

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable Brooks P. Goldsmith, Circuit Court Judge
Case No. 2010-CP-42-4049

RECEIVED

JUN 10 2013

S.C. Supreme Court

NATHANIEL TEAMER,

Respondent,


v.

STATE OF SOUTH CAROLINA,

Petitioner.

NOTICE OF APPEAL

The State of South Carolina hereby appeals from the Order of the Honorable Brooks P. Goldsmith, Presiding Judge for the Seventh Judicial Circuit, dated February 8, 2013, and received by the State on February 11, 2013, in the matter of Nathaniel Teamer vs. State of South Carolina, Case No. 2010-CP-42-4049. The Amended Order denying the State's Motion to Alter or Amend was signed on May 6, 2013 and received by the State on May 13, 2013.



Suzanne H. White, Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3741

June 10, 2013.

OTHER COUNSEL OF RECORD: Tricia A. Blanchette, Esquire
Jeremy A. Thompson, Esquire

THE STATE OF SOUTH CAROLINA
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CERTIORARI TO SPARTANBURG COUNTY
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The Honorable Brooks P. Goldsmith, Circuit Court Judge
Case No. 2010-CP-42-4049

NATHANIEL TEAMER,

Respondent,

v.

STATE OF SOUTH CAROLINA,


Petitioner.

PROOF OF SERVICE

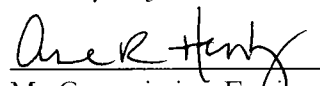
I certify that I have served the Notice of Appeal on Respondent by depositing copies of it in the United States Mail, postage prepaid, on June 10, 2013, to Tricia A. Blanchette and Jeremy A. Thompson, his attorneys of record, to the addresses below.

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
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Columbia, South Carolina 29211

Jeremy A. Thompson, Esquire
Law Office of Jeremy A. Thompson, LLC
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Columbia, South Carolina 29211


Suzanne H. White
Assistant Attorney General

SWORN to before me this
10th day of June, 2013.


My Commission Expires: 7/18/2017
Notary Public for South Carolina.

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2591
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M. Hope Blackley
Clerk of Court

May 13, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Nathaniel Kasper
205309

Applicant

7TH JUDICIAL CIRCUIT

CASE # *2010CP12-4049*

Stee
VS

Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the *Order*
In this action dated *May 13, 2013* on *May 13, 2013*

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Gen Miller

Suzanne White

Nathaniel Kasper

Traci Blanchette + Jerry Thompson

May 13, 2013
(Date)

Rebecca Sey
(Signature)

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Nathaniel Teamer, #285309,)
Applicant,)
v.)
)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS

CASE NO: 2010-CP-42-4049

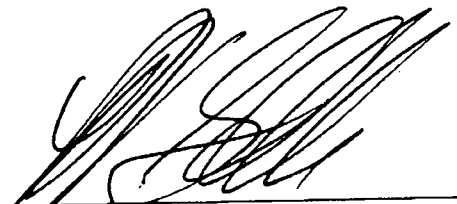
ORDER

This matter comes before the Court upon Respondent's Motion to Reconsider the Court's Order, filed February 8, 2013, that granted Applicant's Application for Post Conviction Relief.

After considering the arguments set for in memoranda submitted by each party's counsel, this Court finds there is no basis for granting the motion, and therefore, denies Respondent's motion.

IT IS ORDERED, ADJUDGED AND DECREED that the Respondent's Motion to Reconsider the Court's Order is denied.

IT IS SO ORDERED.



Brooks P. Goldsmith, Judge

Winnsboro, South Carolina
May 6, 2013

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M. HOPE BLACKLEY

Spartanburg County

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M. Hope Blackley
Clerk of Court

February 11, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Nathaniel Travers
285309
Applicant

CASE # 2010CP42-4049

Stee
vs
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Ord. cert. Application for Post Conviction Relief
In this action dated 2-8-2013 on 2-11-13

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Ann Miller

Suzanne White

Nathaniel Travers

Tricia Blanchette Jones Thompson

2-11-13
(Date)

Cecilia Seg
(Signature)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Nathaniel Teamer, #285309,)
 Applicant,)
 v.)
)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2010-CP-42-4049

ORDER GRANTING APPLICATION
 FOR POST CONVICTION RELIEF

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I. PROCEDURAL HISTORY

A. Post Conviction Relief Procedural History

This matter comes before the Court by way of an Application for Post Conviction Relief (PCR) filed in Spartanburg County on August 2, 2010. On February 16, 2011, the State submitted a Return. On May 17, 2011, Applicant, through counsel, filed a Motion for Discovery in Post Conviction Relief. A Motion Hearing was held on June 15, 2011 at the Spartanburg County Courthouse in front of the Honorable Roger L. Couch. Applicant was present and represented by Tricia A. Blanchette, Esquire, and Jeremy A. Thompson, Esquire. Respondent was represented by Suzanne H. White, Assistant Attorney General. On July 6, 2011, an Order Authorizing Discovery was entered.

On October 8, 2012, Applicant, through counsel, submitted an Amendment to Application for Post Conviction Relief, which added the following specific allegations to his original allegation of ineffective assistance of trial and appellate counsel:

1. Ineffective assistance of trial counsel for failure to prepare with Applicant by going over the discovery materials and fully discussing trial strategy; failure to investigate the witnesses and evidence put forth by the State.
2. Ineffective assistance of trial counsel for failure to make a pre-trial motion regarding the t-shirt worn by the murder victim's family in the courtroom. Failure to request to have the jury questioned regarding their exposure to it.

3. Ineffective assistance of trial counsel for making a motion to sever which allowed the State to stream line the case against Applicant, eliminated defenses and allowed evidence from charges in 1st trial to be used against Applicant in 2nd trial. Ineffective assistance of counsel for failure to be prepared to proceed after motion to sever was granted and to properly preserve the issue for appellate review.
4. Ineffective assistance of trial counsel for failure to discuss the letters admitted into evidence with Applicant prior to trial. Ineffective assistance of trial counsel for providing false information to the court regarding the recipient of the letters, stipulating to the authenticity of the letters, making an untimely objection regarding the recipient and/or foundation for the letters. Ineffective assistance of trial counsel for failure to use the letters to explore the defense regarding the underlying DSS case.
5. Ineffective assistance of trial counsel regarding the phone call evidence introduced and relied upon by the State at trial, specifically:
 - a. Failure to effectively raise a pre-trial argument regarding the logistics of Applicant accessing the phone at the jail.
 - b. Failure to obtain records and/or testimony regarding Applicant's location and access to the phone at the jail.
 - c. Failure to object to the introduction of the call records at trial.
 - d. Failure to object to Erica Gray's identification of Applicant's voice.
 - e. Failure to have a clear strategy regarding redactions and/or the use of the entire phone conversations.
6. Ineffective assistance of trial counsel for failure to properly cross-examine the victims that testified and present Applicant's defense regarding the underlying DSS case.
7. Ineffective assistance of trial counsel regarding the handling of the testimony and evidence elicited from law enforcement witnesses, specifically:
 - a. Failure to object to the introduction of the video evidence.
 - b. Failure to file a motion and/or object concerning the destruction of the beer can, which was taken into evidence.
 - c. Failure to properly address the testimony and/or evidence regarding Applicant's usage of his headlights.
 - d. Failure to object to opinion testimony offered by law enforcement.

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8. Ineffective assistance of trial counsel for failure to address Applicant's filed Motion to Dismiss the Felony DUI charge. Failure to raise all viable defenses to the Felony DUI charge.
9. Ineffective assistance of trial counsel for failure to effectively argue for introduction of the victim's (James Young) toxicology results. Failure to utilize the testimony of James Young to further expose inconsistencies in the testimony of the law enforcement officers.
10. Ineffective assistance of trial counsel for failure to advise Applicant regarding the introduction and use of the drug evidence. Failure to make objections: 1) regarding the searches of the Chevy Caprice that resulted in the location of the drug evidence, 2) regarding chain of custody, and 3) regarding the use of an uncharged "bad act."
11. Ineffective assistance of trial counsel for failure to make a directed verdict motion on the burglary and armed robbery charges.
12. Ineffective assistance of trial counsel for failure to properly prepare and utilize Applicant's alibi witnesses.
13. Ineffective assistance of trial counsel for failure to object to the State's closing argument, i.e. bolstering.
14. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal, including but not limited to pre-trial motions, trial objections and rulings on Applicant's evidence.
15. Pursuant to Rule 15(b), SCRCF, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

An evidentiary hearing into the matter was held on October 29, 2012 at the

Spartanburg County Courthouse in front of the Honorable Brooks P. Goldsmith.

Applicant was present at the hearing and was represented by Tricia A. Blanchette,

Esquire, and Jeremy Thompson, Esquire. The State was represented by Suzanne H.

White, Assistant Attorney General. At the beginning of the hearing, counsel added the following amendment, which was not opposed by the State:

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1. Trial counsel failed to object to the trial judge's statements to the jury that "your sole objective is to simply reach the truth of the matter" and "simply give both the state and the defendant a fair and impartial trial."

During the hearing, Applicant testified on his own behalf. Applicant's counsel also called Latoya McCravy and Joshua Shultz, Esquire to the stand. Applicant's counsel introduced twenty exhibits. The parties agreed that the trial transcript from State v. Nathaniel Teamer, Docket No.: 2007-GS-42-1407 & 1408 would be incorporated in the record and provided to the Court and a map of the area in question would be provided for the Court's reference. This Court was also provided a copy of the Application, the Respondent's Return, Applicant's Amendment, the records of the Spartanburg County Clerk of Court concerning the subject conviction, the trial transcript, and Applicant's records from the South Carolina Department of Corrections.

At the close of the hearing, the Honorable Brooks P. Goldsmith, took the matter under advisement. Thereafter, the Honorable Brooks P. Goldsmith requested that Applicant's counsel submit a proposed Order, from which this Order follows.

B. General Sessions Procedural History

The Applicant is presently confined in the South Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. During the May 2006 term of the Spartanburg County Grand Jury, Applicant was indicted for Burglary, First Degree (Indictment No.: 2006-GS-42-1719), Armed Robbery (2006-GS-42-1720), Felony Driving Under the Influence, Great Bodily Injury (2006-GS-42-1732), and Failure to Stop (2006-GS-42-1733). On September 12, 2007, a jury trial was conducted in Spartanburg County in front of the Honorable J. Derham Cole. Applicant was represented by Joshua Schultz, Esquire. The jury returned a verdict of not guilty on

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the Armed Robbery charge and guilty on the remaining charges. On February 2, 2007, the Honorable J. Derham Cole sentenced Applicant to confinement for concurrent terms of thirty (30) years for Burglary, fifteen (15) years for Felony DUI, and ten (10) years for Failure to Stop.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Katherine H. Hudgins, South Carolina Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Teamer, Op. No. 2010-UP-117 (S.C. Ct. App. filed February 11, 2010). The Remittitur was issued on July 13, 2010. .

II. APPLICABLE LAW

In a PCR action, 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, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC).

For Applicant to meet his burden of proof and prevail on his allegations of ineffective assistance of trial counsel, the two-prong test applicable to such a claim must be met. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2065 (1984). The first prong analyzes whether counsel failed to render reasonably effective assistance under the prevailing professional norms. Id. The second prong places the burden on Applicant to show that but for counsel's deficient performance the outcome would have been different. Id. The second prong is known as the "prejudice" requirement. This requirement is met if counsel's actions or inactions resulted in prejudice to Applicant. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 539 (1995).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the entire record and has heard the testimony and arguments as presented at the hearing. This Court has also had the opportunity to observe each witness and pass upon his or her credibility. This Court has weighed the testimony accordingly. This Court finds the testimony of the evidentiary hearing witnesses to be credible. Set forth below are the relevant findings of fact and conclusions of law on each issue raised by Applicant as required by S.C. Code Ann. § 17-27-80 (2003).

A. Ineffective Assistance of Trial Counsel

1. Ineffective assistance of trial counsel for failure to prepare with Applicant by going over the discovery materials and fully discussing trial strategy; failure to investigate the witnesses and evidence put forth by the State.

At the evidentiary hearing, Applicant admitted that he reviewed the discovery materials with counsel prior to trial, and trial counsel agreed. Trial counsel explained that he utilized a private investigator. Trial counsel explained that the defense and/or strategy regarding the DUI charge was that the Applicant was not materially impaired based upon his Blood Alcohol Content and testimony from an officer that Applicant was not driving erratically. Counsel testified that the defense and/or strategy on the charges relating to the Grays' residence was to focus on the inconsistent statements given by the victims and the fact that they failed to identify the Applicant in their initial statements. Counsel also testified that he had numerous meetings with the Applicant, received a great deal of correspondence from the Applicant, and had many conversations via telephone with the Applicant.

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court of South Carolina reversed the lower court and granted PCR relief when counsel failed to

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COUNSEL



conduct a reasonable investigation. The Court held that a reasonable investigation includes interviewing witnesses and conducting an independent investigation of the facts of the case. Lounds, 380 S.C. at 460, 670 S.E.2d at 649, See Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). This Court finds that trial counsel met with Applicant numerous times, fully reviewed the discovery, and utilized an investigator to interview witnesses and other matters.

Strickland set the standard for evaluating counsel's performance. The courts do not presume ineffective assistance of counsel from a lack of criminal trial experience. Yohey v. Collins, 985 F.2d 222 (5th Cir. 1993); United States v. Pitino, 887 F.2d 42, 48 (4th Cir. 1989). As the Fifth Circuit Court of Appeals noted:

Whether the defendant has been afforded his right to counsel depends on whether the attorney is reasonably likely to render and does render reasonably effective assistance, not on whether counsel has an extensive background in criminal defense work.

United States v. Lewis, 786 F.2d 1278, 1281 (5th Cir. 1986).

Although Counsel testified that he had previously tried only one armed robbery and burglary case prior to the Applicant's case, this Court finds that trial counsel was not deficient because he prepared for trial by going over the discovery materials with the Applicant, fully discussing trial strategy and investigating the witnesses and evidence put forth by the State. Therefore, this claim must fail on the first prong of the Strickland analysis.

2. Ineffective assistance of trial counsel for failure to make a pre-trial motion regarding the t-shirt worn by the murder victim's family in the courtroom. Failure to request to have the jury questioned regarding their exposure to it.

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At the evidentiary hearing, Applicant called Latoya McCravy to the stand. Ms. McCravy recalled seeing a victim's family member in hallway outside the courtroom wearing a t-shirt with images related to Applicant's charge for murder.¹ Ms. McCravy was unsure if the t-shirt was seen by the jury members, but she did see the family member in the courtroom when the jury was present.

While on the stand, Applicant explained that trial counsel failed to bring the issue involving the inflammatory and prejudicial t-shirt to the trial court's attention. When asked, trial counsel could not recall the t-shirt and conceded that he did not make a motion regarding it because he said it was never brought to his attention.

This Court finds that it would require conjecture to find that trial counsel was ineffective for failing to make a pre-trial motion regarding the t-shirt and/or have the jury questioned regarding it. Clearly, Ms. McCravy nor the Applicant could affirm that the jury actually was exposed to the t-shirt and this Court is hesitant to rely upon conjecture. Therefore, this claim must fail under the first prong of the Strickland analysis.

3. Ineffective assistance of trial counsel for making a motion to sever, which allowed the State to stream line the case against Applicant, eliminated defenses and allowed evidence from charges in first trial to be used against Applicant in the second trial. Ineffective assistance of counsel for failure to be prepared to proceed after motion to sever was granted and to properly preserve the issue for appellate review.

At the beginning of Applicant's trial, counsel made a motion to sever the indictments on the basis that the indictments stemmed from three separate incidents. Burglary Transcript p. 11. The trial court held that the murder and burglary charges may

¹ When the case was called for trial, Applicant was also going to trial on charges for murder and assault and battery with intent to kill (Indictment No.: 2007-GS-42-1407 & 1408). After a successful severance motion by defense counsel, the charges for murder and assault and battery with intent to kill were severed from the

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not be tried together, but the DUI and traffic offenses could be tried with either charge. Burglary Transcript p. 28. Following the court's ruling, trial counsel asked for more time to prepare, and the court granted a continuance until the next morning. Burglary Transcript p. 43.

Throughout the course of his lengthy evidentiary hearing testimony, Applicant repeatedly addressed his allegation that counsel was ineffective for making a motion to sever, which allowed the State to stream line the case, eliminated defenses and allowed evidence from charges in first trial to be used against him in at his second trial. Applicant went through the timeline of events and explained that it was detrimental to his defense when the State did not have to reconcile all the events that he supposedly took part in the night in question. Applicant referenced counsel's closing argument regarding "two Charlies" and explained how the severance impaired that argument. Burglary Transcript p. 421. Additionally, Applicant relied upon the murder transcript and explained how the DUI and traffic offenses were used against him at the subsequent murder trial. Applicant also addressed counsel's request for a continuance and alleged that counsel was ineffective when he was not prepared to proceed after his motion to sever was granted. Finally, Applicant explained that the severance issue was raised on direct appeal, but counsel failed to obtain a ruling on his argument that the charges stemmed from three separate incidents and should be tried as such, which resulted in limiting how the issue was addressed on direct appeal.

Trial counsel testified that he made the motion to sever because he believed the prejudice of trying all charges together was greater to the Applicant because the jury

remaining charges and tried on January 14-16, 2008. A copy of the transcript from that trial was incorporated in the record before this Court at the evidentiary hearing.

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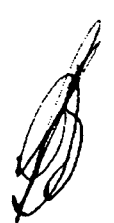
could assume that if Applicant committed one of the alleged charges then he committed all of the charges. So Counsel testified he made the strategic decision to make the motion to sever. Counsel also testified that he was fully aware that the State was planning to introduce the Felony DUI and Failure to Stop charges at the murder trial. He testified that he anticipated the State would elect to try the murder first, so he prepared for that possibility, which included his scripted opening argument; however, he was also aware that the burglary could be tried first. He recalled that he was fully prepared to proceed to trial on any of the charges, but wanted the continuance to rewrite his opening argument.

Upon review of the trial transcripts, the appellate records, and the testimony at the evidentiary hearing, this Court finds that trial counsel was not ineffective for requesting and obtaining a severance. This Court is not convinced that Applicant would have received a more favorable outcome if all the charges were tried together.

Additionally, this Court finds that trial counsel provided an adequate and reasonable explanation for his continuance request. Furthermore, this Court cannot find that trial counsel was ineffective in his preservation of the issue for appellate review. Clearly, the issue was raised and ruled upon by the Court of Appeals and no prejudice was suffered by how trial counsel preserved the issue. Therefore, this claim must fail under both prongs of the Strickland analysis.

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4. Ineffective assistance of trial counsel for failure to discuss the letters admitted into evidence with Applicant prior to trial. Ineffective assistance of trial counsel for providing false information to the court regarding the recipient of the letters, stipulating to the authenticity of the letters, making an untimely objection regarding the recipient and/or foundation for the letters. Ineffective



assistance of trial counsel for failure to use the letters to explore the defense regarding the underlying DSS case.

During pretrial motions, counsel argued that the letters the State planned to introduce were more prejudicial than probative and while they could be considered relevant, the letters would lead to a confusion of the issues. Burglary Transcript p. 32, Ins. 2-17. Trial counsel informed the court that the letters were written by Applicant and turned over to law enforcement by Erica Gray. Burglary Transcript p. 33, Ins. 5-6, 16-17. When directly asked by the court, trial counsel stated that the recipient of the letters provided them to police. Burglary Transcript p. 33, Ins. 21-23. The State explained that the letters established motive regarding Donald Martin. Burglary Transcript p. 34, Ins. 19-25. The State affirmed that the recipient planned to introduce the letters and lay the proper foundation. Burglary Transcript p. 36, Ins. 11-23. Thereafter, the trial court ruled that selected portions of the letters would be admitted over defense counsel's objection. Burglary Transcript p. 96, Ins. 22-23.

While on the stand at trial, Erica Gray identified Applicant's handwriting in the letters and acknowledged that the letters were written to her sister Chrissy (A.K.A. Natalie) and teenage daughter Iesha, who was living with Chrissy at the time. Burglary Transcript pp. 152-3. After which, defense counsel entered a contemporaneous objection since the letters were written to two people that had not testified. Burglary Transcript p. 153, In. 7. The objection was overruled. Burglary Transcript p. 153, In. 14.

At the evidentiary hearing, Applicant testified that trial counsel failed to review the letters or discovery related to the letters with him prior to trial. Applicant's Exhibit #1. Counsel testified that he did discuss the letters delivered to the police from Erica Gray with the Applicant, but he did not recall the timing of his receipt of those letters

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from the State and their discussion and he did not recall reviewing them with Applicant in person. As a result of his alleged lack of preparation, Applicant explained that counsel provided false information to the court regarding the recipient of the letters and made an untimely objection after realizing that he was incorrect about the recipient of the letters. When asked, trial counsel acknowledged that Erica Gray was not the initial recipient of the letters ; however, Erica was the person that had obtained the letters and turned them over to the State. Trial counsel further explained that he did not believe that he could have kept the letters out, because the State had Natalie (Chrissy) listed as a potential State witness and could easily have called her to resolve the issue.

Despite counsel's failure to provide the court with accurate information regarding the recipient during his pretrial motion, this Court finds that trial counsel's failure does not amount to a deficiency that affected the outcome of Applicant's trial. This Court is not aware of any chain of custody issues related to the letters that could have been raised. Furthermore, this Court agrees with trial counsel and finds that even if counsel would have provided the trial court with the names of the actual recipients of the letters, the State could have called the actual recipients and cured the problem. Therefore, this claim must fail under the second prong of the Strickland analysis.

Throughout the course of his testimony, Applicant alleged that trial counsel was ineffective for failing to utilize his defense involving an underlying DSS case with the Gray family. Applicant identified and counsel admitted police reports and DSS documents that Applicant relied upon to support his claim. Applicant's Exhibit #7-8. Applicant explained that he was related to the Gray family and a family feud resulted from a DSS case involving Iesha Gray. Additionally, Applicant explained that the

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outcome of his trial. Therefore, this claim, as it relates to the letters and as stated in issue #6 below, must fail under the Strickland analysis.

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5. Ineffective assistance of trial counsel regarding the phone call evidence introduced and relied upon by the State at trial.

During pretrial motions, trial counsel argued that the phone call evidence should not be admitted under the same logic as the letters – relevancy, prejudice, and potential confusion for the jury. Burglary Transcript p. 37. He asked that the calls be introduced in their entirety if the court ruled the phone calls were admissible. Burglary Transcript p. 37. The court held that the phone call evidence was relevant and admissible. Burglary Transcript p. 40, Ins. 15-16.

By way of his amendment and at the evidentiary hearing, Applicant alleged that trial counsel was ineffective regarding the phone call evidence since he failed to effectively raise a pre-trial argument regarding the logistics of Applicant accessing the phone at the jail, failed to obtain records and/or testimony regarding Applicant's location and access to the phone at the jail, failed to object to the introduction of the call records at trial, failed to object to Erica Gray's identification of Applicant's voice, and failed to have a clear strategy regarding redactions and/or the use of the entire phone conversations. In support of his allegations, Applicant explained that he attempted to obtain records regarding his pod location and rotation time from the jail to show that he could not have made the calls in question, but the records were no longer available. Exhibit #3. He explained that counsel failed to go over the phone calls with him and obtain the information from the jail that could have been used in a pre-trial motion or in his cross-examination of Captain Jones.

Counsel testified that he reviewed the phone calls alleged to have been made by the Applicant while in the Detention Center. As it relates to Applicant's Exhibit 2,

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M. J. LAFFLEY



Counsel stated that his private investigator had made notes regarding the information received about the Applicant making phone calls and they were not able to determine if the Applicant was able to make calls. When asked, counsel admitted that he did not review the phone calls with Applicant since he got them from the State right before trial. Counsel also stood by his request for no redactions to the phone calls because he stated that the conversations were hard to understand and he thought that the jury had just as difficult a time of trying to understand what was being said. Counsel testified that he did not think that the calls either harmed or helped the case.

Based upon the transcript, evidentiary hearing testimony and exhibits, this Court finds that trial counsel was not ineffective as was alleged by Applicant. The Applicant failed to meet his burden of proof in establishing that had Counsel done any additional investigation or made any additional motions, that the outcome of either the pre-trial hearing or trial would have been different. "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). . Additionally, this Court finds that Counsel cross-examined the State's witnesses regarding the phone calls and Applicant has failed to show how counsel's performance amounted to ineffective assistance.

Therefore, this claim must fail under the first prong of the Strickland analysis.

6. Ineffective assistance of trial counsel for failure to properly cross-examine the victims that testified and present Applicant's defense regarding the underlying DSS case.

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As to the portion of Applicant's allegation regarding the underlying DSS case, this Court finds that this claim must fail as is fully discussed in issue #4 above. This Court also finds that Applicant's claim that trial counsel should have more fully cross-examined the witnesses from the residence regarding their statements must fail since the record reflects that counsel conducted cross-examination on the statements. The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not present any testimony showing the witnesses' answers at trial would have been different

Despite counsel's admission that he was familiar with, but lacked experience in admitting prior inconsistent statements, this Court finds that counsel adequately cross-examined the witnesses on their prior inconsistent statements.

However, this Court does find that trial counsel rendered ineffective assistance when he failed to ask Erica Gray, a lead witness for the burglary and armed robbery charges, about her prior conviction for impeachment purposes. During cross-examination of Erica Gray, trial counsel asked her if she had a criminal record. In response, Erica Gray volunteered information about a drug charge from "about the year '97." Burglary Transcript p. 143. At the evidentiary hearing, Counsel testified that he reviewed Erica Gray's NCIC report and although it indicated both the drug charge and the false

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(2) The point in time of the conviction and the witness's subsequent history;

(3) The similarity of the past crime and the charged crime;

(4) The importance of the defendant's testimony; and

(5) The centrality of the credibility issue.

Id. at 627, 525 S.E.2d at 248. After the trial court conducts the balancing test, the judge must make a determination and articulate, on the record, the specific reasons for his ruling. Id. Specifically, the trial judge must articulate why the probative value of the conviction outweighs its prejudicial effect. State v. Johnson, 363 S.C. 53, 59-60, 609 S.E.2d 520 (2005). As it has been recognized that these factors are not exclusive, it must be noted that Colf involved the impeachment of a defendant, so some of these factors would need to be adjusted by the trial court in examining this conviction involving a non-defendant. See State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012).

Here, trial counsel did not provide notice to the State nor did he attempt to impeach Erica Gray with her prior conviction for giving false information to law enforcement. Counsel admitted that he recalled seeing a false information charge on her criminal history, but since the report did not indicate a disposition of the charge, he did not believe it could be used for impeachment purposes at trial. As a result of counsel's failure to act, the trial court did not conduct a balancing test to determine if the conviction, which fell just outside the ten year time limit, could be admitted for impeachment purposes. Based upon record and the above stated balancing test, this Court finds that the false information conviction was likely admissible as it was highly probative to Applicant's defense that Erica Gray was not trustworthy.



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Looking to the Colf factors, this Court finds that the first factor, the impeachment value of the prior crime, weighs in favor of admissibility because the prior conviction is a "crime of dishonesty or untruthfulness that directly impact[s] the witness's veracity." State v. Black, supra, 400 S.C. at 21, 732 S.E.2d at 886. The second factor, the point in time of the conviction and the witness's subsequent history, also weighs in favor of admissibility because Erica Gray had been convicted of, and impeached with, a prior conviction that fell within the ten-year time limit. Cf. Id. ("[T]here is no evidence the witness has been convicted of any additional crimes since his release from confinement some fourteen years prior to trial"). The third factor, the similarity of the past crime and the charged crime, "is of no consequence here" because Erica Gray was not the defendant in this case. Id. The fourth and fifth factors, the importance of the witness's testimony and the centrality of the credibility issue, weigh heavily in favor of admissibility as Erica Gray's testimony was one of the most damaging aspects of the State's case. Since Applicant did not take the stand, his entire defense hinged on counsel's ability to effectively cross-examine the State's witnesses and, particularly, the credibility of Erica Gray. Not only did the State rely upon Erica Gray's testimony identifying Applicant as the perpetrator of the home invasion, but the State also used her to identify Applicant's handwriting and voice.. Accordingly, this Court finds that the probative value of the false information conviction substantially outweighed its prejudicial effect, and that defense counsel's performance was deficient in failing to utilize impeach Erica Gray with this conviction at trial.

Furthermore, for many of the same reasons, this Court finds that defense counsel's failure to impeach Erica Gray with the false information conviction prejudiced

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Applicant. Erica Gray was an important witness against Applicant. As discussed above, evidence that she had been convicted of a crime of dishonesty would have directly reduced her credibility and would have bolstered the Applicant's defense that he did not commit the burglary. As a result, this Court finds that trial counsel's error was prejudicial to Applicant because impeachment of Erica Gray with this conviction would have directly affected the outcome of the trial.

7. Ineffective assistance of trial counsel regarding the handling of the testimony and evidence elicited from law enforcement witnesses.

At trial, Corporal Darity of the South Carolina Highway Patrol, testified that he responded to the accident involving a blue Caprice and Chevy truck. He confirmed that the blue Caprice was driven by Applicant and the Chevy truck was driven by James Young. Burglary Transcript p. 257. He concluded that the accident was caused by Applicant crossing the center line. Burglary Transcript p. 258, lns. 1-5. During cross-examination, he made the following admissions: 1) He did not note the cause of the accident in his report; 2) His report made no mention of Applicant crossing the center line; 3) No measurement or reconstruction was conducted at the scene; 4) The information regarding the center line came from the observations of another deputy. Burglary Transcript, pp. 262-3, 265-6, 270.

Officer St. Louis testified that he began following the blue Caprice when it pulled out in front of him with no lights. Burglary Transcript p. 314. He turned on his video and saw the driver throw out a beer can. Burglary Transcript p. 314. He initiated his blue lights, the driver drove through a stop sign, and he had to stop his pursuit and issue a BOLO ("be on the lookout") per policy. Burglary Transcript pp. 314-5. The video was

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admitted and played without objection. Burglary Transcript p. 316. On cross-examination, he explained that the beer can was taken into evidence but later destroyed. Burglary Transcript pp. 322-23.

Officer Evett testified that he received the BOLO, saw the Caprice and began pursuing it. Burglary Transcript p. 331. He recalled that the lights were off and the Caprice was speeding, which was very unsafe. Burglary Transcript pp. 332-2. He explained how he followed the vehicle without his blue lights on. Burglary Transcript p. 334. He recalled seeing another set of headlights and a shower of sparks. Burglary Transcript p. 336. He concluded that the accident was Applicant's fault since he was driving without his headlights, but he could not see if he crossed the center line. Burglary p. 340, Ins. 16-25. He admitted that he failed to turn on his in car camera and it was error. Burglary Transcript pp. 356-7. On cross-examination, he admitted that Applicant was following the rules of the road, except for no headlights, and was not driving erratically. Burglary Transcript p. 348-9. He also admitted that Applicant never left the roadway nor did he swerve or drift. Burglary Transcript p. 358, Ins. 1-14.

By way of his amendment and at the evidentiary hearing, Applicant alleged that trial counsel was ineffective when he failed to object to the introduction of the video evidence from the traffic charges, failed to file a motion and/or object concerning the destruction of the beer can, failed to properly address the testimony and/or evidence regarding Applicant's usage of his headlights, and failed to object to opinion testimony offered by law enforcement. Specifically, Applicant testified that counsel should have reviewed Corporal Darity's report with him and objected to his opinion testimony that Applicant caused the accident by crossing the center line and Officer Evett's opinion

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counsel was ineffective and Applicant was prejudiced as a result. Due to counsel's cross-examination of the law enforcement officers, which addressed a number of the issues raised by Applicant, this Court cannot find that trial counsel was ineffective. Again, as noted earlier, the nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d at 1321; United States v. Rodriguez, 53 F.3d at 1449. This Court finds that the Applicant failed to meet his burden of proving that had Counsel made different decisions regarding questions or objections, that the testimony and trial outcome would have been different. Therefore, this Court finds that this claim must fail under the first prong of the Strickland analysis.

8. Ineffective assistance of trial counsel for failure to address Applicant's filed Motion to Dismiss the Felony DUI charge. Failure to raise all viable defenses to the Felony DUI charge.

As noted in the discussion of Issue #7 above, Officer Evett testified at trial that he forgot to turn on the on-board camera prior to initiating the pursuit of Applicant.

Burglary Transcript pp. 356-357. At the evidentiary hearing, Applicant testified that he believed that counsel should have moved to dismiss Applicant's Felony DUI charge because of Officer Evett's failure to videotape his conduct at the incident site pursuant S.C. Code Ann. §56-5-2953. Counsel testified at the evidentiary hearing that he defended many DUI cases in his practice and that, in retrospect, he believes that he should have made a motion to dismiss the charge for the lack of a videotape. Counsel, however, testified that the law pertaining to §56-5-2953 was unclear at the time of the trial, and there are exceptions to the rule that requires a videotape or Affidavit when there are Felony DUI charges as a result of an accident.

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This Court finds that counsel was ineffective with regard to this issue. Officer Evett clearly failed to satisfy the requirements of §56-5-2953 because he did not record Applicant's conduct at the incident site. S.C. Code Ann. §56-5-2953(A)(1)(a)(i) (mandating that the video recording must "not begin later than the activation of the officer's blue lights"); see also S.C. Code Ann. §56-5-2953(A)(1)(a)(iii) (requiring that the video recording "include ... a probable cause determination in that the person violated §56-5-2945"). Furthermore, there is no "forgetting to turn on the camera" exception which would save Officer Evett's violation of the statute. See S.C. Code Ann. §56-5-2953(B) (listing a number of possible exceptions, that, if applicable, would not require dismissal of a Felony DUI charge). Therefore, §56-5-2953 mandates dismissal of the Felony DUI charge in this case.

Counsel was deficient for failing to move to dismiss the Felony DUI charge. Counsel's explanation for not making such a motion was that the law was unsettled with regard to a violation of §56-5-2953. While the failure to recognize a potential challenge with regard to an unsettled issue of law does not excuse a defense attorney's failure to raise such a challenge,² the law was settled at the time of Applicant's trial. In City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007), decided three months prior to Applicant's Felony DUI trial, the Supreme Court unequivocally held that "dismissal of [a] charge is an appropriate remedy provided by §56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions." Id. at 17, 646 S.E.2d at 881. Although this was a Felony DUI case involving an accident and there might have

² See, e.g., Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2009) (finding that the PCR applicant was denied the effective assistance of counsel when defense counsel failed to consider whether or not a prior conviction for possession of drug paraphernalia could be used to enhance a drug manufacturing charge, even though the issue was one of first impression for the Supreme Court).

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been an exception for failure to videotape, the law requires that an affidavit be filed by the officer explaining the exception, which was not done in this case. The law was clear when Applicant was tried for Felony DUI: failure to comply with §56-5-2953 required dismissal of the charges.³

Finally, defense counsel's conduct prejudiced Applicant. If defense counsel had moved to dismiss the Felony DUI charge, it is likely that it would have been dismissed. There can be no clearer example of prejudice resulting from a defense attorney's deficient conduct. Accordingly, this Court grants relief with regard to this claim.

9. Ineffective assistance of trial counsel for failure to effectively argue for introduction of the victim's (James Young) toxicology results. Failure to utilize the testimony of James Young to further expose inconsistencies in the testimony of the law enforcement officers.

During trial, counsel made a motion to introduce evidence of the accident victim's intoxication on the night of the accident and cross-examine him about it. Burglary Transcript p. 308. The State objected because the victim had been charged with and found not guilty of DUI. Burglary Transcript p. 308-9. In response, the court questioned how it was relevant when James Young (victim) was found not guilty of DUI and

³ The Supreme Court has also recently noted that the law was clear in this regard:

Although this is the specific question presented, we believe there is a more fundamental question to consider in analyzing §56-5-2953: if the Legislature imposes a statutory obligation on the State to create evidence and provides a sanction for inexcusable noncompliance, does the State's failure to do so necessarily warrant a *per se* dismissal of the accused's case?

Up until this point, our appellate courts have affirmatively answered this question when a law enforcement agency inexcusably failed to videotape a DUI arrest with an *existing* video camera.

Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 344-345, 713 S.E.2d 278, 284 (2011) (emphasis in original).

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whether Counsel had any evidence that the victim had neglected some duty or violated some statute that would have indicated that he contributed to the accident Burglary Transcript p. 309. Trial counsel explained that the only evidence he planned to use was the toxicology report that reported a level below the legal limit and he did not have any other evidence. Burglary Transcript pp. 310-11. Thereafter, the trial court sustained the State's objection finding that the prejudicial value would outweigh any probative value of that evidence. Burglary Transcript p. 311.

While on the stand, James Young testified that before impact he saw lights coming at him. Burglary Transcript p. 360, Ins. 11-17. He also explained that the car turned into him and he saw blue lights upon impact. Burglary Transcript p. 360, Ins. 11-17.

At the evidentiary hearing, Applicant contrasted the testimony of the law enforcement officers, detailed above, with the testimony of James Young and explained that counsel should have further questioned James Young to emphasize the inconsistencies in the testimony regarding his use of headlights and the officer's use of blue lights. He also identified and introduced a copy of the medical records of James Young that showed that he tested positive for cocaine. Applicant's Exhibit #14. Applicant questioned why counsel did not use the medical records in his argument to the court.

When trial counsel took the stand, he agreed that the medical records showed that James Young was positive for cocaine. Counsel testified that questioning Young about the cocaine in his system could have been a good argument but for the fact that Young

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was found not guilty on the DUI. He also stated that it would be difficult, if not impossible, to impeach with a not guilty disposition.

This Court finds that trial counsel moved to admit the toxicology results of James Young and to question him about his DUI charge, but the trial court sustained the State's objection. Even though trial counsel did not utilize the medical records admitted at the evidentiary hearing, this Court finds that Applicant's claim simply boils down to an assertion that trial counsel should have performed better, not that his performance was ineffective. Additionally, this Court finds that trial counsel provided a valid reason for employing his strategy in attempting to admit the records and question James Young. See Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002) (Finding that counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness and such strategy is measured under an objective standard of reasonableness). This Court further finds this reasoning is also applicable to Applicant's claim that counsel should have further exposed the inconsistencies in the testimony of James Young and the law enforcement officers. Questioning a witness during cross-examination in a way that requires one witness to attack another witness's credibility is improper. State v. Benning, 338 S.C. 59, 63, 524 S.E.2d 852, 855 (Cl. App. 1999). Trial counsel cannot pit one witness against another and the jury heard the inconsistent testimony. Therefore, this Court finds that counsel's strategy did not fall below an objective standard of reasonableness, and this claim must fail under the first prong of the Strickland analysis.

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10. Ineffective assistance of trial counsel for failure to advise Applicant regarding the introduction and use of the drug evidence. Failure to make objections: 1) regarding the searches of the Chevy Caprice that resulted in the location of the



drug evidence, 2) regarding chain of custody, and 3) regarding the use of an uncharged "bad act."

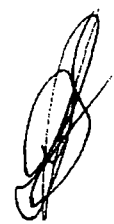
At trial, Officer Edgar Guthro testified about processing the Chevy Caprice and locating a bag of suspected marijuana on the passenger floor board. Burglary Transcript pp. 368-9. George Reeves, evidence custodian, testified that he tested the substance, which was positive for marijuana, and it weighed 4.24 grams. Burglary Transcript p. 373.

Referencing the transcript from his murder trial and several exhibits, Applicant explained that trial counsel moved to suppress a cell phone at the murder trial that was located during an "inventory" search that was the basis for the search warrant executed during the search that yielded the drug evidence. Murder Transcript pp. 44-52, Applicant's Exhibit #17. Applicant questioned why counsel did not make a similar motion to suppress at the burglary trial. Additionally, Applicant questioned why counsel failed to require the State to establish the complete chain of custody or make an objection that the marijuana was the equivalent of an uncharged "bad act."

Trial counsel readily admitted that he did not object to the admission of the drug evidence based upon failure to establish chain of custody or as a prior bad act; however, he did testify that he thought about making the prior bad act argument just as he did at the subsequent trial, concluded that it was one of the least of his concerns.

Here, Applicant was not charged in connection with the marijuana, and this Court finds that Applicant has failed to show how he was prejudiced as a result of its admission. Additionally, this Court finds that Applicant has failed to show how the suppression of the drug evidence would have affected the outcome of his trial. Despite counsel's

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admission that he should have made a motion, this Court finds that this claim must fail as this Court does not find that the Applicant failed to meet his burden of proof of establishing that this affected the outcome of Applicant's trial.

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11. Ineffective assistance of trial counsel for failure to make a directed verdict motion on the burglary and armed robbery charges.

As is reflected in the record, trial counsel made a directed verdict motion at the close of the State's case. In making his argument, counsel first made a motion for directed verdict on all charges, but ultimately did not make an argument on the burglary or armed robbery charge, but focused on the felony DUI charge and failure to stop charge. Burglary Transcript p. 375, lns 14-15. At the conclusion of his argument, the trial court specifically asked: "No motions on the burglary indictment or the armed robbery indictment?" Burglary Transcript 379, lns. 20-21. In response, counsel stated: "No, no, Your Honor." Burglary Transcript p. 379, ln. 22.

At the evidentiary hearing, trial counsel explained that he thought that his strongest argument on directed verdict was on the DUI charge, but he was clearly wrong due to the jury's finding of not guilty on the armed robbery charge. Due to the jury's not guilty verdict, this Court cannot find that counsel was ineffective or that Applicant was prejudiced as a result of counsel's failure to make a directed verdict on the armed robbery charge. Clearly, the jury cured any prejudice suffered by counsel's failure to move for a directed verdict on the armed robbery charge.

Regarding the burglary charge, this Court finds that trial counsel provided ineffective assistance when he failed to argue a motion for directed verdict on the burglary charge. This Court finds that a directed verdict motion was appropriate because evidence indicated that there was consent to enter the residence in question.

During cross-examination, Donald Martin testified that on the night of the burglary, when someone knocked on his door and he asked who it was, the person responded with "Murda." Martin testified that he knew the Applicant as "Murda," so he

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At the evidentiary hearing, Applicant alleged that trial counsel failed to object when the State bolstered the credibility of their witnesses during closing argument. In support of his claim, Applicant referenced the following portion of the argument: "They say the truth comes from the mouths of babies. I had to put a nine year old girl up. It pained me to do that. But you needed to know the truth from that night. And she told you who woke her up and who did this to her." Burglary Transcript p. 429, lns. 7-9. He also referenced the following additional portion: "Like I said, truth comes from the mouth of babies." Burglary Transcript p. 436, ln. 3.

A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness. Elmer v. Maryland, 353 Md. 1, 724 A.2d 625 (Md. Ct. App. 1999). Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony. See State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001) Vouching occurs when a prosecutor implies he has facts that are not before the jury for their consideration. Missouri v. Wolfe, 13 S.W.3d 248 (Mo. 2000).

Based upon the review of the transcript and applicable case law, this Court finds that the Applicant's allegation lacks merit, as the State did not improperly vouch for or bolster the veracity of their witness in closing argument.. Therefore, trial counsel cannot be found ineffective when he failed to enter a contemporaneous objection to comments that do not amount to vouching or bolstering. As a result, this claim must fail under the first prong of the Strickland analysis.

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14. Ineffective assistance of counsel for failure to object to the trial court's statements to the jury that "your sole objective is to simply reach the truth of the matter" and "simply give both the State and the defendant a fair and impartial trial" during the jury instructions.

By way of a verbal amendment at the evidentiary hearing and through his testimony, Applicant alleged that trial counsel rendered ineffective assistance of counsel when he failed to object to the trial court's statements to the jury that "your sole objective is to simply reach the truth of the matter" and "simply give both the State and the defendant a fair and impartial trial" on the basis of impermissible burden shifting, which affected his right to a fair trial. Burglary Transcript p. 437. This Court agrees. If counsel had properly objected the question before the appellate court would have been whether the instruction as a whole properly conveyed the law to the jury and whether it was reasonably likely that the jury acted in contravention of the reasonable doubt standard. State v. Aleksey, 342 S.C. 20, 29, 538 S.E.2d 248, 252-3 (2000) (Finding reversal not required when the trial court's improper instructions were given in the context of witness credibility and not reasonable doubt). Due to counsel's failure to enter a contemporaneous objection the jury charge was not reviewed by the appellate court.

In State v. Daniels, Op. No. 27180, S.C. Sup. Ct. filed October 10, 2012 (Davis Adv. Sh. No. 36 at 41)], the South Carolina Supreme Court addressed the usage of similar language contained in the trial court's instructions to the jury. After finding the issue was not properly preserved for appellate review, Justice Pleicones concluded:

[W]e instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. Moreover, to a lay person, the "all parties involved" in a criminal case may well extend beyond the

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defendant and the State, and include the victim. These inaccurate and misleading charges risk depriving a criminal defendant of his right to a fair trial.

[Davis Adv. Sh. No. 36 at 44.]

In a concurring opinion, Chief Justice Toal strongly warned the judiciary as follows:

Judicial instructions to the jury in a criminal case that "whatever verdict you reach will represent truth and justice for all parties," that "we must see to it that the trial is fair and the verdict is just" and that you and I are "in it together," may seem at first blush to be simply harmless phrases intended to put the jury at ease and portray the judge as a "regular guy." However, the constitutional framework governing criminal trials is a highly technical body of law developed by the United States Supreme Court and by state courts operating under the Supreme Court's guidance. It is inappropriate to jeopardize the constitutionality of a trial by instructing the jury in this way.

It is critical that jurors understand the proper application of the reasonable doubt standard. That standard does not charge the jury with ensuring justice for all of the parties. Justice Pleicones correctly notes that this language could result in jurors substituting concepts of justice or fairness for the State's constitutional duty to prove guilt beyond a reasonable doubt. Thus, I join the Justice Pleicones's admonition to the trial court to restrict his jury instructions to matters of law, and refrain from issuing instructions which run the risk of depriving defendants of their right to a fair trial.

[Davis Adv. Sh. No. 36 at 52.]

Although the Daniels case was not available at the time of trial, this Court finds that trial counsel's failure to object to the charges later found improper in Daniels was deficient conduct. See generally Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008) (finding defense counsel's failure to object to an unconstitutional jury instruction deficient conduct). Moreover, this Court finds that this failure prejudiced Applicant. While the trial court did provide correct instructions on reasonable doubt, the improper charges "did no more than contradict the [proper] instruction." Francis v. Franklin, 471 U.S. 307, 322 (1985). "Language that merely contradicts and does not explain a

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constitutionally infirm instruction will not suffice to absolve the infirmity.” Id. Stated differently, this Court “has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.” Id. It is just as likely that the jury decided to give “the State ... a fair and impartial trial,” Murder Transcript p. 454, that the jury gave the defendant his constitutional “right to a fair trial.” Daniels, supra, Davis Adv. Sh. No. 36 at 52. Consequently, this Court concludes that there is a reasonable likelihood that the jury did as it was instructed and relieved the State of its burden of proof. Defense counsel’s failure to object to the offending charges constitutes ineffective assistance of counsel. Accordingly, Applicant is entitled to a new trial on this issue.⁴

15. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal, including but not limited to pre-trial motions, trial objections and rulings on Applicant’s evidence.

This Court finds that the Applicant has failed to offer any testimony or evidence that would establish that appellate counsel’s performance was deficient under prevailing professional norms and that he was prejudiced as a result of such deficient performance. To prevail on his claim of ineffective assistance of appellate counsel, the Applicant must establish that there is a reasonable probability that the result of the proceeding would have been different, the conviction and sentence would have been overturned, if appellate counsel raised the issues alleged by the Applicant. See Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). This Court has reviewed the entire record and finds that

⁴ This Court notes that the Supreme Court did not grant the petitioner in Daniels a new trial. However, the Supreme Court’s opinion found that the issue was not preserved for review and did not reach the issue of whether a new trial was warranted based on the inclusion of the improper charges. Furthermore, the concurring opinion, which found the issue preserved, spent most of its opinion arguing that the error was harmless because it found that the evidence against Daniels was overwhelming. Contrastingly, the evidence against Applicant is not overwhelming and there are no preservation issues in this case. Therefore, this Court believes that relief is warranted whereas it was not in Daniels.



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Applicant has failed to show that the result of the proceeding would have different if appellate counsel would have raised all issues preserved by trial counsel. Therefore, this Court does not find that appellate counsel was deficient .


V. CONCLUSION

Based upon the foregoing, this Court orders that the Application for Post Conviction Relief is hereby granted. This Court further finds that no other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.


IT IS THEREFORE ORDERED:

1. That Applicant has met his burden of proof as to his specific allegations of ineffective assistance of trial counsel detailed above;
2. That Applicant has not met his burden of proof as to his allegation of ineffective assistance of appellate counsel;
3. That the Application for Post Conviction Relief be granted and his conviction be vacated and granted a new trial;

AND IT IS SO ORDRED this 8 day of February 2013



Honorable Brooks P. Goldsmith
Circuit Court Judge


_____, South Carolina

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M. MARIE BLANKLEY



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

June 10, 2013

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

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JUN 10 2013

S.C. Supreme Court

**RE: Nathaniel Teamer v. State of South Carolina
2010-CP-42-4049**

Dear Mr. Shearouse:

Enclosed are the following:

1. Notice of Appeal
2. Proof of Service of the Notice of Appeal on the Respondent
3. A copy of the Orders to be challenged on appeal.

With highest regards,

Suzanne H. White
Assistant Attorney General

SHW/aam
Enclosures

cc: Tricia A. Blanchette, Esquire (w/enclosure)
Jeremy A. Thompson, Esquire (w/enclosure)
The Honorable M. Hope Blackley, Clerk of Court of Spartanburg County (w/enclosure)
The Honorable Barry J. Barnette, Seventh Circuit Solicitor (w/enclosure)
SCCID, Division of Appellate Defense (w/enclosure)
David M. Tatarsky, Esquire, SCDC (w/enclosure)
Trisha Allen, Victims Services (w/enclosure)