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October 11, 2018

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OCT 16 2018

S.C. SUPREME COURT

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

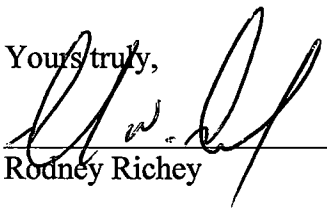
RE: Tyrus Rashawn Woodruff vs. The State of South Carolina
Case No: 2017-CP-42-4115

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,



Rodney Richey

RWR/
Enclosures
cc: Valerie Garcia Giovanoli, Esquire

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
HONORABLE MICHAEL G. NETTLES
2017-CP-42-4115

TYRUS RASHAWN WOODRUFF, SCDC# 353331

APPELLANT,

vs.

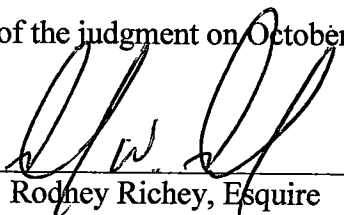
STATE OF SOUTH CAROLINA,

RESPONDENT.

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S.C. SUPREME COURT

NOTICE OF APPEAL

Tyrus Rashawn Woodruff appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Michael G. Nettles, Circuit Judge on February 21, 2018 and May 31, 2018 an Order issued on September 21, 2018 and filed on October 4, 2018. The Appellant received notice of the judgment on October 12, 2018.



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Other Counsel of Record:
Valerie Garcia Giovanoli, Esquire
Jordan A. Cox, Esquire
Office of Attorney General State of SC
Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
HONORABLE MICHAEL G. NETTLES
2017-CP-42-4115

TYRUS RASHAWN WOODRUFF, SCDC# 353331

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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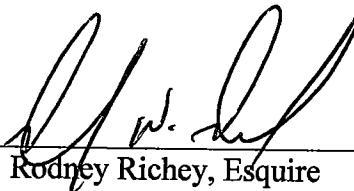
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S.C. SUPREME COURT

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on October 12, 2018, addressed to their attorney of record, Valerie Garcia Giovanoli, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: October 12, 2018



Rodney Richey, Esquire
Attorney for the Appellant
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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Tyrus Rashawn Woodruff, #353331,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2017-CP-42-4115

**ORDER OF DISMISSAL
WITH PREJUDICE**

This matter comes before this Court by way of an application for post-conviction relief ("PCR") filed by Tyrus Rashawn Woodruff ("Applicant") on November 7, 2017. The State ("Respondent") made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on February 21, 2018, at the Spartanburg County Courthouse. Applicant was present and represented by Rodney W. Richey, Esquire. Valerie Garcia Giovanoli, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Paul Neely, Esquire, ("Counsel"), Clay Allen ("Co-counsel") and Spenser Smith ("Solicitor") also testified. The hearing was continued to allow Applicant to locate an alibi witness to testify at a later date. On May 31, 2018, a subsequent evidentiary hearing was convened in front of Judge Nettles in Florence County, South Carolina. Respondent was represented by Jordan A. Cox, Esquire, of the South Carolina Attorney General's Office. Eboni Tubbs testified on behalf of Applicant.

This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the pre-trial and plea transcript, the PCR application, and Respondent's return.

PROCEDURAL HISTORY

Applicant is presently incarcerated pursuant to orders of commitment of the Spartanburg

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County Clerk of Court. In August 2015, the Spartanburg County Grand Jury indicted Applicant for attempted murder and possession of a weapon during the commission of a violent crime (2015-GS-42-3881, count I and II), first-degree burglary (2015-GS-42-3883), and three counts of armed robbery (2015-GS-42-3882, -3884, -3885).

The charges resulted from an incident on July 14, 2015, in which Applicant and two other co-defendants¹ entered the victim's residence, forced the three men inside (victims) onto the floor, shot one of the men twice, took the victims' wallets and iPhone and ransacked the home looking for drugs and money. The stolen iPhone was tracked to another residence within an hour of the incident. When law enforcement arrived at the other residence, the car that was driven to the victims' residence, a black Dodge Avenger, was parked outside and the four co-defendants were inside with the victims' wallets and iPhone. (Tr. pp. 24-26).

On February 21, 2017, Applicant's trial began in Spartanburg County, South Carolina. Paul K. Neely, Esquire, represented Applicant. Clay T. Allen, Esquire, also represented Applicant as second-chair. Solicitor Barry J. Barnette and Assistant Solicitor Spenser Smith represented the State. On February 22, 2017, Applicant pled guilty as indicted to attempted murder, possession of a weapon during the commission of a violent crime, first-degree burglary and one count of armed robbery before the Honorable J. Derham Cole. The State dismissed the other two indictments for armed robbery in exchange for Applicant's guilty pleas. Pursuant to the State's recommendation, Judge Cole sentenced Applicant to imprisonment for concurrent terms of twenty-five years each for attempted murder, first-degree burglary, and armed robbery, and five years for possession of a weapon during the commission of a violent crime. Applicant did not appeal his convictions or sentences.

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ALLEGATIONS

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

1. "Actual Innocence"
 - a. "I am completely innocent of these allegedly above-mentioned charges. I was not at the scene of these alleged offenses. I am not on any audio and/or video surveillance device, nor was I identified by any credible eye witnesses. Furthermore, I have an alibi witness to further substantiate this allegation."
2. "Ineffective Assistance of Trial Counsel"
 - a. Counsel failed to interview or subpoena alibi witness to testify.
 - i. Applicant informed Counsel about his alibi witness, but Counsel never contacted the witness.
 - b. Counsel failed to investigate facts
 - i. During Counsel's visits, Applicant told Counsel his co-defendants were willing to testify Applicant is innocent of the charges.
 - ii. "The police did not have probable cause to arrest me with attempted murder, armed robbery, burglary (1st degree) and possession of weapon during violent crime."
 - c. Counsel failed to challenge affidavit underlying arrest warrant
 - i. Affidavit was "insufficient to support a finding of probable cause."
 - ii. "The affidavit failed to set forth any facts as to why the police believed I committed the alleged offenses. The affidavit failed to set forth how the police conducted its investigation or how they came upon their investigation. Furthermore, it failed to include any facts or underlying reasons concerning the informant's veracity."
 - d. "Counsel failed to object that State impaneled its grand jury outside the jurisdiction of the Court of General Sessions. S.C. Code Ann. § 14-9-210..."
 - i. The grand jury indicted Applicant in August of 2015. "The terms of Spartanburg County General Sessions are filed by S.C. Code Ann § 14-5-710, which DOES NOT offer provisions for a Court to be open on August 21, 2015."
 - e. "Plea Counsel coerced me to plead guilty against my will and voluntary consent."
 - i. A jury was selected on February 21, 2017. "On [February 22, 2017], before trial commenced, my lawyer had me brought to a room behind the judge's chambers with Clay Allen (Head Public Defender) and my plea counsel to inform me that it

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1 A fourth co-defendant drove the black Dodge Avenger to and from the victim's residence.

would be in my best interest to plead guilty because there was overwhelming evidence of guilty, and I would not be able to plead third-party guilty, and that my alibi witness would not be able to testify in my defense.”

3. “My alibi witness was at trial and willing to testify.”

At the start of the hearing, Applicant moved for a continuance on the basis that he was not prepared to present testimony from an alleged alibi witness. This Court allowed the hearing to proceed and reserved ruling on whether the hearing would be bifurcated to take testimony from the alleged alibi witness at a later date. Applicant informed this Court he would be proceeding on his allegations that Counsel failed to call his alibi witness, gave him improper advice to plead guilty because the evidence proved actual innocence, failed to object to the empanelment of the grand jury, and failed to present evidence of a photo lineup identification which established his innocence.

SUMMARY OF TESTIMONY AT PCR HEARING

Trial Counsel

Counsel has been practicing law since May of 2014. Counsel testified he represented Applicant for fifteen months prior to trial. Counsel testified Applicant had always maintained his innocence of the charges. Applicant provided Counsel with the names of two witnesses he claimed could give him an alibi: Christina Booker and Taylor Dawkins. Applicant provided Counsel with the addresses and phone numbers of the two women. Counsel and his investigator made multiple attempts to track down the two women in order to interview them. Their attempts included calling the phone numbers, leaving messages, visiting two separate addresses, and mailing letters. Counsel recalled he and/or his investigator making phone contact one of the women and scheduling an office meeting in order to speak to them regarding an alibi for Applicant. On more than one occasion, the woman failed to appear at the scheduled office visits. In addition to the two women Applicant offered as alibi witnesses, another woman, who is believed to be the mother of Applicant’s child, also offered to testify as an alibi witness. However, because her story was inconsistent with

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Applicant's alibi, Counsel felt ethically prohibited from calling her as an alibi witness. Counsel testified he did not give the State the requisite ten day alibi witness notice because he was never able to get the alleged alibi witnesses to cooperate and talk to him, despite numerous attempts. In the abundance of caution, Counsel researched the notice rule to determine if he could get around it in the event the witness did cooperate at the last minute. Having been unsuccessful at a prior address, Counsel received another address of where the woman may have moved. However, when he went to try to find her there, the residence had been abandoned.

Despite being unable to corroborate Applicant's alibi, Counsel felt confident going into trial based on his strategy of presenting evidence of third party guilt. Counsel also prepared to challenge the out of court identification of Applicant in a six pack photo lineup, pursuant to Neil v. Biggers.² Counsel focused on these strategies rather than the elusive "alibi" witness because he was confident they would be successful and he did not have confidence in the alleged alibi strategy. Although Counsel felt the winning strategy was third party guilt and wholeheartedly disagreed with Judge Cole's ruling on that motion, he could not recall anything from the third party guilt pre-trial motion, the testimony presented, or the arguments made.

Counsel testified that no one identified Applicant in a six pack lineup. Later, Counsel testified the son of Marlon Davis identified Applicant when shown a six pack lineup. Counsel believed Applicant's photo in the six pack lineup was misleading because the photo depicted Applicant with dreads. However, Applicant did not have dreads at the time of the shooting. In addition, one witness identified another man with dreads in the photo lineup -- a man by the name of Terez Robinson. Counsel waived on whether this witness was identifying Terez as the driver of the getaway vehicle or one of the home intruders. Counsel explained that at the scene of arrest, there was a black Dodge Avenger. Law enforcement found one latent print on the back driver's side door.

that made him lose faith in going to trial. Counsel testified he did not threaten Applicant to plead guilty, but rather strongly advised him to do so.

Applicant

Applicant testified that at the time of the burglary, he was at Taylor Dawkins' house. Applicant testified that he was at the home with his friend, Diago, and three other females. Applicant testified that these were all of the people at the home that night. However, his friend gave him a ride to co-defendant Dewberry's home shortly after the burglary. Applicant testified he told Counsel Dawkins and Booker would testify that he was with them at the time of the burglary. Applicant testified that he told his attorney that he was with Booker during the night before the robbery. Applicant testified that Ebony Tubbs was in the house at the same time the night before, but Applicant did not testify that he informed his Attorney of this information. Applicant testified that he did not believe Counsel contacted Booker.

Applicant testified Counsel never told him Judge Cole did not make rulings on the record, and had he known that, he would have proceeded with trial. Applicant admitted he pled guilty because of what Counsel told him how the judge ruled on the pre-trial motions. Applicant testified Counsel told him not to go to trial and to accept the plea offer.

Co-Counsel

Co-Counsel has practiced criminal law since 1979. He is, and was at the time of Applicant's plea, the Chief Public Defender for the Seventh Judicial Circuit. His role in this case was minimal and could be characterized as co-counsel or second chair. He was familiar with the facts and evidence, but not as intimately as Counsel. Co-Counsel was present during a discussion on the second day of trial, in which Counsel and Co-Counsel offered their advice with regard to pleading guilty. He told Applicant he agreed with Counsel's assessment that it was in his best interest to plead guilty. Neither he nor Counsel threatened or coerced Applicant to plead guilty. Co-Counsel

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J. HOPE BRADLEY

The print matched that of Terez Robinson. Counsel felt this was more than just a mere coincidence and felt this supported their argument of third party guilt. However, Applicant was present at the home with the other three co-defendants 30-45 minutes after the burglary, but not Terez.

After the pre-trial hearings, Judge Cole took the matters under advisement. Then there was an in-chambers conference with Judge Cole and the Solicitor. Judge Cole indicated he would not allow evidence of third party guilt and would allow the out of court identification of Applicant. At that time, the Solicitor also handed over jail phone calls made by Applicant from jail after his arrest. They did not capture explicit confessions, but would not have been favorable to the defense if presented. Judge Cole indicated he would allow the jail phone calls to be presented at trial, despite the late disclosure. Counsel spent four hours reviewing the jail phone calls that night before the second day of trial. Counsel admitted that he considered this his case, he was determined to win, and he disagreed with Judge Cole's rulings, but not to the extent he felt Applicant would be successful on appeal.

During the in-chamber conference, Judge Cole indicated that although he believed Applicant deserved much more time, he would give him the same sentence his co-defendant, who had already pled guilty, had gotten -- 25 years. Counsel then advised Applicant he would most likely be convicted at trial since he lost the pre-trial motions and he would most likely get a life sentenced. Counsel also advised him to accept the 25 year offer. Counsel testified he believed the plea was in Applicant's best interest and still believes it was given the circumstances. Counsel discussed with Applicant that by pleading guilty he would give up his rights, but was unsure if he specifically addressed any issues regarding having the judge put his ruling on the record in order for it to be preserved for appeal. Counsel lamented that even with the jail calls coming in, it was the failed motion for third party guilt

²409 U.S. 188 (1972).

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was sure they discussed appeal issues with Applicant. Co-Counsel also explained that it is not uncommon for Judge Cole to inform the parties of his rulings in-chambers.

Assistant Solicitor Spenser Smith

Spenser Smith is an Assistant Solicitor for the Seventh Circuit Solicitor's Office. He became involved with the case when Solicitor Barry Barnette, the lead prosecutor, requested his help. Assistant Solicitor Smith summarized the State's evidence, which included: three intruders entered the residence of Marlon Davis shortly before noon; the intruders robbed three men in the house and searched the house for drugs and money; the homeowner, Marlon Davis, was shot twice by two of the intruders; Davis' son identified Applicant in a six pack photo lineup; Davis was never shown a lineup because he was in the hospital being treated for his gunshot wounds, but was prepared to identify Applicant in court; when police arrived to the home within minutes after the burglary, one of the victim's claimed they had tracked their stolen iphone; within approximately twenty minutes, an investigator arrived at the residence to which the iphone had been traced (co-defendant Dewberry's home); the investigator saw a black Dodge Avenger outside the residence which matched the description of the car in which the intruders fled; there were also four men standing outside which he observed until backup arrived; no one left the residence during that time; when backup arrived, they went in to arrest the four men since there were allegations three men entered the residence and one man drove the car; they found the wallets (and contents) of the victims, a letterman jacket belonging to a victim, as well as the stolen iphone at the residence and in the black Dodge; Xavier Martin, a co-defendant, who was a paraplegic and confined to a wheelchair, gave a statement that he was the driver of the car; Xavier Martin had dreads; one of the victims identified Terez Robinson from a six pack photo lineup, who also had dreads, as the driver of the car; Akia Ross, another victim in the home during the burglary, also gave a statement that none of the intruders had dreads, Davis' son identified Applicant as one of the home intruders; there was a jail call from Applicant's account in

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J. HOE BARNETTE

he was informed of Taylor Dawkins and Christina Booker as potential alibi witnesses. A third witness, the mother of Applicant's child, was also named by Applicant as a possible alibi witness. Counsel testified he and his investigator made numerous attempts at locating and speaking to the witnesses Applicant provided. In addition to being difficult, if not impossible to locate, the witnesses missed multiple scheduled office visits. Counsel and his investigator even went to two different addresses, one in Greenville, looking for these witnesses. Counsel testified that he was able to communicate with the mother of Applicant's child, but her version of events did not match with what Applicant had described as his alibi. Counsel was also not as confident pursuing the alibi strategy as much as he was confident in pursuing what he believed was their winning strategy third party guilt.

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This Court finds that Applicant has failed to show that Counsel was ineffective for not presenting Christina Booker, Taylor Dawkins, or the mother of his child as witnesses to support his alleged alibi. First, this Court notes any claims surrounding the failure to present testimony from an alleged alibi witness assumes the testimony from the alleged alibi witness would have been favorable to the defense and therefore affected the outcome of the trial. An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Because Applicant failed to produce the testimony of the alleged alibi witness Christina Booker, Taylor Dawkins, or the mother of his child, any prejudiced derived from any of Counsel's actions leading to her not testifying is purely speculative. Therefore the allegations are denied and dismissed.

Failure to present alibi witness Ebony Tubbs

Although Applicant never informed Counsel of Ebony Tubbs' potential use as an alibi witness, she was called to testify at the PCR hearing. Ms. Tubbs testified that she was Applicant's

close friend and she was with him the night before the robbery, along with eight to ten other people. Ms. Tubbs testified that she was the person responsible for driving Applicant during the night before the alleged crime, as well as the next morning. Ms. Tubbs testified that none of the eight to ten witnesses from Dawkins' home were ever contacted by Counsel. Ms. Tubbs testified that she did not have any children in common with Applicant.

This Court finds that Ms. Tubbs testimony is not credible in light of the record, Applicant's testimony, and of Counsel's credible testimony. First, Ms. Tubbs claims to have been at a get together with eight to ten people, including Applicant, on the night before the burglary. Applicant contradicts this claim by alleging he was with Ms. Tubbs and only three other individuals. Next, Ms. Tubbs stated that no one was contacted by Counsel in order to testify on Applicant's behalf. Counsel testified that he attempted to contact all of the witnesses provided to him and spoke to at least one of the women at the alleged get-together. Counsel scheduled multiple meetings with this potential witness, but the witness never arrived for a meeting.

Ms. Tubbs testified that she was not the mother of Applicant's child, but that she was with Applicant the night before the burglary. Counsel testified that he spoke to the mother of Applicant's child and that she would have testified that she was with Applicant, instead. Counsel found that this testimony contradicted what Applicant had previously told him and chose not to call her as a witness. Ms. Tubbs testified that she dropped Applicant off at noon, which was after the alleged burglary. The record shows that a witness for the State, Ms. Dewberry, would have testified at trial that Applicant arrived at her home around noon in a car with his co-defendants, including her own son.

Finally, Ms. Tubbs testified that she was not contacted by Counsel prior to Applicant's guilty plea. Counsel testified as to the great lengths he went to contact and interview all of the individuals Applicant informed him would be potential alibi witnesses. This included calling multiple phone numbers, driving to multiple addresses, and enlisting the help of his investigator. Applicant never

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which he was heard telling a girl to go back to Dewberry's residence and retrieve both the keys to the black Dodge and a gun he had hidden under the refrigerator; Ms. Dewberry, the owner of the residence at which Applicant was arrested, gave a statement that she witnessed all four men arrive at the same time and together in the black Dodge.

Assistant Solicitor Smith testified he did not realize the inculpatory value of the jail calls until the pre-trial motions, although he was aware of them well in advance of trial. However, even without the jail calls, the evidence against Applicant was strong. Assistant Solicitor Smith testified Judge Cole indicated he would not allow evidence of third party guilt to be admitted because although Terez Robinson's fingerprint was found on the black Dodge and he was identified in a photo lineup as the *driver*, because neither was inconsistent with Applicant's guilt.

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Alibi Witness – Ms. Tubbs

Ms. Tubbs testified that she was with Applicant on the night of July 13, 2015, through the morning of July 14, 2015. Ms. Tubbs testified that she was with a group of eight to ten people at Booker's home until she dropped Applicant off at about noon the next day. Ms. Tubbs testified that she and Applicant were "close friends." Ms. Tubbs testified that her number and address had not changed since the incident. Ms. Tubbs testified that none of the eight to ten people at Booker's home were contacted about Applicant's case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency.

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC).

Where ineffective assistance of counsel is alleged 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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 (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. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

Failure to present alibi witnesses Christina Booker and Taylor Dawkins

Applicant alleged Counsel was ineffective for failing to present testimony from an alleged alibi witness and failing to request a continuance in order to present testimony from an alleged alibi witnesses. This Court finds Counsel provided credible testimony on the issue. Counsel testified that

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H. HOPE BLACKBERRY

testified that he informed Counsel of Ms. Tubbs' contact information, even though Ms. Tubbs testified that her number and address have not changed. This Court finds that Counsel testified credibly when stating that he attempted to get in contact with all of the potential witnesses provided to him by Applicant.

This Court finds that Ms. Tubbs was not credible in her testimony, as it conflicts with the record, Applicant's own testimony, and the credible testimony of Counsel. Counsel was not deficient in failing to call Ms. Tubbs as an alibi witness, because Applicant has failed to show that she was offered to Counsel as a potential witness. Applicant has further failed to show any prejudice, as no evidence was presented to show that absent the deficiency of Counsel, Applicant would have proceeded to trial. Applicant testified that he pleaded guilty in order to avoid a life sentence, not because of any failure on the part of Counsel. Applicant has failed to meet his burden of proof. The allegation is denied and dismissed.

Failure to challenge empanelment of grand jury

Applicant alleged counsel should have objected to the empanelment of the grand jury. However, he has offered no reason as to why the empanelment was objectionable or invalid. "The regularity of grand jury proceedings is presumed absent clear evidence to the contrary." Evans v. State, 363 S.C. 495, 514, 611 S.E.2d 510, 520 (2005) (citing State v. Griffin, 277 S.C. 193, 285 S.E.2d 631 (1981); State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct.App.1991)). This Court has also reviewed the indictments and cannot find any defects. Applicant has failed to present evidence to overcome the presumption of regularity in the grand jury proceedings or show some defect in the grand jury empanelment or process. Applicant has failed to meet his burden of proof with regard to this allegation. It is therefore denied and dismissed.

Improper advice to plead guilty

Applicant alleged Counsel was ineffective for advising him to plead guilty. He further

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argues, in support of this allegation, that he is actually innocent and evidence involving photo lineup identification proves his innocence. An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771.

This Court finds Counsel's advice to plead guilty was reasonable and Applicant has failed to prove, by a preponderance of the evidence, that the advice was somehow improper. First, this Court notes the evidence against Applicant was strong, as outlined above in Assistant Solicitor Smith's testimony. Although Counsel may question his decisions in hindsight, at the time of trial, Counsel was faced with pre-trial rulings that were detrimental to Applicant and his entire defense. Counsel disagreed with Judge Cole's rulings, however, he did not believe they would be likely to prevail on appeal. Weighing the risk of continuing trial, with the almost certainty of Applicant being convicted and sentenced to life imprisonment with the uncertainty of prevailing on appeal and the guarantee of a twenty-five year sentence if Applicant pled guilty, he advised Applicant to plead guilty. Counsel may perpetually question that decision, but regardless, this Court finds Counsel's advice to be reasonable in light of the circumstances. Even Co-Counsel, the Chief Public Defender, agreed and

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HOPKINS COUNTY

supported the advice to plead guilty.

Applicant asserts he is actually innocent of the crimes to which he pled and therefore Counsel should not have advised him to plead guilty. However, Applicant has provided little, if any, evidence to prove this claim. Counsel believed the evidence against Applicant was sufficient to convict Applicant and this Court views the evidence with that same belief. Therefore, the advice to plead guilty was in Applicant's best interest and was certainly reasonable. This allegation is denied and dismissed.

Failure to await ruling on pre-trial motions

Applicant alleges Counsel was ineffective for failing to await a ruling on the pre-trial motions. This Court finds this allegation to be without merit. Although no ruling was made on the record with regard to Applicant's pre-trial motions on third party guilty and Biggers, Judge Cole indicated in a chambers conference that he would allow the out of court identification to be admitted and he would not allow any evidence of third party guilt, because the evidence presented with regard to a third party was consistent with Applicant's guilt. After review of the pre-trial transcript, this Court agrees with Judge Cole's prospective ruling.

At the pre-trial hearing, Counsel argued that testimony would be presented that a witness would have identified a third-party as the driver of the vehicle, rather than identify Applicant. Counsel argued that Applicant's finger prints were not located on the scene nor was there any gunshot residue testing done on Applicant. Assistant Solicitor Smith argued prior to Applicant's trial, the admitted driver of the vehicle had already entered a guilty plea. Assistant Solicitor Smith argued the evidence would show that Applicant was inside the home of the victim's and would not have been the driver. Assistant Solicitor Smith continued, arguing Applicant was identified by Ms. Dewberry as one of the four individuals who arrived at her home immediately following the robbery. Assistant Solicitor Smith argued two other witnesses, including the gunshot victim, would identify

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2018 OCT -4 PM 4:39
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Applicant as one of the shooters inside the home. Finally, Assistant Solicitor Smith argued the person identified for third-party guilty was never found near the arrest scene, while all four involved were. Both attorneys agreed that there were only four men involved in the robbery.

“Evidence offered by a defendant as to the commission of the crime by another person is limited to facts which are inconsistent with the defendant's guilt.” State v. Rice, 375 S.C. 369, 317 S.E.2d 409, 416 (Ct. App. 2007), overruled on other grounds by State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011). “The evidence must raise a reasonable inference as to the accused's innocence.” Id. Therefore, despite Applicant's assertion to the contrary, there is no reasonable probability that had Counsel awaited a ruling by Judge Cole on the record, Applicant would not have pled guilty but insisted on trial.

There was some testimony from Applicant indicating that had Counsel sought a ruling on the record, the issues would have been preserved for appeal. However, this is completely erroneous. Whether Judge Cole ruled off or on the record, would not have affected Applicant's ability to appeal those rulings after Applicant pled guilty. “[A] plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses[...]” Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975)(emphasis added.) Applicant was advised of this during the guilty plea. Judge Cole asked Applicant if he understood that if he had a defense, he gave up the right to assert it by pleading guilty, to which Applicant responded, “yes, sir.” (Plea tr. p. 12, ll. 15-18). Applicant also told Judge Cole he had discussed that fact with Counsel. (Plea tr. p. 12, ll. 19-20). Therefore, Applicant was aware he was waiving his right to assert his defense(s) by pleading guilty. A ruling from Judge Cole on the record would not have affected that waiver or Applicant's ability to appeal the judge's rulings. The allegation is denied and dismissed.

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CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

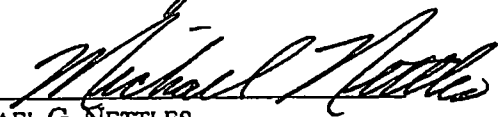
This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking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

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IT IS THEREFORE ORDERED THAT:

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

AND IT IS SO ORDERED this 21 day of Sept, 2018.


MICHAEL G. NETTLES
Presiding Judge
Seventh Judicial Circuit

Lorenzo, South Carolina

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