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October 16, 2019

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

RECEIVED
OCT 18 2019
S.C. SUPREME COURT

Re: Tyrel Rashone Collins v State, 2018-CP-10-0611

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, in the above Charleston 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:
Benjamin Limbaugh, Esq
Tyrel Rashone Collins 338147
Charleston County Circuit Court Clerk

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
OCT 18 2019
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Michael G. Nettles, Circuit Judge

Case No.: 2018-CP-10-0611

Tyrel Collins 338147..PETITIONER

V.

State of South Carolina..RESPONDENT

NOTICE OF APPEAL

The Petitioner Tyrel Rashone Collins 338147 appeals the Honorable Michael G Nettles' September 19, 2019 Order of Dismissal. Undersigned counsel received notice of entry of the order on October 3, 2019. A copy of the order on appeal is attached hereto.

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

October 16, 2019

Benjamin Limbaugh, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Charleston CP
100 Broad Street
Charleston, SC 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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OCT 18 2019

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable Michael G Nettles, Circuit Judge

Case No.: 2018-CP-10-0611

Tyrel Rashone Collins 338147..PETITIONER

V.

State of South Carolina..RESPONDENT

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, Benjamin Limbaugh Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Charleston County Clerk of Court. I further certify that all parties required by Rule to be served have been served this October 16, 2019.

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

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STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	) FOR THE NINTH JUDICIAL CIRCUIT
Tyrel Rashone Collins, S.C.D.C. No. 338147,	) Case No.: 2018-CP-10-~~1611~~ 0611
Applicant,	
v.	) **ORDER OF DISMISSAL**
State of South Carolina,	
Respondent.	

FILED
2019 OCT -1 AM 10: 03
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed by Tyrone Rashone Collins ("Applicant") on February 7, 2018. Respondent made its return on June 7, 2018. The Court convened an evidentiary hearing into the matter on July 23, 2019, at the Charleston County Courthouse in South Carolina. Applicant was present at the hearing and represented by James K. Falk, Esquire. Jacob A. Isenberg and Benjamin Limbaugh, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Jason King, Esquire ("Counsel") also testified. Algernard Young ("Young") testified on behalf of Applicant. Stacy Collins ("Collins") also testified on behalf of Applicant. 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 Charleston County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. After thorough review of all the evidence and testimony in the record, this Court finds Applicant has not met his burden of establishing any constitutional deprivations or other grounds entitling him to relief and denies and dismisses this application with prejudice.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. In September 2012, the Charleston County Grand Jury indicted Applicant for the murder of Solomon Chisolm (2012-GS-10-5449) and possession of a firearm during the commission of a violent crime (2012-GS-10-5452). Assistant Public Defenders Jason T. King and Luke J. Malloy, III, of the Charleston County Public Defender's Office represented Applicant. Assistant Solicitors Stephanie B. Kinder and Gregory Voigt of the Ninth Circuit Solicitor's Office prosecuted the case.

The State originally called the charges for trial on September 9, 2013, before the Honorable J.C. Nicholson, Jr. Judge Nicholson declared a mistrial based on the defense's opening statement. The State called the charges for trial again on January 6, 2014, before the Honorable Roger M. Young, Sr. On January 9, 2014, the jury convicted Applicant as indicted. Judge Young then sentenced Applicant to life imprisonment without the possibility of parole.

Applicant filed a timely notice of appeal and was represented on appeal by Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense-Division of Appellate Defense. The State was represented on appeal by Senior Assistant Deputy Attorney General Melody J. Brown of the South Carolina Office of the Attorney General. On May 26, 2015, Applicant filed a Final Brief of Appellant in the South Carolina Court of Appeals and raised the following issues:

> I. Did the trial judge err in limiting the introduction of evidence of the deceased's reputation in the community where the evidence was necessary to Appellant's presentation of a complete defense and where the prosecutor opened the door to such evidence during his opening statement?
>
> II. Was Appellant's second trial barred by double jeopardy where the grant of the mistrial during defense counsel's opening

statement at the first trial was not dictated by manifest necessity or the ends of public justice after consideration of all the facts and circumstances?

(FBOA, p. 1).

The State filed its Final Brief of Respondent on May 26, 2015. The South Carolina Court of Appeals issued an unpublished opinion affirming the convictions and sentence. (App. pp. 1-3). On February 4, 2016, Applicant sought rehearing, (App. pp. 4-18), which the Court of Appeals denied on March 24, 2016, (App. p. 20).

On May 13, 2016, Applicant filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. On June 9, 2016, the State filed its return. On December 1, 2016, the Supreme Court granted the petition for review and directed additional briefing. On January 3, 2017, Applicant submitted his Brief of Petitioner. The State submitted its Brief of Respondent on February 2, 2017. The Supreme Court heard oral argument on the case on May 2, 2017. Thereafter, on July 19, 2017, the Supreme Court issued a memorandum opinion dismissing certiorari as improvidently granted. The Remittitur was issued on July 19, 2017.

II. SUMMARY OF FACTS ADDUCED AT TRIAL[1]

On October 27, 2011, a City of Charleston Police Officer heard five shots fired in a local park. (R. p. 83, line 9 – p. 84, line 3). As the officer approached, he saw Raymond Clement, crying and "in a state of panic" by the bleachers. (R. p. 85, line 2 – p. 86, line 22; p. 89, lines 6-10; p. 93, line 9- p. 94, line 1). Mr. Clement's brother, Solomon Chisolm, had been shot while playing cards on the bleachers, his playing cards still in his hand. (R. p. 145, lines 15 –24; p. 148, lines 15-21; p. 120, lines 4-5; p. 134, lines 12-16; p. 113, lines 24-25). Mr. Chisolm was shot five

[1] This section cites to the appellate index in the record. All other record citations in this order are from the trial transcript.

times – twice in the back, once in the neck, once in the forehead and once in the abdomen. (R. p. 219, lines 1-5). Five shells were found at or round the bleachers. All five were fired from one gun. (R. p. 230, lines 13-14).

Officer Quevas Gamble testified that he was on patrol in the area when he heard five gunshots in quick succession and immediately went toward the shots. He testified he heard shouts, saw children running, and "young juveniles hopping over the fences." (R. p. 83, line 23 – p. 84, line 10). He testified he also "saw some males running west out of the Mall Park area … wearing hoodies … running toward Columbus Street…" (R. p. 84, lines 19-21). He called in to advise that he saw the males running out of the area. (R. p. 84, lines 21-22). Officer Gamble testified he also "saw a black male … standing next to a body… yelling, screaming, … crying," and the man "wav[ed]" to the officer, "asking for help." (R. p. 84, lines 11-14). The body was across the bleachers. (R. p. 85, lines 12-15).

Officer Shaun Insley testified that he heard the report of shots fired, and that three black males were running toward Columbus. He testified he stopped three people in the area, Waukeem Madison, Dominique Montgomery, and Lavar Anderson. (R. p. 97, line 25 – p. 98, line 20). He testified he saw "playing cards on the sidewalk" close to Mr. Anderson's feet. (R. p. 98, lines 21-24).

Crime scene investigator Michael Sherman testified he was called out to the scene and arrived shortly after seven o'clock pm. (R. p. 105, lines 2-7). Investigator Sherman testified that five fired shell casings were recovered at the scene. (R. p. 114, lines 16-17; p. 118, lines 20-24). He also identified the fired projectiles which were recovered from autopsy. (R. p. 114, lines 17-18; p. 115, lines 2-10). Officer Sherman testified that he recovered evidence from a search of an A****** Street apartment. (R. p. 121, lines 16-22). He testified a black t-shirt was seized as a

result of the search. (R. p. 124, lines 10-12). He also testified that fingerprints were lifted from the bleachers where the murder occurred that matched to Lavar Rashone Anderson, (R. p. 134, lines 4-5), and that fingerprints were also lifted from the cards that matched the victim, (R. p. 134, lines 12-16).

Raymond Clement testified that he had just finished playing basketball when the victim, Mr. Clement's half-brother, approached and asked if he wanted to play cards. (R. p. 145, lines 7-11). He testified that he and the victim, along with Lavar Anderson and Britney Anderson began to play cards on the bleachers. (R. p. 145, lines 17-24). Mr. Clement testified that "Tyrel Collins came and started shooting," at which point Mr. Clement ran. (R. p. 148, lines 15-24). He testified the shooter was wearing a black t-shirt, jeans, a shirt pulled up over his head, and was "[b]rown skin, tall, slim." (R. p. 149, lines 14-19). Mr. Clement was shot in his leg. (R. p. 149, line 22). Mr. Clement testified he saw Applicant approach a white Crown Victoria automobile. Before he entered the vehicle, according to Mr. Clement, Applicant "looked at [Mr. Clement] and shook his head like: Yeah, I did that." (R. p. 150, lines 6-8). According to Mr. Clement, the shirt that had been over Applicant's head was pulled down. He testified that Applicant then drove away. (R. p. 150, lines 9-16). Mr. Clement testified he went back to the bleachers and found the victim. Officers were already approaching. (R. p. 150, lines 18-21). Mr. Clement testified he was hysterical, and feared getting involved: "I didn't want to talk, because I didn't want to be putting my family or nobody in danger by identifying no one, anything like that." (R. p. 151, lines 4-13).[2]

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[2] The jury did not hear, but the record reflects, shots were fired into Mr. Clement's mother's home prior to the second trial, and two witnesses declined to testify after being called. The witnesses were held in contempt. (R. p. 213, lines 1-21; p. 205, line 18 – p. 208, line 2; p. 209, line 18 – p. 212, line 7).

Though he did not originally want to be involved, Mr. Clement testified that he eventually spoke with police and identified Applicant by a photo lineup. (R. p. 154, line 15 – p. 156, line 1). He testified he also advised officers that Applicant had shot him in the leg. (R. p. 156, lines 2-10). Mr. Clement testified that Applicant was a friend to the victim, and he had known Applicant since 2006. Mr. Clement would see Applicant at least several times a week. (R. p. 157, lines 11-22). Mr. Clement testified that he was contacted several times by several of Applicant's family members and friends, including Applicant's mother, Stacey Montgomery, and Applicant's brother, Adrienne Collins. (R. p. 158, lines 5-16; p. 159, lines 1-17). Mr. Clement testified Applicant directly contacted him on a three-way call facilitated by Applicant's mother. (R. p. 159, lines 24-25). According to Mr. Clement, Applicant wanted him to write a statement saying Mr. Clement did not actually see anything. Applicant's brother and mother picked Mr. Clements up one day and took him to the library to complete the statement, writing what Applicant wanted written. (R. p. 160, line14 – p. 161, line 3). At trial, Mr. Clement identified several recorded calls from the jail. R. p. 161, line 15 – p. 166, line 7). Mr. Clement recounted part of the phone call talking about the shooting. When he mentioned to Applicant that he should not have done the shooting "like that," and complained that Applicant also shot him, Applicant stated, "that was foul, man, that was foul; whatever." (R. p. 164, lines 3-7).

Officer Jeremy Davidson testified that he saw Applicant walk from the park, cross A****** Street toward Columbus Street at six twenty-seven p.m. (R. p. 200, lines 17-21). He was wearing a black t-shirt and jeans. (R. p. 201, lines 2-11).

A tool mark examiner with SLED, Agent Suzann Cromer, testified that all the cartridges recovered from the scene were fired by one weapon, and all the bullets from autopsy were fired by one weapon. (R. p. 232, lines 1-14). The cartridges and bullets were fired by a 9mm Macarov.

(R. p. 233, lines 8-11). She could not say they were all fired by one weapon, though. (R. p. 233, lines 3-4).

Agent Ila Simmons, a SLED expert in trace evidence and gunshot residue, testified that the victim had particles on his hands that are "characteristic of gunshot residue," but they were not rounded particles that would constitute gunshot residue. (R. p. 248, line 16- p. 250, line 2). Agent Simmons testified that such material could be consistent with being shot in close proximity to the weapon. (R. p. 252, lines 19-24). The agent noted fewer particulars on the hands of Dominique Montgomery and Waukeen Madison, and none on Lavar Anderson's hands. (R. p. 253, line 3 – p. 255, line 11). Agent Simmons testified that the t-shirt similarly had particles consistent with gunshot residue, but did not reflect all three elements fused together in rounded particulars that could be identified as gunshot residue. (R. p. 257, lines 5-16; p. 258, line 21- p. 259, line 3).

Officer David Osborne testified he responded to the scene and conducted interviews, though many were not fruitful. He testified that he did, however, learn there were three people on the bleachers with the victim, that victim's vehicle was still at scene, and that his phone was in the vehicle. (R. p. 274, lines 4-23). As a result of his investigation, Officer Osborne was able to develop Applicant as a suspect and applied for an arrest warrant. (R. p. 275, lines 4-18). After Applicant was arrested, investigators sought a search warrant for an apartment on A***** Street. (R. p. 276, lines 19-24). They were to search for a "dark t-shirt," and weapons, ammunition, accessories, or "anything that might" aid in the investigation. (R. p. 277, lines 2-6). A black t-shirt was recovered. (R. p. 277, lines 7-11). Officers also found paperwork in the same room with Applicant's name. (R. p. 290, line 13- p. 291, line 25). Officer Osborne recounted how Mr. Clement had positively identified Applicant as the shooter from a photo array. (R. p. 277, lines 4-17). He further recounted how Mr. Clement had reported being shot himself, at which time the

officer photographed the injury and secured the pants Mr. Clement wore when shot. (R. p. 280, lines 4-13).

Applicant offered a defense at trial. Domonique Montgomery, Applicant's brother, testified that Applicant did not actually live at the apartment on A****** Street; that he was present in the park but did not see the shooting; that Mr. Clement was not at the park the whole time; and, that the black t-shirt belonged to either him, or another brother, Tory, (though admittedly the brothers were approximately 5'5" while Applicant was 6') and that it was taken from Tory's room. (R. p. 296, line 8 – p. 300, line 24; p. 304, lines 10-21). Britney Washington testified that she was playing cards with the victim at the time of the shooting; she could not see the man who shot the victim as the man wore a mask (which she later described as a black t-shirt over the shooter's face); that Mr. Clement was not with them at the time of the shooting; and, that she did not see Applicant at the park that day. (R. p. 319, line 3 – p. 320, line 15; p. 321, lines 5-16).

II. CURRENT ALLEGATIONS

In his amended[3] post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
    a. Failure to object during the opening statement
    b. Failure to object during the closing statement
    c. Failure to object to an improper statement made the trial court (Tr. 476)
    d. Failure to investigate Dominick Montgomery
    e. Failure to object to bolstering testimony by Raymond Clement
    f. Failure to call alibi witness at trial

Applicant requests relief as follows:

- Vacate sentence, reverse and remand for a new trial, and any other relief the Court deems just and proper.

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[3] Applicant orally amended his application at the beginning of this evidentiary hearing.

At the evidentiary hearing, Applicant proceeded forward on the above-mentioned allegations.

III. 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

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286

S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced 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. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

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 object to opening statement

Applicant contends Counsel deficiently failed to object to improper racial remarks made by the Assistant Solicitor during his opening statement. Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective. Legare v. State, 333 S.C. 275, 282, 509 S.E.2d 472, 475 (1998). The particular portion at issue is as follows:

> And when the city ultimately built that park, the neighborhood really wasn't – they built a park and a playground, and the people who – most the people who lived in that neighborhood park, they weren't allowed to even use the park. It wasn't until the 1950s that the City of Charleston let African Americans use the park in the neighborhood that had been by that point for 100 years, primarily African American.

(Tr. 107, L. 6-13). Here, Counsel credibly testified he only objects to opening statements when he believes it is necessary. Counsel credibly testified he did not believe this comment from the Assistant Solicitor was so inflammatory as to elicit an objection. Further, Counsel credibly recalled he did not believe this history lesson strategy was an effective opening statement. Instead, Counsel credibly testified he noted the comment to respond in his opening statement. Indeed, Counsel responded in his open as follows:

> Thank you. That was a nice history lesson and all, but I'm going to get to the point. The point is that [Applicant] is not guilty. The State is not going to be able to give you evidence that leaves you firmly convinced. He didn't shoot Solomon Chisolm. And this trial is about determining who did.
>
> All of that opening statement you just heard, you didn't hear much about the evidence. A good case, what do you think you would hear? I got this witness who saw this, and here's why you should believe him, and here's some other stuff to support it. That what you have when you have a good case.

(Tr. 112-3, L. 16-25, L. 1-2). Accordingly, this Court finds Counsel implemented a valid trial strategy choosing to respond during his opening statement when a remark made by the other side is not sufficiently inflammatory to merit an objection. This Court further finds Counsel implemented that strategy in this case. Accordingly, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient in failing to object during opening statements.

Applicant contends the remarks referencing segregation were sufficiently inflammatory based upon interjecting race into the case. However, the remarks cannot be construed as an attempt to incite or inflame the jury's passion. These comments appear to be an attempt to provide a history lesson about the location where the incident happened. The record reflects Counsel also treated it as a history lesson. Further, the heart of the issue at hand is segregation. It is difficult to ascertain how the jury would hold any mention of state-sponsored segregation against Applicant. The likely result of mentioning state-sponsored segregation to a jury is prejudicing the State itself. Therefore, this Court finds the opening statements on segregation do not appear to have prejudiced Applicant. Accordingly, Applicant has failed to overcome the burden to prove he was prejudiced by them.

2. Failure to object to closing arguments

Applicant contends Counsel deficiently failed to object to remarks made about the Genovese effect during closing statements. References in closing argument to threats or dangers to witnesses are improper unless evidence is offered connecting defendant with threats. Mincey v. State, 314 S.C. 355, 358, 444 S.E.2d 510, 511 (1994) (finding witness intimidation comments were made during closing where there was no evidence in the record to support defendant played a role). The particular portion was actually first referenced by the Assistant Solicitor in the following portion of his opening statement:

> And into that neighborhood is Solomon Chisolm attempting to go play a card game. There may also be another factor involved. They call it Genovese effect, also known as spectator effect, or bystander effect. Genovese was killed in Queens in 1964. The New York Times reported that 34 people in heard her scream as she was attacked and nobody called the police. New York Times actually got it wrong. It was probably more like 12. But it caused psychologists to study this effect.

(Tr. 113, L. 6-10). Here, Counsel credibly reiterated his trial strategy is not to object during opening statements unless he finds it necessary. Counsel further credibly testified he did not believe the Genovese references were sufficiently inflammatory to warrant an objection. Further, Counsel credibly recalled believing nobody understood the connection to this case anyway. Therefore, Counsel credibly assessed it was beneficial to let the Assistant Solicitor illogical analogy. Instead, Counsel credibly testified he sufficiently responded these remarks in his opening statements. Counsel responded in his opening statement as follows:

> And solicitor talks about this bystander effect and the East side, I mean, the East side and bystander effect is not an excuse for a weak case. The burden of proof is still the same. State has to prove this man guilty beyond a reasonable doubt.[4]

(Tr. 113, L. 6-10). The Assistant Solicitor again addressed this issue during closing statements as follows:

> You know a lot of the people from the State's witness list that you heard read off in the beginning were not here, were not presented to you. But remember who was here. Only one eyewitness for the State testified. Only one person was brave enough and willing to go against the East Side. Only one person, who you heard was threatened by numerous people, came to court?

(Tr. 443-4, L. 20-5, 1). Shortly after, the Assistant Solicitor elaborated:

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[4] Therefore, this Court finds Counsel implemented a valid trial strategy in deciding not to object. This Court finds Applicant has failed to overcome the burden to prove Counsel was deficient in failing to object to these comments during opening statements.

> [Clement] gave a few statements. And he explained the essence of that, that he was scared, didn't want to be involved. Was that warranted? You heard that he was getting threats. You heard that [Applicant], his family, and his friends, were threatening [Clement]. You heard on those jail phone calls just part of the threats: Yeah, you need to go to the library, you need to get that done. You heard how [Clement] was picked up by [Applicant's] mother and brother, brought to the library, stood over as he wrote this statement.

(Tr. 446-7, L. 18-25, 1-2). Here, the Assistant Solicitor referenced evidence in the record from Clement's testimony. Initially, Clement testified Applicant contacted by phone to sign a statement saying he did not see anything. (Tr. 193, L. 5-11). Thereafter, Clement testified Applicant's mother and brother accompanied him to a library. (Tr. 193, L. 20-1). At the library, Clement testified Applicant's brother stood with him while he wrote a statement. (Tr. 193, L. 24). After finishing, Clement testified Applicant's brother took the statement to a lawyer. (Tr. 194, L. 7-9). Subsequently, the Assistant Solicitor played five jailhouse phone calls in front of the jury. (Tr. 196, L. 17) (Tr. 197, L. 11, 21) (Tr. 198, L. 18) (Tr. 199, L. 1). Clement testified Applicant was on the phone in all five. (Tr. 196, L. 20) (Tr. 197, L. 13, 23) (Tr. 198, L. 20) (Tr. 199, L. 3). Thereafter, Clement testified he wrote the statement at the library because of visits, phone calls, and threats. (Tr. 199, L. 21-2). Accordingly, there was substantial evidence in the record to corroborate threats of violence against Clement. The record reflects Applicant was directly connected to every single instance of improper contact. Therefore, this Court finds witness intimidation comments made by the Assistant Solicitor were supported by some evidence in the record. Therefore, this Court finds Applicant has failed to overcome the burden to prove prejudice based upon closing arguments.

3. Failure to object to improper statement by trial court

Applicant contends the trial court's sentence resulted from prejudice against a particular community. It is important to remember that judges have discretion to sentence within the

statutory limits. State v. Sidell, 262 S.C. 397, 205 S.E.2d. 2 (1974). A sentence is not excessive if within statutory limitations and not the result of partiality, prejudice, or corrupt motive. Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Wood v. State, 257 S.C. 179, 184 S.E.2d 702 (1971). The trial court's comments were as follows:

> Well, [Applicant] this whole case seems to be about people wanting to live outside of the law. They all seem to have a belief in that part of the community that you live in, that you run it by your own set of rules. There's one thing that we cannot tolerate in this country, is people thinking that they live above the law.
>
> The other thing we cannot tolerate is terrorizing people. And it is clear that y'all have a – amongst your peer group – some sort of belief that you live above the law, and that the way you enforce your code is through acts of terror on other people. And I do not use the word lightly. But it is, without a doubt, fear, intimidation, and terrorism that you folks are imposing, and you are clearly involved in it.
>
> And by your actions in this case, you have, in my opinion, forfeited your right to walk amongst this community again.
>
> The sentence of the Court is life without parole.

(Tr. 476, L. 4-21).

Here, the trial court's comments came after the jury deliberated. Further, the comments came during the sentencing portion. The trial court sentenced him to life without parole. This sentence is within the statutory limits.[5] Therefore, this Court finds the trial court sentenced Applicant within his discretion.

Accordingly, the issue is whether these sentencing comments were made with partiality, prejudice, or a corrupt motive. The record reflects shots were fired into the home of Clement's mother on the evening before trial. (Tr. 288-9). As previously mentioned, Clement testified

[5] See S.C. Code Ann. § 16-3-20.

Applicant improperly contacted him several times to change his statement. Clement also testified Applicant directed people to personally ensure the statement was changed. This included personal visits from Applicant's relatives to ensure the deed was done. Clement even indicated Applicant's brother submitted the coerced statement to a lawyer immediately after it was finalized.

Additionally, the record reflects two witnesses refused to testify after they were subpoenaed by the Assistant Solicitor. It further reflects both witnesses had to be held in contempt. The Assistant Solicitor described the first witness as an individual who positively identified Applicant as the shooter in a photographic lineup. (Tr. 243-4). Thereafter, a video of the witness positively identifying Applicant was played for the trial court outside the presence of the jury. (Tr. 267). The interviewing detective testified the witness did not want their name on record because of a genuine concern with retaliation for cooperating with police.[6] (Tr. 267). Thereafter, Counsel's motion to suppress this photographic identification was denied. (Tr. 276). The witness then refused to testify following a contempt colloquy from the trial court. (Tr. 279). The Assistant Solicitor then described the second witness, who shared a cell with Applicant, was relevant as follows:

> [The witness] wrote [Assistant Solicitor] saying that he wanted – he had some information. He then went to court, got sentenced, went to prison. [Investigator] and [Assistant Solicitor] had a conference call with him while he was in prison, and then [Assistant Solicitor and Investigator] drove down there and saw him months later. And he gave statements both those times to us, and indicated that [Applicant] told him he shot Sol, and told him he was trying to get his girlfriend and other to pressure the guy who was playing cards who was found with cards at his feet to change his statement, which would be [redacted].[7]

[6] This testimony was also outside the presence of the jury.
[7] The name redacted is the first witness held in contempt.

(Tr. 281, L. 9-19). Thereafter, this witness refused to testify after a contempt colloquy from the trial court. (Tr. 285-6).

The record indicates Applicant admitted, in jail, to instructing his girlfriend to pressure another eyewitness to change their statement. Subsequently, the cellmate and eyewitness refused to testify. The record also indicates Applicant instructed relatives to force Clement to change his statement. Accordingly, this Court finds the trial court's sentencing comments were based upon Applicant's role in witness tampering. Therefore, this Court finds the comments did not exhibit prejudice, partiality, or corrupt motive. Accordingly, this Court finds Applicant has not overcome the burden to prove he suffered prejudice from them.

4. Failure to object to bolstering testimony by Raymond Clement

Applicant contends Counsel deficiently failed to object to testimony bolstering Raymond Clement's credibility as a frequent confidential information for law enforcement. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). The line of questioning at issue happened as follows:

Q: Now I hate to even talk about this, but do you have a pending charge in my office?

A: Yes

Q: And am I the one handling that charge?

A: No.

Q: Have I promised you anything in relation to that charge--

A: No.

Q: with you being here?

A: No.

Q: Have you ever cooperated with law enforcement before?

A: Yes.

Q: Did your cooperation with both local and federal law enforcement?

A: Yes.

Q: Did your cooperation last for a couple of years?

A: Yes.

Q: Did your cooperation lead to a lot of people getting arrested?

A: Yes.

Q: And did it lead to a lot of people being convicted?

A: Yes.

Q: And have you ever received any sort of benefit for your cooperation on other cases in the past?

A: Yes.

(Tr. 200-1 L. 1-25, 1).

Here, Counsel credibly testified his trial strategy was to get these facts about Clement into the record. Specifically, Counsel credibly testified he wanted to bring out that Clement was in bed with a law enforcement handler. Counsel credibly testified this was relevant because Clement made a statement initially favorable to Applicant then later named Applicant responsible after talking to law enforcement. Counsel further credibly testified he believed the Assistant Solicitor

elicited this line of questioning on direct to prevent surprises on cross examination. This testimony is consistent with the record. Specifically, Counsel conducted a line of questioning on cross to rehash information about Clement being an informant. (Tr. 202-4). Further, Counsel elicited testimony about Clement giving inconsistent statements. Therefore, this Court finds Counsel had a valid reason for not objecting to the testimony at issue. As a result, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient for failing to object to bolstering.

Applicant contends testimony about getting people convicted in the past improperly bolstered Clement's testimony. Clement's key testimony came when he identified Applicant as the individual who "started shooting." (Tr. 181, L. 20-1). Thereafter, Clement testified he saw Applicant fleeing the scene in a vehicle. (Tr. 183, L. 6-8).

Here, Counsel credibly testified Clement was the key witness. Counsel further credibly testified he wanted to Clement to establish credibility so he could shoot it down on cross examination with inconsistent statements. The line of questioning is as follows:

Q: And but you've known [Applicant] for years?

A: Yes.

Q: For a long time before the shooting?

A: Yes.

Q: You knew what he looked like?

A: Yes.

Q: You were on the scene when the police officers first arrived after the shooting, right?

A: Yes.

Q: You didn't tell them: [Applicant] shot my brother; did you?

A: Nope.

Q: You didn't tell Officer Gamble, first officer who got there?

A: No.

Q: You didn't tell Officer Lites?

A: No.

Q: Another officer who got there?

A: No, I didn't.

Q: Even though you knew exactly who shot your brother?

A: Yes.

(Tr. 205-6, L. 6-25, 1-2). Thereafter, Counsel brought up the police interview where Clement gave a statement on this incident. Counsel elicited testimony from Clement as follows:

> Q: And then later on that same interview, Detective Fleming was asking you, you know, hoping you could be a solid witness for them, and you said: If I could help, I would help. I'm not going to take the stand and lie if I don't know how he did it. Do you remember saying that?
>
> A: Yes.

(Tr. Tr. 210, L. 7-12). Thereafter, Clement admitted he got in touch with his contact with federal law enforcement. (Tr. 211, L. 9-11). Clement further admitted the contact then linked him up with Detective Osborne. (Tr. 211, L. 12-4). Counsel then elicited the following testimony:

> Q: And Osborne told you, it's your cooperation, if you cooperated with them, then that would be a big deal, do you remember him telling you that?
>
> A: I don't recall.
>
> [Tape is played]
>
> Q: Do you remember that now?

A: Yes.

(Tr. 211-2, L. 11-25, 1-24). Counsel then elicited testimony that Clement then changed his statement with detectives. (Tr. 212-3). Subsequently, Counsel began his closing statements as follows:

> Thank you, Your Honor. How many times does Raymond Clement get to lie and the State still ask you to believe what he has to say? He's at the scene standing by his brother who's just been shot. He claims he was shot. The police arrive. He doesn't tell them anything. Says he knew who [Applicant] was. He doesn't say, I know who shot my brother; it's [Applicant]. He doesn't tell them.
>
> And then he goes down to the police station, meets with them in an interview, with the detectives who are investigating the case, trying to solve the case for the murder of his brother, and he tells them he's not in the park. He tells them he was playing cards, but he walked down the street for a bit, and as he was coming back, he saw the shooter standing over him shooting. He was too far away to see and that he had a shirt on his face. That's what he tells detectives trying to solve his brother's murder. He doesn't tell them he was shot either.

(Tr. 423-4, L. 11-25, 1-3). Later on, Counsel addressed connected informant issue as follows:

> He talks to his federal contact, Grill, that he has a phone number for, that he can call anytime. And Osborne—Detective Osborne and Grill talk. And I played that clip where Detective Osborne was talking about giving him money and how if he cooperated with a murder case, then that would be a big deed.
>
> So at some point, the reins changed. I don't know if he hears on the street who he thinks he did it, but he's decided that he's going to send [Applicant] up for this crime. So he goes back to the police station on the 31st. Now that's about four days later. And he meets with detectives again, and he says he's going to come clean. Then he says it was [Applicant].

(Tr. 424, L. 11-23). Accordingly, Counsel effectively addressed the issue on cross examination and close. On both occasions, Counsel pointed out Clement did not say anything to police on the date of the incident or the next day at the station. Counsel also pointed out Clement got in touch

with a federal contact, got personal gain assurances, and then changed his official statement. Therefore, this Court finds it is not reasonably probable improper bolstering of Clement effected the outcome of this case. Thus, Applicant has not overcome the burden to prove he suffered any prejudice from a failure to object to the testimony at issue.

5. Failure to investigate Dominick Montgomery

Applicant contends Counsel deficiently failed to investigate another individual potentially involved with shooting the victim. . 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).

Here, Counsel credibly testified he did conduct an interview with Dominick Montgomery about this case. However, Counsel credibly recalled this being a difficult process because Montgomery was incarcerated at this point in time. Counsel also credibly recalled Montgomery having representation which meant no direct contact could be made. Counsel credibly testified the interview took place at the courthouse with another lawyer present, who was representing Montgomery. Thereafter, Counsel credibly testified he called Montgomery to the stand. Further, Counsel credibly testified he believed it was worth putting Montgomery on stand before and after eliciting testimony. Finally, Counsel credibly testified Montgomery's testimony was, at worst, equally beneficial for both sides. On the other hand, Applicant testified Counsel called Montgomery as a witness without conducting an interview beforehand. Applicant based this upon the way Counsel conducted Montgomery's direct examination. However, Applicant failed to corroborate his claim beyond this subjective assessment. Counsel provided a credible explanation

of the interview with Montgomery before calling him as a witness. Therefore, this Court finds it was reasonable for Counsel to conduct an interview, in the manner in which he did based upon Montgomery's availability. Accordingly, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient for failing to conduct an interview before calling Montgomery to the stand.

Applicant contends Counsel failed to adequately prepare for Montgomery's prejudicial testimony before calling him as a witness. After failing to interview a witness, counsel may prejudice the defendant by eliciting testimony that "totally" contradicts the defense theory. Ingle v. State, 348 S.C. 467, 472, 560 S.E.2d 401, 403 (2002) (finding prejudice where the witness was called first and her testimony effectively eliminated any previous reasonable doubt established through counsel's trial strategy).

Here, Counsel credibly testified his defense strategy was to highlight the evidence collected was at a residence where Applicant did not reside. At trial, Montgomery testified Applicant did not live at the residence where material evidence was recovered. (Tr. 400, L. 16). Second, he testified Applicant did not keep any possessions at this residence. (Tr. 400, L. 19). Third, Montgomery testified Applicant did not do laundry at this residence. (Tr. 403, L. 11-2). Fourth, Montgomery testified the shirt in evidence did not belong to Applicant. (Tr. 396, L. 20-1). Additionally, Montgomery testified he never fired a gun while wearing the shirt. (Tr. 405, L. 14). He further testified nobody fired a gun in his presence when wearing the shirt. (Tr. 406, L. 22). Applicant testified this testimony prejudiced their strategy to blame Montgomery. However, at that point, Counsel already entered three pictures of Montgomery holding guns into evidence. (Tr. 374). Counsel had also gotten Montgomery to confirm he was the person in the pictures. (Tr. 397, L. 8).

Accordingly, the testimony from Montgomery substantially benefited Counsel's attempt to distance Applicant's association from the residence where vital evidence was collected. Montgomery then distanced himself from gunshot residue on the shirt he admitted to wearing. However, Counsel provided numerous exhibits to the jury showcasing Montgomery posing with guns. Therefore, this Court finds Montgomery's failure to admit to being responsible for the gunshot reside did not sufficiently contradict the trial strategy, where he provided substantially beneficial testimony and admitted to posing with guns for numerous photographs. This Court finds Applicant has failed to overcome the burden to prove he was prejudiced by testimony from Montgomery after an alleged failure to interview by Counsel.

6. Failure to call alibi witness at trial

Applicant contends Counsel deficiently failed to call an alibi witness at trial. The South Carolina Supreme Court has held it is valid trial strategy for counsel to decide to only call witnesses he believes are credible and relevant. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992).

Here, it is undisputed Counsel interviewed Young in preparation for trial. Counsel credibly testified he conducted this interview in pursuit of an alibi defense. Counsel credibly testified Young provided a story which placed Applicant at a wake around the time of the incident. However, Counsel credibly recalled Young could not provide a specific time period Applicant was at this wake. Further, Counsel credibly testified an officer identified Applicant at the scene of the crime about eighteen minutes before it happened. Finally, Counsel credibly testified referencing the wake could point to a potential motive. Specifically, Counsel credibly testified the wake was held for a friend of Applicant. Counsel further credibly testified there were rumors the victim shot and killed the deceased friend a few days before this incident. Thereafter, Counsel credibly

testified he believed the alibi defense was not a good idea. Counsel also credibly testified Applicant agreed presenting an alibi defense was a bad idea. Finally, Counsel credibly testified Applicant specifically concluded he did not want to pursue an alibi defense during their last conversation about it.

On the other hand, Applicant testified he presented Counsel with an alibi and a witness for corroboration. Applicant testified he remembered being at approximately 6:45 PM. He did not know how far the wake was from the incident's location. Further Young testified he saw Applicant at the wake. Young also testified the wake was about twenty minutes from where the incident occurred. Young recalled talking to Applicant for about five minutes at this wake. He testified this conversation happened at 6:30 PM.

Accordingly, Counsel had several valid concerns with presenting this alibi. He questioned the witness' ability to verify a specific time, considered the direct conflict with an eyewitness in law enforcement, and cautioned against referencing the alibi's location because it could backfire. At trial, an officer testified he saw Applicant near the incident at 6:27PM. (Tr. 237, L. 21). This corroborates Counsel's version of events. Therefore, this Court finds Counsel was not deficient where he fairly assessed the alibi witness was not credible based upon factors mentioned above. Further, Counsel and Applicant were apparently in agreement to pursue different strategies. Therefore, this Court finds Counsel was not deficient when he decided not to call the irrelevant alibi witness. This Court finds Applicant has failed to overcome the burden to prove Counsel was deficient for failing to call this alibi witness.

Applicant contends calling this alibi witness would have corroborated him not being at the incident. 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.

Here, Counsel credibly testified he had concerns with Young's inability to give an approximate time period. Furthermore, Counsel credibly recalled having concerns with witness bias because he attended a wake for an individual rumored to be killed this incident's victim. Finally, Counsel credibly testified he had concerns with pitting this witness against a law enforcement officer. Oddly, Young testified Applicant's mother did not want him to be presented as a witness based upon credibility concerns. Further, Young characterized the individual who the wake was held for as his "best friend." Young also recalled speaking to Applicant for five minutes beginning at 6:30 PM. However, Applicant recalled arriving at the wake at approximately 6:45 PM. The incident occurred also at 6:45 PM. (Tr. 105, L. 2).

Accordingly, this alibi defense would not have provided exoneration. The witnesses did not provide a consistent timeline of events. Young did provide testimony that would have made it improbable for Applicant to be at the incident. However, he had obvious bias against the victim in this case. That would have been brought out on cross examination. Further, it would have opened the door for the jury to see a potential motive for Applicant. Therefore, this Court finds the alibi defense would not have provided sufficient corroboration, where the timeline is inconsistent and cross examination would have exposed bias as well as a potential motive. This Court finds Applicant has failed to overcome the burden to prove he suffered prejudice from the alleged failure to call Young as an alibi witness at trial.

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.

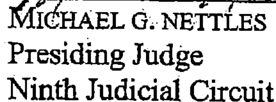
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), 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. Your 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

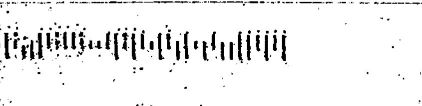
2. The Applicant must remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 19 **day of** Sept **, 2019.**



MICHAEL G. NETTLES
Presiding Judge
Ninth Judicial Circuit

Florence, South Carolina



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