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September 24, 2018

VIA U.S. MAIL
The Honorable Daniel E. Shearhouse
Clerk of South Carolina Supreme Court
Supreme Court Building
Post Office Box 11330
Columbia, SC 29211

Re: *Marvin Bowens-Green, #346650 v. State of South Carolina*
Civil Action No.: 2016-CP-10-6395

Dear Mr. Shearhouse:

Enclosed for filing, please find an original and two copies of Appellant's Notice of Appeal of the denial of his application for Post-Conviction Relief, and a Proof of Service regarding same. If you find everything in order, please file the original and return the clocked-in copies in the enclosed self-addressed envelope.

Please note, I was appointed to this and case and have copied the Office of Appellate Defense on this who will handle the appeal. Please call if you have any questions.

With kindest regards, I am

Sincerely,

Christopher L. Murphy, Esq.
For the Firm

CLM/jh

Enclosures
cc (w/ encls.): Mr. Marvin Bowens-Green
Kelly Openheimer, Asst. AG
Office of Appellate Defense
The Honorable Roger M. Young, Sr.
The Honorable Julie J. Armstrong, Clerk, 9th Jud. Cir.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No.: 2015-CP-10-6855

Marvin Bowens-Green, #346550 ..... Appellant

v.

State of South Carolina ..... Respondent

NOTICE OF APPEAL

Appellant appeals the Court's denial of his application for post-conviction relief. Attached is the order from the court dated August 23, 2018 and received September 7, 2018.

September 24, 2018

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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Marvin Bowens-Green, #346550 ..... Appellant

v.

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PROOF OF SERVICE

I certify that I have served APPELLANT'S NOTICE OF APPEAL by delivering a copy via U.S. Mail First-Class postage prepaid on the 24th day of September, 2018, on the following:

Kelly Oppenheimer Asst. Attorney General Rembert C. Dennis Building PO Box 11549 Columbia, SC 29211-1549 The Honorable Julie J. Armstrong Clerk of Court, Ninth Judicial Circuit 100 Broad Street, Suite 106 Charleston, SC 29401 Mr. Marvin B. Green, SCDC #346650 Lieber Correctional Institution PO Box 205 Ridgeville, SC 29472	The Honorable Roger M. Young, Sr. Charleston County Judicial Center 100 Broad St., Suite 368 Charleston, SC 29401 Office of Appellate Defense PO Box 11433 Columbia, SC 29211-1433

Jodi Hamlin

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Marvin Bowens-Green, #346650, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2015-CP-10-6855 **ORDER OF DISMISSAL**

FILED
2018 AUG 24 PM 12:42
CLERK OF COURT
CHARLESTON, SC

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed December 18, 2015, by Marvin Bowens-Green (Applicant). The State (Respondent) submitted its Return and Motion to Dismiss on September 7, 2016, requesting the application be summarily dismissed as successive and untimely. This Court, in its capacity as Chief Administrate Judge for the Ninth Judicial Circuit for the Court of Common Pleas, Charleston County issued a Conditional Order of Dismissal provisionally dismissing the application on September 27, 2016. Thereafter, on January 24, 2017, Respondent submitted its Amended Return and Motion to Vacate the Conditional Order of Dismissal, requesting the Conditional Order be vacated and requesting an evidentiary hearing on the application[1]. This Court issued an Order vacating the Conditional Order of Dismissal on January 26, 2017. An evidentiary hearing was convened on May 21, 2018, at the Charleston County Courthouse. Applicant was present at the hearing and was represented by Christopher L. Murphy, Esquire. Respondent was

[1] In its original Return and Motion to Dismiss to this application for post-conviction relief, Respondent inadvertently indicated this current application was successive to his 2013 post-conviction relief action. That 2013 action arose from a separate armed robbery offense (2009-GS-10-5376), of which Applicant was convicted following a jury trial one June 24, 2011. Applicant appealed that conviction, which was dismissed. Thereafter, he filed a post-conviction relief application challenging that armed robbery conviction. Following an evidentiary hearing into that matter, the post-conviction relief court denied that application, and Applicant appealed.

represented by Assistant Attorney General Kelly Oppenheimer 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 Charleston County Clerk of Court. During its April 2011 term, the Charleston County Grand Jury indicted Applicant for armed robbery (2011-GS-10-02338), possession of a firearm during the commission of a violent crime (2011-GS-10-02339). Cody J. Groeber, Esquire, represented him on these charges. On June 11-14, 2012, Applicant proceeded to a jury trial before the Honorable Kristi L. Harrington. The jury convicted Applicant as indicted on both counts, and Judge Harrington sentenced Applicant to a term of imprisonment of life without the possibility of parole for armed robbery and a concurrent term of five years imprisonment for the weapons charge.

Applicant filed a timely notice of appeal, and Appellate Defender Susan B. Hackett, of the South Carolina Commission on Indigent Defense, Office of Appellate Defense, perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issues:

1. Violating [Applicant's] Sixth Amendment right to a fair trial, the trial judge erred in failing to provide the jury with specific instructions concerning how to analyze the evidence presented concerning the identification of [Applicant] as the perpetrator, including expert testimony on the subject, significant language barriers between the police officers and the eyewitness who participated in the photographic line-up, and the use of surveillance video to make an identification[;]
2. The trial judge erred in allowing the prosecution to introduce [Applicant's] mug shot where no demonstrable need of the mug shot was established, the mug shot was unnecessary and cumulative to the prosecution's case, and the mug shot prejudiced [Applicant] by suggesting to the jury that [Applicant] had a prior criminal record[; and]
3. Violating the Eighth Amendment's ban on cruel and unusual punishment, the trial court erred in sentencing [Applicant] to life imprisonment without the possibility of parole pursuant to the state's recidivist statute because

[Applicant's] prior conviction was committed when he was seventeen-years old.

Following briefing and oral argument, the South Carolina Court of Appeals issued a published opinion affirming Applicant's conviction and sentence on March 11, 2015. *State v. Green*, 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015). Applicant then petitioned the Court of Appeals for a rehearing on March 26, 2015. On April 21, 2015, the Court of Appeals issued a written order denying the petition for rehearing. Applicant then petitioned to the South Carolina Supreme Court for a writ of certiorari, which was denied by written order on September 3, 2015. The Remittitur was issued on September 16, 2015.

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. "Counsel rendered ineffective assistance by failing to object to solicitor's comments vouching for the credibility of the State's witnesses;"
   b. "Counsel rendered ineffective assistance by failing to object to the perjured testimony of Charles Lawrence and Deputy Dustin Luckadoo;" and
   c. "Counsel rendered ineffective assistance of by advising applicant not to testify."

At the hearing, Applicant proceeded forward on the claims in his original application, as well as allegations that Counsel was ineffective for failing to investigate and present an alibi defense, and for failing to have Applicant evaluated by a mental health professional.

STATEMENT OF FACTS ADDUCED AT TRIAL

At 7:45 a.m. on December 24, 2010, a man entered Natubhai Patel's (Victim) convenience store and robbed him at gunpoint. Tr. 289. Victim called the police immediately, and the police arrived and viewed the surveillance video with Victim. Tr. 291. Victim told the

police he recognized the robber as a regular customer but did not know his name. Tr. 294. On December 29, 2010, police met with Victim and showed him a six-person photo lineup from which he chose a photo of the man who robbed him. Tr. 296-300.

At trial, the State called Victim, who described what happened the day of the robbery. Tr. 286-91. Victim testified that the man who entered his store with a gun on December 24, 2010, was a regular customer he had known for approximately one year. Tr. 289. The man came into the store approximately three times a week to buy cigarettes, gas, and lottery tickets. Tr. 290. Victim explained he and the man had a running joke about Obama's signature being on the man's identification. Tr. 290. Victim identified the robber in court as Applicant. Tr. 290-91. He was able to recognize Applicant by his voice and by seeing his face, despite the fact he was wearing sunglasses and holding a gun during the robbery. Tr. 302-03. Victim testified regarding his selection of Applicant out of a six-person lineup. Tr. 296-300. He explained that he does not read English well, so his son read and explained the lineup procedure. Tr. 297. He verified he was one hundred percent positive when he circled Applicant's photo in the lineup and was able to identify Applicant within a half second. Tr. 298, 300.

Deputy Dustin Luckadoo, of the Charleston County Sheriff's Office, testified he responded to the scene, talked to Victim, and viewed the video tape from the scene. Tr. 326-27, 332-34. He recognized Applicant as the robber, based on general dealings with him including a traffic stop, and identified him in court with one hundred percent certainty. Tr. 334-36, 345.

Detective Charles Lawrence of the Charleston County Sheriff's Office testified he was brought on to investigate the crime after it had occurred. Tr. 346-49. When Lawrence viewed the video from the crime scene on December 29, 2010, he recognized Applicant as the perpetrator based on having dealt with him before. Tr. 351-52. Lawrence testified he had the

opportunity to observe Applicant's face, mannerisms, voice, and gait for hours at a time. Tr. 352-53. He testified he recognized Applicant's walk in the video because it was distinctive; he also was able to identify Applicant's distinctive nose, as well as his height and weight. Tr. 353-54. Lawrence testified he was one hundred percent positive that the man pointing the gun at Victim in the video was Applicant. Tr. 354-55.

Once Detective Lawrence identified Applicant in the video, he generated a six-person photo lineup through SLED. Tr. 355. He then arranged to meet with Victim to see if he could pick out the man who robbed him. Tr. 356. Lawrence took Detective James Perkins with him to conduct the actual lineup with Victim because policy prohibits an officer from performing the lineup identification if he knows who the suspect is. Tr. 356-57. On December 29, 2010, Lawrence and Perkins met Victim outside a Sears store and Perkins conducted the lineup while Lawrence stayed away from the procedure. Tr. 357-58. Lawrence testified Victim made an identification and Lawrence then generated an arrest warrant for Applicant based on that identification. Tr. 359.

Next, the State requested to approach the bench and the trial court held the following bench conference:

> [The State]: I think we probably are going to have a matter of law outside the presence of the jury on the booking photo.
>
> The Court: On the booking photo? Why?
>
> [The State]: Because we want to put the booking photo in because it's relevant. It shows his side profile, it's from when he was arrested from this instance so it's not a prior incident. It has nothing to do with 404(b) but it's relevant so the jury can see him and be able to look at this and look at the video.
>
> The Court: Let me see.
> What's your objection?

[Applicant]: The booking photo. I was researching lineups last night - -

The Court: Which is different - -

[Applicant]: I understand, and I was going through some South Carolina cases on booking photos - -

. . . .

[The State]: I don't have a problem if you want me to cut those photos, cut the top half off.

[Applicant]: Yeah, but, I mean, it still shows it's a booking photo.

The Court: Let's just mark it for identification.

Tr. 359-60. Immediately following the bench conference, the State moved to admit the booking photo, State's Exhibit #5, and Applicant objected under Rule 404(b). Tr. 361. The trial court overruled the objection but did not allow the State to publish the exhibit at that time. Tr. 361.

Joseph L. West, a SLED investigator, testified regarding his role in obtaining still photographs from the video captured at the scene. Tr. 450-52. Applicant objected to the still photos, State's Exhibit #6, being admitted. Tr. 456-57. After hearing arguments, the trial court admitted State's #6 over Applicant's objection. Tr. 490-94.

Jagruti Patel, Victim's wife, testified that she recognized the man in the store video as a regular customer who often came in to buy Newport cigarettes, lottery tickets, and gas. Tr. 532-35. She recounted him joking about Obama signing his identification when she would ask for it. Tr. 536. Patel positively identified Applicant in court as the man in the video. Tr. 538, 539.

Next, the trial court addressed the booking photo again. Tr. 556. The trial court noted that the booking photo was admitted earlier, but was not published yet, and discussed the size of the photo after redaction. Tr. 556-57. The following exchange took place:

[Applicant]: And we believe we have sort of a front picture, side pictures. Any jury can - - any reasonable juror can infer that's a booking photo.

The Court: But that's not standard, is it? That's not what I'm concerned with. We can infer anything from anything and the case that you provided indicates that it was a different type of photo. It was the actual booking photo. We all know that he was arrested and there was indication that he was booked, and the case that you provided me it was from a - - the date was around his neck on his booking photo, which was prior to the arrest that he was being tried for.

[Applicant]: Yes, Your Honor. Basically, when you look at the three factors in the case we don't believe the evidence need [sic] to introduce the photograph.

The Court: The reason that they indicated to the Court that they needed it is because they needed a side profile picture. When we approached at the bench there was a discussion, because I'm not sure if it was on the record, there was a discussion on what would be admissible.

Mr. Groeber indicated that his major objection was to the top and to the bottom row because it clearly then indicated that it came from Charleston County. There's absolutely no distinguishing marks on the remaining two photographs. There's nothing to indicate that they - - he's in a jail suit or anything around the neck as in the case that you provided, and so I made the decision to cut the top and the bottom off of those pictures. So back to my initial question, Mr. Grimes.

[Applicant]: Yes, ma'am.

The Court: They have a larger picture of what I have had redacted. Okay. So it's now - - that picture is a full page. There was an objection because during the redaction now it's a smaller page.

[Applicant]: Yes, ma'am.

The Court: So which would you prefer me, preserving all of your objections, give the bigger page so that it's in conformity with all the other paper page sizes or the smaller page that's black and white?

[Applicant]: Preserving everything we prefer the bigger photo to go back.

The Court: All right. If we will, just so the record is clear, we will mark that as 5-A. Five does not go back.

Did you understand, Mr. Grimes? Did you hear what I said?

[Applicant]: They are substituting the - -

The Court: I'm not substituting because I want the record to be thoroughly preserved. This will be 5-A, and 5, the redaction that I did cutting, it will not go back but it will remains as 5. The one 5-A will go back.

[Applicant]: Thank you.

(Whereupon, State's Exhibit Number 5-A, a Photograph, was marked and admitted into evidence.)

Tr. 557-59.

The State rested, and Applicant then presented his case. After recalling Detective Lawrence, Applicant called Dr. Jennifer Beaudry, an assistant professor of psychology at the University of South Carolina Beaufort. Tr. 593-94. Dr. Beaudry testified that she wrote her dissertation about eyewitness identification procedures and people's perceptions of those procedures. Tr. 594. The trial court admitted her as an expert in human memory and eyewitness identification without objection. Tr. 599. Dr. Beaudry testified that factors such as the presence of a weapon, whether someone is wearing a disguise, and whether a perpetrator and witness are of the same race, can affect an observer's ability to encode information. Tr. 609-10. She admitted there are no studies regarding one's ability to recognize somebody one already knows but who is wearing a disguise. Tr. 642.

Applicant requested jury charges via electronic mail, marked as Court's Exhibit #9, which included a specific request as to identification as it relates to expert testimony based on

State v. Long, 721 P.2d 483 (Utah 1986). Tr. 701-02. The trial court informed Applicant it would be charging its standard identification charge, which lists all elements and factors that may be considered. Tr. 701, 702. The portion of the jury charges in regard to identification stated:

> An issue in this case is the identification of the defendant as the person who committed the crime charged. The State has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant.
>
> Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of each identification witness in the same way as any other witness.
>
> You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past.
>
> Once again, I instruct you, the burden of proof on the State extends to every element of the crime charged and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the crime.
>
> If after examining the testimony you have a reasonable doubt as to the accuracy of the identification you must find the defendant not guilty.

Tr. 750-51. Specifically as to expert witnesses, the trial court charged:

> The rules of evidence ordinarily do not permit witnesses to testify to opinions or to conclusions. An exception to this rule exists for witnesses we call expert witnesses.
>
> A witness who by education and experience has become expert in some art, science, profession or calling may state an opinion as to relevant and material matter in which the witness claims to be an expert and may also state the reasons for the opinion.
>
> You should consider any expert opinion received in evidence in this case and like any other evidence give it the weight you think it deserves. If you decided that the opinion of an expert

> witness is not based on sufficient education and experience or if you conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence you may disregard the opinion entirely.
>
> An expert witness's testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. Further, you are not required to accept an expert's opinion even though it is not contradicted.

Tr. 747-48.

After the trial court instructed the jury, Applicant asked that he be permitted to place on the record the reasons he requested certain charges. Tr. 755. He then went through each portion of the specific charges he requested and how he believed the trial court's charges did or did not comply with what he requested. Tr. 756-61. The trial court recognized the preservation of his argument and objection and ruled that it would not change the charge given. Tr. 761.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and presented the testimony of trial counsel, Cody J. Groeber, Esquire (hereinafter "Counsel"). This Court also had before it a copy of Applicant's trial transcript, the records of the Charleston County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

Applicant first testified on his own behalf. Applicant testified he was initially represented by Rodney D. Davis, Esquire, and then Counsel Andrew Grimes, Esquire represented him. He elaborated that Counsel and Mr. Grimes were assigned his case two months prior to trial. He testified during this time, that he was charged with armed robberies out of both Charleston and Colleton counties. He explained that he was convicted of the Colleton robbery and sentenced to twenty years imprisonment.

He further testified that he met with Counsel once while he was incarcerated in Lee Correctional Institute. He testified that he was not sure whether or not he and Counsel reviewed the discovery. He elaborated they discussed a plea offer to this Charleston County armed robbery for twenty years imprisonment. He elaborated that he refused the offer. Applicant also testified that he and Counsel had three conversations over the phone, and that he did not receive any letters from Counsel. He testified that during their second phone conversation, Counsel informed him the plea offer was for a concurrent term of imprisonment of twenty years. He elaborated that under this offer, he would accept responsibility, but that his release date would not change. He further elaborated that he wanted to proceed to trial because he was not guilty of these charges. He explained that he had three charges pending, and two of the armed robbery charges were dismissed. He further explained that there was a video of one of the associated armed robberies, but there was no identification of the gender or race of the suspect.

Applicant also testified that he and Counsel discussed an alibi defense, and that he wrote a letter to Counsel detailing the events of the morning of the robbery. He elaborated that three people could place him elsewhere during the commission of this armed robbery. He further elaborated that a store employee at a Sunoco in Jacksonboro, South Carolina could testify he was at that store the morning of this robbery. He also testified that Marian Grant and his father could also testify as to his alibi. Applicant testified that Counsel did not interview these witnesses, which they discussed prior to trial. He testified that these alleged witnesses were not present to testify at the evidentiary hearing, but that they would testify to his whereabouts. He further testified, however, that Counsel and Mr. Grimes were focused on the serial number of the gun. He further elaborated that Counsel did not take the time to have these witnesses present at trial, even though they were accessible. He further testified that these witnesses would have vouched

for the fact he was not present during the commission of this robbery. He explained that he was also on an ankle monitor at the time, which his bondsman, in Colleton County, required him to wear. He further explained that he told Counsel he was on GPS monitoring.

He testified that Deputy Luckadoo identified the suspect and indicated that he knew the suspect from the news and the area. He elaborated, however, that Deputy Luckadoo knew his brother, Marvin Bowens, not Applicant. He further elaborated his brother was charged on December 17, 2010, for a robbery in Walterboro, which was covered in the news. Applicant testified he told Counsel he was not in the news, and they debated this. He explained Counsel did not believe his brother was not him. He also testified Deputy Luckadoo was never questioned about whether he identified Applicant or his brother, and it was not brought out that they are two different people.

He further testified Detective Lawrence interviewed him in 2008, which he did not deny, and Detective Lawrence testified to this interview during the *Neil v. Biggers*[2] hearing prior to his trial. He elaborated that Detective Lawrence gave a start time for the interview but did not give a finish time. He further elaborated in 2011, Detective Lawrence testified the 2008 interview lasted approximately one to one-and-a-half hours, whereas in 2012, Detective Lawrence testified the interview lasted between two and three hours. Applicant explained this testimony was inconsistent; and, therefore, Detective Lawrence was not a credible witness.

Applicant testified that Victim identified him based on prior dealings Victim's prior dealings with Applicant. He further testified that Ms. Patel discussed the robbery with Victim, which influenced the identification. He elaborated that Ms. Patel knew him from his walk and mannerisms, but only after talking with Detective Lawrence. He further elaborated that Ms. Patel independently recognized him, but that Counsel made no objection to her in-court

[2] 409 U.S. 188 (1972).

identification of him.

Applicant also testified that he took issue with multiple comments made during the solicitor's closing argument. He elaborated that his comments served to bolster his personal opinion, vouch for the witnesses presented at trial, put the weight of the government behind the witnesses, and appeal to the racial and ethnic biases of the jurors. In particular, Applicant believed some of the solicitor's comments during closing were intended to produce passion in the jury and to make the jurors sympathetic towards Victim, who was an immigrant. Applicant also testified there were ten instances during the closing argument in which Counsel should have objected, but did not. He explained that Counsel's failure to object influenced the jury, as it appeared Counsel was endorsing the witness.

Applicant ultimately testified that he believed he was Counsel's first case. He explained that Counsel failed to admit the photograph of the bank robber in Colleton County and failed to present a defense.

Following Applicant's testimony, Counsel testified. Counsel testified he began working as a State Public Defender in January 2008, and he was the primary attorney on Applicant's case. He also testified Mr. Davis initially represented Applicant and after a motion for severance, tried the other armed robbery case. He further testified that after Mr. Davis left the Public Defender's Office, he inherited Applicant's case. He testified that by the time he had been assigned Applicant's case, he had already received the discovery materials, and he and Applicant reviewed the materials. He testified that hemet Applicant in person at Lee Correctional Institute[3] once, and spoke on the phone with him at least three times. He elaborated that he discussed with Applicant the plea offer for a concurrent term of twenty years both in person and over the phone.

[3] As aforementioned, Applicant was convicted of a separate armed robbery offense in 2011. When Counsel represented him on this current armed robbery charge, Applicant was already serving a sentence at Lee Correctional Institute for that 2011 conviction.

He further elaborated that he is always concerned with proceeding to trial when the client is facing a life sentence, and that Applicant understood his concerns. He also testified that they discussed the elements of the charges, and Applicant's version of the facts. He explained based on these conversations, their defense was that Applicant was not present at the robbery.

Counsel also testified that he had no issues communicating with Applicant. He further testified he did not have a mental evaluation performed on Applicant, as he had no reason to have Applicant evaluated.

He testified that he had no information Applicant was on GPS monitoring at the time of the commission of these crimes. He also testified he discussed Applicant's case with his father, who never mentioned GPS monitoring. He elaborated that if he, or Mr. Grimes, had knowledge Applicant was on GPS monitoring at the time, they would have investigated it.

Counsel also testified that he had his private investigator conduct an investigation into the alibi. He elaborated that he provided his investigator with the names and locations of the alleged alibi witnesses, and the investigator interviewed these individuals. He further elaborated that Applicant provided him with the following names: Tyrone Patel, who the investigator attempted to contact, but could not finds someone who knew him; Vinny, who was a clerk; Jen, who was a cook in Jacksonboro; and Lina Sims, who was the mother of Vinny Sims. He also testified that the investigator met with Victim at his Sunoco store on May 18, 2012, and also reached out to a different Mr. Patel who owned the Sunoco in Jacksonboro. He elaborated that he could not determine, based on this investigation into the other Sunoco store, whether the alibi was valid. He explained that this alibi was not strong, as people could not remember seeing Applicant and Applicant did not do the things he alleged to have done. He further explained that presenting this alleged alibi would have distracted from the defense.

He testified that there were several eyewitnesses to this crime; and, consequently, they had a *Biggers* hearing. He elaborated that two law enforcement officers testified during the hearing, who recognized Applicant from prior interactions with him and from the news. He further testified that two eyewitnesses testified at the hearing, Victim and Ms. Patel. He elaborated that Ms. Patel testified that Applicant was a regular in the store, and that she recognized him.

Counsel also testified that he attempted to submit a photograph from the Colleton County bank robbery. He elaborated that Applicant's brother was arrested in connection with that armed robbery, and the photographs of the suspects in both robberies were similar, though the picture from the bank robbery was fuzzy. He further elaborated that he attempted to introduce this photograph in order to discredit Ms. Patel's ability to identify the suspect of this robbery. He testified, however, that he was unable to introduce the photograph. He further testified that he proffered the photograph through Applicant's mother, but the trial court sustained the State's objection.

He testified that Detective Lawrence and Deputy Lucakdoo gave inconsistent testimony at trial. He elaborated that their testimony was inconsistent with regards to previous interviews with Applicant, specifically that the interview either lasted one hour or two-and-a-half hours. He explained that there was no way to verify the length of the previous interview, as there was no evidence to challenge the duration, except for Applicant's testimony. He further explained that he did not want to highlight these inconsistencies, as he wanted to avoid all references to prior armed robberies Applicant had committed.

Counsel also testified that he should have objected during closing, particularly in light of the fact that Victim was an immigrant and the solicitor was telling the jury the witnesses were

telling them the truth. He elaborated, however, at the time, that he did not believe these comments were objectionable and only now believes that they were.

He further testified that he and Applicant discussed the possibility of Applicant taking the stand. He testified in order to show that Victim and Ms. Patel were mistaken in their identification of Applicant. He hired an expert. Counsel further testified that he did not need to testify in order to say he was not present at the scene, as he felt they had presented a good defense. He explained that he feared if Applicant testified he would open the door for the prosecution to question him about his previous armed robbery conviction. He also testified that he advised Applicant of his right to testify, and, ultimately, it was Applicant's decision whether or not he would testify. He elaborated that the trial court would have questioned Applicant regarding this right, and that he and Applicant discussed it. He further elaborated that it was possible Applicant and Mr. Grimes discussed this possibility without Counsel being present.

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 presented 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 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 object during the solicitor's closing argument

Applicant contends Counsel was ineffective for failing to object during the solicitor's closing argument. Specifically, Applicant contends Counsel was ineffective for failing to object when the solicitor stated: "But maybe the thinking was who would believe this immigrant anyway. Who would believe this man who couldn't even come into this courtroom and couldn't

speak English." Tr. 725. Applicant alleges this comment bolstered the testimony of Victim and was an inflammatory statement meant to appeal to the jurors' emotions. Applicant further contends Counsel was ineffective for failing to object when the solicitor made the following comment:

> Before I show it to you though I don't think all of you are going to be able to identify this man, obviously. I don't think that can be done, and that is just what Dr. Beaudry was telling you about. Strangers have a lower level of being able to identify somebody. So just because all of you can't, and some of you may, does not mean you have reasonable doubt. This case is based on the witnesses who knew him, not on your ability to look at this video and determine if it is him.

Tr. 729-30. Applicant alleges this comment is bolstering. Next, Applicant alleges Counsel was ineffective for failing to object when the solicitor stated: "There are four people in this case who told you they know. If you want to take off 20 percent take one and a half people. They are all telling you they know. They are not all mistaken. They are actually all correct." Tr. 731. Applicant contends the solicitor was vouching for the credibility of the witnesses with this statement. Applicant further alleges Counsel was ineffective for failing to object to the following comment made by the solicitor in closing argument: "And just because they weren't able to take an exact translation there that day at the scene about this is the man who comes in and buys Newport cigarettes, usually a lottery ticket, sometimes gas and he jokes with us about Obama does not mean it didn't happen." Tr. 734. Through this comment, Applicant argues the solicitor was bolstering his own personal opinion. Next, Applicant contends Counsel was ineffective for failing to object to the following statement, which he alleges is explicit vouching: "You judge their credibility and you determine if they are lying to you, and they are not. Why would they? Why would they go through a lie to frame somebody and say things they don't know? This isn't about their credibility. They are telling you the truth." Tr. 734. Applicant

also alleges Counsel was ineffective for failing to object when the solicitor stated: "You heard from Ms. Patel, and you'll decide to believe her or not. There's every reason in the world to believe her. . . . Does she know or is she lying? She is not." Tr. 738. Applicant contends this comment vouched for the credibility of Ms. Patel. Further, Applicant alleges the following comment was a personal assurance by the solicitor of the witnesses' veracity: "You can believe all those witnesses and you can believe the truth in this case." Tr. 738-39. Finally, Applicant contends Counsel was ineffective for failing to object when the solicitor stated: "If you knew with certainty what happened in this case you wouldn't be sitting where you are. You would have taken the witness stand, told the jury what you knew. People who are certain have certain information. They know. And certain people take that stand." Tr. 739. Applicant contends through this comment, the solicitor placed the prestige of the government behind the witnesses.

This Court finds Applicant has wholly failed to establish Counsel was deficient. "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) (citing *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). Furthermore, a closing argument should stay within the content of the record and the reasonable inferences to be drawn therefrom and must not be intended to arise the passions or prejudices of the jury. *Id.* at 609-10, 602 S.E.2d at 744 (citing *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); *Copeland*, 321 S.C. at 324, 468 S.E.2d at 624). A solicitor must also not vouch for a witness' credibility. *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citing *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001)). A solicitor vouches for the credibility of a witness by placing "the government's prestige behind a witness by making personal assurances, or indicating that information not presented to the jury supports the testimony." *Id.* However, "'[a]

solicitor's argument concerning the credibility of the State's witnesses based on the record and its reasonable inferences is not error.'" *State v. New*, 338 S.C. 313, 319-20, 526 S.E.2d 237, 240 (1999) (quoting *State v. Caldwell*, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990) (finding the solicitor's remarks referencing credibility of State witnesses permissible and directly related to the evidence where biases of the witnesses were apparent from the record)). *See also State v. Raffaldt*, 318 S.C. 110, 456 S.E.2d 390 (1995) (the State may comment on the credibility of witnesses in argument).

Here, the solicitor's closing argument was within the confines of the record and the reasonable inferences therefrom. Furthermore, his comments on the credibility of the State's witnesses were based upon the record and its inferences. At trial, evidence was presented that Victim, Ms. Patel, Detective Lawrence, and Deputy Luckadoo all had personal knowledge of Applicant. Specifically, Victim and Ms. Patel were familiar with Applicant based upon prior dealings with him in their store. *See* Tr. 289-90, 532-36. Similarly, Detective Lawrence and Deputy Luckadoo both had prior encounters with Applicant. *See* Tr. 334-36, 352-54.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from the alleged deficiencies. Even if the comments made by the solicitor were improper, "[c]onduct that would otherwise be improper may be excused under the 'invited reply' doctrine if the prosecutor's conduct was an appropriate response to statements or arguments made by the defense." *Vaughn*, 362 S.C. at 169, 607 S.E.2d at 75. When the door has been opened to such comments, the comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. Christoforo*, 416 U.S. 637, 643 (1974). Furthermore, upon review of such comments, "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury,

sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Id.* at 647.

At trial, Applicant presented the testimony of Dr. Beaudry in order to cast doubt on the identifications made in this case. Dr. Beaudry's testimony served to present a slew of factors, some present in this case, which could have affected the identification of Applicant. The solicitor's comments made during closing were merely an invited response from the defense—that the jury should believe the witnesses because their identifications of Applicant were not wrong. Based on all the foregoing, this Court finds Applicant has failed to meet his burden. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to testimony

Applicant alleges Counsel was ineffective for failing to object to the so-called "perjured" testimony of Detective Lawrence and Deputy Luckadoo. Specifically, Applicant contends Counsel was ineffective for failing to object when Detective Lawrence testified to the duration of a prior interview with Applicant, which were inconsistent. Applicant further alleges Counsel was ineffective for failing to object when Deputy Lucakdoo testified he knew Applicant from the news.

With respect to the inconsistencies in Detective Lawrence's testimony regarding the length of a prior interview with Applicant, this Court finds Applicant has failed to establish Counsel was deficient or any resulting prejudice therefrom. 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). Counsel testified he did not want to highlight the fact Applicant had been interviewed by Detective Lawrence in the past, because he wanted to quell all references to Applicant's prior armed robbery convictions. Furthermore, Counsel testified that there was no method in which to verify the length of the interview, whether it be one hour or two-and-a-half hours, without Applicant having to testify. Based on the foregoing, this Court finds Counsel employed a valid strategic decision in not highlighting this minor inconsistency; therefore, Applicant has wholly failed to establish that Counsel was deficient or any prejudice therefrom. This allegation must be denied and dismissed with prejudice.

With respect to Applicant's allegation that Counsel was ineffective for failing to object to Deputy Luckadoo's testimony, this Court finds Applicant has failed to meet his burden. Applicant contends he was not featured in the media, but rather his brother was, and therefore Deputy Luckadoo could not have recognized Applicant from the media. However, even assuming Applicant is correct in that he was not featured in the news, Applicant completely overlooks that Deputy Luckadoo recognized him from prior dealings with Applicant. Therefore, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to advise Applicant of his right to testify

Applicant alleges Counsel failed to advise him of his right to testify. In particular, Applicant contends Counsel was ineffective for advising him not 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. 419-21. The trial court specifically stated to Applicant: "You may talk with your attorney, either together or individually, your friends, your family members, or anyone else but the final decision is left *entirely up to you.*" Tr. 421 (emphasis added). Furthermore, the record clearly indicates Applicant made a choice, of his own, not to testify after having been fully advised of his rights and the ramifications of testifying or, in the alternative, not testifying. Tr. 684. Applicant chose not to testify. Tr. 439. Moreover, Counsel testified he discussed Applicant's right to testify with him and expressed his concerns if Applicant did decide to testify, namely opening the door for his prior armed robbery convictions to become admissible. He further testified that he made it clear to Applicant the decision whether or not he would testify ultimately rested with him. 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. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to investigate and present an alibi defense

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*, 422 S.C. 174, 810 S.E.2d 836 (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). This Court finds Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. Counsel testified that he hired an investigator and had that investigator search for and interview Applicant's alleged alibi witnesses. He testified based on this investigation, he could not present a strong alibi defense, as the alleged witnesses could not be found, did not remember the events of that date, or indicated Applicant did not partake in the actions in which he alleged to have partaken. Because Counsel did, indeed, investigate Applicant's alleged alibi, this Court finds Applicant has failed to establish any deficiency on the part of Counsel.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Prejudice from counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witness's testimony would have been cannot, by itself, satisfy his burden of showing prejudice. *Clark v.*

State, 315 S.C. 385, 434 S.E.2d 266 (1993); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995). An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the post-conviction relief hearing in order to establish prejudice from the witness's failure to testify at trial. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998). Applicant wholly failed to present the testimony of these alleged alibi witnesses. Applicant's mere speculation as to what these witnesses would have said does not give rise to the level of proof required to establish his burden. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to have Applicant mentally evaluated

Applicant further alleges Counsel was ineffective for failing to have him mentally evaluated. Counsel testified he has no problems communicating with Applicant and, therefore, had no reason to have Applicant evaluated. Therefore, this Court finds Applicant has failed to show Counsel was deficient. Furthermore, because Applicant neither produced any medical records concerning his mental health "nor offered the testimony [of some mental health expert] in some other manner consistent with the rules of evidence," what this additional testimony would have been, and similarly what his medical records would have shown, is "purely speculative." *Bannister*, 333 S.C. at 304, 509 S.E.2d at 810. This Court finds this allegation must be denied and dismissed with prejudice.

CONCLUSION

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

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt 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 23rd day of August, 2018.

ROGER M. YOUNG, SR.
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

Marvin Bowens Green, #346650 Applicant,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

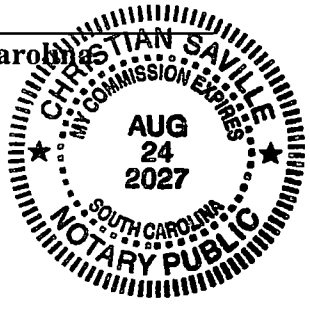
Christopher L. Murphy, Esquire
Murphy Law Offices, LLC
234 Seven Farms Drive, Suite 128
Charleston, SC 29492

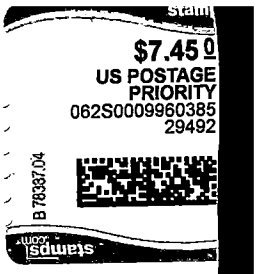
This 5th day of September, 2018.

Jennifer Jennison
Legal Assistant for Respondent

SWORN to before me this 5th day of September, 2018.

Notary Public for South Carolina
My Commission Expires:





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