other time to do it, but it's 100 percent, 100 percent. Don't worry about assigning fault. I'll tell you now you're not going to like Sherry. But there is enough blame to go around, and it certainly covers Timmy. **Timmy Rogers' testimony will tell you that he strangled Fred Engel at that the** [sic] **mailbox at Carolina Forest.**" Oct. 12, 2010, Tr. 88-89 (emphasis added).

- "This means an awful lot to Timmy Rogers. It's the date he's waited for. He pled not guilty, and I would ask you to listen to all the evidence and don't jump to any conclusion and say, 'I'm mad at Timmy Rogers. I'm mad at Sherry Engel. Let's find a tree and hang this crowd.' That's not how our system is set up. I want you to listen to all the evidence, and give him every benefit of the doubt. **Listen to him.** There is more than enough evidence here." Oct. 12, 2010, Tr. 94-95 (emphasis added).

It is impermissible for the prosecution to comment, directly or indirectly, upon the defendant's failure to testify. Johnson v. State, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997); Edmond v. State, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000). "However, improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant." Johnson at 187, 480 S.E.2d at 735 (citations omitted). For example, the Supreme Court of South Carolina has found no prejudice where the State merely suggested in its opening remarks that the defense would introduce witnesses and testimony. State v. Dawkins, 297 S.C. 386, 391-93, 377 S.E.2d 298, 301-02 (1989).

Operating in reverse order, the second of the two remarks is very plainly not prejudicial. In context, the solicitor is encouraging the jury to respect the appropriate standards and properly consider all of the evidence presented.

As to the first remark, it simply is not a remark on the right to remain silent. To the contrary, the solicitor's suggestion that Applicant would testify and inculpate himself is a poor forecast: Applicant did not testify, let alone admit to strangling Fred Engel. The statement is a non-sequitur in the context of surrounding the transcript. Considering the remark with the entire record in mind, the Court is inclined to agree with Respondent's argument that it was intended to reference Applicant's call to Sherry Engel after the murder was performed, at which time Applicant told Ms. Engel "[i]t's done." Oct. 11, 2010, Tr. 186, ll. 17-19. The Court finds that this statement was not so outrageous as to deny the right to due process. If one reads the solicitor's use of "testimony" to mean "words", the remark is a permissible reference to facts eventually introduced by the testimony of Ms. Engel. On the other hand, if the solicitor intended to predict Applicant would theatrically admit his guilt on the stand, the prediction is something akin to a Dawkins remark that did not come to pass, and such an error could only reflect more poorly on the credibility of the solicitor than the Applicant. Accordingly, Applicant's request for relief as to these allegations is **DENIED**.

IAC Allegation #4 – Failure to Object to Remarks and Argument Not Supported By Evidence

Applicant alleges that Counsel was ineffective for failing to object to three instances of opening or closing remarks by the State that implied evidence not put on the record. Namely:

- "The family members of Sherry Engle, hey, something is going on. You need to look at this red haired guy. They put that together, got a photograph, took it to Karla Green so A.T.&T. will bring you the phone records of both Sherry and Timmy Rogers. And it will show hundreds of calls. Maybe not dollars, **but at least over a hundred calls over a four or five day period**. Bam, bam, bam.

Hang up, call again. Much in love. Much in love. A tight wound conspiracy." Oct. 12, 2010, Tr. 91-92 (emphasis added).

- "You may very well not like her. I don't think you should like her. She played a huge part in the death of her husband. And she is charged for that. **She's looking at the same time; the same sentence that her codefendant is.**" Oct. 11, 13-14, 2010, Tr. 386, ll. 5-10 (emphasis added).

- "But it shouldn't be minimized to the point to say: we got a picture of the truck. And somebody makes telephones calls. Uh – No. No, no, no, no. It's not that easy people. It is that: At 9:40, when she says he was there; **when Kimberly Maluda said he was there,** the cell tower, another disinterested party, says: He's right there (indicating)." Oct. 11, 13-14, 2010, Tr. 395, ll.10-20 (emphasis added).

Opening remarks serve to inform the jury of the general nature of the trial and the issues involved so that they can better understand the evidence presented. State v. Kornahrens, 290 S.C. 281, 284, 350 S.E.2d 180, 183 (1986). The solicitor is permitted in opening statement to outline the facts the State intends to prove, and so long as the State introduces evidence to reasonably support the stated facts, there is no error. Id. At closing arguments, a solicitor may not rely on statements not in evidence, and must confine him or herself to evidence in the record. State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). Where a solicitor fails to be so confined, a new trial will not be granted unless the "prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. (citing State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990)).

The Court finds that sufficient evidence was introduced to support each of the bolded claims above. As to the first remark, Ms. Engel testified to calling Applicant "[f]ifteen, 20 times a day" prior to the murder. Oct. 12, 2010, Tr. 210, ll. 2-5.

As to the second argument, Ms. Engle testified that she appeared under proffer and that no promises had been made to her at the time of trial, such that she was at that time still facing

the charge for murder. Oct. 11, 13-14, 2010, Tr. 190-192. Additionally, the argument was plainly in response to Counsel's own closing argument attacking Ms. Engel's credibility: "This woman is expecting a deal." Oct. 11, 13-14, 2010, Tr. 370, l.23.

Finally, as to the third remark, Ms. Maluda testified to seeing a truck that matched the description of Applicant's truck: a red Chevrolet S10. Oct. 12, 2010, Tr. 101, ll. 20-23. On cross-examination, Ms. Maluda admitted that she did not see the driver of the truck and was not familiar with who owned which vehicles in her neighborhood. Oct. 12, 2010, Tr. 108-09. While the State's argument in closing does not perfectly capture these caveats elicited by Counsel, it captures the State's circumstantial and ultimate conclusion for which ample evidence was introduced: the truck seen by Ms. Maluda was driven by Applicant as he prepared to murder the victim.

Applicant has failed to prove either deficiency or prejudice in these allegations. Accordingly, Applicant's request for relief as to these allegations is **DENIED.**

IAC Allegation #5 – Failure to Object to Solicitor's Statement Regarding Reasonable Doubt

Applicant alleges that Counsel was ineffective for failing to object to the solicitor's description of the jury's duty in weighing the evidence against Applicant. Namely:

- "And you've got a duty. And that duty is to seek justice. **It's not to seek reasonable doubt.** If there's reasonable doubt, you'll have it. Judge Hyman's going to tell you: You must be firmly convinced. I submit to you, in your heart, you already know who the killer is here. You are already firmly convinced." Oct. 11, 13-14, 2010, Tr. 419-420 (emphasis added).

The Court finds nothing objectionable in this statement. A prosecutor may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect. State v. Durden, 264 S.C. 86, 92, 212 S.E.2d

587, 590 (1975) (quoting 23A C.J.S. Criminal Law § 1107). The prosecutor may ask for a conviction, or assert the jury's duty to convict. Id. The solicitor properly stated that the jury must be firmly convinced, and any error or confusion caused by the argument was cured by the Court's thorough instructions on the matter. See State v. Portee, 278 S.C. 260, 261, 294 S.E.2d 421 (1982) (finding the trial judge's proper instruction cured prosecutor's remark that "the reasonable doubt standard in criminal cases was something good defense lawyers use to free guilty defendants."). Accordingly, Applicant's request for relief as to this allegation is **DENIED**.

IAC Allegation #6 – Counsel Misadvised Applicant to not Testify at Trial

At the evidentiary hearing,[4] Applicant alleged Counsel was ineffective for advising him not to testify at his trial. The Supreme Court of South Carolina has found counsel ineffective where the advice to not testify was based upon an error of law. See Horton v. State, 306 S.C. 252, 411 S.E.2d 223 (1991).

Applicant testified that it was his intent to testify at trial, but that when the time came to inform the Court of his desire to do so, Counsel advised against doing so—so he didn't. Tr. 32, ll.18-25. Applicant indicated regret for the decision. Tr. 33, ll. 8-10. On cross-examination, Applicant conceded that the decision was his own. Tr. 35, ll.9-10.

Counsel testified that she did not feel Applicant's testimony would offer much help where Ms. Engel's deficiencies in credibility were already apparent, and where Applicant himself had credibility issues due to his professed inability to remember the day of the murder. Tr. 54-55. In particular, Counsel testified that "[i]t's not as believable that you don't recall anything all day long, you know, from mid-day until the next morning. I mean, it's just not

[4] The allegation was not raised in the original application, which was prepared by counsel, nor amended prior to the evidentiary hearing.

believable, and I didn't want that to be an issue at trial. I felt that it was easier and better to not risk opening that door." Tr. 55, ll. 17-21. Counsel also testified that she did not recall Applicant indicating a desire to testify prior to trial, but that she was sure that she advised him in advance of trial not to testify. Tr. 56, ll. 5-21.

The Court finds that Counsel has expressed a clear, competent, and reasonable trial strategy upon which she advised Applicant to not testify at trial. Furthermore, upon observation of the witnesses, the Court finds Counsel's testimony credible and Applicant's testimony not credible. The alternative conspiracy offered and implied by Applicant does not pass muster. With that in mind, the Court finds that Counsel's advice was well founded. Accordingly, Applicant's request for relief as to this allegation is **DENIED**.

[*Conclusion and signature on following page*]

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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 notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 8 **day of** Sept, **2017.**

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

Marion, South Carolina

PRESS FIRMLY TO SEAL

PRESS FIRMLY TO SEAL

PRIORITY MAIL
POSTAGE REQUIRED

PRIORITY
★ MAIL ★

UNITED STATES POSTAL SERVICE

VISIT US AT USPS.COM
ORDER FREE SUPPLIES ONLINE

FROM:

DKT
PO Box 1059
Charleston, SC 29402

TO:

SC Supreme Court Clerk
PO Box 11330
Columbia, SC 29211

Label 228, March 2016

FOR DOMESTIC AND INTERNATIONAL U

UNITED STATES POSTAL SERVICE.

Retail

FROM:

P

US POSTAGE PAID

$6.65

Origin: 29407
Destination: 29211
0 Lb 6.10 Oz
Oct 10, 17
4514840249-07

1024

PRIORITY MAIL 2-Day ®

Expected Delivery Day: 10/12/2017

B099

USPS TRACKING NUMBER

9505 5111 9143 7283 2876 09

WHEN US
A CUST
LABEL

This envelope is made from post-consumer waste. Please recycle - again.