LAW OFFICE OF
JEREMY A. THOMPSON
LLC

April 29, 2013

RECEIVED

APR 30 2013

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211-1330

RE: Samuel Harmon, #328335 v. State of South Carolina; 2011-CP-32-2954

Dear Mr. Shearouse:

Enclosed please find the original and one (1) copy of my Notice of Appeal in the above-captioned action. I would appreciate your filing the original, clocking the copy, and returning the clocked copy to me in the envelope provided. I will be continuing my representation of the Petitioner on appeal. I would note that Judge McIntosh issued a written Order of Dismissal in this case which was filed with the Lexington County Clerk of Court's Office on March 28, 2013. A copy of this order is also enclosed. With my thanks for your assistance in this matter and my best regards, I am,

Yours sincerely,

Jeremy A. Thompson
Attorney and Counselor at Law

JAT/
Enclosures
cc: The Honorable Beth Carrigg (w/ Notice of Appeal)
J. Walter Whitmire, Assistant Attorney General (w/ Notice of Appeal)
Samuel Harmon, #328335 (w/ Notice of Appeal)
Anne Binyard (w/ Notice of Appeal)

: 803-779-2555
: 803-779-2556
: jeremyatlaw@yahoo.com
: www.jathompsonlaw.com

Mailing Address:
P.O. Box 12891, Columbia, SC 29211
Physical Address:
1612 Marion Street, Suite 210, Columbia, SC 29201

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Presiding Judge

11-CP-32-2954

RECEIVED

APR 30 2013

S.C. SUPREME COURT

SAMUEL HARMON, #328335,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Samuel Harmon, #328335, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed March 28, 2013, and received by counsel on April 3, 2013, issued by the Honorable R. Lawton McIntosh, presiding judge.

Jeremy A. Thompson
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555 Phone
803-779-2556 Fax
jeremyatlaw@yahoo.com E-mail

ATTORNEY FOR PETITIONER

This 29th day of April, 2013.

Other Counsel of Record:
J. Walter Whitmire, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Presiding Judge

11-CP-32-2954

RECEIVED

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S.C. SUPREME COURT

SAMUEL HARMON, #328335,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petitioner's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Walter Whitmire, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 29th day of April, 2013.

Jeremy A. Thompson
Attorney and Counselor at Law

SWORN TO BEFORE me this 29th day of April, 2013.

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: 7/10/2022

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP3202954

Samuel D Harmon #328335	State of South Carolina RECEIVED 4/3/13
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order: (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

_____

_____

INFORMATION FOR THE JUDGMENT INDEX Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

	2155	3/29/2013
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **n/a**, and a copy mailed first class or placed in the appropriate attorney's box on **29th day of March 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Jeremy Adam Thompson PO Box 12891 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

Salley W. Elliott South Carolina Attorney General's Office PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/wh

Beth A. Carrigg - Clerk of Court

Court Reporter

(2)

LMC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
FILED
COUNTY OF LEXINGTON) 2013 MAR 28 A 11:50
BETH A. CARRIGG CLERK OF COURT LEXINGTON, SC
Samuel D. Harmon,) 2011-CP-32-2954
S.C.D.C. No. 328335,)
Applicant,)
v.) **ORDER OF DISMISSAL**
State of South Carolina,)
Respondent.)

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 4, 2011. The Respondent made its return on April 5, 2012. An evidentiary hearing into the matter was convened on January 31, 2013 at the Lexington County Courthouse. The Applicant was present at the hearing and represented by Jeremy A. Thompson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing.[1] Also testifying was the Applicant's trial counsel, Wayne Floyd, Esquire. The Court had before it the trial transcript, the records of the Lexington County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the PCR application, the return, the appellate records, and the Applicant's Exhibit 1.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. The Applicant was indicted at

[1] The Applicant briefly took the witness stand to assert he wanted a new trial on his charges.

the April 2007 term of the Lexington County Grand Jury for possession of a weapon during commission of a violent crime (2007-GS-32-1440), murder (2007-GS-32-1442), assault with intent to kill (AWIK) (2007-GS-32-1443), and assault and battery with intent to kill (ABWIK) (2007-GS-32-1444). He was represented by Wayne Floyd, Esquire.

After the State called the case to trial, the Applicant was found guilty. On May 7, 2008, the Applicant was sentenced by the Honorable R. Ferrell Cothran to concurrent terms of five (5) years for possession of a weapon during commission of a violent crime, life imprisonment for murder, and ten (10) years for AWIK. Judge Cothran levied a consecutive fifteen (15) year sentence for ABWIK.

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Harmon, Op. No. 2011-UP-080 (S.C. Ct. App. filed February 24, 2011).

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
   a. Failure to prepare and investigate.
   b. Failure to interview and call witnesses.
   c. Failure to present a viable defense.
2. Ineffective assistance of appellate counsel.

In an Amended Application for Post-Conviction Relief filed November 14, 2012, the Applicant made the following allegations:

1. Ineffective assistance of trial counsel:
   a. Failure to object to testimony that the Applicant was a member of a gang.

b. Failure to object to portions of the Solicitor's closing argument wherein the Solicitor argued that the Applicant committed the crime because he was a gang member.

c. Failure to object to testimony by Investigator Eric Russell during the State's case-in-chief that George Mack identified the Applicant as the shooter on hearsay and Confrontation Clause grounds.

d. Elicited testimony from Investigator Russell that Mack identified the Applicant as the shooter.

e. Failure to realize that he could move for a mistrial and/or a directed verdict at the close of the State's case based on the State's opening argument that all of the Applicant's co-defendants identified the Applicant as the shooter when Mack did not testify at the trial and his statement should have been excluded.

f. Failure to object to the improper admission of prior consistent statements by Investigator Russell that Sherman Davis, Brandon Harmon, Alex Haigler, and James Keitt identified the Applicant as the shooter.

g. Failure to object to the Solicitor's insertion of himself as a witness during Hope Frick's testimony.

h. Failure to move to disqualify the Eleventh Circuit Solicitor's Office following the Solicitor's questioning of Hope Frick regarding the plea agreement that was reached between the Solicitor's Office and Mack.

i. Failure to object to the admission of Mack's statement on hearsay and Confrontation Clause grounds.

j. Failure to object to portions of Mack's statement referring to the Applicant's neighborhood as a "bad" neighborhood and that "people there all have guns."

k. Failure to object to the trial court's charging the jury on the law of accomplice liability.

l. Failure to object to the Solicitor's bolstering of the testimony of the Applicant's co-defendants in his closing argument where the Solicitor argued that he would not prosecute the co-defendants for murder since they had given full statements.

m. Failure to present testimony that Mack had confessed to an inmate at the Lexington County Detention Center that he fired the assault rifle.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the

opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

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

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

Trial counsel testified he was appointed in this case and had 5-10 meetings with the Applicant while he was in jail. Trial counsel testified all of the co-defendants identified the Applicant as the shooter. Trial counsel testified the odds were slim that they would win at trial. Trial counsel testified the defense at trial was that the Applicant was not the shooter and the Applicant testified to that effect.

This Court finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court notes, however, that the State presented overwhelming evidence of the Applicant's guilt. Four of the Applicant's co-defendants (including the Applicant's brother) testified at trial and all of them identified the Applicant as the shooter. (Trial transcript, pp.57-58; pp.97-98; pp.125-26; pp.151-54). Three other individuals identified the shooter as someone who was not present at the initial altercation. (Trial transcript, pp.185-86; p.227; pp.263-64). Two more individuals testified the last person they saw holding the assault rifle before the shooting had not been present at the initial altercation. (Trial transcript, p.250; pp.274-75). The Applicant (along with Alex Haigler and James Keitt) were the only members of that group that were not present at the initial altercation. As such, this Court finds that any minor errors made by trial counsel during the trial could not and did not affect the ultimate outcome of the case. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); State v. McFadden, 318 S.C. 404, 416, 458 S.E.2d 61, 68 (Ct. App. 1995) (holding the solicitor's comments did not infect the trial with unfairness to the extent that his conviction was a denial of due process where there was ample evidence of guilt in the record).

A.

Trial counsel testified the discovery materials included comments that the Applicant was in a gang. Trial counsel testified he believed these comments would come out at trial and decided not to file a motion in limine. Trial counsel testified he decided to attack the problem by

arguing the organization mentioned was not a gang. Trial counsel noted the Applicant testified on direct examination that the organization in question was a music group.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to references to a gang. At trial, the Applicant's brother said he told someone he was not in a gang but his brother was. (Trial transcript, p.51). Jamar Porcher stated someone in his group said – at the initial altercation – that someone in the other group was "GKB, and that's the – that's the blood gang group." (Trial transcript, p.178). The Applicant testified he was not in a gang. The Applicant testified he was involved with Gpan but that it was called Gpan Entertainment (and he identified a CD released by Gpan Entertainment). (Trial transcript, p.460; p.463). In the State's reply, Investigator Russell read George Mack's statement into evidence, which detailed the initial altercation and argument about "if [the Applicant's brother] was Gpan and if [another individual] was a blood." (Trial transcript, p.490). In closing argument, the Solicitor mentioned the above-referenced testimony from the Applicant's brother. (Trial transcript, p.520). The Solicitor stated "[The Applicant] doesn't care about the law. Not him. He's Gpan." and references the Applicant's testimony that Gpan is a music group. (Trial transcript, p.524; p.532). This Court finds the limited references to gang activity during the trial did not have any effect on the outcome of that trial and thus trial counsel was not deficient in not objecting or seeking a motion in limine. This Court notes there only one witness who testified the Applicant was in a gang. The other references were to general gang activity that occurred during the initial altercation – an altercation where the Applicant was not present. Further, trial counsel stated he made a strategic decision to combat this issue by arguing Gpan was not a gang and the Applicant was able to explain the nature of Gpan and even identified on re-direct a CD produced by that group. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)

(finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). This Court finds any references to gang activity did not prejudice the outcome of the trial. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

B.

Trial counsel stated he believed all of the Applicant's co-defendants would testify at trial. Trial counsel testified that is why he did not object when the Solicitor mentioned a statement made by George Mack during its opening argument. (Trial transcript, pp.39-40). Trial counsel testified he did not object when Investigator Russell implied Mack said the Applicant was the shooter. (Trial transcript, pp.397-98; pp.400-01). Trial counsel acknowledged the first thing he asked Russell on cross-examination was to verify Mack had identified the Applicant as the shooter. (Trial transcript, p.405). Trial counsel testified he did not move for a mistrial – because Mack did not end up testifying – but admitted Mack's statements to police were cumulative to statements and testimony presented at trial.

This Court finds the Applicant failed to meet his burden of proving trial counsel mishandled issues related to comments made at trial about George Mack. This Court finds there was no basis for trial counsel to have objected to Russell's testimony. This was not hearsay testimony, it was merely testimony about statements made during the course of the investigation that explain why the investigation – into the Applicant as the shooter – was undertaken. See Caprood v. State, 39 S.C. 103, 111, 525 S.E.2d 514, 518 (2000). This Court also finds there was no error in trial counsel's question to Russell in which he had Russell verify Mack had identified the Applicant as the shooter. This was clearly cumulative testimony. This Court further finds there was no basis for trial counsel to have moved for a mistrial. Based on the cumulative nature

of Mack's statement and the overwhelming evidence of the Applicant's guilt, trial counsel would not have been able to demonstrate any prejudice. See State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) ("In order to receive a mistrial, the defendant must show error and resulting prejudice.").

C.

Trial counsel testified Mack's statement was admitted at trial. (Trial transcript, pp.189-92). Trial counsel testified he did not object to a portion of the statement because he questioned whether or not it was really evidence of bad character. (Trial transcript, p.489, lines 13-14). Trial counsel testified it was part of his trial strategy to have Mack's statement and sentencing sheets admitted.

This Court finds the Applicant failed to meet his burden of proving trial counsel mishandled issues related to Mack's statement. This Court finds from both the trial transcript and testimony at the PCR hearing that it was clear trial counsel's strategy was two-fold: to argue the Applicant was not the shooter and to highlight that the co-defendants all pled guilty to the lesser charge of accessory after the fact. To this end, trial counsel argued that he should be allowed to enter Mack's sentencing sheets into evidence. (Trial transcript, p.467). After discussion between the judge and parties, all agreed to allow admission of both Mack's sentencing sheets and statement. (Trial transcript, pp.468-77). Trial counsel noted to the trial judge this was a strategic decision. (Trial transcript, p.469; p.471). This Court finds trial counsel did not render deficient performance because this was a valid trial strategy. See Roseboro v. State, 317 S.C. at 294, 454 S.E.2d at 313. This Court further finds the Applicant cannot prove he was prejudiced from this strategic decision because, as noted supra, the

information in Mack's statement was cumulative to the testimony from the other four co-defendants. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.[2]

D.

Trial counsel noted Investigator Russell testified that the Applicant's co-defendants had identified the Applicant. (Trial transcript, pp.402-05). Trial counsel stated he did not object.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to Investigator Russell's testimony that the co-defendants had identified the Applicant. Investigator Russell testified he believed the Applicant was involved with the shooting. (Trial transcript, pp.400-01). Investigator Russell testified he continued to investigate and interviewed the Applicant's co-defendants – who all stated the Applicant was the shooter. (Trial transcript, pp.402-05). This Court finds that, as this was not hearsay testimony, trial counsel was not deficient in failing to object. As noted supra, our Supreme Court has held that statements made for the purpose of explaining why the State's investigation was undertaken do not qualify as hearsay. See Caprood v. State, 39 S.C. at 111, 525 S.E.2d at 518. Further, Investigator Russell's statements in this regard were merely cumulative to the four co-defendants' prior testimony in which they identified the Applicant as the shooter in open court.

E.

Trial counsel testified he did not object when the Solicitor asked the Clerk of Court – Hope Frick – about Mack's sentencing sheets and guilty plea. Trial counsel testified he also did not move for a mistrial. Trial counsel admitted, however, that he wanted Mack's sentencing sheet to be admitted at trial because it was part of his trial strategy to demonstrate that the

[2] This Court also finds the alleged evidence of bad character was not objectionable. The portion of Mack's statement was "[t]his is a bad neighborhood and people there all have guns." This Court finds there was no reason for trial counsel to object to this portion of Mack's statement under Rule 404, SCRE.

Applicant's co-defendants all received plea deals. Trial counsel further admitted that not moving for a mistrial likely did not change the outcome of the trial.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected or moved for a mistrial during the Solicitor's direct examination of Hope Frick. As discussed supra, it was determined by the parties that Mack's sentencing sheets would be entered into evidence. (Trial transcript, pp.468-77). Trial counsel called Hope Frick, the supervisor of the criminal division in the Lexington County Clerk of Court's office, to authenticate Mack's sentencing sheet, and note he received a seven-year sentence for a guilty plea to accessory after the fact and that several warrants that had been dismissed. (Trial transcript, pp.478-81). On cross-examination, the Solicitor asked Frick several questions about the indictment process. (Trial transcript, pp.481-83). The Solicitor asked "I can't try anybody unless the Grand Jury indicts them for a crime; can I?" and Frick said "[c]orrect." The Solicitor then asked if Mack was ever indicted for murder and Frick said he had not. (Trial transcript, pp.483-84). Pursuant to the Solicitor's questions about Mack's sentencing sheet, Frick also stated he had been indicted for accessory after the fact and the State had not made recommendations or negotiations. (Trial transcript, p.484). The Solicitor then asked "[s]o we didn't have anything to do with the sentencing" and Frick said no. (Trial transcript, p.484).

Contrary to the Applicant's assertion, this Court does not find the Solicitor effectively made himself a witness during Frick's cross-examination. Rather, as noted supra in Section C of this order, it is clear the parties agreed to have both Mack's sentencing sheet introduced into evidence. Trial counsel stated at the time this was part of his defense strategy. (Trial transcript, p.469; p.471). Again, this Court finds this was a valid strategy. See Roseboro v. State, 317 S.C. at 294, 454 S.E.2d at 313. In any event, this Court finds the Solicitor's comments were not made

from a personal angle. Instead the Solicitor was merely asking if the Solicitor's Office – as a whole – do such things as pursue cases without an indictment or have impact on sentencing in a case without a negotiation or recommendation. As the Solicitor did not make himself a witness in this case, this Court finds the Applicant's reliance on State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999) is misplaced. Further, trial counsel was not deficient in not moving for a mistrial during Frick's testimony. Based on the overwhelming evidence of the Applicant's guilt, trial counsel would not have been able to demonstrate any prejudice. See State v. Harris, 340 S.C. at 63, 530 S.E.2d at 628.

F.

Trial counsel noted he did not object during the Solicitor's closing argument when he said the Applicant's co-defendants were telling the truth. (Trial transcript, p.530).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the Solicitor's comments. The Solicitor made the following statements about the co-defendants:

> But folks, they weren't lying. They were telling the truth.
>
> They told the truth on that Saturday night. They told the truth Sunday morning. They told the truth Sunday afternoon. And they told the truth Monday . . . .
>
> . . .
>
> And I'm going to prosecute five people who have given full – for murder?

(Trial transcript, p.530, lines 11-20). This Court finds the Solicitor's comments did not constitute either bolstering or vouching. The Solicitor did not say he believed these witnesses or that the jury should believe them. See, e.g., Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) ("Improper vouching occurs when the prosecution places the government's

prestige behind a witness by making explicit personal assurances of a witness' veracity. . . ."). Rather, the Solicitor's comments merely referred to the credibility of these four co-defendants/eyewitnesses. See Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("A solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences.").

G.

Trial counsel testified he should have objected to the trial judge's charge on accomplice liability because the Applicant's co-defendants all pled guilty to accessory after the fact and the Applicant was on trial for murder.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the jury charge for accomplice liability, or "the hand of one is the hand of all." This Court finds that, given the facts presented at trial, the charge for accomplice liability was appropriate. See State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (finding the law to be charged must be determined from the evidence presented at trial). The South Carolina Supreme Court has stated that under "the hand of one is the hand of all" theory, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999). While the Applicant argues he should not have been charged on accomplice liability because his co-defendants pled guilty to accessory after the fact, this Court finds this argument is unpersuasive because the facts and evidence presented at trial clearly supported a charge of accomplice liability. See State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996) (finding a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence).

H.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules

for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and

2. That the Applicant be remanded to the custody of the Respondent.

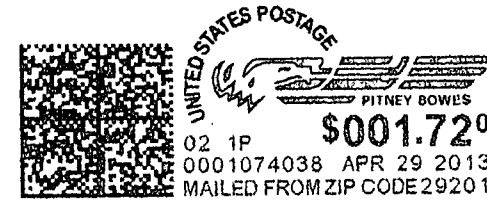
AND IT IS SO ORDERED this 25 day of March, 2013.

R. Lawton McIntosh, Presiding Judge

Anderson, South Carolina.

FILED
2013 MAR 28 A 11:50
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

Law Office of Jeremy A. Thompson
P.O. Box 12891
Columbia, SC 29211



The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211-1330