



STATEMENT OF FACTS

Assist. Solicitors of the Ninth Circuit, Jennifer Shealy and Jessica Baldwin prosecuted petitioners case. Prior to trial, assistant solicitors admitted to trial counsels that the stories of some of the witnesses don't match up, particularly, Tawanna Alston and Antione Aiken. The State then changed its theory of petitioners case to hand of one, hand of all, from petitioner allegedly being the shooter as indicted. See Indictment. Assistant solicitors then moved forward with the murder indictment only, using their alternative theory, even though Petitioner does not have any co-defendant's or accomplices. App. 719-720. On December 12, 2013, the jury convicted petitioner after receiving the trial courts unwarranted hand of one, hand of all jury instructions and the Honorable Stephanie P. McDonald sentenced petitioner to a term of life imprisonment. App. 675-676.

Thereafter, Petitioner filed a timely notice of appeal. Petitioner was represented by Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense - Division of Appellate Defense. Prior to the submission of briefs, Petitioner asked counsel to brief, whether the trial court erred in denying his directed verdict motion and by instructing the jury on hand of all, in which, counsel refused and stated she would not raise said issues because she already raised the issue she wanted to raise. App. 766-767. Following the submission of briefs, the South Carolina Court of Appeals affirmed petitioner's conviction and sentence. See State v. James R. Rose, 2015-UP-286 (Ct. App. filed June 17, 2015). The Remittitur was returned to the circuit court on July 6, 2015.

Petitioner filed an application for post-conviction relief on July 7, 2015. App. 697-703. Petitioner raised various allegations of ineffective assistance of counsel including ineffectiveness as to failing to object, move to quash the indictment, or include in her motion for directed verdict that there was a material variance between the offense charged in the indictment and the State's proof. App. 774-775. Petitioner also raised ineffective assistance of appellate counsel as to failing to brief preserved issues on appeal, specifically, whether the trial court erred in denying his directed verdict motion and by instructing the jury on "hand of one, hand of all." App. 790-791.

The State filed a return requesting an evidentiary hearing dated February 16, 2016. App. 704-709. An evidentiary hearing was convened on January 10, 2017, before the Honorable William Seals. James K. Falk, Esquire represented petitioner. Alicia Olive was the assistant attorney general. App. 712. The witnesses during the post-conviction hearing were trial counsel Martha Kent Runey, Petitioner (James R. Rose), and appellant counsel Susan Hackett. App. 713.

An order of dismissal was filed on September 15, 2017. This order noted that Petitioner alleged: "Failure to challenge the indictment OR argue there was a material variance between the indictment and the State's proof." App. 782-783. and "appellate counsel failed to brief preserved issues on appeal, specifically, whether the trial court erred in denying his directed verdict motion and by instructing the jury on "hand of one, hand of all." App. 790-791. However, appellate counsel Robert M. Dudek omitted these significant issues from Petitioner's petition for writ of certiorari after being requested to do so, since these particular issues are the fundamental basis of Petitioner's unconstitutional conviction and sentence. See Robert M. Dudek letter addressed to Petitioner.

This Motion / Petition follows.

In this pro se petition for bail pending appellate review, Petitioner declares that once his omitted issues are addressed in his petition for writ of certiorari, the Court would find "a fundamental miscarriage of justice" and will determine that petitioner is 'actually innocent', because (1) the trial court lacked subject matter jurisdiction where the indictment failed to charge him with the offense allegedly proven at trial; and (2) the trial court erred in refusing to direct a verdict where a material variance existed between the evidence offered at trial and the allegations presented in the indictment. See State v. Jones, 536 S.E. 2d 396. This Court would also find that trial court's unwarranted hand of one, hand of all jury instruction broadened the scope of petitioner's indictment and permitted a conviction for an uncharged offense and must be corrected on appeal even if petitioner did not preserve issue by objection. See U.S. v. Randall, 171 F. 3d 195, 203 (4th Cir. 1999).

Petitioner is a citizen of North Charleston, South Carolina for over 25 years. Prior to his unconstitutional incarceration he attended Trident Technical College and provided free landscaping for his community. Petitioner was diagnosed with non-hopskins lymphoma and is currently in remission. If granted bail pending appellate review, Petitioner will further his education and continue to be relevant to society.

CONCLUSION

For the reasons set forth herein, Petitioner demands to be relieved of court-appointed counsel and pray he be granted granted bail pending appellate review.

Respectfully submitted,

James R. Rose

James R. Rose, #293938

MCCI

386 Redemption Way

McCormick, SC 29899

May 13, 2019

McCormick, South Carolina

Notary - Brenda Waldeman  
Exp. 9.30.26

cc: Robert Michael Dudek, Esquire

Samuel Leonard Key, Esquire



## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
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May 07, 2019

James R. Rose, #293938  
McCormick Correctional Institution  
386 Redemption Way  
McCormick SC 29899

Re: James R. Rose v. State  
Appellate Case No. 2017-002052

Dear Mr. Rose:

Upon reviewing your motion to relieve counsel and request for bail, the following deficiency or deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

No proof of service showing that all parties have been served has been provided.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jay A. Kitef".

CLERK

cc: Robert Michael Dudek, Esquire  
Samuel Leonard Key, Esquire



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

October 7, 2014

James Rose, #293938  
Broad River Correctional Institution  
4460 Broad River Road  
Columbia, SC 29210

Re: State v. James Rose, Appellate Case No. 2013-002750

Dear Mr. Rose:

I received your letter dated October 6, 2014. Your letter asks me to raise an issue concerning the trial judge's failure to direct a verdict in your favor. I will not do so. First, I have already filed your brief and it may not be amended unless there are extraordinary circumstances. Failure to brief an issue that I was aware of prior to the filing of the brief is not an extraordinary circumstance. Second, the issue lacks merit. A directed verdict should be granted unless there is direct evidence or substantial circumstantial evidence of a defendant's guilt. In your case, there was direct evidence of your guilt. In fact, Joy Mills, the daughter of the deceased, told the jury that she was held at gunpoint by two masked men. She further told the jury that she recognized your voice as belonging to one of the masked men. That is direct evidence of your involvement. Certainly, this evidence contradicted the testimony of Antoine Aiken and Tawana Alston, but the court is not concerned with the weight of evidence – only the existence of the evidence. Further, Aiken testified that he heard you calling out to the perpetrators in the house directing them to the back room and to hurry up. This is also direct evidence of your involvement. Therefore, in my opinion, the directed verdict issue was not meritorious. I also encourage you to look at the argument made by trial counsel on this issue. He argued the witnesses were not credible. He did not argue a lack of evidence (except physical evidence). The credibility of testimony is for the jury and is not a basis for a directed verdict.

Sincerely,

Susan B. Hackett  
Appellate Defender



# SCCID

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Division of Appellate Defense  
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Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

August 21, 2018

Mr. James R. Rose, #293938  
McCormick Correctional Institution  
386 Redemption Way  
McCormick, SC 29899

Dear Mr. Rose:

I received your recent letter dated August 9, 2018. The state has not filed their return to petition for writ of certiorari. I will mail you a copy of the petition as soon as I receive it.

The State filing a normal petition for writ of certiorari is not a reason to respectfully seek an appeal bond, which will not be granted, where you lost your case in the court below and where you were convicted of murder and sentenced to life in prison.

Sincerely,

Robert M. Dudek  
Chief Appellate Defender

RMD/cp



# SCCID

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Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

May 18, 2018

Mr. James R. Rose, #293938  
McCormick Correctional Institution  
386 Redemption Way  
McCormick, SC 29899

Dear Mr. Rose:

Enclosed please find a copy of the Petition for Writ of Certiorari and a copy of the Appendix in your case, which I have filed with the South Carolina Supreme Court on your behalf. The first issue provides you the best chance of obtaining reversal, and a new trial. This letter is attorney-client privileged. You waive that privilege if you share this letter with anyone else.

I would urge you to not be writing anymore to the Court or anyone else about your case. It does not help you. If you choose to disregard this advice – it is your life, but I hope you will heed this advice. I strongly think you were entitled to an alibi instruction, and this is the issue in your case. I am not sure anyone in your corner understood this at any stage of your prosecution until now. I will not move to amend the certiorari petition as this is your best shot, and I will not move for an appeal bond because, among other reasons, you lost in the PCR court. I will keep you posted when the state files its return naturally arguing that you received a fair trial, and are entitled to no relief. Obviously, I disagree with that assertion that I am sure will be their response.

Should you have any questions concerning this matter, please contact me by telephone collect, or write me.

Sincerely,

Robert M. Dudek  
Chief Appellate Defender

RMD/cp  
Enclosure

The South Carolina Court of Appeals

James R. Rose, )  
Petitioner, )  
v. )  
State of South Carolina, )  
Respondent. )

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Appellate Case No.: 2017-002052

MOTION TO RELIEVE COUNSEL AND  
REQUEST FOR BAIL PENDING  
APPELLATE REVIEW

IT APPEARING to this Court that the Plaintiff above-captioned would like to relieve appellate counsel from his case, and request bail pending appellate review pursuant to SCACR, Rule 243 (K).

IT is hereby ORDERED, ADJUDGED AND DECREED that appellate counsel Robert M. Dudek, esq. is hereby relieved of all further duties of representation of the above-captioned plaintiff and request for bail pending appellate review is granted.

IT IS SO ORDERED.

May 13, 2019

McCormick, South Carolina

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COURT OF APPEALS JUDGE  
FOR THE STATE OF SOUTH CAROLINA

The South Carolina Court of Appeals

James R. Rose, )  
                  Petitioner, )  
v. )  
The State of South Carolina )  
                  Respondent. )  
\_\_\_\_\_ )

Appellate Case No.: 2017-002052

Certificate of Service

I hereby certify that a copy of the foregoing motion was this date served upon the following individuals by placing a copy of the same via mail to his/her last known address as follows:

Robert Michael Dudek, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589

Samuel Leonard Key, Esquire  
Assistant Attorney General  
S.C. Bar No. 103206  
PO Box 11549  
Columbia, SC 29211

ATTORNEY FOR RESPONDENT

**RECEIVED**

MAY 16 2019

SC Court of Appeals

James R. Rose  
James R. Rose, #293938  
MCCI  
386 Redemption Way  
McCormick, SC 29899

May 13, 2019

The South Carolina Court of Appeals

May 13, 2019

Jenny Abbot Kitchings, Clerk

Post Office Box 11629

Columbia, South Carolina 29211

Re: James R. Rose v. State

Appellate Case No. 2017-002052

**RECEIVED**

MAY 16 2019

SC Court of Appeals

Dear Mrs. Kitchings:

Find enclosed an original and five copies of the Motion to Relieve Counsel and Request for Bail pending Appellate Review and Petitioner's Memorandum in Support of Petitioner's Motion to Relieve Counsel and Request for Bail Pending Appellate Review on the above referenced case.

Sincerely,

James R. Rose

James R. Rose, #293938

MCCI

Redemption Way 386

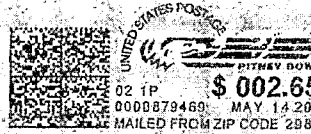
McCormick, SC 29899

Enclosures

cc: Robert Michael Dudek, Esquire

Samuel Leonard Key, Esquire

James R. Rose, # 293938  
MCCI  
386 Redemption Way  
Mc Cormick, SC 29899



South Carolina Court of Appeals  
Jenny Abbott Kitchings, Clerk  
Post Office Box 11629  
Columbia, SC 29211

RECEIVED  
MAY 16 2019  
SC Court of Appeals

RECEIVED

MAY 14 2019

MCCI  
MAIL ROOM