LAW OFFICE OF

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

June 22, 2018

RECEIVED

JUN 26 2018

S.C. SUPREME COURT

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

RE: Dominic Gallman, SCDC # 234627, vs. State of South Carolina
Appeal of Case No. 2012-CP-40-5000

Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal. I was **appointed** to represent Mr. Gallman on his PCR.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,

Kristy Goldberg

CC: Kelly Oppenheimer
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Dominic Gallman, SCDC # 234627
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

Jeanette McBride
Richland County Clerk of Court
Post Office Box 2766
Columbia, South Carolina 29202

1720 MAIN STREET • SUITE 303 • COLUMBIA, SOUTH CAROLINA 29201
PHONE (803) 667-6633 • FACSIMILE (803) 799-4059

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUN 26 2018
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Brooks P. Goldsmith., Circuit Court Judge

Case No. 2012-CP-40-5000

Dominic Gallman, SCDC # 234627, ... Appellant

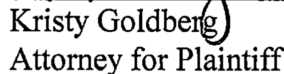
v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant Dominic Gallman hereby appeals from the Order of the Honorable Brooks P Goldsmith presiding Judge for the 5th Judicial Circuit, filed June 5, 2018 and received by counsel for the Applicant on June 8, 2018 in the matter of Dominic Gallman v. State of South Carolina, Case No. 2012-CP-40-5000.

June 22, 2018



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:
Assistant Attorney General, Kelly Oppenheimer
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Brooks P. Goldsmith., Circuit Court Judge

Case No. 2012-CP-40-5000

Dominic Gallman, SCDC # 234627, ... Appellant

v.

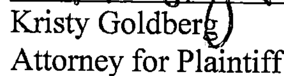
State of South Carolina, ... Respondent.

PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on June 22, 2018 by depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Kelly Oppenheimer
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.

1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:
Assistant Attorney General, William Kelly Oppenheimer
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Dominic A. Gallman, #234627,

Applicant,

v.

State of South Carolina,

Respondent.

Case No. 2012-CP-40-05000

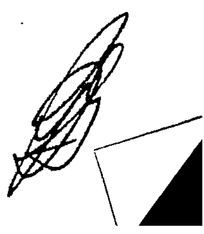
ORDER OF DISMISSAL

2018 JUN -5 PM 9:39

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed July 20, 2012, by Dominic A. Gallman (Applicant). The State (Respondent) made its Return on November 6, 2012, requesting an evidentiary hearing be held. Thereafter, on March 3, 2018, and March 15, 2018, through his counsel, Applicant filed an amended application for post-conviction relief and a second amended application for post-conviction relief, respectively. An evidentiary hearing was convened on March 20, 2018, and March 23, 2018, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Kristy G. Goldberg, Esquire. Respondent was represented by Assistant Attorney General Jessica E. Kinard of the South Carolina Attorney General's Office.

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. During its November 2005 term, the Richland County Grand Jury indicted Applicant for one count of first-degree burglary (2005-GS-40-09696), three counts of armed robbery (2005-GS-40-09695; -09697; -09698), one count of kidnapping (2005-GS-40-09699), and three counts of murder (2005-GS-40-09700; -09701; -11581). Jonathan M. Milling, Esquire



represented Applicant on these charges. On December 3-18, 2007, Applicant proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr, along with his two co-defendants, Stanley Oliver, who was charged with the same crimes as Applicant, and Kenneth Joy, who was charged as an accessory before and after the fact of these crimes. At the close of the State's case, Judge Cooper directed a verdict acquitting Applicant and Oliver of the charge of armed robbery of victim Desiree Felder. The trial proceeded on the remaining charges. Following deliberations, the jury acquitted Applicant for armed robbery against victim Kevin Miller and convicted Applicant as indicted for the remaining charges. Judge Cooper sentenced him to a term of imprisonment of life without the possibility of parole for all three murder convictions, life without the possibility of parole for first-degree burglary, thirty years for armed robbery, and thirty years for kidnapping.

Applicant filed a timely notice of appeal, and Chief Appellate Defender Robert M. Dudek perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issues:

1. Whether the court erred by refusing to declare a mistrial where state's witness Jason Brown testified co-defendant Oliver told him in jail that he and [Applicant] rushed into the drug dealer's house and committed the murders and that he told the police this in his statement, since defense counsel correctly argued this violated the principles of *Bruton v. United States* and *Crawford v. Washington* since [Applicant] was denied the opportunity to cross-examine Oliver about making that alleged statement which implicated [Applicant] in the murders?;
2. Whether the court erred by allowing co-defendant Oliver's girlfriend, Renata Williams, to testify that Oliver came to her apartment in the middle of the night around the time of the murder, and telephoned [Applicant] since the state failed to lay the necessary evidentiary predicate to show how Williams knew [Applicant] was 'on the other end of the phone' since her testimony clearly implied Oliver called [Applicant] about the crimes?; [and]
3. Whether the court erred by allowing the admission of Tatanisha Robinson's redacted statement into evidence since it called undue attention to that statement, the redaction was so sloppily done that it was obvious matters were being hid from the jury, and Robinson's admissions and explanations regarding the statement during her

testimony made admission of the statement itself improper under Rule 613(b), SCRE?

Following briefing, the South Carolina Court of Appeals issued an unpublished opinion affirming Applicant's convictions and sentences. *State v. Gallman*, Op. No. 2011-UP-006 (S.C. Ct. App. Filed January 20, 2011). Applicant subsequently petitioned for rehearing, which was denied on March 1, 2011. Applicant then petitioned the Supreme Court of South Carolina for a writ of certiorari to review the Court of Appeals' decision. In his Petition, Applicant raised the following issues:

1. Whether the Court of Appeals erred by summarily holding it was not error for the trial court to refuse to declare a mistrial where state's witness Jason Brown testified co-defendant Oliver told him in jail that he and [Applicant] rushed into the drug dealer's house and committed the murders and that he told the police this in his statement, since defense counsel correctly argued this violated the principles of *Bruton v. United States* and *Crawford v. Washington* since [Applicant] was denied the opportunity to cross examine Oliver about making that alleged statement which implicated [Applicant] in the murders?;
2. Whether the Court of Appeals erred by summarily holding it was harmless error for the trial court to allow co-defendant Oliver's girlfriend, Renata Williams, to testify that Oliver came to her apartment in the middle of the night around the time of the murder, and telephoned [Applicant] since the state failed to lay the necessary evidentiary predicate to show how Williams knew [Applicant] was "on the other end of the phone" since her testimony clearly implied Oliver called [Applicant] about the crimes?; [and]
3. Whether the Court of Appeals erred by summarily holding it was not error for the trial court to allow the admission of Tatanisha Robinson's redacted statement into evidence since it called undue attention to that statement, the redaction was so sloppily done that it was obvious matters were being hid from the jury, and Robinson's admissions and explanations regarding the statement during her testimony made admission of the statement itself improper under Rule 613 (b), SCRE?

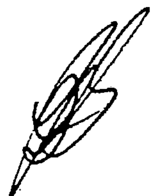
By Order dated June 7, 2012, the Supreme Court denied Applicant's petition for writ of certiorari. The Remittitur was issued on June 12, 2012.

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

1. Ineffective Assistance of Counsel;
    a. Failure to object to irrelevant & prejudicial evidence.
2. Improper Jury Deliberations; [and]
    a. Jury verdict rendered on not evidence not presented at trial.
3. After Discovered Evidence/Actual Innocence.
    a. Prosecutorial Misconduct/not the perpetrator of the crime.

In his amended application for post-conviction relief, Applicant raised the following grounds:

1. Ineffective assistance of counsel for failure to argue severance of the Applicant's trial from his co-defendants' trials;
2. Ineffective assistance of counsel for failure to object or request a new jury panel when eleven jurors publicly announced their history with victims of violent crime. TT. 92-102;
3. Ineffective assistance of counsel for failure to call witnesses to testify on behalf of the defense, including but not limited to Alfonso Simmons, Albert Gallman;
4. Insufficient investigation by trial counsel;
5. Ineffective assistance of counsel for failure to present alibi defense;
6. Ineffective assistance of counsel for failure to object or request a mistrial when Ulicen Allen testified that Oliver "and his friends" have done robberies and that he had received threats not to testify. TT. 968 and 972;
7. Ineffective assistance of counsel for failure to object when Leticia Jones said she had a physical confrontation with Gallman. TT page 1029;
8. Ineffective assistance of counsel for failure to object when Omekas Moaney testified that Gallman had come to him to purchase marijuana, cocaine, or crack in the past, which constitutes an inadmissible prior bad act. TT. 1085;
9. Ineffective assistance of counsel for admitting Federal Court document into evidence. TT. 1125, 1455;
10. Ineffective assistance of counsel for failing to properly cross-examine and impeach Leticia Jones with prior inconsistent statements;
11. Ineffective assistance of counsel for inadequately advising the Applicant regarding his right to testify, and additionally, for failing to request a ruling from the Court regarding admissibility of the Applicant's prior convictions for impeachment purposes;
12. Ineffective assistance of Appellate counsel for failure to properly raise and argue the Applicant's appealable issues under *Bruton* and *Crawford* and argue that the error in Jason Brown's testimony where the Applicant was named undermined all attempts at redactions and infected the trial as a whole;
13. Ineffective assistance of counsel for failure to object during closing argument to facts not in evidence. TT. 2244;
14. After discovered evidence regarding juror misconduct; [and]



15. Cumulative error.

In his second amended application Applicant raised the following grounds:

1. Ineffective assistance of counsel for failure to argue severance of the Applicant's trial from his co-defendants' trials;
2. Ineffective assistance of counsel for failure to object or request a new jury panel when eleven jurors publicly announced their history with victims of violent crime. TT. 92-102;
3. Ineffective assistance of counsel for failure to call witnesses to testify on behalf of the defense, including but not limited to Alfonso Simmons, Albert Gallman, and Michael Jackson, Jr.;
4. Insufficient investigation by trial counsel;
5. Ineffective assistance of counsel for failure to present alibi defense;
6. Ineffective assistance of counsel for failure to object or request a mistrial when Ulicen Allen testified that Oliver "and his friends" have done robberies and that he had received threats not to testify. TT. 968 and 972;
7. Ineffective assistance of counsel for failure to object when Leticia Jones said she had a physical confrontation with Gallman. TT page 1029;
8. Ineffective assistance of counsel for failure to object when Omekas Moaney testified that Gallman had come to him to purchase marijuana, cocaine, or crack in the past, which constitutes an inadmissible prior bad act. TT. 1085;
9. Ineffective assistance of counsel for admitting Federal Court document into evidence. TT. 1125, 1455;
10. Ineffective assistance of counsel for failing to properly cross-examine and impeach Leticia Jones with prior inconsistent statements;
11. Ineffective assistance of counsel for inadequately advising the Applicant regarding his right to testify, and additionally, for failing to request a ruling from the Court regarding admissibility of the Applicant's prior convictions for impeachment purposes;
12. Ineffective assistance of Appellate counsel for failure to properly raise and argue the Applicant's appealable issues under *Bruton* and *Crawford* and argue that the error in Jason Brown's testimony where the Applicant was named undermined all attempts at redactions and infected the trial as a whole;
13. Failure to object to introduction of telephone records and summary of telephone records as evidence;
14. Ineffective assistance of counsel for failure to object during closing argument to facts not in evidence. TT. 2244;
15. After discovered evidence regarding juror misconduct; [and]
16. Cumulative error.

At the hearing, Applicant proceeded forward on the claims of ineffective assistance of counsel raised in his second amended application for post-conviction relief, as well as a claim of actual innocence based on co-defendant Oliver's testimony concerning the crime.

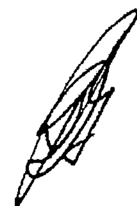
STATEMENT OF FACTS ADDUCED AT TRIAL

Zondria McKie, a friend of victim Desiree Felder, was attempting to find Felder to repay a loan Felder had made to McKie. (Tr. p. 594-95). Shortly before five o'clock in the afternoon on September 4, 2005, McKie went to the home that Felder had shared with boyfriend, George "Jim" Batie. (Tr. 501-02; 532; 595-96; Tr. p. 603). McKie found Miller and Batie dead in the home, and called 911. (Tr. 597-99). She could not, however, find Felder, though she searched the home looking for her friend. (Tr. 600-01).

Batie was a known drug dealer. Miller was at Batie's home to buy drugs for his friend, Christopher Cochran, during the early morning hours of September 4, 2005. (Tr. 562-67). Miller was shot once in the back of the head. (Tr. 1695-96). Batie was shot three times, once in his hip, once in his thigh, and the fatal wound – a shot to the head. (Tr. 1703-06; 1714-16). Batie's house was ransacked, and a nearby safe was found opened but empty, with blood smears evident on the outside. (Tr. 598; 637-39).

Felder's body was found off a dirt road in Richland County three days later, when a nearby resident walking his dog investigated a decomposition smell that he had noticed for "more than a day." (Tr. 767-69). Her body was wedged between two trees. She had been shot in the head. (Tr. 781-82; 785; 1523-25).

Investigation revealed co-defendant Oliver's fingerprint on a shoe box in the ransacked home. (Tr. 675). Two .40 caliber shells were also recovered from the home. (Tr. 630; 739-40).



Oliver's girlfriend, Renata Williams, testified Oliver came into the apartment that the two occasionally shared sometime after two o'clock in the morning on September 4, 2005, and he called Applicant. The next day, she overheard him tell "Mike" about "doing a lick," and she also saw that Oliver had a large of amount of drugs and money. (Tr. 830; 835-38). Williams and Oliver would later go on a spending spree. (Tr. 838-43). After seeing a news report on the murders, Oliver asked Williams if she would tell people that he was her husband in the event he was "locked up." (Tr. 844).

Oliver's longtime friend Ulicen "Mike" Allen testified Oliver (whom he called his "brother") called him in the early morning hours of September 4, 2005, and asked him to come over to the apartment, and he did. When he arrived, he saw "guns," a .12 gauge shotgun, bundles of money, crack cocaine, and digital scales. Oliver admitted he had robbed someone, and when Allen expressed concern that the victim may come after Oliver, Oliver advised, "[t]he guy we got this from ain't going to be looking for us." (Tr. 902-04). He testified that Oliver had a .40 caliber gun and a 9 mm gun. (Tr. p. 928-29). Oliver would later again admit committing the robbery to Allen and that his fingerprint was at the scene, but maintained that he did not kill victim Felder. (Tr. 908-10). Allen testified he knew Applicant to be "associated" with his friend Oliver, and he confronted Applicant about the incident, asking why Applicant "let him" leave fingerprints at the scene, "why did [he] let him leave his prints all over the place if it was going to go down like this?" Applicant then responded, "you know how your brother be. Your brother was all on that cocaine. Man, I couldn't tell your brother that. You know, your brother wanted to do what he wanted to do." Applicant further admitted his involvement in the crime, telling Allen that he and Oliver gained entry "[w]hen the white boy got out the car, they rushed the white boy into the house. That is how they gained entrance." (Tr. 924-28).

Applicant's girlfriend, Leticia Jones, testified Applicant tearfully confessed to her in the early morning hours of September 4, 2005, (Tr. 1030-31), telling her:

> . . . [she] was right about his friend, that he had gotten him into trouble and that – said, Leticia, listen to me. He said that – he said that he had gotten him into trouble and that he made him do something that he didn't want to do and that he didn't know what to do. He couldn't – he just was upset and that he didn't know how to handle it.
>
> He said that his – his friend had – had some idea to make someone and that he didn't really know what was involved but he went with him and it just turned out to be not what he thought it was.
>
> He said that they went to the house and that his friend, that they knocked on the door and somebody opened the door and his friend shot the guy that opened the door. And then they – that the guy he was with shot the other guy that was in the house and that then they were trying to rob the man and that the man wouldn't tell him where his – his money was. And so the guy he was with just flipped out and got really mad and angry and just shot the man. . . .

(Tr. 1031-32).

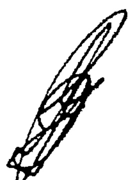
He also confessed to the murder of Felder:

> The person that he was with said that they had to take her because she probably knew where . . . the money was. And so he put her in the car and they drove with the lady. And I don't – I don't know what happened. But that the person that he was with told him that he had gotten his hands dirty and he had to do the same thing and that he was like crazy and he tried to hurt the lady and that Dominic had to stop him from him – from attacking the lady, from like raping her and stuff. But that he put the gun to his head and told him that if he didn't shoot the lady that he would shoot him. So Dominic said he didn't know what to do. And he had just closed his eyes and pulled the trigger. And that was it.

(Tr. 1033-34).

She would later see Applicant with his father, burning something – some kind of material – on the grill the next day. (Tr. 1034-35).

Omekas Moaney, a/k/a "Blue," testified he had met Oliver in 2003, but had known Applicant since childhood. (Tr. 1077; 1097). He testified Ken Joy dropped Oliver at Moaney's



home on September 5, 2005. Applicant came by approximately thirty minutes later. They asked him to cook a large amount of cocaine into crack and distribute it. The money from the subsequent sales went to Oliver and Applicant. (Tr. 1081-87). Oliver eventually told Moaney that he obtained the drugs through robbery, and asserted "they didn't intend to harm anybody. They did not go there with the intentions of harming anybody but things got out of hand, things went wrong." (Tr. 1091).

Tatanisha Robinson, another of Oliver's girlfriends, gave a statement to investigating officers that Oliver had admitted he had done something that could possibly send him to jail for life, and that Oliver had a significant amount of cash and cocaine the day following the murders. She also noted Applicant was "bragging" about the murders until Oliver was arrested. (State Exhibit 203, pp. 3-4).

Jason Brown, a longtime friend of Oliver's, who was with Oliver in the Detention Center in October of 2005, testified Oliver confessed his involvement in the crimes. Oliver told him he had killed two people at a house on Mildred Avenue over drugs and money and had taken another from the house and killed that victim at another location. He told Brown he trashed the home, "looking through shoe boxes" and under furniture. He also said two guns were used, a .40 caliber that Oliver had, and a .38 the other person involved had. Oliver told Brown that he had "made" the other individual with him kill the woman at the second location. (Tr. p. 1412-15). Oliver would later ask Brown to kill Renata Williams, Omekas " Blue" Moaney, and Ulicen "Mike" Allen, for giving statements to the police. (Tr. 1417-19).

The bullets recovered from autopsy revealed two guns were used, a .40 caliber and a .38 or .357, and the bullet fragment recovered from Felder's wound was fired by the same weapon that fired the bullet fragment from Batie. (Tr. 1359-61; 1389-90).

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

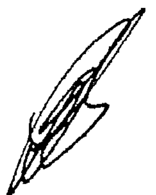
At the evidentiary hearing, Applicant testified on his own behalf and presented the testimony of his co-defendant Stanley Oliver, Pongella Fryson, Albert Gallman, Phyllis Rideout, and Yamica Auton. Respondent presented the testimony of Jonathan M. Milling, Esquire (hereinafter "Counsel"). This Court also had before it a copy of Applicant's trial transcript, the records of the Richland County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant first presented the testimony of Stanley Oliver. Oliver testified he has already had a hearing on his first application for post-conviction relief, which has been resolved, and he has filed a successive application. He testified he has a history of criminal activity. He also testified he and Applicant grew up together, and they met in prison again and were friends. He elaborated Applicant is a good friend and is smart.

He testified he and Applicant were tried together, and Circuit Public Defender for the Fifth Judicial Circuit Douglas S. Strickler was his attorney at the trial. He further testified he and Applicant were charged with the same crimes. He testified Kenneth Joy was also tried with him and Applicant for accessory charges. He elaborated Joy was acquitted of all charges, and only he and Applicant were convicted.

Oliver also testified he did not agree with the joint defense agreement into which he and his co-defendants entered. He elaborated he wanted to go to trial by himself, but the attorneys got together for them and entered into this agreement.

Oliver also testified he has never admitted to committing these crimes, but Applicant was not involved. He elaborated if Applicant had information regarding the case, he would have given that information to someone. He further testified Applicant did not have any information

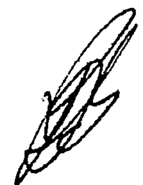


about these crimes, but he, Oliver, did have firsthand knowledge of these crimes because he committed them. He elaborated he did not give a statement to law enforcement implicating Applicant, and he believed they all would have been acquitted because law enforcement had not been provided with any correct information regarding these crimes. He further testified he does not know how law enforcement decided he and Applicant committed these crimes together because he committed them alone. He described this crime as a "me and Desiree situation," explaining he and Felder decided to rob Felder's boyfriend, and he shot Felder's boyfriend. He continued to explain he had to shoot Felder as well because she was with him during the robbery, and he knew she was going to betray him.

Oliver testified he has never told anyone he was going to admit to committing these crimes but wanted to now because he could look at Applicant and admit it. He explained he has maintained his innocence until the hearing.

Oliver explained he would not have testified against Applicant because Applicant had nothing to do with these crimes. He testified, however, he was unable to help Applicant without hurting himself. He elaborated if he had testified he would not have admitted to committing these crimes but, rather, would have told "some truths and some falses."

Next, Applicant presented the testimony of Pongella Fryson. Fryson testified she met Applicant while she was in college, in 1993 or 1994. She also testified law enforcement contacted her and asked her to give a statement, and she gave both oral and written statements. She further testified she told law enforcement she and Applicant were together Labor Day Weekend. She elaborated law enforcement told her the murders occurred Friday evening to Saturday morning, and she told them she was with Applicant Saturday evening to Sunday morning. She also testified law enforcement informed her that the receipt from the hotel was



dated for Friday evening, but her recollection was they were at the hotel Saturday evening. She further testified the dates in her written statement conflicted. She elaborated in her statement, she said she was with Applicant on September 2, 2005.

Fryson testified she met Applicant at a club, Billy D's; and because she did not recognize him at the time, so she gave him her middle name. She further testified she was at the club with Applicant, his father, and a girlfriend of hers. She elaborated they danced at the club until it closed and then went to Waffle House, around three or four o'clock in the morning. She testified they went to Carolina Hotel and stayed there until about seven o'clock Sunday morning. She elaborated she and Applicant shared a room at the hotel and were in the room around 4:30 or five o'clock in the morning, for about two to three hours. She testified while at the hotel, they watched the movie "Million Dollar Baby," which they ordered through the hotel. She testified the receipt from the hotel lists the arrival date as September 3, 2005, and the departure date as September 4, 2005. She testified Applicant, however, turned himself in to law enforcement.

She also testified she did not testify at trial because no one asked her to, and she did not volunteer to testify. She testified she did, however, reach out to a private investigator and "Richland County" and told them she was ready to testify. She testified in 2006 she met with an investigator for Applicant, but she did not recall the statement she gave.

Then, Applicant testified on his own behalf. Applicant testified he is currently serving a life sentence, as well as a thirty year sentence. He testified he was served with a mandatory life without the possibility of parole notice due to his prior convictions[1]. He also testified he proceeded to a twelve-day jury trial with his co-defendants Stanley Oliver and Kenneth Joy.

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[1] Applicant was convicted of armed robbery in 1996 and sentenced to fourteen years imprisonment, and was also convicted for assault and battery with intent to kill for which he was sentenced to ten years imprisonment. Applicant also has a 1997 conviction for accessory after the fact to burglary and armed robbery and was sentenced

Applicant also testified he turned himself in to law enforcement on September 20, 2005. He explained he turned himself in to law enforcement because his mother saw him on the news, and he was not going to hide from it because he did not do anything wrong. He further testified he sought to hire James Todd Rutherford, Esquire, and he also talked to Jack B. Swerling, Esquire. He elaborated Mr. Swerling did something with regards to Applicant's warrants, but then Applicant fired him. Thereafter, Kathrine H. Hudgins, Esquire was appointed to represent Applicant, but she left to work for the Office of Appellate Defense. When she left, she told Applicant she thought Counsel would represent Applicant. By that time, Applicant's charges had been pending for approximately four to five months.

Applicant testified Counsel met with him frequently, about once a week, and would explain to Applicant if he missed a meeting. He further testified he did not recall what was in discovery, but he believed Counsel showed him everything. He elaborated there was nothing in the discovery to link Applicant to these crimes.

He testified Counsel brought the joint defense agreement to him while he was in Alvin S. Glenn Detention Center, and they reviewed the agreement. He elaborated he was against the agreement at first because he and Counsel had talked about a severance. He further testified, however, there were certain safeguards that came with the agreement, so he went along with it. For example, this agreement would prevent a co-defendant from testifying against him at trial and if a co-defendant were to testify, he would have had to be informed in advance. He testified this was not the only advantage of the agreement. .

Applicant testified Counsel told him there was much more evidence in discovery against Oliver, so he would file a motion for severance. He testified, however, there was no hearing on

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to ten years imprisonment for that charge. Finally, Applicant was convicted in 2005 for unlawful carrying of a weapon for which he was sentenced to sixty days imprisonment.

that severance motion. He also testified he and Counsel spoke about the severance in October, and Applicant still indicated he wanted a severance. He elaborated Counsel filed the motion to sever in November 2007; but at pre-trial arguments, Counsel told him it was too late to move for a severance and no judge would grant that motion at that time. Applicant testified Counsel did not feel the need to argue severance. He elaborated Counsel felt Applicant was in a good position with his co-defendants, as there was no evidence linking Applicant to the crimes.

He also testified Counsel never explained to him the safeguards afforded to him by *Bruton*[2] and *Crawford*[3], but they did discuss the joint trial, the possibility of having a trial alone, and *Bruton*. Specifically, he and Counsel discussed the fact that under the joint defense agreement, Oliver and Joy could not testify or give statements without notification to Applicant. He testified, however, he was not protected by *Bruton* and *Crawford*, as jailhouse witnesses, who were roommates with Oliver in prison, testified to things Oliver told them, which implicated Applicant. Applicant testified these statements were admissible as a statement against Oliver's interest, and they would not have been admissible if Applicant had been tried separately. He elaborated he did not make any statements to anyone; therefore, these witnesses would not have been able to testify at his trial. He further testified he was not able to confront Oliver as the original declarant, which harmed him. Applicant testified *Bruton* would allow for redactions to remove the existence of anyone else's name, meaning Applicant's name could be substituted for "him," or another term. Applicant also testified Counsel argued the redactions violated *Bruton*, but this argument was unsuccessful. He elaborated he thought these redactions were improper because not enough information was removed. Applicant further testified Jason Brown testified to what Oliver did with another individual, and Oliver's attorney, Mr. Strickler, used Applicant's

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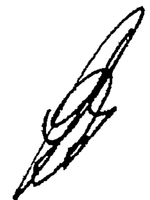
[2] *Bruton v. United States*, 391 U.S. 123 (1968).
[3] *Crawford v. Washington*, 541 U.S. 36 (2004).

name in his cross-examination of Jason Brown, to which Counsel objected. He testified, however, from that point on, the cat was out of the bag.

Applicant testified he told Counsel he was not involved in these crimes and that he had an alibi. He further testified, however, Counsel did not put forward a full defense. He elaborated Counsel did not thoroughly investigate his alibi in that he spoke to some witnesses regarding Applicant's whereabouts Labor Day Weekend, but not all of them. Specifically, Counsel never called Applicant's brother or sister; however, Applicant's brother and sister were not with Applicant on the night of these crimes. He further testified he was not aware of any alibi witnesses who were called, and Counsel did not file a notice of alibi. He testified Counsel filed subpoenas, but they remained unanswered. Applicant also testified he gave a statement to law enforcement about his whereabouts during Labor Day Weekend, but it was not presented at trial. In that statement, he stated he was staying at his mother's house between September 2, 2005, and September 5, 2005, because he had a fight with his girlfriend. He stated while there he smoked; and on Saturday, he helped prepare food for a barbecue. He further stated on Saturday, he went to Billy D's around ten or eleven o'clock in the evening and stayed there until three o'clock Sunday morning. Then, he went to a Waffle House on Park Lane, where his father paid cash. He stated he, his father, Fryson, and Fryson's friend proceeded to the Days Inn, but they had no rooms, so they went to the Carolina Inn, according to the statement. He testified, however, the hotel listed should have been the Red Roof Inn, rather than the Carolina Inn. He further testified they checked into the hotel on September 3, 2005, and checked out September 4, 2005, and ordered a movie Sunday morning, so he could not have been committing these crimes. He testified they left around six or seven o'clock the following morning. He testified this statement

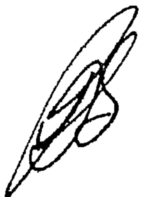


to law enforcement is the truth, and he would testify to those same facts today. He further testified he talked to Counsel about this statement, who said he would hire an investigator.

Applicant also testified Counsel hired an investigator, Lee Connelly, who—up to a certain point—did everything Applicant wanted. He elaborated Ms. Connelly never received the hotel receipts, but she could have talked to someone at the hotel. He also testified Counsel called Ms. Connelly as a witness at trial in order to testify about previous statements Jones had given her. In particular, Ms. Connelly would testify to the fact that Jones had previously said Applicant was not involved in these crimes. He explained, however, that the State objected to this line of testimony as being hearsay; and therefore, Counsel was unable to introduce both sides of the story. He further explained he believed Jones testified for the State because she was forced, specifically her son had been taken from her and her parents threatened her because they did not want Jones to have any sort of relationship with Applicant.

He also testified Michael Jackson, Jr.'s father was in Alvin S. Glenn Detention Center at the time of Applicant's trial, and he approached Applicant to tell him Michael Jackson, Jr. had personal knowledge of these crimes. Applicant further testified he told Counsel about this, and Counsel told him he was going to call Jackson as a witness; however, Jackson did not want to be involved. Similarly, he testified he wanted Counsel to call Alfonso Simmons, who was in prison before Applicant was arrested, as a witness at trial. He elaborated Simmons spoke with Stan Smith and Stephen Foster, who gave Simmons information about these crimes, but Counsel was unable to speak with Simmons because he was represented by counsel.

Applicant testified he and Counsel agreed to call certain witnesses, but they never talked about calling Applicant's father or Fryson as witnesses. He further testified Counsel did not want to present any evidence in order to preserve the last argument. He elaborated Counsel



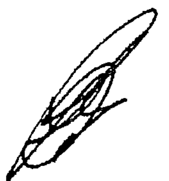
informed him the last argument was the most important strategy at trial. Applicant also testified Counsel had no other trial strategy but to preserve last argument. He also testified Counsel advised him not to testify because of Applicant's past armed robbery conviction, which Counsel advised the State would mention in order to impeach Applicant. He testified there was never a legal analysis performed by the trial court as to whether or not Applicant's prior record would be admissible, and Counsel never argued that Applicant's prior crimes were not probative of honesty or too similar to the present charges. Applicant explained had his prior criminal history not been admissible, he would have testified at trial. He further testified, however, he trusted Counsel's advice not to testify; and based on Counsel's advice, Applicant ultimately made the decision not to testify.

He testified Leticia Jones was his girlfriend in 2005, and they were living together. He testified he was unaware that Jones was going to testify, and Counsel was unaware as to what her testimony would be, as there was no reciprocal discovery received from the State. At trial, Jones testified Applicant came home after the crimes had been committed and admitted his involvement to her. Applicant testified at the hearing this was not true. Jones also testified as to what Applicant told her to say, and Applicant asked Counsel to cross-examine her about that. He testified, however, that this was not proper cross-examination, as Jones was unable to answer fully. He elaborated Jones gave inconsistent statements, and Counsel should have addressed her varying statements. Jones also testified she and Applicant had a physical confrontation Labor Day Weekend, to which Applicant contends she should not have been allowed to testify because the jury could have believed that Applicant beat her up. Applicant elaborated had he testified at trial, he would have explained this physical confrontation—that it was not a brawl between the two, but an actual fight. He explained Jones was cutting up his clothes, and he grabbed her and

hit her in the face. He further testified he should have been able to testify as to the events as they happened, rather than leaving the jury to speculate as to what happened.

Applicant testified Omekas Moaney, who was a federal inmate but had grown up with Applicant, testified at trial as to a letter written by Oliver or Applicant. Applicant further testified Counsel attempted to discredit Moaney on cross-examination because Moaney did not have any information about Applicant or the underlying crimes and simply was trying to get a downward departure on his pending sentence in federal court. In doing so, Counsel introduced a memo from the Assistant United States Attorney, which indicated the investigation into the information Moaney provided was fruitless. Applicant testified he did not agree to the introduction of this memo because Counsel had said they were not going to present any evidence. Applicant explained by introducing this memo, they lost last argument, and Counsel had no trial strategy after losing last argument. Moaney also testified at trial that he had sold drugs to Applicant. Applicant testified at the hearing this was improper, as it had no probative value and was prejudicial. He explained Moaney was able to testify as to a prior bad act of Applicant, and Applicant was unable to defend himself.

Applicant also testified records from Renata Williams's phone, which was Oliver's home phone, records from Jones's phone, and a summary of those records were introduced at trial. He testified a paralegal for the State compiled the phone records into a summary. Applicant further testified Counsel objected to these records because he had not previously received them and only received them at the last minute, but Applicant believed Counsel should have objected because they were unable to review the records before trial. He elaborated Counsel did what he could, but the trial court would not give them time. Applicant also testified the records were inaccurate, and Counsel did not object to them on that basis. Specifically, four calls listed on the report were

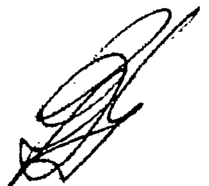


explained he signed this statement because the receipt law enforcement showed him listed the checkout date as September 3, 2005, but he had never seen the receipt Applicant produced at the evidentiary hearing, which did not name the specific hotel. He further explained maybe he made a mistake, but there was no way they could have been together on Friday evening.

At the close of Applicant's case, Applicant requested the record be held open in order to get in contact with a juror from Applicant's trial. The post-conviction relief court granted that request and allowed Respondent to proceed with its case.

Respondent then presented the testimony of Counsel. Counsel testified Ms. Hudgins approached him in 2006 to represent Applicant; and after that, he was appointed to represent Applicant. He testified he met with Applicant numerous times, approximately once a week, as he recognized the importance of the case. He further testified in these meetings, he and Applicant would discuss the discovery, the evidence against Applicant and his co-defendants, the elements the State would have to prove at trial, and the State's burden. He further testified he did not give a copy of the discovery to Applicant, and it is his normal practice not to do so for fear of jailhouse snitches rifling through the discovery.

Counsel testified he did not recall Applicant's position regarding the joint defense agreement, but he believed the joint defense agreement was a good idea because Applicant and Joy were similarly situated in that there was little evidence connecting them to the crimes. He elaborated an advantage of the agreement was that he and co-counsel would be able to collaborate on challenging the evidence at trial. He further elaborated the agreement would allow them to know what Oliver's strategy at trial would be beforehand. He also testified he explained the principles under *Bruton* and *Crawford* to Applicant, as well as the redacted statements.



He testified he filed a motion for a severance approximately two months before trial but withdrew that motion because as he continued to prepare for trial, it became clear the State was going to point the finger at Oliver. He elaborated there was no evidence suggesting Applicant was involved, so he believed a joint trial created a tactical advantage for them. He explained the State would have to distinguish the evidence between Applicant and his two co-defendants at a joint trial, whereas if Applicant had been tried separately, all of the State's attention would be focused on Applicant. Counsel further testified he spoke with Applicant about the severance before trial, and it is his normal practice to speak with the client before making a decision to enter a joint agreement, particularly highlighting the advantages and disadvantages of a joint trial. He testified there was no indication in his notes in which Applicant insisted on proceeding to trial alone. He also testified co-counsel for Joy and Oliver—John D. Delgado, Esquire, and Circuit Public Defender for the Fifth Judicial Circuit Douglas S. Strickler, respectively—presented an advantage as well. He explained Mr. Delgado and Mr. Strickler would also be attacking the credibility of witnesses, which would help Applicant's case. He further explained this advantage factored into their decision not to move for a severance. Counsel also testified he did not believe a severance motion would have been granted based on an evaluation of actual prejudice versus judicial economy. He further testified establishing actual prejudice resulting from a joint trial would have been challenging, as the evidence was against Oliver, not Applicant.

Counsel testified he and Applicant often spoke about what the State did not have; for example, there was physical evidence linking Oliver to these crimes but nothing linking Applicant and Joy. He elaborated the lack of physical evidence was his strongest defense at trial. He further elaborated his strategy was to highlight the absence of evidence throughout trial,

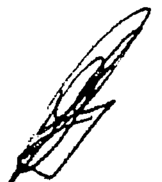
including during opening and closing arguments, particularly in light of the fact there were no fingerprints and no DNA evidence to link Applicant to the crimes. Counsel explained the less Applicant's name was mentioned at trial, the better. He also testified his strategy concerning witnesses who made statements that implicated Applicant in these crimes was to highlight that those witnesses had a reason to lie. He elaborated, for example, that Moaney had a federal sentence and the memorandum from the Assistant United States Attorney outlined exactly what Moaney was hoping to get by cooperating with Applicant's case. He also testified he did not see any harm resulting from Moaney's testimony regarding Applicant's drug use, as it did not show any tendency towards violence on the part of Applicant. He further elaborated the letter to which Allen testified was bizarre and affected his credibility, and Brown did not personally know Applicant. He testified he used all of these facts in order to attack the credibility of these witnesses. Counsel ultimately testified he was able to maintain his strategy throughout trial by discrediting the State's witnesses and highlighting the lack of evidence linking Applicant to these crimes. He elaborated he had a strategic decision behind everything, which he explained to Applicant.

Counsel also testified he was able to cross-examine Allen with his statement and strange drawings he had made and, therefore, was able to attack his credibility. He testified Allen's statement regarding "Oliver and his friends" did not implicate Applicant, so he did not see a reason to move for a mistrial. He further testified Mr. Strickler's use of Applicant's name during cross-examination was merely an accident.

Counsel testified he did not recall a list of witnesses to call. He elaborated Applicant's alleged alibi witnesses could not account for Applicant's whereabouts during the time in which these crimes were committed. He also testified Applicant wanted Counsel to call Simmons, who

was at Alvin S. Glenn Detention Center with Applicant, as a witness at trial in order to testify to improper conduct by law enforcement. However, Simmons was represented by Mr. Swerling; and, therefore, Counsel was unable to speak with Simmons. He further testified Ms. Connelly attempted to see Simmons, but he was in lockup. He testified Simmons did not add anything to Counsel's trial strategy. He explained in order to present such testimony concerning improper conduct by law enforcement, they would have needed a lot more than a jailhouse snitch. He further explained presenting such testimony could easily appear as a last ditch effort. Counsel further testified not calling Simmons as a witness was the only thing Applicant regretted, but calling Simmons would not have changed the result at trial.

Counsel also testified it would not have been atypical for him to highlight the fact that Oliver's fingerprint was found at the crime scene whereas there was nothing placing Applicant at the scene. He further testified the only evidence linking Applicant to these crimes was the testimony of Jones. He testified her testimony was surprising, as Counsel met with Jones frequently leading up to trial. He did not recall when he received notice from the State that Jones would be testifying, but any summary he would have received would have been very brief. He elaborated Jones wrote letters to Applicant indicating Applicant had no involvement in these crimes. He further testified Jones testified at trial that Applicant told her he had gotten involved in something stupid, he shot a woman, and his father was burning his clothing. He also testified Jones's demeanor at trial resonated with him—she was clearly distraught and upset, as evidenced by her vociferous crying on the stand. He elaborated Jones's testimony changed how he needed to defend Applicant. Counsel testified he attempted to cross-examine Jones as to prior inconsistent statements, particularly in light of the fact that up until trial, Jones had been saying Applicant was not involved. He testified he also attempted to highlight reasons Jones had to



lie—that she had a driving under suspension charge and her child had been taken away from her. He further testified but for Jones's testimony, he believed Applicant would have been acquitted, but the jury ultimately believed her testimony.

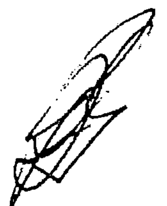
He also testified he had to address Jones's testimony through his investigator, Ms. Connelly, who was thoroughly involved in the investigation into Applicant's case. He testified he attempted to call Ms. Connelly as a witness to testify to Jones's prior inconsistent statements, but the trial court would not allow this testimony. He further testified because he had to address Jones's testimony through Ms. Connelly, he would have lost the last argument.

Counsel also testified Applicant wanted to mitigate Jones's testimony regarding a physical altercation she had with Applicant by saying he hit her in the face. He explained during trial he had to evaluate whether an objection to this characterization of their fight would draw too much attention to what was said. He elaborated it was best not to highlight the fact Applicant and Jones were in a physical confrontation, as Jones's testimony concerning this fact could have been a lot worse.

Counsel testified he reviewed various statements from law enforcement, and all of them concerned Applicant's activities on Friday evening, before these crimes were committed. He elaborated on Friday night, Applicant and his father went to a club and met up with Fryson and another woman. He further elaborated they stayed at the club until closing, about two o'clock Saturday morning, then proceeded to get something to eat and then went to the hotel. He further testified the statements and the hotel receipt were consistent as to the timeline. He elaborated he obtained the hotel receipt through discovery, which did not specify the hotel and listed Gallman as the purchaser. Specifically, the receipt showed they would have checked in during the early morning hours and checked out a few hours later, and the arrival date was after Friday night, into

September 3, 2005. He further elaborated an unknown individual rented a movie at the hotel on September 4, 2005, but Applicant, Fryson, and Fryson's friend had left the same morning they checked into the hotel. He explained it was unclear whether Mr. Gallman had returned to the hotel or who spent the night at the hotel from the receipt. He also testified Applicant indicated he was at a barbecue Saturday and Sunday, but no one was able to specifically identify where Applicant was during that time. Counsel testified Applicant was with his brother at some point Labor Day Weekend, but that encounter did not expand long enough to establish an alibi. He also testified he subpoenaed records from the hotel and some other places Applicant alleged he was during this time, but he was still unable to account for Applicant during the entire time of the commission of these crimes. He ultimately testified Applicant did not have an alibi, as they would have had to admit to the gap in time in Applicant's purported alibi.

Counsel further testified he did not speak with Applicant's father, because he was sequestered during the trial. He elaborated he believed to do so would have been improper under the ethical rules. He testified he considered calling Gallman as a witness at trial but was unsure how he could protect both Applicant and Gallman from criminal liability. He explained in order to avoid this dilemma, he decided to raise the fact that Gallman had not been charged with a crime in his closing argument. Counsel testified Ms. Hudgins began her investigation into Applicant's case prior to Counsel becoming involved, and she would have interviewed Gallman. He elaborated he did not recall the specifics of that interview with Gallman, but if Gallman had indicated he was with Applicant during the time in which these crimes were committed, that would have changed Counsel's strategy. Counsel also testified he saw Gallman shortly after the trial, and Gallman never mentioned he wished Counsel would have called him to testify.



Counsel also testified he could not have known about Oliver's purported "confession" prior to trial, as Oliver was represented by counsel and Counsel could not speak to him. He elaborated Oliver spoke with Applicant on the day the jury rendered its verdict. He further elaborated in that conversation, Oliver apologized to Applicant that he was involved; but Oliver did not confess at that time. He explained Applicant did not share the substance of this conversation with Counsel until after the verdict had already been rendered.

Counsel testified during the *voir dire* of the jury panel, some potential jurors mentioned their experience with violent crimes. He testified he believed it was necessary for them to know who of the potential jurors did have experience with violent crime because graphic photographs would be introduced at trial that the impaneled jury would have to see. He also testified after the jury was impaneled, he believed they had a good jury, particularly in light of the fact that the jury acquitted Joy and acquitted Applicant of one count of armed robbery. Counsel did not recall whether one or two jurors who were impaneled mentioned their experience with violent crime during *voir dire*, but he did not believe there would have been any harm had those jurors been impaneled, as the trial court was required to question the potential jurors about their impartiality.

Counsel testified he did not specifically recall Applicant wanting to testify, and Applicant did not suggest that he wanted to testify. He further testified the trial court reviewed Applicant's constitutional rights with Applicant, and Applicant decided not to testify. He elaborated it was Applicant's decision not to testify on the advice of Counsel. He explained it is his standard practice to advise his clients that the State would be able to cross-examine him on his prior record. Counsel also testified because Applicant chose not to testify, it was unnecessary for the trial court to rule on the admissibility of Applicant's prior record. He further testified even if Applicant's prior convictions were not admissible, he still would have advised Applicant not to

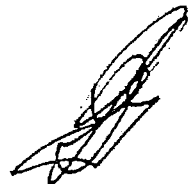
testify. He elaborated his concern was Applicant would say something that hurt their case if he decided to testify.

Counsel also testified he objected to the admission of the phone records at trial, as he received them at the last minute. He further testified under the rules of evidence, a summary of records is proper if it is verified they are an accurate representation. He explained, however, mistakes can occur. Counsel testified the phone records merely showed calls were made around the time these crimes took place, and did not indicate who placed the calls. He elaborated phone records generally do not concern him, as they are simply a record that is maintained.

Counsel testified he was unaware of any juror misconduct; but if it had been brought to his attention, he would have brought it to the trial court's attention.

After the close of Respondent's case and on the second day of the evidentiary hearing, Applicant presented the testimony of Phyllis Rideout, who was a juror at Applicant's trial. She testified she does not recall any outside information being presented during deliberations. She further testified she did not do any internet research into Applicant, and she was unaware that any other jurors had performed any research. She testified the foreman of the jury did not ask any juror to perform a Google search of Applicant, and she did not inform anyone that she or any other member of the jury did any independent research into Applicant. She also testified she had no knowledge of Applicant's prior record and did not inform anyone that she had such information.

Applicant then presented the testimony of Yamica Auton. She testified she works with Ms. Rideout, and she worked with Ms. Rideout prior to Applicant's trial. She elaborated she saw that Ms. Rideout was on the jury, but she did not recognize Ms. Rideout at the time. She further



testified she did not speak with Ms. Rideout during the trial. She also testified after the conviction, Ms. Rideout approached her and apologized.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

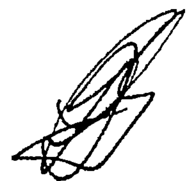
This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the 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, 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. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms."

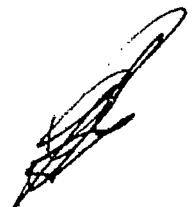


Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsel's alleged failure to argue severance of Applicant's trial from his co-defendants' trial

Applicant alleges Counsel was ineffective for failing to argue for severance of his trial from that of his co-defendants, Stanley Oliver and Kenneth Joy. Criminal defendants who are jointly tried for murder are not entitled to separate trials. *State v. Kelsey*, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (citing *State v. Holland*, 261 S.C. 488, 201 S.E.2d 118 (1973); *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972). "A severance should be granted only when there is a serious **risk that a joint trial would compromise a specific trial right of a co-defendant** or prevent the jury from making a reliable judgment about a co-defendant's guilt." *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001) (citing *State v. Dennis*, 337 S.C. 275, 523 S.E.2d 173 (1999)) (emphasis in original). In order to reverse a conviction on the basis of an allegation that a defendant was improperly tried jointly, a defendant must show prejudice. *Dennis*, 337 S.C. at 281, 523 S.E.2d at 176 (citing *Crowe*, 258 S.C. 258, 188 S.E.2d 379). Such prejudice is established by a showing that the defendant would have obtained a more favorable result at a separate trial. *Hughes*, 346 S.C. at 559, 552 S.E.2d at 317. In order to ensure no prejudice



results from a joint trial, a cautionary instruction may help protect the individual right of each defendant. *Id.* (citing *State v. Holland,* 261 S.C. 488, 494, 201 S.E.2d 118, 121 (1973)).

Moreover, "counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Strickland,* 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. *Yarborough v. Gentry,* 540 U.S. 1, 8 (2003) (quoting *Massaro v. United States,* 538 U.S. 500 (2003)). "Accordingly, when 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)). *See also Stokes v. State,* 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); *Ingle v. State,* 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." *Whitehead v. State,* 308 S.C. 119, 417 S.E.2d 529 (1992) (citing *Goodson v. United States,* 564 F.2d 1071 (4th Cir. 1977)).

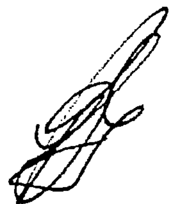
Here, Counsel testified the benefits to proceeding to trial with Oliver and Joy were significant. In particular, through a joint trial, the State would have to distinguish the evidence between all three co-defendants, which would establish there was no physical evidence linking Applicant to these crimes. Furthermore, a joint trial would remove some of the focus from Applicant, whereas if he had proceeded to trial alone, all of the State's resources and attention

would be solely focused on Applicant. Still further, a joint trial allowed Counsel and counsel of Applicant's co-defendants to collaborate throughout the trial, particularly in challenging the evidence the State produced, and also allowed Counsel to be aware of Oliver's trial strategy beforehand. Counsel explained these advantages to Applicant prior to trial, and Applicant did not make any specific objections to Counsel concerning a joint trial with Oliver and Joy. Counsel employed a specific trial strategy when choosing to proceed to trial with Oliver and Joy. Therefore, Counsel's performance was reasonable under the circumstances, and Applicant has wholly failed to establish any deficiency on the part of Counsel.

Moreover, Applicant has failed to establish any resulting prejudice from this alleged deficiency. Counsel testified it would have been very difficult to be successful on a motion for severance, as all of the evidence was against Oliver and not Applicant and, therefore, establishing actual prejudice from a joint trial would be particularly challenging. Furthermore, although the statements made by Oliver to the various jailhouse snitches who testified at trial would not be admissible in a trial of Applicant alone, Leticia Jones still would have been able to testify in a trial against Applicant to Applicant's tearful confession to her. As Counsel explained at the evidentiary hearing, but for Jones's testimony, Applicant may have been acquitted. Consequently, Applicant cannot establish any prejudice from this alleged deficiency. Based on the foregoing, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object or request a new jury panel when eleven jurors publicly announced their history with victims of violent crime

Applicant alleges Counsel was ineffective for failing to object or request a new jury panel when eleven jurors publicly announced their history with victims of violent crime. Specifically, Applicant contends because these potential jurors had experience with violent crimes, Applicant

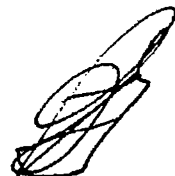


would not have received a fair ruling on the facts from these potential jurors. A criminal defendant has the right to a trial by an impartial jury. U.S. Const. Amend. VI; S.C. Const. Art. I, § 14. There is no per se rule, however, which requires the exclusion of a juror who has been a victim of a crime or whose close relative was a victim of a crime similar to that with which the defendant is charged. *United States v. Fulks*, 454 F.3d 410, 432-33 (4th Cir. 2006) (citing *United States v. Jones*, 608 F.2d 1004, 1008 (4th Cir. 1979)). At Applicant's trial, multiple potential jurors on the jury panel expressed their personal or their family members' experience with violent crime. *See* Tr. 92-102. Following their disclosure, the trial court would then inquire of each juror whether or not that experience would affect their impartiality. *See id.* Each potential juror responded their experience would not affect their impartiality. *See id.* Because there is no per so right to have these potential jurors excluded from the jury, Counsel cannot have been deficient for failing to object or request a new jury panel.

Furthermore, Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency. Counsel testified he did not recall whether one or two jurors who were impaneled mentioned their experience with violent crime during *voir dire*, but he did not believe there would have been any harm had those jurors been impaneled, as the trial court was required to question the potential jurors about their impartiality. Based on the foregoing, this Court finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to call witnesses to testify on behalf of the defense

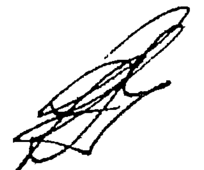
Applicant alleges Counsel was ineffective for failing to call witnesses to testify on his behalf at trial. Specifically, Applicant alleges Counsel should have called Alfonso Simmons and Michael Jackson, Jr. as witnesses at trial. With respect to Michael Jackson, Jr., Applicant alleges Jackson's father approached Applicant at the detention center and told him Jackson had personal



knowledge of these crimes. Similarly, Applicant contends Alfonso Simmons would have testified to his personal knowledge of these crimes, as well as police misconduct with respect to their investigation into these crimes. An applicant for post-conviction relief "*must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the post-conviction relief hearing in order to establish prejudice from the witness' failure to testify at trial." *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis in original). When an applicant merely speculates as to what the witnesses' testimony would have been, that speculation, by itself, cannot satisfy the applicant's burden of showing prejudice. *Id.* (quoting *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995)). Here, Applicant neither produced the testimony of Jackson nor produced the testimony of Simmons at the evidentiary hearing. Furthermore, Applicant has wholly failed to provide this Court with any affidavits in support of the alleged testimony of these witnesses. This Court finds Applicant's mere speculation as to what Jackson's and Simmons's testimony would have been wholly fails to establish any deficiency on the part of Counsel, as well as any resulting prejudice from the alleged deficiency. Therefore, this allegation must be denied and dismissed with prejudice.

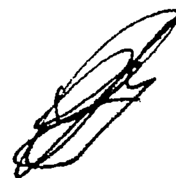
Counsel's alleged insufficient investigation

Applicant alleges Counsel was ineffective for conducting an "insufficient" investigation. Specifically, Applicant alleges Counsel was ineffective for failing to obtain the receipt from the hotel at which Applicant alleged to have been staying during the commission of these crimes and for failing to go to the hotel to speak with someone who could have verified this transaction. Furthermore, Applicant contends Counsel was ineffective for failing to fully investigate Applicant's purported alibi. "'Although counsel should conduct a reasonable investigation into



potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client.'" *Tucker v. Ozmint*, 350 F.3d 433, 442 (4th Cir. 2003) (quoting *Green v. French*, 143 F.3d 865, 892 (4th Cir. 1998)). Moreover, "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), *abrogated on other grounds by Smalls v. State*, ___ S.C. ___, 810 S.E.2d 836, 839 (2018) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003).

Counsel testified he hired an investigator, who was thoroughly involved in Applicant's case. He testified he reviewed statements given to law enforcement by Applicant's alleged alibi witnesses, as well as a hotel receipt provided to him through discovery, and also subpoenaed records from the hotel and additional locations Applicant alleged he was during the time of these crimes. Counsel also testified Ms. Hudgins began her investigation into Applicant's case prior to Counsel becoming involved, and she would have interviewed Applicant's father. Counsel further testified he did not speak with Applicant's father, because he was sequestered during the trial, and he believed to do so would have been improper under the ethical rules. Indeed, Counsel's investigation into Applicant's case was quite extensive, and he was not required to uncover every scrap of evidence that could conceivably be helpful to Applicant. Based on the foregoing, this Court finds Counsel's investigation into the hotel, as well as Applicant's alleged



alibi, was reasonable under the circumstances. Accordingly, this Court finds that this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to present an alibi defense

Applicant alleges Counsel was ineffective for failing to present an alibi defense. Specifically, Applicant contends Counsel was ineffective for failing to present the testimony of Pongella Fryson and Albert Gallman in order to testify at trial that Applicant was with them during the commission of these crimes. Through an alibi, an accused attempts "'to show that because he was not at the scene of the crime at the time of its commission, having been at another place at the time, he could not have committed the crime.'" *State v. Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (quoting 21 Am. Jur. 2d Criminal Law s 136)). To do so, the accused must show "'he was at a place so distant that his participation in the crime was impossible.'" *Id.* Furthermore, the alibi must account for the entire time during which these crimes were committed. *Id.*

Here, both Fryson and Gallman testified on Saturday, September 3, 2005, leading into the early morning hours of Sunday, September 4, 2005, they went to a club with Applicant, stayed until closing, and then proceeded to a hotel, where they spent the night. In support of this timeline, Applicant produced a hotel receipt, which listed the check-in date as September 3, 2005, and the checkout date as September 4, 2005. This hotel receipt did not specify from which hotel it came and also was in Albert Gallman's name. Furthermore, both Fryson and Gallman gave statements to law enforcement indicating they were with Applicant Friday, September 2, 2005, leading into the early morning hours of Saturday, September 3, 2005.

Alternatively, Counsel testified he received the hotel receipt through discovery which showed Applicant, Gallman, and Fryson would have checked in during the early morning hours

and checked out a few hours later. Specifically, the arrival date was after Friday night, into September 3, 2005. He further elaborated an unknown individual rented a movie at the hotel on September 4, 2005, but Applicant, Fryson, and Fryson's friend had left the same morning they checked into the hotel. He explained it was unclear whether Gallman had returned to the hotel or who specifically spent the night at the hotel from the receipt. He also testified Applicant indicated he was at a barbecue Saturday and Sunday, but no one was able to specifically identify where Applicant was during that time. Counsel also testified Applicant was with his brother at some point Labor Day Weekend, but that encounter also did not expand long enough to establish an alibi. He ultimately testified Applicant did not have an alibi, as they would have had to admit to the gap in time in Applicant's purported alibi.

This Court finds Counsel's testimony concerning this allegation very credible, whereas the testimony of Applicant, Gallman, and Fryson is not credible. Counsel testified he reviewed all of the statements provided to him in discovery, as well as the hotel receipt, and from these was unable to establish an alibi for Applicant. Moreover, he attempted to account for Applicant's whereabouts at the barbecue at which Applicant alleged to be but was unable to find anyone who could definitively place Applicant there. Based on the foregoing, Applicant has wholly failed to establish any deficiency on the part of Counsel.

Similarly, Applicant has failed to establish any resulting prejudice from this alleged deficiency. As Applicant's whereabouts could not be definitively accounted for, there is no indication the result of the proceeding would have been different if these purported alibi witnesses were presented at trial. In particular, both "alibi" witnesses would have been confronted with their prior statements to law enforcement, which indicated Applicant's whereabouts for the day before these crimes occurred, and were inconsistent with their testimony

at the evidentiary hearing. Based on these conflicting statements, it is unlikely the result of the proceeding would have been any different. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object or request a mistrial when Ulicen Allen testified that Oliver "and his friends" have done robberies and that he had received threats not to testify

Applicant alleges Counsel was ineffective for failing to object or request a mistrial during Ulicen Allen's testimony. Specifically, Applicant contends Counsel was ineffective for failing to object or request a mistrial when Allen testified Oliver "and his friends" had committed robberies in the past, as well as when Allen testified he received threats in order to prevent him from testifying at trial. *See* Tr. 968, 972. Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 689. Furthermore, "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992).

At Applicant's trial, Allen generally testified Oliver "and his friends" had done robberies in the past. Furthermore, Allen generally testified he had received threats not to testify at Applicant's trial. Both statements wholly failed to identify who Oliver's friends were or who had threatened Allen. Based on the utter lack of identification of Applicant in either of these

statements, Counsel chose not to object to the statements or move for a mistrial. Indeed, such an objection or motion may have highlighted the statements to the jury, thus leading the jury to question as to whether Allen was suggesting Applicant had been involved in said robberies or threatened Allen. Based on the foregoing, this Court finds Counsel employed a valid strategic decision in not objecting or moving for a mistrial. This Court further finds Counsel's actions were reasonable under the circumstances.

Similarly, this Court finds Applicant has wholly failed to establish any resulting prejudice from the alleged deficiency. Given that Allen neither specifically identified Applicant as one of Oliver's friends who had committed robberies in the past nor specifically identified Applicant as one of the individuals who threatened him, there is no indication the trial court would have sustained an objection to this line of testimony, much less granted a mistrial. "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes." *State v. Kirby*, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977). Such vague comments made by Allen are unlikely to constitute urgent circumstances which would require the trial court to grant a motion for mistrial. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object when Leticia Jones testified she had a physical confrontation with Applicant

Applicant alleges Counsel was ineffective for failing to object when Leticia Jones testified she had a physical confrontation with Applicant: In particular, Applicant contends Counsel should have objected when Jones testified she and Applicant "had gotten into an argument that resulted in a physical confrontation." Tr. 1029. Applicant further contends he should have been able to explain this physical confrontation—that it was not a brawl between the

two, but rather Jones was destroying his clothes, and he grabbed her and hit her in the face. Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 689. Furthermore, "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro*, 317 S.C. 292, 454 S.E.2d 312; *Underwood*, 309 S.C. 560, 425 S.E.2d 20; *Stokes*, 308 S.C. 546, 419 S.E.2d 778.

Here, Counsel testified during Applicant's trial he had to evaluate whether an objection to this characterization of Jones and Applicant's fight would draw too much attention to the fact that they, in fact, had been in an altercation. He elaborated it was best not to highlight the fact Applicant and Jones were in a physical confrontation, as Jones's testimony concerning this fight could have been a lot worse. This Court finds Counsel employed a valid strategic decision in choosing not to object to this line of testimony; and, therefore, Counsel's actions were reasonable under the circumstances. This Court further finds this allegation must be denied and dismissed with prejudice.

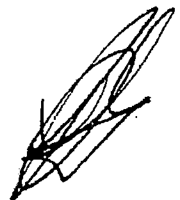
Counsel's alleged failure to object when Omekas Moaney testified to Applicant's prior bad acts

Applicant alleges Counsel was ineffective for failing to object when Omekas Moaney testified to Applicant's prior bad acts. Specifically, Applicant contends Counsel should have objected when Moaney testified "whenever I dealt with [Oliver and Applicant], they were coming to me to either purchase marijuana, cocaine, or crack." Tr. 1085. "Evidence of other

crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. Here, Moaney testified Oliver and Applicant approached him in order to sell a large quantity of cocaine of which they were in possession. Tr. 1082. He further testified he, Oliver, and Applicant cooked some of the cocaine, so as to produce crack cocaine, and left the majority with Moaney for him to sell. Tr. 1083-84. Upon leaving the crack cocaine with Moaney, Oliver and Applicant gave him instructions to sell each circle of crack cocaine for approximately seven hundred dollars and distribute the proceeds to them. Tr. 1084-85. Moaney then testified that this transaction between him, Oliver, and Applicant was unusual, as it was customary for Oliver and Applicant to purchase drugs from him, rather than bringing him any product to sell. Tr. 1085. This testimony was not offered to prove Applicant acted in conformity with his propensity to purchase drugs when committing these murders and armed robberies. Rather, this line of testimony was offered to show how unusual it was for Oliver and Applicant to approach Moaney with a large quantity of cocaine to sell. Because this testimony did not amount to prior bad act evidence, this Court finds Applicant has wholly failed to carry his burden in showing any deficiency on the part of Counsel and any resulting prejudice therefrom. This allegation must be denied and dismissed with prejudice.

Counsel's alleged failure in admitting Federal Court document into evidence

Applicant alleges Counsel was ineffective for admitting a federal court document into evidence, thereby failing to preserve last argument at trial. Specifically, Applicant alleges Counsel was ineffective for introducing Omekas Moaney's plea agreement with the United States government during his cross-examination of Moaney. *See* Tr. 1120-26. Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of



circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 689. Furthermore, "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992).

Here, Counsel testified his strategy concerning witnesses who made statements implicating Applicant in these crimes was to highlight that those witnesses had a reason to lie. With Moaney, in particular, Counsel emphasized the fact Moaney was facing a mandatory minimum of twenty years imprisonment for a federal conspiracy charge. *See* Tr. 1118. He emphasized Moaney had entered into a proffer agreement with the United States Attorney's Office through which he hoped to get a downward departure for his cooperation. Tr. 1119. Furthermore, this agreement between Moaney and the United States government emphasized the government did not find Moaney believable, thereby going to the heart of Counsel's strategy. Tr. 1124-25. Based on the foregoing, this Court finds Counsel employed a valid strategic decision with respect to entering this document into evidence and, therefore, finds Counsel was reasonable under the circumstances.

Similarly, Applicant has failed to establish any prejudice resulting from this alleged deficiency. Counsel testified following Leticia Jones's testimony, in which she relayed Applicant's tearful confession to her, he had no choice but to present her prior inconsistent statements through his investigator, Lee Connelly. Therefore, Counsel would have lost the last

argument regardless of whether or not he entered Moaney's plea agreement into evidence. This Court finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to properly cross-examine and impeach Leticia Jones with prior inconsistent statements

Applicant alleges Counsel was ineffective for failing to properly cross-examine and impeach Leticia Jones with her prior inconsistent statements. In particular, Applicant contends Counsel should have cross-examined Jones thoroughly as to her varying statements given to law enforcement, as well as to Lee Connelly. Applicant further alleges Counsel should have cross-examined Jones about her statement indicating she told law enforcement what Applicant told her to say. *See* Tr. 1038. "A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony." Rule 801(d)(1)(A), SCRE. Extrinsic evidence of such a prior statement "is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement." Rule 613(b), SCRE. When a witness admits making the prior statement, extrinsic evidence of that statement is inadmissible. *Id.* On cross-examination of Jones, Counsel questioned Jones about the various statements she had given to varying parties. Specifically, Counsel questioned Jones about her two prior statements to law enforcement, neither of which mentioned Applicant's tearful confession. Tr. 1044-45. In fact, Counsel was able to emphasize in Jones's first statement she told law enforcement Applicant had nothing to do with these crimes. Tr. 1045. Furthermore, Counsel was able to elicit testimony from Jones she informed neither Counsel nor his investigator, Lee Connelly, about Applicant's tearful confession to her in prior conversations with them. Tr. 1046-47.

Moreover, Counsel elicited testimony from Jones she had written to Applicant while he was incarcerated. Tr. 1048, 1049. In these letters, Jones told Applicant she believed he was innocent of these crimes. Tr. 1049. Jones never denied making any of these inconsistent statements, but rather admitted to making each one. This Court finds Counsel's cross-examination of Jones was extensive, and he was able to thoroughly question her regarding the numerous inconsistent statements she had given. This Court further finds Applicant has wholly failed to establish any deficiency on the part of Counsel.

Moreover, this Court finds Applicant has wholly failed to establish any prejudice from this alleged deficiency. Counsel extensively cross-examined Jones regarding her various statements, and Jones never denied making any of these statements. In fact, she admitted to failing to mention her conversation with Applicant, in which he confessed to committing these crimes, to numerous parties, including not only law enforcement but also Counsel and his investigator. Because Jones admitted to these statements, Counsel would have been unable to introduce extrinsic evidence of the prior statements at trial. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure for inadequately advising Applicant regarding his right to testify and for failing to request a ruling from the Court regarding admissibility of the Applicant's prior convictions for impeachment purposes

Applicant alleges Counsel was ineffective for failing to adequately advise him of his right to testify. A criminal defendant has a constitutional right to testify on his own behalf. *Rock v. Arkansas*, 483 U.S. 44 (1987). The decision on whether or not the defendant will testify ultimately rests with the defendant alone. *Jones v. Barnes*, 463 U.S. 745 (1983). When a defendant chooses not to testify, "an on-the-record waiver of a constitutional or statutory right is

but one method of determining whether the defendant knowingly and intelligently waived that right." *Brown v. State*, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994) (citing *Myers v. State*, 248 S.C. 359, 151 S.E.2d 665 (1966)). Here, the trial court fully advised Applicant of his right to testify at trial. *See* Tr. 1823-25. Furthermore, the record clearly indicates Applicant made a choice, of his own free will and volition, not to testify after having been fully advised of his rights and the ramifications of testifying or, in the alternative, not testifying. Tr. 1825. Applicant chose not to testify. Tr. 1825. Accordingly, this Court finds Applicant has failed to show any deficiency or resulting prejudice with respect to Counsel's alleged failure to adequately advise of Applicant regarding his right to testify, and it is denied and dismissed.

Additionally, Applicant alleges Counsel was ineffective for failing to request a ruling from the trial court regarding the admissibility of his prior convictions for impeachment purposes. Specifically, Applicant contends Counsel should have made an argument to the trial court regarding the admissibility of each of his prior convictions prior to Applicant making a decision as to whether or not he would testify. Evidence that an accused has been convicted of a crime, which was punishable by death or imprisonment in excess of one year, is admissible for the purpose of attacking the credibility of a witness if the court makes a finding the probative value of admitting this evidence outweighs the prejudicial effect. Rule 609(a)(1), SCRE. Here, Applicant testified Counsel advised him not to testify because of Applicant's past armed robbery conviction, which Counsel advised the State would raise on cross-examination for impeachment purposes. Applicant explained had his prior criminal history not been admissible, he would have testified at trial. Counsel, however, testified Applicant did not suggest to him he wanted to testify. He elaborated it was Applicant's decision not to testify. Counsel also testified because Applicant chose not to testify, it was unnecessary for the trial court to rule on the admissibility of

Applicant's prior record. This Court finds because Applicant knowingly and voluntarily waived his right to testify based on the advice of Counsel and an explanation of his rights by the trial court, it was unnecessary for the trial court to make a specific finding as to the admissibility of Applicant's prior convictions. This Court further finds Applicant has wholly failed to meet his burden with respect to this allegation, and it must be denied and dismissed with prejudice.

Counsel's alleged failure to object to the introduction of telephone records and summary of the telephone records as evidence

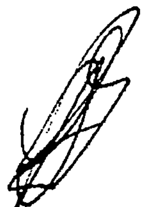
First, Applicant alleges Counsel was ineffective for failing to object to the introduction of telephone records. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 689. Furthermore, "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro*, 317 S.C. 292, 454 S.E.2d 312; *Underwood*, 309 S.C. 560, 425 S.E.2d 20; *Stokes*, 308 S.C. 546, 419 S.E.2d 778. Here, Counsel testified the phone records merely showed calls were made around the time these crimes took place and did not indicate who placed the calls. He elaborated phone records generally do not concern him, as they are simply a record that is maintained. Because these records did not indicate Applicant placed these phone calls, much less implicating him in these crimes, this Court finds Counsel's actions were reasonable under the circumstances. Moreover, this Court finds Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency.

> A . . . record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business

> activity, and if it was the regular practice of that business activity to make the . . . record . . ., all as shown by the testimony of the custodian or other qualified witness.

Rule 803(6), SCRE. Each records custodian for each service provider testified at trial these records were kept in the ordinary course of business. *See* Tr. 1162, 1294, 1299, 1306. Therefore, it is unlikely that an objection made by Counsel to these records would have been successful, particularly in light of the fact the records contained no identifying information of Applicant. This allegation with respect to the records themselves must be denied and dismissed with prejudice.

Applicant also alleges Counsel was ineffective for failing to object to a summary of the telephone records, which was introduced at trial. "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation, provided the underlying data are admissible into evidence." Rule 1006, SCRE. Here, Counsel objected extensively to the introduction of the summary of the telephone records on the grounds of attributing a specific phone number to Applicant, receiving the summary at the trial itself, and containing inaccuracies. *See* Tr. 1756, 1758, 1764, 1778. Following these objections and argument by Counsel, the State agreed to remove the coversheet, which attributed certain phone numbers to Applicant, and also agreed to make certain redactions so that Applicant's name would not appear on the summary. Tr. 1758, 1768. Because Counsel did, in fact, object to the introduction of the summary of the records and was successful in excluding identifying information of Applicant attributed with this summary, this Court finds Applicant has failed to establish any deficiency on the part of Counsel. This Court further finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. The information in this summary was gleaned from records for four different



telephone numbers, all of which had already been admitted into evidence. Therefore, under South Carolina Rule of Evidence 1006, the summary itself was admissible. This Court finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object during closing arguments

Applicant alleges Counsel was ineffective for failing to object during closing arguments to facts not in evidence. Specifically, Applicant contends Counsel was ineffective for failing to object when the State, in its closing argument, attributed phone numbers to Applicant and other parties and highlighted phone calls made from Applicant to Renata Williams, which was provided in the summary of the phone records. Applicant wholly failed to present any testimony or argument regarding this claim at the evidentiary hearing, consequently abandoning this allegation. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Notwithstanding Applicant's failure to present any evidence or argument concerning this allegation, this Court finds Counsel was not deficient and there was no resulting prejudice from this alleged deficiency.

> "Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions."

State v. Mouzon, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995) (quoting *Herring v. New York,* 422 U.S. 853, 862 (1975)). Moreover, "a solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." *Von Dohlen v. State,* 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable

Angelone, 163 F.3d 835, 852 (4th Cir. 1998). This Court finds that a cumulative error analysis would be inappropriate and therefore finds that this allegation must be denied and dismissed with prejudice.

Ineffective Assistance of Appellate Counsel

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

Although ineffective assistance of appellate counsel claims for failure to raise a particular issue on direct appeal can be successful, the Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." *Jones*, 463 U.S. at 754. Additionally, our Supreme Court has expressly

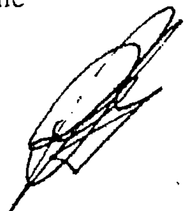
rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. *Tisdale*, 357 S.C. at 476, 594 S.E.2d at 167. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" *Smith v. Robbins*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

In order to meet his burden, an applicant must establish a reasonable probability that, but for appellate counsel's failure to raise a specific issue on appeal, he would have prevailed on his appeal. *Smith*, 528 U.S. at 285-86.

Appellate Counsel's alleged failure to raise and argue Applicant's appealable issues under Bruton and Crawford and argue that the error in Jason Brown's testimony where Applicant was named undermined all attempts at redaction and infected the trial as a whole

Applicant alleges appellate counsel was ineffective for failing to argue violations of *Bruton* and *Crawford* on appeal. Applicant also alleges appellate counsel was ineffective for failing to raise and argue on appeal that the mention of Applicant's name during the testimony of Jason Brown undermined all attempts at redaction, thereby infecting the trial as a whole. This Court finds this allegation is wholly without merit; therefore, this allegation must be denied and dismissed with prejudice. On appeal, appellate counsel raised three issues:

> 1. Whether the court erred by refusing to declare a mistrial where state's witness Jason Brown testified co-defendant Oliver told him in jail that he and [Applicant] rushed into the drug dealer's house and committed the murders and that he told the police this in his statement, since defense counsel correctly argued this violated the principles of *Bruton v. United States* and *Crawford v. Washington* since [Applicant] was denied the opportunity to cross-examine Oliver about making that alleged statement which implicated [Applicant] in the murders?;
> 2. Whether the court erred by allowing co-defendant Oliver's girlfriend, Renata Williams, to testify that Oliver came to her apartment in the middle of the night around the time of the murder, and telephoned [Applicant] since the state failed to lay the necessary evidentiary predicate to show how Williams knew [Applicant] was 'on the other end of the

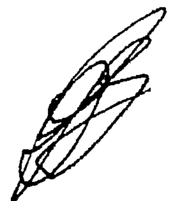


> phone' since her testimony clearly implied Oliver called [Applicant] about the crimes?; [and]
>
> 3. Whether the court erred by allowing the admission of Tatanisha Robinson's redacted statement into evidence since it called undue attention to that statement, the redaction was so sloppily done that it was obvious matters were being hid from the jury, and Robinson's admissions and explanations regarding the statement during her testimony made admission of the statement itself improper under Rule 613(b), SCRE?

Each issue was thoroughly briefed not only at the Court of Appeals but also at the Supreme Court.

This Court finds Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds Applicant has failed to show that appellate counsel's performance was deficient, where there is no standard requiring appellate counsel to brief every possible meritorious issue and counsel appropriately raised three stronger, meritorious issues on Applicant's behalf. Indeed, Applicant's first issue on appeal specifically addresses the claims which he is now arguing appellate counsel failed to raise on appeal. Second, this Court finds Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal.

Both the United States Supreme Court and the South Carolina Supreme Court have consistently ruled that appellate counsel has no duty to raise all meritorious issues on appeal. *See Jones*, 463 U.S. 745; *Smith*, 528 U.S. at 288; *Tisdale*, 357 S.C. 474, 594 S.E.2d 166. When appellate counsel reviews all possible issues and elects to raise those issues he deems most meritorious, he has performed in accordance with professional standards and is not deficient. As appellate counsel raised three meritorious issues on appeal, his performance was in accordance with professional norms and this Court finds that this allegation must be denied and dismissed with prejudice.



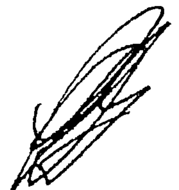
Additionally, this Court finds Applicant has failed to establish any prejudice from counsel's alleged deficiency, as issues pertain to *Bruton*, *Crawford*, and Jason Brown's testimony were raised on appeal. Following extensive briefing on this issue, the Court of Appeals affirmed Applicant's convictions and sentences. *State v. Gallman*, Op. No. 2011-UP-006 (S.C. Ct. App. Filed January 20, 2011). Furthermore, following a denial of Applicant's petition for rehearing, appellate counsel raised this very issue in his petition for writ of certiorari to the Supreme Court, which was denied. Accordingly, this allegation must be denied and dismissed with prejudice.

After-Discovered Evidence

In order to obtain a new trial based on after-discovered evidence, the party requesting said new trial "must show that the evidence: (1) is such as would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching." *Hayden v. State*, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1993) (citing *State v. Caskey*, 273 S.C., 325, 256 S.E.2d 737 (1979)).

Juror misconduct

Applicant alleges he has newly discovered evidence, in the form of juror misconduct, which would warrant a new trial. Specifically, Applicant alleges a juror from his trial spoke with Applicant's cousin, with whom she works, and informed her the jury undertook an independent investigation into Applicant's criminal record. "Juror misconduct discovered post-trial is not properly considered 'newly discovered evidence,' rather, it is a separate basis for a new trial." *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 627 (2013). "A new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and



(2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." *Id.* This Court finds Applicant has wholly failed to meet his burden with respect to this allegation. Indeed, Applicant has wholly failed to provide this Court with any proof the jury engaged in any misconduct. At the evidentiary hearing, Phyllis Rideout, who served on the jury at Applicant's trial, testified she did not recall any outside information being presented during deliberations, and she did not perform any independent research into Applicant. Furthermore, she was unaware of any other jurors performing any research. She also testified she had no knowledge of Applicant's prior record and did not inform anyone she had such information. Accordingly, this Court finds no such evidence exists and this allegation must be denied and dismissed with prejudice.

Actual innocence

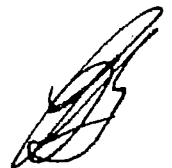
Applicant alleges he has after-discovered evidence which would grant him a new trial. Specifically, Applicant alleges Oliver's purported confession to these crimes at the evidentiary hearing warrants reversal of his convictions. The determination of whether new evidence is credible for purposes of a new trial rests with the trial court. *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). In particular, "our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment." *State v. Mercer*, 381 S.C. 149, 168, 672 S.E.2d 556, 565 (2009). "When testimony is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence." *State v. Deese*, 266 S.C. 534, 538, 225 S.E.2d 175, 176 (1976). Moreover, inconsistency in statements undermines the possibility that the result of a new trial would be different. *See Johnson v. Catoe*, 345 S.C. 389, 548 S.E.2d 587 (2001) (holding the petitioner failed to meet the requirement for a new trial such that the evidence would probably change the

result if a new trial were granted when the witness on which the newly discovered evidence was based made prior inconsistent statements and, therefore, was not credible).

After his conviction and during sentencing, Oliver addressed the trial court, stating "I have a higher judge to be judged by. If I was guilty of these crimes, that would be the judge that I would be worried about more so than anything." Tr. 2345. He further declared "I'm hurt at the fact that this case was initiated behind me, just being in the wrong place at the wrong time. . . . I didn't commit a murder. I didn't accompany nobody who committed a murder or witness the murder." Tr. 2345. Oliver also indicated "justice hasn't been served. Because the person that did this to [the victims], they're still free. And by my judge one day I'll be free from this illegal prosecution." Tr. 2346. Now, Applicant wants to rely on Oliver's testimony at the evidentiary hearing indicating Applicant had nothing to do with these crimes. In particular, Applicant wants to rely on Oliver's testimony that he alone committed these murders. This Court finds Oliver's testimony at the evidentiary hearing is not credible. At this stage, Oliver has nothing to lose—he has already been convicted of these crimes, his convictions and sentences have been affirmed on appeal, and he has been denied post-conviction relief. Furthermore, there was evidence at trial presented specifically against Applicant from which the jury convicted Applicant. Applicant cannot now rely on Oliver's change in his story, and this alleged evidence is not such that would permit this Court to grant a new trial. Accordingly, this allegation must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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 that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

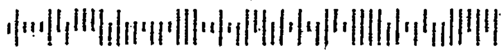
IT IS THEREFORE ORDERED:

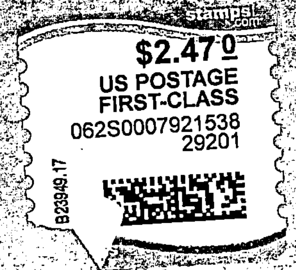
1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 29 day of May, 2018.

BROOKS P. GOLDSMITH
Presiding Judge
Fifth Judicial Circuit

________________, South Carolina





LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW
1720 MAIN STREET, SUITE 303
COLUMBIA, SOUTH CAROLINA 29201

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