ALAN WILSON
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June 3, 2013

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

RE: Alti Monte Haskell v. State of South Carolina
2010-CP-01-0175

Dear Mr. Shearouse:

Enclosed are the following:

1. Notice of Appeal
2. Proof of service of the notice of appeal on the Petitioner-Respondent.
3. A copy of the order which is to be challenged on appeal.

With highest regards,

J. Rutledge Johnson
Assistant Attorney General

JRJ/aam
Enclosures

cc: Stephen D. Geoly, Esquire (w/enclosure)
The Honorable Emily Y. McMahan, Clerk of Court of Abbeville County (w/enclosure)
The Honorable David M. Stumbo, Eighth Circuit Solicitor (w/enclosure)
SCCID, Division of Appellate Defense (w/enclosure)
David M. Tatarsky, Esquire, SCDC (w/enclosure
Trisha Allen, Victims Services (w/enclosure)

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

The Honorable Thomas Russo, Circuit Court Judge

Case No. 2010-CP-01-0175

Alti Monte Haskell,.....Respondent,

v.

State of South Carolina,.....Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Thomas Russo's order dated April 26, 2013 and filed May 2, 2013 granting post-conviction relief to the Respondent. The State received notice of entry of the order on May 6, 2013. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
S.C. Bar # 78871

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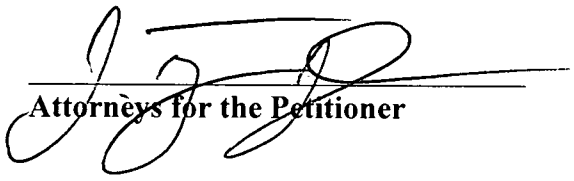
(803) 734-3737

By: 

Attorneys for the Petitioner

Columbia, South Carolina

June 3, 2013

Other counsel of record:

Stephen D. Geoly, Esquire
1225 S. Main St.
Greenwood, South Carolina 29646

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

The Honorable Thomas Russo, Circuit Court Judge

Case No. 2010-CP-01-0175

Alti Monte Haskell,.....Respondent,

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State of South Carolina,.....Petitioner.

PROOF OF SERVICE

I, J. Rutledge Johnson, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Stephen D. Geoly, Esquire
1225 S. Main St.
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served this 3rd day of June, 2013.

J. RUTLEDGE JOHNSON
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Attorney for the Petitioner

IN THE COURT OF COMMON PLEAS
COUNTY OF ~~GREENWOOD~~ ABBEVILLE
EIGHTH JUDICIAL CIRCUIT

	) Case No.: 2010-CP-~~24~~-01-00175
Alti Monte Haskell, # 185392	)
Plaintiff,	) Order
vs.	)
State of South Carolina,	)
Defendant.	)

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2012 MAY 31 P 3:12
EMILY Y MCGAHAN
CLERK OF COURT

TRUE COPY
BY
ABBEVILLE COUNTY CLERK OF COURT

Russo, J.:

This matter comes before the Court by way of an Amended Application for Post-Conviction Relief filed May 30, 2012, which amended the Application for Post-Conviction relief that was originally filed on May 26, 2010. The Respondent made its Return to the original application and requested no additional time to respond to the Amended Application and made no objection to proceeding on the Amended Application. An evidentiary hearing into the matter was convened on June 8, 2010, at the Greenwood County Courthouse. The Applicant was represented by Stephen D. Geoly of the Greenwood County Bar. J. Rutledge Johnson of the South Carolina Attorney General's Office represented the Respondent.

At the hearing, the Applicant testified on his own behalf. James Graham "Tripp" Padgett III, Esq., and Katherine H. Hudgins, Esq., also testified. Additionally, the Applicant's step-grandmother, Mary Ella Thomas, testified on the Applicant's behalf. This Court also had before

it a copy of the Amended Application, return, records of the Abbeville County Clerk of Court, trial transcript, letters from appellate counsel and appellate records.

PROCEDURAL HISTORY

The Abbeville County Grand Jury indicted the Applicant for assault and battery with intent to kill, attempted armed robbery, and possession of a deadly weapon during a violent crime. After a three-day trial before the Honorable Roger Couch, the jury returned guilty verdicts on all charges and the Applicant was sentenced to an aggregate term of 20 years imprisonment. Applicant's appeal to the Court of Appeals was denied, in addition to his subsequent petition for rehearing. Applicant's petition for writ of certiorari to the Supreme Court and motion to file petition of writ of certiorari out of time were denied. This application for post conviction relief followed.

The Applicant alleges that he is being held in custody unlawfully based on ineffective assistance of trial counsel and ineffective assistance of appellate counsel for the following reasons:

1. Counsel's failure to make proper objections and motions during the trial;
2. Counsel's failure to object to the Assistant Solicitor essentially testifying during the trial and pitting his own testimony against witnesses in the process.
3. Applicant claims he was denied a fair trial as a result of police misconduct.
4. Counsel's failure to object to Sgt. Vandiver being allowed to remain in the courtroom.
5. Counsel's failure to object to the State's violation of Rule 5 and Brady.
6. Counsel's improper instructions to the Applicant that he should not take the stand.
7. Counsel's failure to object to the State sending an indictment to the jury that contained language that seemed to indicate the Applicant had a prior record of violent crime.

8. Counsel's failure to cross examine Sgt. Vandiver about his "convenient" change in his testimony upon being recalled to the stand.

9. Appellate counsel's failure to timely file a Writ of Certiorari.

10. Appellate counsel's failure to raise and brief the issue of allowing prior statements of the witnesses to be allowed to be entered into evidence over the objection of trial counsel.

Of the issues raised by Applicant, I find that Applicant has successfully demonstrated ineffective assistance of counsel with regard to issues 1, 2, 7, and 9.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In an action for post-conviction relief, the burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence. Frasier v. State, 351 S.C. 385, 570 S.E.2d 172 (2002) (citing Rule 71.1(e), SCRCP); Butler v. State, 286 S.C. 441, 442 (1985). "To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different." Johnson v. State, 480 S.E.2d 733, 735 (1997)(citing Underwood v. State, 309 S.C. 560 (1992); Simmons v. State, 308 S.C. 481 (1992)). In this way, an ineffective assistance of counsel claim involves a two prong analysis: (1) that counsel's performance was deficient and (2) that counsel's performance prejudiced the Applicant. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Demonstrating error requires a showing that counsel's performance fell below the "reasonableness under professional norms." Id. at 117. In order to show prejudice, the Applicant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson, 480 S.E.2d at 735(citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984)).

Error and Prejudice of Trial Counsel

The Applicant's claim of ineffective assistance of trial counsel is successful on three specific errors: (1) trial counsel's failure to object to testimony violating the Applicant's constitutional right to confront his accusers; (2) trial counsel's failure to object to comments made by the solicitor during direct examination of witnesses where the solicitor pitted his credibility against the witnesses repeatedly; and (3) trial counsel's failure to object to inflammatory and superfluous allegations contained within the indictment that incorrectly stated that Applicant had previously been convicted of a prior violent crime. Reviewing each of these exceptions, I find that counsel's conduct at trial fell below the constitutional standard and prejudiced the Applicant.

The Applicant first alleges that trial counsel's failure to object to hearsay testimony constituted ineffective assistance of counsel in that the introduction of the hearsay testimony deprived him of his constitutional right to confront his accusers. I agree. "The Confrontation Clause of the Sixth Amendment guarantees an accused the right 'to be confronted with the witnesses against him' in a criminal prosecution." State v. Staten, 364 S.C. 7, 16 (Ct. App. 2005)(citing U.S. Const. amend. IV). This fundamental right is applicable to the States under the Fourteenth Amendment and is also guaranteed under the South Carolina Constitution. Staten, 364 S.C. at 16 (citing Pointer v. Texas, 380 U.S. 400 (1965); S.C. Const. art. I, § 14).

In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court held a defendant's Sixth Amendment rights are violated by the admission of hearsay testimony where (1) the declarant is unavailable to testify and (2) the defendant had no prior opportunity to cross-examine the declarant. Id. at 54. The Crawford rule has no application "outside the scope of testimonial hearsay." State v. Ladner, 373 S.C. 103, 113 (2007). Furthermore, unless counsel can articulate a valid reason for employing a certain strategy in his failure to object, such conduct falls below an objective standard of reasonableness. See Dawkins, 346 S.C. 151, 157 (2001); Watson v.

State, 370 S.C. 68, 72 (2006)(citing Stokes v. State, 308 S.C. 546 (1992)); State v. Schumpert, 312 S.C. 502 (1993).

In the case at bar, the only testimony connecting the Applicant to the scene of the crime was a hearsay-within-hearsay statement to which trial counsel never properly objected. Here, Lieutenant John Smith testified to statements made by Torey Brown which incorporated comments made by the victim stating that the Applicant had shot him. While the victim later testified, Brown was never called as a witness and therefore the Applicant was denied his constitutional right to confront Brown. Trial counsel objected to the statements on general hearsay grounds but never raised and therefore never preserved the confrontation issue. Moreover, when the victim finally testified, he never presented any testimony which remotely corroborated Lt. Smith's earlier statement. In fact, the victim testified that he was unaware of who shot him. Again, trial counsel never objected nor did he move to have Lt. Smith's earlier testimony stricken. At the close of the state's case, the only evidence linking the Applicant to the scene of the crime was the hearsay testimony introduced by Lt. Smith.

While the victim in this case did testify at trial, Torey Brown was never called as a witness and was therefore unavailable to testify. Moreover, nothing in the record indicates that the Applicant ever had the opportunity, in this proceeding or any other, to cross examine Torey Brown. Furthermore, no evidence was introduced to demonstrate that the alleged statements repeated by Lt. Smith were non-testimonial. Ladner, 373 S.C. at 111(citing Davis v. Washington, 547 U.S. 813 (2006)). On the contrary, the statements were made by Torey Brown to a law enforcement officer during the course of a criminal investigation. See Staten, 364 S.C. at 20-22 (discussing the testimonial nature of statements made to law enforcement). Cf. State v. Davis, 371 S.C. 170, 177-78 (2006)(stating that hearsay statements made outside of a judicial or investigatory context are

non-testimonial and do not fall under Crawford). In this way, the introduction of this testimony was a violation of Crawford. Trial counsel's failure to object to these statements under Crawford clearly constitutes error.

The Applicant also contests the fact that the only objection raised by trial counsel in response to Lt. Smith's testimony was a general hearsay objection. At trial, the Applicant's general hearsay objection was overruled on the grounds that the statements in question were not introduced for the truth of the matter asserted.

This Court is bound by the Court of Appeals' finding that Torey Brown's statements were admissible under the character evidence exception. With regard to the conclusions of the Court of Appeals, far be it for me to grade the papers of those who grade my papers. On review, the Court of Appeals determined, as a matter of law, that the statements were admissible under a hearsay exception, finding that the statements were introduced as character evidence. It defies logic that the trial court would admit this evidence under the guise of it being offered not for the truth of the matter asserted and the Court of Appeals would deem the same evidence admissible as a character evidence. These statements, however, violate the prohibition set forth in Crawford despite their admissibility under this State's rules of evidence. The Court of Appeals never reached the Crawford issue because trial counsel never specifically objected to it. See State v. Johnson, 363 S.C. 53, 58-59 (2005)(holding that counsel must contemporaneously object in a sufficiently specific manner that brings attention to the exact error or the party is procedurally barred from raising the issue on appeal)(citing State v. Johnson, 324 S.C. 38 (1996); State v. Prioleau, 345 S.C. 404 (2001); State v. Pauling, 322 S.C. 95 (1996)). Instead, the Court of Appeals was left to consider only the general hearsay objection. This further compounds trial counsel's error.

Additionally, it is without a doubt that the introduction of this evidence constitutes prejudice.

Even if admissible as character evidence, the admission of these statements deprived the Applicant of his right to confront his accuser. The right to confront one's accusers is sacrosanct in our criminal justice system. "The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and ensures that convictions will not result from testimony of individuals who cannot be challenged at trial." Staten, 364 S.C. at 16 (citing California v. Green, 399 U.S. 149 (1970); State v. Gillian, 360 S.C. 433 (Ct. App. 2004)). Our State has recognized that Crawford "heightened the awareness of the importance of the confrontation clause in criminal proceedings." State v. Pauling, 371 S.C. 435, 439 (Ct. App. 2006). The right of confrontation has been described by the United States Supreme Court as the "greatest legal engine ever invented for the discovery of truth." Green, 399 U.S. at 158. This case presents a textbook example of the necessity of such a right and the jeopardy presented by its violation.

As already stated, the only evidence tying the Applicant to the crime scene in this case was the hearsay statements presented by Lt. Smith. In light of the other evidence presented by the state, the importance of Lt. Smith's testimony is further amplified. Event the victim's own testimony contradicted the statements of Lt. Smith. It is even more problematic considering that two additional witnesses–discussed below–presented significant credibility issues for the state. Without any other evidence supporting Lt. Smith's statements, the Applicant was critically and unfairly disadvantaged in his inability to confront Torey Brown. See Davis, 371 S.C. at 182 (finding reversible error beyond a reasonable doubt where the Defendant was denied his right to confront his accuser and there was "scant physical evidence . . . connecting [the defendant] to the scene" of the crime). For these reasons, I find that trial counsel's performance was deficient and prejudicial.

The record further reveals that, at trial, at least two critical witnesses recanted their prior statements and testified instead that their earlier statements were the product of coercion. In

response to these witnesses' change in testimony, the prosecutor proceeded to impermissibly interject his own credibility against the witnesses'. In one exchange, the solicitor asked the witness

Q. But did you tell us that last night?

A. No, I didn't, sir.

Q. You didn't tell us that last night?

A. No, sir.

Q. And you never told—is it correct you never—

The transcript demonstrates no less than fourteen instances of such conduct. Nevertheless, even after repeated admonitions by the trial judge, trial counsel never objected to these lines of questioning.

"[I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge [by a prosecutor] are apt to carry much weight against the accused when they should properly carry none." Berger v. United States, 295 U.S. 78, 88 (1935). When a prosecutor comments as to facts not only outside of the record but also to matters within his personal knowledge, he essentially becomes a witness against the defendant and "place[s] his own credibility in issue before the jury." Judge v. State, 539 S.W.2d 340, 345 (Tenn. Court Crim. App. 1976). Here, I must consider the nature of the remarks, the repeated efforts by the solicitor to convey the idea to the jury, and the fact that such comments were directed towards witnesses produced by the state as eye-witnesses. The comments of made by the solicitor were not "an isolated incident in an otherwise properly tried case." State v. Keenan, 66 Ohio St. 3d 402, 410 (1993)(citing Donnelly v. DeChristoforo, 416 U.S. 637, 643-45 (1974)). Rather, the solicitor improperly commented on his own personal knowledge at least fourteen times. In this regard, the solicitor repeatedly put his own credibility behind these statements in an attempt to convey to the jury that the alleged statements had in fact been made by these witnesses. The jury was likely put in a position to determine whom it was to believe: an

officer of the government or the witness. "Because of the special regard in which the [prosecutor] is held by the citizenry, under such circumstances the effect on the jury is likely to be pronounced." Judge, 539 S.W.2d at 345. Moreover, the solicitor sought to introduce evidence for the jury's consideration as to the applicant's guilt and sought to use the status and influence of the government to bolster the believability of such evidence. "When zeal does outrun fairness and the prosecutor makes inappropriate statements there is a multiple effect which tends to tip the scales in favor of the government." Hall v. United States, 419 F.2d 582, 588 (5th Cir. 1969). For this reason, I find that trial counsel's failure to object to this improper line of questioning constitutes error and prejudice.

Finally, Applicant raises an issue concerning specific language in the indictment, which was read to the jury pool by the trial judge. The language of Count Three states that

> CLARENCE A. HARRISON, II, and ALTI MONTE LIVINGSTON HASKELL, aiding, abetting, and assisting one another, did in Abbeville County, state aforesaid, on or about the 10th day of February, 2004, possess a firearm or visibly displayed what appeared to be a firearm, or visibly displayed a knife during the commission of a violent offense, to wit: Assault and Battery with Intent to Kill, and/or Attempted Armed Robbery, or any lesser included violent offense, said offense being defined as a violent offense in Section 16-1-60 of the 1976 Code of Laws of South Carolina, as amended, *and the said defendant(s) was/were convicted of committing or attempting to commit the said violent crime, Assault and Battery with Intent to Kill, and/or Attempted Armed Robbery, or any lesser included violent offense, in violation of Section 16-23-490 of the South Carolina Code of Laws, 1976, as amended.*

(emphasis supplied). This language was read by the trial judge to the newly impaneled jury just before any evidence was presented. Trial counsel never objected.

While the surplusage contained in the indictment is sufficient to allege the crime charge, see State v. Thompson, 305 S.C. 496, 501n.1 (Ct. App. 1991), this language was inflammatory and prejudicial. This language clearly implies that the Applicant had already been convicted of the prior charges of the indictment. Additionally, having been read by a trial judge, it likely impressed upon

the jury, prior to the admission of evidence, that the Applicant had committed the crimes for which he was standing trial. Trial counsel's failure to object to this reading was error and prejudice.

Error and Prejudice of Appellate Counsel

Following trial, and unless the defendant intelligently waives appeal, counsel must either initiate an appeal or comply with the procedures set forth in Anders v. California, 386 U.S. 738 (1967). Turner, 380 S.C. at 224. On appeal, "[a] defendant is constitutionally entitled to the effective assistance of appellate counsel." Thrift v. State, 302 S.C. 535, 539 (1990)(citing Evitts v. Lucey, 469 U.S. 387 (1985)). "[W]hen counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim." Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000). See also Johnson v. Champion, 288 F.3d 1215, 1230 (10th Cir. 2002)("[T]he negligent failure to perfect an appeal 'amount[s] to a complete denial of assistance of counsel during a critical stage' of the criminal proceeding." (citations omitted)); McHale v. United States, 175 F.3d 115, 119 (2d Cir. 1999); Jones v. Crowley, 28 F.3d 1067, 1073 (10th Cir. 1994)(holding that prejudice is presumed where counsel filed a notice of appeal but failed to perfect the direct appeal).

In the present case, appellate counsel timely filed and perfected an appeal with the Court of Appeals. The record is clear that no appeal to the Supreme Court was filed after Applicant's unsuccessful appeal to the Court of Appeals. The record makes plain that appellate counsel attempted to remedy her dereliction by filing a motion to file the petition for certiorari out of time, which was also unsuccessful. Appellate counsel admits in her brief

> [c]ounsel failed to timely file the petition for writ of certiorari and only learned on October 21, 2009, that the petition for rehearing had been denied by the Court of Appeals. The Court of Appeals denied rehearing on May 28, 2009, and the remittitur was sent on July 28, 2009. While the Court of Appeals properly provided notice to counsel, due to an administrative oversight within the office of Appellate Defense, counsel did not receive a copy of the order and the order was not entered into the

office data base and not properly calendared. Counsel takes full responsibility for the error . . . .

By her own admission, appellate counsel's failure to timely file deprived the Applicant his right to appeal his case to the Supreme Court. I find that this omission fell below the reasonable standard of professional norms.

CONCLUSION

This Court finds the Applicant has satisfied the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant presented specific and compelling evidence that counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has satisfied the second prong of the Strickland test – that he was prejudiced by counsels' performance. This Court concludes the Applicant has met his burden of proving counsel failed to render reasonably effective assistance.

Based on the testimony of the witnesses, a careful review of the record and all of the foregoing, the Court finds and concludes that the Applicant has met his burden in establishing that the Applicant is entitled to post-conviction relief. Although counsel were certainly well-intentioned, counsels' representations of the Applicant at trial and on appeal were deficient under accepted professional norms. For the foregoing reasons, this application for post-conviction relief is granted.

The other claims in the application and supplement to application which are not specifically addressed above are without merit.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Applicant has met his burden in establishing that he is entitled to post-conviction relief and the same is hereby granted. The conviction and sentence in this case are hereby vacated.

Applicant is ordered remanded to the custody of the Abbeville County Detention Center

pending further proceedings on this case.

IT IS SO ORDERED.

Signed this 26th day of April, 2013
At Lexington, South Carolina

Honorable Thomas Russo
Circuit Court Judge