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May 30, 2018

RECEIVED

JUN 01 2018

S.C. SUPREME COURT

**Via US Mail**

Daniel Shearouse  
Clerk of Court  
South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

***Re: Notice of Intent to Appeal from Tavish Yeargin v. State of SC  
C.A. No.: 2017-CP-39-0170***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Letitia H. Verdin's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Pickens County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,  
LAW OFFICE OF R. MILLS ARIAIL, JR.  
Attorney at Law

  
R. Mills Ariail, Jr.

RMAjr/dl  
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

JUN 01 2018

S.C. SUPREME COURT

Letitia H. Verdin, Circuit Court Judge

Case No. 2017-CP-39-0170

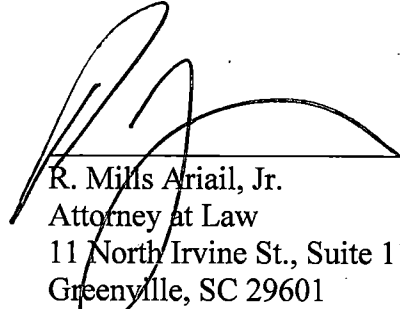
Tavish Yeargin,..... Appellant,

v.

State of South Carolina ..... Respondent.

**NOTICE OF APPEAL**

Appellant appeals the Honorable Letitia H. Verdin’s Order of Dismissal dismissing Appellant's application for post-conviction relief. On May 15, 2018, the Honorable Letitia H. Verdin signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on May 29, 2018. A copy of the Honorable Letitia H. Verdin’s Order of Dismissal is attached.

  
\_\_\_\_\_  
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Facsimile (864) 232-9392  
Attorney for Appellant

Greenville, South Carolina  
May 30, 2018

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

JUN 01 2018

S.C. SUPREME COURT

Letitia H. Verdin, Circuit Court Judge

Case No. 2017-CP-39-0170

Tavish Yeargin,..... Appellant,

v.

State of South Carolina ..... Respondent.

**CERTIFICATE OF SERVICE**

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this May 30, 2018, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

**DeShawn Mitchell, Esq.**  
**Assistant Attorney General**  
**PO Box 11549**  
**Columbia, SC 29211**

**Pickens County Clerk's Office**  
**Pickens County Courthouse**  
**214 East Main Street**  
**Pickens, SC 29671**

**Tavish Yeargin #00317173**  
**Lieber Correctional Institution**  
**136 Wilborn Avenue**  
**Ridgeville, SC 29472**

**SC Commission of Indigent Defense**  
**Division of Appellate Defense**  
**PO Box 11433**  
**Columbia, SC 29211-1433**

*Denise Tanner LaBeck*  
Denise Tanner LaBeck

May 30, 2018

STATE OF SOUTH CAROLINA )  
COUNTY OF PICKENS )  
Tavish Dominique Yeargin, #317173 )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

2017-CP-39-0170

ORDER OF DISMISSAL

CLERK OF COURT  
THIRTEENTH JUDICIAL CIRCUIT  
GREENVILLE, SOUTH CAROLINA

MAY 21 A 8 32

This matter comes before the Court by way of an application for post-conviction relief filed on February 10, 2017 by Tavish Dominique Yeargin (Applicant). Respondent made its Return on or about July 26, 2017. An evidentiary hearing into the matter was convened on October 25, 2017, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by R. Mills Ariail, Jr, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Trial Counsel John W. DeJong, Esquire. This Court had before it a copy of the records of the Pickens County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County Clerk of Court. In April 2012, the Pickens County Grand Jury indicted Applicant for murder (2011-GS-39-2148) and grand larceny, value

more than \$2,000, but less than \$10,000 (2011-GS-39-2149). John DeJong, Esquire represented Applicant. Assistant Solicitors Doug Richardson, Esquire and Brandi Hinton, Esquire prosecuted the case. On November 18-20, 2013, Applicant proceeded to trial before the Honorable Robin B. Stilwell. The jury found Applicant guilty as indicted. Judge Stilwell sentenced Applicant to imprisonment for concurrent terms of sixty years for murder and five years for grand larceny.

Applicant filed a timely notice of appeal. Robert Michael Dudek, Esquire, of the Office of Appellate Defense and Jeffery P. Dunleavy, Esquire perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on January 20, 2016. State v. Yeargin, Op. No. 2016-UP-043 (S.C. Ct. App. filed January 20, 2016). The remittitur was returned to the circuit court on March 1, 2016.

### **FACTUAL HISTORY**

On September 17, 2011, Applicant shot and killed Sean Dinneen in the parking lot of Crosswell Baptist Church in Easley, SC. Dinneen was shot once. The shot entered in his right upper chest, right at the clavicle. (Tr. 529). The shot fractured the mid-point of the clavicle, crossed diagonally downwards towards the back, injured the left lung, pierced the diaphragm, and ended up right in front of one of the large vessels. (Tr. 530). Dinneen died as a result of blood loss resulting from the wound to the right side of the lung. (Tr. 530-32).

#### **Applicant plans to steal a car from the victim**

Applicant and his two co-defendants, Kayla Williams and Nyia Utsey,<sup>1</sup> initially planned to steal one of two cars the victim had for sale. The victim had a teal Pontiac Grand Prix and a blue Mitsubishi Lancer for sale, and he was asking \$7000 for each car. (Tr. 78-9).

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<sup>1</sup> Nyia Utsey is one of Applicant's sisters. Kayla Williams was Nyia's girlfriend at the time. (Tr. 308, 392-93).

Kayla testified that she initially received a call from Applicant on September 16, 2011. Nyia also indicated that she received a call from Applicant asking if he could get a ride from Kayla. (Tr. 394). Applicant had informed Kayla and Nyia that he had some cars in Easley that he wanted to pick up. (Tr. 311-13, 395-96). Applicant indicated that he needed a ride to get the cars from Easley. (Tr. 395-96). Kayla, who at the time drove a Ford Mustang, agreed to assist as long as Applicant provided her with gas money. (Tr. 312, 314, 395-96). The three initially met on Friday, September 16, after Kayla and Nyia dropped off Nyia's son at Nyia's mother's house.<sup>2</sup> (Tr. 313, 396-97). During the drive to the victim's house, Applicant indicated to Kayla and Nyia that he planned on robbing the victim. (Tr. 316). Kayla noted that Applicant stated he wanted to tie the victim up with zip ties and knock him out. (Tr. 316). Nyia stated that Applicant had told them that the plan would be for Kayla and Nyia would get the victim to come to his front door, and while they were talking with the victim Applicant would enter from the back door, get the car keys, and tie the victim up. (Tr. 397-98). Nyia indicated that before they left the house that Friday, she saw Applicant get a long barreled gun from their brother Michael, and she further noted she saw them load the gun. (Tr. 398-99). Applicant placed the gun in the trunk of Kayla's Mustang. (Tr. 399).

On that Friday, when the three went to the victim's home, no one was there. (Tr. 317, 400-02).

#### **The Three Regroup for a Second Attempt on Saturday**

The next morning, Applicant called Kayla and Nyia again, asking if they would take him back to the victim's house.<sup>3</sup> (Tr. 319, 402-03). After Applicant agreed to provide Kayla with gas money, they agreed to again help Applicant. (Tr. 319, 403). The two picked up Applicant after they dropped Nyia's son off at Nyia's mother's house. (Tr. 320, see Tr. 404). Kayla

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<sup>2</sup> Nyia indicated that they dropped off her son at her sister Tequala's house, and they then picked Applicant up from her mother's house. (Tr. 397).

<sup>3</sup> Nyia believed the conversation may have been on the evening of September 17<sup>th</sup>. (Tr. 402-03).

testified that while at the mother's house, Applicant obtained a long barreled gun from his brother Michael. (Tr. 321). Nyia testified that they picked Applicant up from her sister's house, but they went to her mother's house so Applicant could pick up the gun. (Tr. 404, 445). Applicant put the gun in the trunk of Kayla's Mustang. (Tr. 322, 405, 445). The three then went to Taylors and picked up Applicant's brother Charles. (Tr. 324, 406-07).

The group started with a plan to convince the victim that they wanted to purchase both cars the victim had for sale. (Tr. 325-26, 406, 407). Applicant made the initial contact with the victim by telephone. (Tr. 406, see Tr. 449). When the group arrived at the victim's house, Kayla, Nyia and Charles walked up to the victim's house to meet with him.<sup>4</sup> (Tr. 329, 410).

Margaret Hinson, the victim's neighbor, testified that on September 17, the victim received calls from a male wanting to look at the two cars he had for sale. (Tr. 80). She noted that at least one of the calls was to her house phone. (Tr. 79-80). Later that evening, as it was just getting dark, she noted three people came to see the car. (Tr. 80-2). Hinson indicated there were two females who were looking at the cars, and a male was midway down the hill in the driveway from the victim's house. (Tr. 81-2).

The three looked at both the Grand Prix and a Mitsubishi Lancer the victim had for sale. (Tr. 329, 410-11). At some point during the initial meeting with the victim, Charles expressed reluctance about continuing with the group's plan. (Tr. 329-30, 410-11). Kayla and Nyia informed the victim that they needed to go to a local gas station to use the restroom, and that they would return. (Tr. 330, 412). Hinson noted that when the group left, the victim brought the Grand Prix down from his house and parked it in front of her house. (Tr. 83-4). She also stated that the victim was heavily intoxicated, and that he was drinking. (Tr. 84-5, 102).

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<sup>4</sup> Applicant remained in Kayla's Mustang; he did not want the victim to recognize him because he had previously lived with the victim. (Tr. 326-27, see Tr. 406).

The group left the victim's house, went to a gas station, and left Charles at the station. (Tr. 331, 413). Applicant, Kayla, and Nyia then returned to the victim's residence; Kayla and Nyia went back to the house to look at the two cars. (Tr. 332-33, 414). Nyia noted that she saw the gun in the backseat of the Mustang at this point. (Tr. 414). They were unable to start the Lancer and keep it running.<sup>5</sup> (Tr. 333).

Hinson testified that when the group came back, they pulled into the victim's driveway. (Tr. 84). The victim had indicated to her that they planned on taking the Grand Prix for a test drive. (Tr. 84, 85). Kayla and Nyia then requested to test drive the Grand Prix. (Tr. 334, 415). During the test drive, Kayla drove the Grand Prix, and Nyia sat in the front passenger seat. (Tr. 335, 377, 416, 451). The victim sat in the back seat of the Grand Prix. (Tr. 335, 377, 416, 451). Both Kayla and Nyia testified that he was heavily intoxicated, and he was drinking during the test drive. (Tr. 335-36, 416, 451). Applicant remained in Kayla's Mustang, and he followed the Grand Prix during the test drive. (Tr. 336, 416).

#### **The Two Cars Stop in a Church Parking Lot**

Kayla testified that during the test drive, she followed signals from Applicant as directions of where he wanted her to take the car. (Tr. 336-37, 376-77).<sup>6</sup> Eventually, Kayla pulled into the parking lot of Crosswell Baptist Church because she was tired of driving. (Tr. 337, 417). She pulled into the parking lot, and Applicant pulled in behind her. (Tr. 417). Once they were stopped, Nyia got out of the Grand Prix and went back to the Mustang to talk with Applicant about their next move. (Tr. 337-38, 378, 417, 453). After talking with Applicant, Nyia went back to the Grand Prix to talk with Kayla. (Tr. 338, 417-18). Kayla then went back to the Mustang to talk with Applicant. (Tr. 338, 378, 418-19, 453). While the two were talking,

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<sup>5</sup> Both Nyia and Hinson indicated the attempt at operating the Lancer occurred during their first contact with the victim. (Tr. 82, 410-11).

<sup>6</sup> Nyia testified that this was done according to the instructions by Applicant. (Tr. 414, 452).

they noticed the victim had gotten out of the car and was starting to walk towards the driver's side of the car.<sup>7</sup> (Tr. 338-39, 418-19; see Tr. 380). Kayla ran back to the Grand Prix and jumped in the driver's seat before the victim could get into the seat. (Tr. 339, 378, 418-19, 453-54). Kayla then tried to start the car. (Tr. 339, 419). The victim got on top of Kayla and attempted to jerk the keys out of Kayla's hand. (Tr. 339). During cross-examination, Kayla indicated that the victim was grabbing at her, and at some point, she showed where she was bruised to law enforcement. (Tr. 379).

Kayla testified that he also attempted to put the car in park while she was attempting to put the car in drive. (Tr. 339-40, 380). Nyia also confirmed the victim Kayla and the victim were engaged in a struggle over the car. (Tr. 419). Nyia observed the victim throw the beer bottle behind him, and further saw him lose a shoe after Kayla got the car to go a little bit. (Tr. 419).

Kayla noted, "[the victim]'s not hitting me, he's just trying to get me out of the car, trying to pull me out." (Tr. 340, ll 6-7). She also noted that the victim was not saying anything. (Tr. 340). Nyia testified the victim was laying on top of Kayla. (Tr. 420). His hands were on the driver's seat and, at some point in time, on the ignition switch. (Tr. 420). She also stated that she did not see him hit her, but he "[m]ight be pushing her a little bit." (Tr. 420, ll 21-22).

### **The Shooting**

Kayla described what happened next as follows:

It happened so fast. Tav [Applicant] pulled up beside the car, the Grand Prix that we were in. And the window was rolled down on the passenger side of the Grand Prix. And my window won't roll down in my Mustang on the driver's side. So,

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<sup>7</sup> Kayla noted that the victim did have a beer bottle in his hand when he was walking towards the driver's side of the car. (Tr. 380). Kayla did not know when the beer bottle was broken in the parking lot. (Tr. 380). She also did not know if it was thrown or dropped. (Tr. 380).

he opens his door, sticks the gun out and tells him to get up off me or he's going to shoot him.

And Dinneon says, Shoot me, I don't care.

And he shoots him on top of me.

(Tr. 341, ll 1-8). Nyia recalled, “[s]o the Defendant, he drives around and he told Sean he said, Get off her. And Sean looked up at him and said, Kill me. And he had the gun pointed at the window. And he shot him.” (Tr. 421, ll 3-8). Nyia also indicated Applicant had pulled up to the passenger side of the Grand Prix, opened the Mustang door, and fired the gun towards the victim. (Tr. 421, 457-59). Nyia acknowledged the victim was not using any weapons, and he was not threatening Kayla in any way. (Tr. 422).

Kayla indicated that immediately prior to the shooting, the victim had half of his body in the Grand Prix and had his legs dangling out of the Grand Prix. (Tr. 341). Kayla testified that she saw Applicant shoot the victim. (Tr. 341). After he was shot, the victim went limp. (Tr. 341). Nyia also admitted she saw Applicant shoot the victim. (Tr. 421).

During cross-examination, Kayla testified that she could not tell what Applicant may have seen during the confrontation between her and the victim. (Tr. 383). She also did not know what Applicant could see when he shot the victim. (Tr. 382). Kayla surmised Applicant was just trying to get the victim off of her. (Tr. 382, 384).

Kayla testified that after Applicant shot the victim, she panicked. (Tr. 342). She pushed the victim off of her, started the Grand Prix, and sped out of the parking lot. (Tr. 342). Nyia also confirmed that Kayla pushed the victim out of the car and took off. (Tr. 421-22). Eventually, Applicant and Nyia were able to catch up with Kayla in Kayla's Mustang. (Tr. 342-43, 422). Kayla and Applicant switched cars, and they drove back to Applicant and Nyia's mother's house. (Tr. 343, 422-23). Kayla testified that Applicant was bragging about shooting the victim at his

mother's house. (Tr. 343). She also noted Applicant said that he got his mother's car back. (Tr. 343).

That night, Kayla and Nyia went back to their hotel. (Tr. 427). The next day, September 18, they received a call from Applicant. (Tr. 345, 426). They later picked up Applicant, and over the course of several days, travelled from Greenville area to Gatlinburg, TN, back towards Spartanburg, SC, Traveler's Rest, SC, and eventually to Asheville, NC. (Tr. 347-53, 428-31). The three were apprehended at a Sleep Inn in Asheville. (Tr. 182-83, 295-99, 353, 432).

#### **Law Enforcement Investigation**

The victim was still breathing shallowly, but was otherwise unresponsive when the first officer arrived to the scene. (Tr. 130, 132). The first deputy to arrive noted that the victim was face down, and there was blood on the ground when he arrived. (Tr. 132). The victim was lifeless by the time EMS arrived. (Tr. 145, 146, 149).

At the scene, a broken liquor bottle and a tennis shoe were located several feet away from the victim's body. (Tr. 155-56, 158, 246-47). Law enforcement was able to identify the victim via his driver's license. (Tr. 158).

Law enforcement obtained a lead when a detective spoke with Ms. Hinson about the call she received. (Tr. 164-65). Hinson provided a detective with the phone number from which she had received a call about seeing the cars. (Tr. 103, 164-65, 231). Law enforcement traced the number to Harold Sloan. (Tr. 106). Sloan testified that the number was for a cell phone that he provided to Taznick Utsey, one of Applicant's sisters.<sup>8</sup> (See Tr. 106-07, 165). Law enforcement later made contact with Taznick, and they were able to establish Applicant, Kayla, and Nyia as possible suspects. (Tr. 169-70).

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<sup>8</sup> Josqueze Thomas, one of Taznick's ex-boyfriends, testified that he recalled seeing Applicant use the phone on September 17, 2011. (Tr. 110-12, 113).

The Grand Prix was found in Greenville on Monday, September 19, by the US Marshal Service. (Tr. 171-72). Near the car was a rolled up license plate. (Tr. 175). A receipt from a Family Dollar dated September 18, 2011 was found in the car. (Tr. 177-78). Video from the Family Dollar on the date and time of the timestamp on the receipt reflected that an individual with a similar appearance to Applicant came to the store in the Grand Prix and made a purchase inside the store. (Tr. 180-81, 192-93).

After Applicant and his co-defendants were arrested, Kayla's Mustang was searched. (Tr. 182-86). A BB gun was found underneath the passenger seat.<sup>9</sup> (Tr. 186).

The victim's blue Lancer was processed for fingerprints. (Tr. 232, 249-50). Three prints from the Lancer were matched to Nyia. (Tr. 502-03, 518). The Grand Prix and the license plate found behind the Grand Prix were also processed for fingerprints. (Tr. 255-58, 262-63). Prints from the rolled up license plate were matched to Applicant. (Tr. 504-05, 520). Prints from the Grand Prix were matched to Applicant and to Kayla. (Tr. 506, 509-10, 517).

#### **ALLEGATIONS**

1. Ineffective Assistance of Trial Counsel
  - a. "Counsel failed to competently argue due process violation."
  - b. "Counsel failed to argue against § 16-3-10"
  - c. "Counsel failed to investigate exculpatory evidence."
  - d. "Trial counsel was ineffective for failure to request for impaneling documents that supported evidence of grand jury convene for procurement related to improper indictment."
    - i. "Applicant point to deficiency by Defense DeJong did not at any time investigate or make no effort to secure information upon this matter, where defense counsel abandoned his duty to protect applicant rights for not employ investigator to find out if any physical evidence or biological material presented to say that grand jury agreed with decision."
  - e. "Defense counsel was ineffective in related to Applicant rights to challenge the

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<sup>9</sup> Kayla had testified that Applicant gave her a BB gun on the night of the shooting, and he told her to use it on the lady (Ms. Hinson) with the victim when they were initially looking at the cars. (Tr. 328). Nyia confirmed Applicant gave Kayla the gun, and further confirmed that Applicant told Kayla to use it to keep the lady with the victim from going anywhere to call the police. (Tr. 408). Nyia also testified that Charles threatened to punch Kayla if she hit the lady with the gun. (Tr. 412).

- affidavit for arrest, search and seizure.”
- f. “Trial counsel was ineffective for failing to asks the trial court to poll the jury individually by name to determine whether this their verdict.”
  - g. “It was counsel DeJong ineffectiveness for not objecting to a sentence that outside the scope of law in S.C. Code Ann. § 16-3-10.”
  - h. “IAC shown where counsel did not protect Applicant rights’ for not rebut and or make no effort to possess information prior to trial, which created an Brady violation.”
- 2. Ineffective Assistance of Appellate Counsel
    - a. “Appellate counsel was ineffective for failing to brief issue ‘trial abuse of authority.’”
  - 3. Brady Violation
    - a. “The prosecutor knowingly misrepresented a BB gun as a .22 caliber handgun. ‘The prosecutor knew the BB gun shoot pellet.’”
  - 4. Trial Court Error
    - a. “The circuit court err in the abuse of authority where Applicant sentence or conviction exceeds the maximum authorized by law. Under this section, the Legislature set forth guidelines be thirty years to life. Applicant sentence is obviously in violation of State and the United States Constitution.”

### **SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING**

#### Applicant’s Testimony

Applicant testified Trial Counsel represented him from 2011 until the time of trial in November of 2013. He testified Trial Counsel met with him a good amount of times and if he had to estimate probably ten times. Applicant testified Trial Counsel discussed the case with him but never discussed potential witnesses. He testified he did not know his sister would testify at trial until the night before she testified. Applicant testified he told Trial Counsel about an alibi witness but Trial Counsel told him he could not track them down because he did not have enough time and his investigator retired. He testified his cousins Tracy and Steve where his alibi witnesses and they would have testified at trial that he was somewhere else when this crime took place. He testified Trial Counsel failed to get a preliminary hearing after he asked for one but Trial Counsel told him he did not need one. Applicant testified he thought he could have learned more about the allegations at a preliminary hearing if he would have had one. He testified Trial

Counsel should have called his alibi witnesses at trial and he was prejudiced because his co-defendant got less time for testifying. Applicant testified he wanted to know who the witnesses were that were going to testify at trial and Trial Counsel failed to inform him of them.

On cross-examination, Applicant testified he met with Trial Counsel but he did not go over discovery with him at all and never discussed facts of the case with him. He testified Trial Counsel never discussed any plea offers with him either. Applicant testified he gave Trial Counsel addresses and names of his alibi witnesses but Trial Counsel said he could not locate them because his investigator retired. He testified Trial Counsel did cross-exam his co-defendant regarding their involvement and if they were receiving a lesser sentence for testifying.

#### Trial Counsel's Testimony

Trial Counsel testified he represented Applicant from the time of his arrest. He testified he definitely discussed the discovery and reviewed everything with Applicant because he met with him at least ten times during his representation of Applicant. Trial Counsel testified two witnesses said they saw the shooting including Applicant's sister who was Applicant's co-defendant. He testified on September 22, 2013, he went to the jail to visit Applicant and discussed with him that his sister and other witnesses would be testifying. Trial Counsel testified Applicant thought initially his sister would not testify against him and Applicant had written a letter to his sister about her potential testimony. He testified he discussed with Applicant different variables regarding Applicant's sister's testimony. Trial Counsel testified these variables included other witnesses testifying and other circumstantial evidence that may be introduced at trial. He testified there was never any plea offer from the state and Applicant did not say he wanted to plead guilty. Trial Counsel testified he thought Applicant gave him names of potential alibi witnesses but he did not have any luck finding the alibi witnesses. He testified

based on his conversations with Applicant he never believed Applicant's identity or placement at the crime scene was ever in question. Trial Counsel testified he sought a jury charge of defense of others and tried to use that as a defense in Applicant's case but was unsuccessful in getting the charge.

On cross-examination, Trial Counsel testified to the facts of the case. He testified Applicant was with his sister and another women and they had come from Greenville to Easley to look at a vehicle for sale. He testified the victim in this case was very intoxicated and after a test drive of the vehicle the parties involved ended up at a church. Trial Counsel testified something transpired between the victim and the females and Applicant shot the victim. He testified he reviewed all of Applicant's charges with him and the sentences he could face including that murder carried a sentence of thirty years to life day for day. Trial Counsel testified he looked at the evidence in the case, went to the crime scene, and tried to locate witnesses. He testified he was unable to find any witnesses despite diligent efforts. Trial Counsel testified the possible defenses in this case for Applicant were self-defense and defense of others. He testified he reviewed the discovery with Applicant. Trial Counsel testified both of Applicant's co-defendant testified against him including his sister and those testimonies where fatal to Applicant's case. He testified he discussed with Applicant about testifying in his defense many times and told him to decide after the state rested their case but that the decision to do so was solely up to Applicant.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly.

These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the 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, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

Applicant proceeded on the following allegations:

### Ineffective Assistance of Counsel

Applicant alleged Trial Counsel was ineffective in his representation. This Court finds Applicant has failed to prove Trial Counsel was ineffective. This Court would first note Trial Counsel provided effective assistance in this case. Trial Counsel is a trial practitioner who had experience in the trial of criminal offenses. Trial Counsel conferred with Applicant on multiple occasions, during which time Trial Counsel discussed the pending charges, the State's evidence, possible defenses and courses of action, and answered all of Applicant's questions.

This Court also finds Trial Counsel thoroughly investigated Applicant's case and Applicant failed to show how any further investigation would have helped his case. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 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."). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). Applicant has failed to show what beneficial information could have been discovered had Counsel done more investigation. Even so, Counsel testified credibly that not only did he review all of the discovery, he went to the crime scene, and tried to locate witnesses. This Court finds Trial Counsel's investigation was beyond reasonable.

This Court further finds Trial Counsel's search for Applicant's alibi witnesses was reasonable. First, this Court notes any claims surrounding the failure to investigate alleged alibi

witness assumes the testimony from the alleged alibi witnesses would have been favorable to the defense and therefore affected the outcome of the trial. However, this contention is based on pure conjecture and speculation. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An 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. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Because Applicant failed to produce the testimony of the alleged alibi witness, this Court finds Applicant has failed to demonstrate he suffered any prejudice.

Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

#### **Ineffective Assistance of Appellate Counsel**

Applicant alleged Appellate counsel was ineffective for failing to brief the issue "trial abuse of authority." At the evidentiary hearing, Applicant informed this Court he was waving the

claim of ineffective assistance of appellate counsel. This Court finds this claim was expressly waived by Applicant. Therefore, this allegation is denied and dismissed with prejudice.

#### **Brady Violation/Prosecutorial Misconduct**

Applicant alleged the State committed a Brady<sup>10</sup> violation or prosecutorial misconduct by knowingly misrepresenting a BB gun as a .22 caliber handgun. This Court construes this allegation as prosecutorial misconduct. This Court finds Applicant failed to present any information on this allegation. This Court finds Applicant has failed to meet his burden of proving actual prosecutorial misconduct. It is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Therefore, this allegation is denied and dismissed with prejudice.

#### **Trial Court Error**

Applicant alleged the circuit court erred in the abuse of authority where Applicant sentence or conviction exceeds the maximum authorized by law. A trial court has broad discretion in imposing criminal sentences within the limits prescribed by law. State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976); Clark v. State, 259 S.C. 378, 192 S.E.2d 209 (1972). The courts normally have no discretion to correct a sentence given within statutory limits. To be entitled to relief, the Applicant must prove that the alleged excessive sentence was the result of partiality, prejudice, oppression or corrupt motive, or that the sentence constitutes cruel and unusual punishment per se. Clark, Id.; State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979). Applicant was charged with and ultimately convicted of murder. The criminal offense of murder carries a sentence of thirty years to life imprisonment. Applicant was sentenced to sixty years. This Court finds the trial court committed no error in sentencing Applicant. Accordingly, Applicant has failed to show his sentence was a result of any of the above mentioned factors.

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<sup>10</sup> Brady v. Maryland, 373 U.S. 83 (1963)

Therefore, this allegation is denied and dismissed with prejudice.

**CONCLUSION**

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

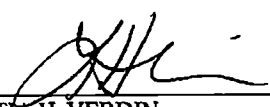
This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they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

**IT IS THEREFORE ORDERED THAT:**

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

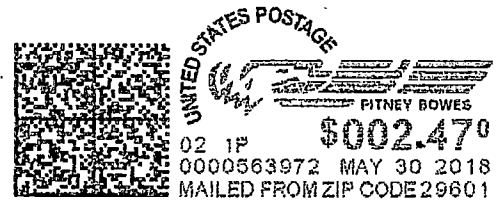
AND IT IS SO ORDERED this 15 day of May, 2018.

CLERK OF COURT  
SOUTH CAROLINA  
2018 MAY 29 A 8:33



LETITIA H. VERDIN  
Presiding Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina



Daniel Shearouse  
Clerk of Court  
South Carolina Supreme Court  
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██████████  
IL, JR.

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SUITTE 11  
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