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July 11, 2019

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Adbul Furquan 260214 v State, 2017-CP-26-7737

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, in the above Horry County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc:
Johnny James Jr., Esq
Abdul Furquan 260214
Horry County Circuit Court Clerk

RECEIVED
JUL 16 2019
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable Bentley Price, Circuit Judge

Case No.: 2017-CP-26-7737

Abdul Furquan 260214.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner appeals the Honorable Bentley Price's June 14, 2019 Order of Dismissal. Undersigned counsel received notice of entry of the order on July 8, 2019. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

July 11, 2019

Johnny James, Jr., Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Horry CP
PO Box 677
Conway, SC 29526

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas
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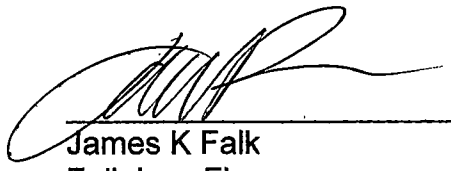
CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Johnny James, Jr. Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Horry County Clerk of Court. I further certify that all parties required by Rule to be served have been served this July 11, 2019



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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	
Abdul Furquan,	)	Case No.: 2017-CP-26-07737
S.C.D.C. No. 260214,	)	
	)	
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Abdul Furquan (Applicant) on November 27, 2017. The State of South Carolina (Respondent) filed a Return on March 1, 2018. The Court convened an evidentiary hearing into the matter on March 29, 2019, at the Horry County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Jacob Isenberg and Johnny James, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Ryan Stampfle, Esquire (Counsel) also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds Applicant has not met his burden of establishing any constitutional deprivations or other grounds entitling him to relief and denies and dismisses the application with prejudice.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the May 2012 term of the Horry County Grand Jury for first degree burglary (2012-GS-26-02057) and attempted murder (2012-GS-26-02058). Joshua D. Holford, of the Fifteenth Circuit Solicitor's Office, prosecuted the case.

Applicant proceeded to trial before the Honorable Larry B. Hyman and a jury. The jury found Applicant guilty as indicted on September 19, 2013. Pursuant to S.C. Code Ann. § 17-25-45, Judge Hyman sentenced Applicant to imprisonment for the duration of his life without the possibility of parole (LWOP).

Applicant filed a timely notice of appeal and a direct appeal was perfected by Susan B. Hackett, Esquire. She raised the following issue:

> Did the trial court violate the Eighth Amendment's bar against cruel and unusual punishments by imposing a sentence of life imprisonment without the possibility of parole pursuant to the recidivist statute where the offense used to enhance the sentence occurred two decades before the instant crime?

By opinion decided November 16, 2016, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Furquan, Op. No. 2016-UP-479 (Ct. App. 2016). Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated September 29, 2017. The Remittitur was issued on October 10, 2017.

II. PRESENT APPLICATION

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

1. Ineffective Assistance of Counsel, in that:

a. "Counsel failed to adequately investigate the facts and circumstances surrounding the DNA evidence. Counsel's failure to conduct such an investigation deprived the jury of critical exculpatory DNA evidence. This information is relevant to an accurate assessment of applicant's guilty or innocence."
b. "Counsel's failed to correct unsupported facts offered by the State in [their], closing argument. The State informed the jury 'Ladies and gentlemen, that is the gun that shot this victim in the head.' The record does not support this allegation nor does the SLED report. The jury may have had doubt if this 'fact' had been corrected."
c. "Counsel failed to notify the Court that he in fact filed two separate motion to be relieved as counsel. The Applicant was not satisfied with counsel's representation and did not want to proceed to trial with him. The Applicant filed a complaint against counsel and requested he be relieved from representing the Applicant. In the best interest of the Applicant he should have been afforded a newly appointed counsel."
d. "Counsel failed to investigate and present the facts and circumstances surrounding the possession of the weapon during the attempted murder. The fact that the co-defendant admission to wearing the gloves with the skeletal designs and the firearms trace which revealed the co-defendant was the owner of the gun along with GSR findings on the gloves. Counsel's failure to present these facts on cross-examination deprived the jury critical information relevant to an accurate assessment of applicant's innocence to attempted murder."
e. "Counsel failed to seek an instruction stating that a burglary charge must set forth one, specific crime intended upon entry and stating what the specific crime was in this case."
f. "Counsel failed to seek an instruction on 'Hands of One – Hands of All' to explain that 'intent' was an essential element to prove applicant guilty to knowingly participating in this case. Applicant was prejudiced due to the fact he had no intention to do bodily harm to victim."
g. "Counsel was ineffective for failing to file a notice of appeal when his client specifically requested him to do so. Another individual who had to take her time to go to the public defenders and did the appeal herself when trial counsel informed her 'I would not do it.'"

Applicant stated he was seeking a new trial or lesser sentence. At the evidentiary hearing, Applicant additionally proceeded forward on ineffective assistance of counsel for the failure to investigate potential alibi witnesses and failure to present a valid trial strategy.

III. EVIDENTIARY HEARING TESTIMONY

Applicant

Applicant testified on his own behalf at the evidentiary hearing. Applicant testified he met with Counsel about four or five times before trial. Applicant further testified he asked Counsel to investigate DNA evidence. Applicant also testified he received LWOP notice close to trial. Applicant testified Counsel told him he could get a better sentence than LWOP. Furthermore, Applicant testified Counsel guaranteed him they could beat the case. Applicant testified Counsel never advised him about the three-strike law.

Applicant testified he filed a motion to relieve that was denied. Applicant further testified he filed a second motion to relieve that Counsel delayed filing for a couple of months. Applicant testified he requested the second motion because he did not feel Counsel was investigating properly. Applicant testified the DNA evidence in his case reflected him not being present at the scene. Applicant also testified Counsel did not properly argue hand of one hand of all. According to Applicant, there is no proof of common scheme in his case. Ultimately, Applicant testified the judge gave him a choice between proceeding with Counsel or without representation at a motion to relieve hearing before trial.

Applicant testified Counsel did not show him DNA evidence until after the trial. Furthermore, Applicant testified he did not receive the SLED report until after incarceration. Applicant testified the report is exculpatory because of his exclusion from the trigger, bandana, and glove. However, Applicant acknowledged nobody testified to him firing the weapon at trial. Furthermore, Applicant acknowledged nobody testified to him wearing gloves at trial. Applicant did testify the victim's identification of two men with bandanas made it necessary to produce the DNA report.

Applicant testified the State should have not been allowed to say the weapon was the one used to shoot this victim. Applicant testified the State did not certify any experts to prove this was the weapon used to fire at the victim. Furthermore, Applicant testified he does not think the weapon presented at trial was the one used. Finally, Applicant testified the weapon fired could have been something similar to the one presented at trial. However, Applicant acknowledged multiple witnesses identified a black and silver revolver as the gun used.

Applicant testified Counsel failed to investigate an alibi that came up during conversations. Applicant testified he could not have been at the scene because he was working at the time. Applicant testified he told Counsel to go check with management at his job. Applicant further testified Counsel never followed up with management.

Finally, Applicant testified Counsel never filed an appeal on his behalf.

Counsel

Counsel testified he first met Applicant after the initiation of discovery. He further testified to meeting with Applicant about seven or eight times before trial. Counsel testified he never told Applicant they could beat the case. He also testified about notifying Applicant there was a great deal of evidence piled up that was beneficial to the prosecution. Counsel further testified about watching video of police interviewing multiple state witnesses. Counsel also testified he discussed LWOP with Applicant after it was served by the State.

Counsel testified Applicant was adamant about not wanting to take a plea deal. Thereafter, Counsel testified all pleas were taken off the table when Applicant relayed this message to the State.

Counsel testified to filing a motion to relieve on Applicant's behalf. He further testified Judge Hyman held a hearing on the matter the week before trial. Counsel testified to Judge

Hyman putting him on standby at the conclusion of the hearing. According to Counsel, Judge Hyman notified Applicant his choice was to proceed with the representation provided or pro se. Counsel testified Judge Hyman's basis for this was Applicant's pattern of filing this motion already caused previous lawyers to be relieved from his case and delay the trial.

Counsel testified Applicant presented him with an alibi about a month before trial. He recalled this was about six months after representation began. He further testified Applicant did not even present him with any witnesses to investigate. Counsel testified to investigating Applicant's employment and work schedule. During the investigation, Counsel recalled there being no smoking gun to indicate Applicant was working. Therefore, Counsel testified to concluding there was no evidence to indicate Applicant was anywhere but the apartment complex that night.

Counsel testified he did consider using DNA evidence at trial. Counsel further testified he sent out subpoenas to SLED agents with the intent for them to testify about the report. However, Counsel testified things changed when Applicant decided not to testify. First, Counsel testified putting up witnesses would prevent his ability to have last close. Second, Counsel testified he anticipated witness testimony for the State would not assert Applicant fired a weapon or wore gloves. Counsel testified Tyler did not notice gloves on Applicant's hands, and Sam claimed they were on his co-defendant's hands. Third, Counsel testified SLED agents notified him they intended to state the items tested may have been cleaned. Counsel further testified SLED agents claimed it is common for items to be cleaned when there are multiple days between incident and recovery. Fourth, Counsel testified he did not cross-examine the police officer about DNA because it was not raised on direct-examination. Counsel testified there just was not a smoking gun with the DNA evidence so he did not use it. Finally, Counsel testified he did not

think a jury would consider DNA evidence as exoneration when every witness testified Applicant was present. Specifically, Counsel testified he anticipated the jury would conclude he believed they were not intelligent if he used the DNA evidence to contradict four witnesses testifying Applicant was present. Thereafter, Counsel testified these concerns ultimately caused him to believe using DNA was a bad trial strategy.

Counsel testified his strategy ultimately came down to accomplice liability. Counsel testified his anticipation centered on nobody being able to identify the shooter. Counsel testified nobody had prior knowledge a gun was even going to be drawn. However, Counsel testified he anticipated witnesses to have secondhand knowledge about a Co-Defendant firing the weapon. Furthermore, Counsel testified nobody believed Applicant was wearing gloves. However, Counsel testified he anticipated witnesses to identify gloves on the shooter. On top of that, Counsel testified to his anticipation witnesses would identify a co-defendant having gloves on that night. Counsel further testified he anticipated three witnesses to state they went to the apartment complex to purchase marijuana. Ultimately, Counsel testified to anticipating witnesses would testify Applicant was only present at the scene to buy marijuana. Therefore, Counsel testified his ultimate trial strategy came down to proving there was no common plan or scheme.

Additionally, Counsel testified he did object to the gun being introduced at trial. According to Counsel, Judge Hyman overruled his objection based upon consistent witness testimony about the gun's description.

Finally, Counsel testified about filing an intent to appeal on Applicant's behalf. Furthermore, Counsel testified to getting a response from the Appellate Court acknowledging he filed an appeal on Applicant's behalf.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her 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, he or she must prove "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." Butler, 286 S.C. at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at

689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Failure to Investigate DNA evidence

First, Applicant has alleged Counsel failed to investigate a report created by the South Carolina Law Enforcement Division (SLED). Applicant entered the SLED report ("report") into evidence. The report reflects no traces of Applicant's DNA on two bandanas, a weapon, or skeletal gloves.

a) Deficiency in Investigation

Applicant contends Counsel failed to investigate witnesses to introduce a SLED report. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation "was itself reasonable." Taylor v. State, 404 S.C. 350, 364, 745 S.E.2d 97, 104 (2013). However, Counsel is not deficient in conducting a reasonable investigation as long as they interview potential witnesses "when it is reasonable to do so." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). For purposes of a claim of ineffective assistance, while the scope of a reasonable investigation depends upon a number of issues including, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007). Finally, Counsel acts unreasonable when he or she fails to interview the expert witness who testifies about contents of an evidentiary analysis and report. Id, 372 S.C. at 333-4, 642 S.E.2d at 598. (finding counsel's investigation was unreasonable where he failed to interview expert witness who created gun-shot residue report).

Here, Applicant testified he told Counsel the report should be presented at trial as proof of his innocence. Applicant further testified Counsel never notified him the report was not being used at trial. Finally, Applicant testified he assumed the report would be introduced at trial. However, Counsel credibly testified he interviewed multiple SLED agents after reviewing the report with Applicant. Furthermore, Counsel credibly testified he subpoenaed those agents to testify at trial. Thereafter, Counsel credibly testified the agents notified him the lack of match was not uncommon. Counsel testified to being aware during the conversation items were not recovered until multiple days after the crime were committed. Counsel credibly explained agents told him they would testify this amount of time between crime and recovery allowed perpetrators

to wipe fingerprints. This Court finds Counsel independently interviewed material witnesses, discussed relevant information, and subpoenaed them for trial which resulted in a reasonable investigation. Therefore, Applicant has not sufficiently overcome the burden to prove Applicant was deficient in his investigation of witnesses relevant to the report.

b) Prejudice of alleged deficiency with DNA evidence

Applicant contends the jury would have believed he was not guilty if Counsel would have investigated the report to corroborate his alibi. Failure to proffer evidence is not prejudicial where it would not have exonerated the applicant if presented. Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) (finding the benefit of corroboration through witness testimony must be weighed against credibility concerns potentially brought out on cross examination as well as strong evidence of applicant's guilt). Furthermore, introducing cumulative evidence, or evidence that fails to aid anything introduced at trial, will not establish prejudice. Id. In South Carolina, if two or more combine together to commit an unlawful act and, in execution of such criminal act, another crime is committed by one of the actors, as a probable or natural consequence of the acts done in pursuance of common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act. State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972).

i) Credibility Concerns

Here, Applicant testified entering the report into evidence would have given the jury notice he was not present. Counsel credibly testified he could have put SLED agents on the stand to introduce and authenticate the report. As previously mentioned, Counsel credibly testified those witnesses were going to offer an explanation about why Applicant's DNA would not be on found on those items. Counsel credibly testified they would have explained the

commonality of removing DNA in situations where the items are not recovered for multiple days in a location away from the crime scene. Furthermore, Counsel credibly testified the Assistant Solicitor was prepared to bring out this testimony on cross examination. Finally, Counsel credibly testified the report would end up negatively impacting Applicant based upon evidence tampering allegations by the agents. Indeed, the record indicates the search warrant was executed three days after the shooting. (Tr. 210). Furthermore, the record indicates the items were recovered at a house where Applicant was living with Fleming. (Tr. 132-3). Therefore, this Court finds the agent would have raised credibility concerns about Applicant potentially tampered with evidence if Counsel entered the report through them.

ii) Overwhelming Evidence of Presence

Additionally, Counsel credibly testified the report would not have even remotely rebutted the consistent testimony from several witnesses identifying Applicant's presence at the scene. Tyler, Samantha, Smith, and Fleming testified Applicant went to the apartment with them to either get marijuana or money. (Tr. 63, 85, 99, 162). Tyler, Samantha, and Smith testified Applicant and Fleming went into the apartment complex unaccompanied by anyone else from the car. (Tr. 64, 75, 94). Tyler, Samantha, and Smith all testified to hearing a loud noise before seeing Applicant run back to the vehicle with Fleming. (Tr. 64, 77, 94). Samantha even identified that loud noise as a gunshot. (Tr. 76). Smith testified Applicant told her to leave the scene upon entering the vehicle. (Tr. 94). Samantha testified Applicant began screaming at the top of his lungs to the leave scene. (Tr. 78). The record reflects four witnesses in agreement Applicant was present without contradiction from any other witness who testified. Therefore, this Court finds there was overwhelming evidence Applicant was present.

iii) Corroboration

Applicant contends entering the report would have corroborated his alibi defense. Specifically, Applicant testified the report would have raised reasonable doubt as to whether he wore the bandanas introduced through Large's testimony at trial. Furthermore, Applicant testified it would have raised identification issues based upon Moran's testimony both individuals were wearing bandanas. Applicant testified these contradictions would have aided in showing he spent the night with his girlfriend after leaving work at Olive Garden. However, Counsel credibly testified there was nothing to connect the report to an alibi. Moran testified both individuals were wearing bandanas. (Tr. 175). Large did discuss collecting two bandanas from the residence searched. (Tr. 125). However, Large also testified to confirming with Olive Garden that Applicant got off work prior to the incident that night. (Tr. 107). Furthermore, Applicant's girlfriend testified at this trial without mentioning he potentially had an alibi. (Tr. 129-34). The report by itself would not show Applicant was working or with his girlfriend during the crime's commission. Therefore, this Court finds Applicant's alibi would not have been corroborated by introducing the report.

Accordingly, this Court finds the credibility concerns in entering the report through witnesses who would suggest evidence tampering and overwhelming evidence of presence at scene outweighs any corroboration it could have provided to Applicant's alibi. Therefore, this Court finds Applicant has not satisfied the burden of proving prejudice in any alleged failure to investigate the report.

2. Failure to Notify Court about Motions to Relieve

Applicant contends Counsel failed to properly put the court on notice of his motion to relieve. Applicant testified the court gave him no choice but to proceed with Counsel to trial. However, Counsel credibly testified to enduring multiple motions to relieve him by Applicant.

Counsel further credibly testified Applicant had already had previous lawyers relieved from this case. Counsel also credibly testified the last motion to relieve was heard by the Court within a week of the trial. Counsel credibly explained the court notified Applicant his options were either to proceed to trial with Counsel or pro se. Thereafter, Counsel testified Applicant contacted him to provide representation at trial. The trial record reflects Applicant's decision:

> MR. HOLFORD: Your Honor, we've just – just the issue of [Counsel] representing [Applicant].
> THE COURT: Well, it's my understanding from [Applicant] that [Counsel] will be representing him; is that right [Counsel]?
> MR. STAMPFLE: Yes, Your Honor, I was order to sit standby on this. [Applicant] has requested that I represent him. He requested this last Thursday evening and I believe it was your instructions that as standby, if he requested that then I was to sit in as his attorney.
> THE COURT: All right. [Applicant], [Counsel] will be representing you; is that correct?
> MR. FURQUAN: Yes, sir. (Tr. 9-10)

After recollection refreshment, Applicant testified the court actually gave him the choice between proceeding to trial with representation or pro-se. Therefore, this Court finds Applicant has failed to establish Counsel was deficient for not putting the Court on notice of his request to file motions to relieve.

3. Failure to investigate facts surrounding the weapon

a) Deficiency in Investigation

Applicant contends Counsel did not investigate whether he fired a weapon at the victim in preparation for trial. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation "was itself reasonable." Taylor v. State, 404 S.C. at 364, 745 S.E.2d at 104. However, Counsel is not deficient in conducting a reasonable investigation as long as they interview potential witnesses "when it is reasonable to do so." Edwards, 392 S.C. at 457, 710 S.E.2d at 65.

Here, Counsel credibly testified to reviewing police interviews of Samantha and Smith to investigate their point of view. Counsel credibly recalled the interviews indicating Fleming fired the weapon. Thereafter, Counsel credibly testified to reviewing the report results which exhibited Fleming's DNA on the weapon and skeletal gloves. Furthermore, Counsel credibly recalled the report reflecting gunshot residue on the skeletal gloves. Finally, Counsel credibly testified he interviewed multiple SLED agents who made the report.

Accordingly, this Court finds Counsel conducted a reasonable investigation in reviewing police interviews with fact witnesses, reviewing the report, and interviewing witnesses about the report they created. Therefore, this Court finds Applicant has not sufficiently proven Counsel was deficient for failure to investigate facts surrounding possession of the weapon.

b) Prejudice in Investigation

Applicant contends his defense was weakened based upon Counsel not being adequately prepared to elicit certain facts about who fired the weapon at trial. To prove prejudice in an alleged failure to prepare the case, an applicant must show how additional preparation would have made a difference in the outcome. Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (Finding no prejudice where applicant could not show how moving for a continuance would have been helpful to his case).

Here, Counsel credibly testified the central issue of the trial was accomplice liability. Counsel further credibly recalled the evidence overwhelmingly indicated Fleming fired the weapon at the victim in the presence of Applicant. Therefore, Counsel credibly assessed there was nothing more to elicit in showcasing Applicant did not fire the weapon. During closing statements, the Assistant Solicitor admitted he could not tell the jury with absolute certainty who pulled the trigger. (Tr. 211). He further assessed it was not necessary because Applicant and

Fleming acted together. (Tr. 212). Also, the record reflects nobody testifying Applicant fired the weapon. Therefore, this Court finds Applicant has not shown how additional preparation would have created a different outcome.

4. Failure to cross examine facts surrounding the weapon

a) Deficiency in cross examination

Applicant contends Counsel failed to elicit testimony about possession, ownership, and gunshot residue connected to firing the weapon. Counsel can be deficient in cross examination if they fail to elicit testimony key to an applicant's defense. Miller v. State, 379 S.C. 108, 116, 665 S.E.2d 596, 600 (2008), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (finding counsel was deficient in failing to elicit testimony about similarities between armed robberies from a witness who could corroborate where the applicant's key defense was third party guilt).

Here, Counsel credibly recalled using cross examination across multiple witnesses to highlight the likelihood Fleming fired the weapon. On cross examination, Tyler, Samantha, and Smith testified they did not know who fired the weapon. (Tr. 70, 84, 101). Samantha further testified to telling police during the interview that Fleming "shot the dude in the head." (Tr. 84). Smith testified to not remembering she told police Fleming shot a guy. (Tr. 99-100). Smith also testified Fleming said he wanted to go back and finish the job. (Tr. 103). Thereafter, Large testified nobody claimed ownership of the gun when it was recovered. (Tr. 129). Accordingly, this Court finds Counsel was not deficient in eliciting cross examination about facts surrounding the weapon.

Additionally, Counsel testified he highlighted the connection between the gloves and weapon to increase the likelihood Fleming fired. Tyler testified to seeing Fleming with skeletal

gloves on that night. (Tr. 64). Samantha testified to seeing Fleming with skeletal gloves on. (Tr. 84). The Crime Scene Investigator, Jill Domogauer, testified the skeletal gloves recovered had gunshot reside on them. (Tr. 156). Thereafter, Fleming testified he wore the skeletal gloves. (Tr. 163). Therefore, this Court finds Counsel was not deficient in eliciting cross examination about facts surrounding the gloves.

b) Prejudice in Cross Examination

Applicant contends failure to elicit testimony about possession of the weapon and who wore the gloves prejudiced his defense against the attempted murder charge. To prove prejudice in alleged deficient cross examination, an applicant must first provide evidence of what a more extensive cross examination would have revealed without merely speculating. Miller, 325 S.C. at 217, 481 S.E.2d at 133 (finding no prejudice where applicant did not present any evidence at the PCR hearing to exhibit additional information a trial witness should have been examined on).

Here, Applicant acknowledged Counsel elicited testimony on cross examination about Fleming firing the weapon. Applicant acknowledged Counsel eliciting testimony from Tyler, Samantha, and Smith that they did not know who fired the weapon. Applicant further acknowledged Counsel elicited testimony from Samantha and Smith about Fleming taking responsibility for firing the weapon. Thereafter, Applicant did not offer additional information these witnesses should have been cross examined on. Therefore, Applicant is purely speculating that he was prejudiced by Counsel's alleged failure to extend cross examination of Tyler, Smith, and Samantha.

Additionally, Applicant testified Large should have been cross examined to show Fleming had ownership of the weapon. However, Large testified to never finding out who owned the weapon. (Tr. 129). Furthermore, Large did not testify at this PCR hearing.

Therefore, Applicant is purely speculating Large could have provided additional information about ownership of the weapon.

Accordingly, this Court finds Applicant has failed to meet the burden to prove prejudice based upon any alleged deficiencies in cross examination.

5. Failure to Object during Closing Statements

a) Deficiency in Objections

Applicant contends Counsel ineffectively failed to object to closing statement remarks connecting the weapon in evidence to the one fired at the victim. Counsel is not deficient in failure to object if he or she can provide a strategic explanation about their decision. Stokes v. State, 308 S.C. 546, 548. 419 S.E.2d 778, 779 (1992) (where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel).

Here, Counsel made a Rule 403, SCRE, objection to the gun's admission into evidence. (Tr. 146). However, the court overruled Counsel's objection because witness descriptions matched the weapon recovered using a search warrant resulted in the probative value not being substantially outweighed by any unfair prejudice. (Tr. 147).

Here, Counsel gave a credible explanation about his custom not to object during closing statements unless opposing counsel goes beyond the scope of evidence admitted. Counsel credibly testified witness testimony connecting the weapon in evidence to the crime scene made this closing statement objection superfluous. Counsel further testified when you object to certain issues at close it creates the potential a jury will think you have something to hide before deliberation. According to Counsel, it is strategically unwise to bring unwanted attention to an issue during closing statements. In this situation, Counsel testified the weapon had been entered

into evidence despite an earlier objection. Indeed, Counsel made a Rule 403, SCRE, objection to the weapon's admission into evidence that was overruled. (Tr. 146). Counsel further testified witnesses from the vehicle, apartment, and recovery house positively identified a black and silver revolver. Collins identified a silver revolver in the apartment. (Tr. 56). Tyler identified a silver and black revolver in the vehicle. (Tr. 65). Large recovered a revolver with a silver and black handle upon executing a search warrant. (Tr. 118). Linder identified Applicant and Fleming lived at the residence where Large executed the search warrant. (Tr. 130, 132). Thereafter, Domogauer established chain of custody for the weapon. (Tr. 153-5).

Thus, this Court finds Counsel articulated a valid trial strategy in not objecting to the closing argument comments connecting the weapon to the crime. This Court finds Applicant has failed to satisfy the burden to show Counsel was deficient for failing to object during closing statements.

b) Prejudice based upon alleged failure to object

Applicant contends he was prejudiced by Counsel's failure to object during closing statements when the weapon entered was connected to the crime at issue. A solicitor's closing argument must not appeal to the personal biases of the jurors, nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences thereto. Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004) (finding the solicitor's argument about applicant being a "dirty cockroach" was not so unfair as to make conviction a denial of due process). Furthermore, a solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony. Id. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166

(2002) (finding solicitor's comparison of defendant to victim was not prejudicial because it was based upon evidence already in the record).

Here, Applicant testified the jury would have doubted the connection between the weapon and the crime if Counsel objected during the Assistant's Solicitor's closing statements. Counsel testified the court would have overruled the objection based upon testimony linking the weapon, entered into evidence, to the crime. As previously mentioned, Collins identified a silver revolver being used by the individual who shot Moran. (Tr. 56). Tyler testified Applicant had a silver and black revolver after running from the apartment complex. (Tr. 65). Large recovered a silver and black revolver while executing a search warrant. (Tr. 118). Linder identified Applicant and Fleming lived at the residence where Large executed the search warrant. (Tr. 130, 132). Thereafter, Domogauer established chain of custody for the silver and black revolver recovered. (Tr. 153-5). During closing arguments, the Assistant Solicitor admitted to not knowing who fired the weapon. (Tr. 211).

Therefore, this Court finds a closing argument connecting the weapon to the crime was based upon reasonable inferences from evidence entered into the record. As a result, Applicant has failed establish prejudice based upon Counsel's alleged deficiency in not objecting during closing statements.

6. Failure to seek Jury Instruction on Hand of One, Hand of All

Applicant contends Counsel failed to seek a jury instruction for accomplice liability that intent is an essential element to prove he knowingly participated. In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution. Battle v. State, 382 S.C. 197, 204, 675

S.E.2d 736, 740 (2009). A jury instruction violates due process if it is reasonably likely that the jury understood the charge to create a mandatory presumption requiring it to infer an element of the offense if the State proved certain predicate facts, thereby relieving the State's burden of proof on an element of the offense. Lowry v. State, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008). Substantively, if two or more combine together to commit an unlawful act and, in execution of such criminal act, another crime is committed by one of the actors, as a probable or natural consequence of the acts done in pursuance of common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act. State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972). Here, the court instructed the jury as follows:

> If a crime is committed by two or more people who are acting together in committing the crime, the act of is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person, which happens as a probable or natural consequence of the acts done in carrying out the common plan and purpose. If two or more people are together, act together, assisting each other in committing the offense, the act of one is the act of all or it is sometimes said the hand of one is the hand of all.
>
> Prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, if the Defendant is present when the crime is committed is not sufficient to convict the Defendant as a principal. Guilt as a principal is shown by actual or constructive presence at the scene as result of prior arrangement. Therefore, a finding of a prior arranged plan or common scheme is necessary for a finding of guilt as a principal. The State must prove beyond a reasonable doubt by confident evidence the theory of a hand of one is the hand of all. A principal in a crime is one who either actually commits a crime or who is present, aiding, abetting, or assisting in committing the crime. When a person does an act in the presence of and with the assistance of another, the act is done by both. Where two or more people acting with a common plan or scheme are present at the commission of a crime, it does not matter who actually commits the crime. All are guilty. The hand of one is the hand of all. (Tr. 228-9)

The court correctly instructed the jury about knowledge requirements with accomplice liability. Therefore, this Court finds Applicant has failed to prove prejudice from any alleged deficiency in Counsel's failure to object this jury instruction.

7. *Failure to seek Jury Instruction on First-Degree Burglary Intent*

Applicant contends Counsel failed to seek a proper jury instruction for intent with first degree burglary. A jury instruction violates due process if it is reasonably likely that the jury understood the charge to create a mandatory presumption requiring it to infer an element of the offense if the State proved certain predicate facts, thereby relieving the State's burden of proof on an element of the offense. Lowry, 376 S.C. at 505, 657 S.E.2d at 763. Generally, the trial court is simply required to charge only the current and correct law in South Carolina. Sheppard v. State, 357 S.C. 646, 663, 594 S.E.2d 462, 472 (2004). First-degree burglary requires that, at the time the offender entered the dwelling, he intended to commit a crime once inside. State v. Gilliland, 402 S.C. 389, 398, 741 S.E.2d 521, 526 (Ct. App. 2012). Here, the court instructed the jury as follows:

> Next the State must prove beyond a reasonable doubt the Defendant intended to commit a crime, either a felony or misdemeanor, at the time of entry. The mere entry into a dwelling without consent is not burglary. If the intent to commit a crime is formed after the entry, it's not a burglary. On the other hand, if the Defendant intended to commit a crime at the time of entry, it is a burglary even if the intent was abandoned after the injury – entry. It does not matter that the intended crime was not committed. Intent may be shown by acts and conduct of the Defendant and other circumstances from you may naturally and reasonably infer intent. (Tr. 233)

The court correctly instructed the jury about intent requirements with first degree burglary. Therefore, this Court finds Applicant has failed to prove prejudice from any alleged deficiency in Counsel's failure to object this jury instruction.

8. *Failure to File Notice of Appeal*

Applicant contends Counsel failed to file a notice of appeal after his request. To show prejudice from counsel's deficient failure to consult with him about appeal, defendant must demonstrate that there is reasonable probability that, but for counsel's deficient performance, he would have timely appealed. Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000). When counsel's constitutionally deficient performance deprives defendant of appeal that he otherwise would have taken, defendant has made out successful ineffective assistance of counsel claim entitling him to an appeal. Id. Here, Applicant did file an appeal which was perfected by appellate counsel. Therefore, this Court finds Applicant cannot show prejudice from any alleged failure to file notice of appeal by Counsel.

9. *Failure to Investigate Alibi Witnesses*

a) Deficiencies Investigating Alibi

Applicant contends Counsel failed to investigate witnesses after being put on notice of a potential alibi. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation "was itself reasonable." Taylor v. State, 404 S.C. at 364, 745 S.E.2d at 104. However, Counsel is not deficient in conducting a reasonable investigation as long as they interview potential witnesses "when it is reasonable to do so." Edwards v. State, 392 S.C. at 457, 710 S.E.2d at 65. One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable. Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014).

Here, Applicant testified he requested Counsel to investigate whether he was at work when the crime took place. However, Counsel credibly testified about issues he had with getting Applicant to communicate leads throughout the case. Specifically, Counsel credibly testified Applicant only showed interest in pursuing an alibi defense a month before trial. According to Counsel, this was about six months after he began representing Applicant. Thereafter, Counsel credibly testified about his concern with this being brought up several months into the case. Furthermore, Counsel credibly testified Applicant never even gave him a single name to use as a potential witness. Finally, Counsel credibly recalled he assessed and notified Applicant it was a bad defense based upon consistent stories given by witnesses during police interviews.

Therefore, this Court finds Counsel's decision not to investigate witnesses was reasonable where he reviewed witness interviews, believed the timing was suspicious, and never actually received names to corroborate an alibi. As a result, this Court finds Applicant has not overcome the burden to show Counsel was deficient for a failure to investigate a potential alibi defense.

b) Prejudice based upon deficient investigation

Applicant contends the jury would have found him not guilty if his girlfriend testified. To establish it through witness corroboration 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." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). Furthermore, an applicant's mere speculation as to what witness's testimony would have been, had she been called at trial cannot, by itself, satisfy applicant's burden of showing prejudice resulting from counsel's failure to call such witness at trial. Id.

Here, Applicant reasoned his girlfriend would have established an alibi defense. Specifically, Applicant testified his girlfriend, Mary Linder, would recall picking him up from work the night of this incident. Furthermore, Applicant testified Linder would recall going straight home together afterwards. Finally, Applicant testified Linder would recall hanging out with Applicant at their home the rest of that evening. However, Counsel testified Linder never indicated she could establish an alibi on Applicant's behalf. At trial, Linder testified without giving any indication Applicant had an alibi. (Tr. 129-33). Also, Linder did not testify at this PCR hearing. Therefore, this Court finds Applicant is merely speculating about her testimony which is insufficient to prove prejudice from any alleged failure to present an alibi defense.

10. Failure to present valid trial strategy

a) Trial Strategy Deficiency

Applicant contends Counsel was deficient for failing to introduce the report at trial. When counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011). The validity of counsel's strategy, in context of an ineffective assistance claim, is viewed under an objective standard of reasonableness. Id. In reviewing an ineffective assistance claim, the Court must be wary of second-guessing trial counsel's tactics. Id. Substantively, If two or more combine together to commit an unlawful act and, in execution of such criminal act, another crime is committed by one of the actors, as a probable or natural consequence of the acts done in pursuance of common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act. State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972).

i) Attempted murder

Here, Counsel credibly reasoned the evidence strongly indicated Fleming fired the weapon at the victim. Counsel further credibly testified his trial strategy for this offense was bringing out all the evidence Fleming was responsible. At trial, Counsel got Samantha to admit Fleming said he shot the victim in the head. (Tr. 84). Counsel then got her to admit Fleming expressed a desire to return to the crime scene to kill Moran. (Tr. 85). Counsel also got Samantha to admit Applicant never said he wanted to go back and kill Moran. (Tr. 85). Counsel also got Smith to admit Fleming said he wanted to go back and finish the job since the victim lived. (Tr. 103). Counsel also got Tyler to admit Fleming made all the death threats to him. (Tr. 71). Later on, Counsel got Fleming to admit he wore the skeletal gloves recovered.[1] (Tr. 163). Importantly, Counsel got Investigator Jill Domogauer to admit those skeletal gloves were positive for gunshot residue. (Tr. 156). Therefore, this Court finds Counsel had a valid trial strategy for the attempted murder charge.

ii) First degree burglary

Here, Counsel credibly recalled the lack of testimony or evidence clarifying who entered the dwelling. Counsel credibly testified his strategy with the burglary charge was to highlight a lack of evidence showing Applicant entered the home. Counsel further credibly testified his strategy was to highlight the likelihood only Fleming entered the home. On cross examination, Counsel got Tyler, Samantha, and Smith to admit they did not see Applicant enter the apartment. (Tr. 70, 83, 100). Counsel also got Collins to admit he could not identify who entered the home. (Tr. 59). Subsequently, Moran testified on direct examination of his uncertainty about two individuals entering the home. (176-7). On cross examination, Counsel got Moran to assess the individual who punched had gloves on based upon a padded blow. (Tr. 181-2). As previously

[1] Tyler also testified Fleming wore skeletal gloves. (Tr. 64).

mentioned, Fleming admitted to wearing the gloves which tested positive for gunshot residue. Moran further testified on cross the person who punched him, with gloves on, entered the apartment. (Tr. 181-2). Thereafter, Counsel got Moran to admit he did not know if both individuals entered the apartment. (Tr. 182). However, Collins testified to his certainty that both entering the apartment on cross examination (Tr. 61). Counsel properly highlighted this inconsistent testimony during closing statements. (Tr. 219). As previously mentioned, Fleming admitted to wearing the gloves which tested positive for gunshot residue. Therefore, this Court finds Counsel had a valid trial strategy for the first degree burglary charge.

iii) Accomplice liability

Here, Counsel credibly testified his trial strategy was highlighting Applicant did not intend to engage in a common plan or scheme with Fleming. At trial, Counsel's opening statement highlighted Applicant's lack of knowledge a robbery or shooting was going to occur. (Tr. 53). Tyler testified Fleming requested the ride so he could pick up money. (Tr. 63). Thereafter, Samantha testified her belief that Applicant and Fleming went to the apartment to buy marijuana. (Tr. 85). During cross examination, Smith testified Applicant and Fleming only intended to go to the apartment to pick up some money owed to them. (Tr. 99). During cross examination, Fleming testified Applicant came to the address with intent to buy marijuana. (Tr. 168). Fleming testified a girl named Brie provided Moran's address so they could buy marijuana. (Tr. 168). Moran testified he had been texting a girl name Brie that night. (Tr. 181). During closing statements, Counsel argued the collective testimony highlighted Applicant only being there for marijuana which was insufficient for a common plan or scheme to shoot anyone. (Tr. 221). Therefore, this Court finds Counsel had a valid trial strategy to combat accomplice liability for the above-mentioned charges.

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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 notifies the Applicant that he must file and serve a notice of appeal within thirty (30) 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, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 19th day of June, 2019.

BENTLEY PRICE
Presiding Judge
Fifteenth Judicial Circuit

Charleston, South Carolina