THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr. Circuit Court Judge

Case No. 2012-CP-40-01543

Randy Thomas, SCDC # 313802, ... Appellant

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant Randy Thomas hereby appeals from the Order of the Honorable G. Thomas Cooper, Jr. presiding Judge for the 5th Judicial Circuit, filed May 10, 2013 and received by counsel for the Applicant on May 15, 2013 in the matter of Randy Thomas v. State of South Carolina, Case No. 2012-CP-40-01543.

June 7, 2013

Kristy Goldberg
Attorney for Plaintiff

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Other Counsel of Record:

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PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on June 7, 2013 by depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Robert Daniel Corney
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

June 7th, 2013

Kristy Goldberg
Kristy Goldberg

Attorney for Plaintiff

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LAW OFFICE OF

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

June 7, 2013

S.C. SUPREME COURT

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

RE: Randy Thomas, SCDC # 313802, vs. State of South Carolina
Case No. 2012-CP-40-01543

Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the court order which is to be challenged on appeal.

I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal so that they may begin representation of Mr. Thomas. I am also hereby requesting that Appellate Defense obtain a copy of the court transcript within the time required by this court.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,

Kristy Goldberg

CC: Robert Corney
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

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Mr. Randy Thomas, SCDC #313802
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386 Redemption Way
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Jeanette McBride, Clerk of Court
Post Office Box 2766
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Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
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Columbia, SC 29211-1433

FORM 4

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

JUDGMEN[illegible]N A CIVIL CASE

CASE NUMBER: 2012CP4001543

Randy B #313802 Thomas
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

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

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

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

JEANETTE W. McBRIDE
C.C.P. & G.S.
2013 MAY 10 PM 2:31
RICHLAND COUNTY
FILED

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

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

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 10 May 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Randy B #313802 Thomas
Jason P. Peavy

Melissa Jane Armstrong
Kristy Grafton Goldberg

Robert Daniel Corney

Randy B #313802 Thomas

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Randy B. Thomas, #313802, Applicant, v. State of South Carolina, Respondent.	**2012-CP-40-01543** **ORDER OF DISMISSAL**

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for Post-Conviction Relief (PCR) filed February 23, 2012, and amended December 21, 2012. An evidentiary hearing into the matter was convened before this Court on Wednesday, January 16, 2013, at the Richland County Courthouse. Applicant was present at the hearing represented by attorneys Kristy Grafton Goldberg, Esquire; Lisa Armstrong, Esquire; and Jason Peavy, Esquire. Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying were Applicant's former trial attorney, LaNelle DuRant, Esquire, and two character witnesses for Applicant. This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, the documents related to Applicant's direct appeal and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the February 2005 term of the Richland County Grand Jury for Criminal Sexual Conduct – First Degree, Assault and Battery of a High

and Aggravated Nature and two (2) counts of Kidnapping (2005-GS-40-10296 through -10299). He was represented by then Richland County Public Defenders LaNelle DuRant, Esquire, and Jeanette VanGinhoven, Esquire, on the charges. On February 6, 2006, Applicant proceeded to jury trial before the Honorable James W. Johnson, Jr., where he was convicted of the charges as indicted. Judge Johnson sentenced Applicant to twenty-two (22) years imprisonment each for Kidnapping and Criminal Sexual Conduct, as well as ten (10) years imprisonment for ABHAN. All sentences were ordered to run concurrently.

A notice of appeal was filed and an appeal was perfected on Applicant's behalf. Chief Appellate Defender Robert Dudek of the South Carolina Office of Appellate Defense represented Applicant on the appeal. By unpublished opinion filed September 10, 2009, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. On March 2, 2011, the South Carolina Supreme Court denied Applicant's subsequent Petition for Writ of Certiorari. The remittitur was issued March 7, 2011.

In the current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons[1]:

a. Trial counsel failed to investigate allegations introduced through Lyle evidence and accordingly failed to sufficiently prevent this Lyle evidence from being introduced to the jury,
b. Trial counsel failed to object or request a mistrial based upon admitted violation of the Sequestration order by witnesses,
c. Trial counsel failed to object or request a mistrial based upon Solicitor's improper argument as to flight,
d. Trial counsel failed to present positive character evidence during the jury trial,
e. Trial counsel failed to sufficiently object or request a mistrial in response to the State offering testimony regarding the magistrate's denial of bond for the Defendant.
f. Appellate counsel was ineffective in failing to raise the issue of the trial court's refusal to charge false imprisonment as a lesser

[1] At the start of the evidentiary hearing before this Court, Applicant expressly waived allegation (a) regarding the Lyle hearing.

10. State concisely and in the same order the facts which support each of the grounds set out in (9).

a. Trial counsel's file reveals the existence of witnesses whose testimony would have been material to the pre-trial determination of whether prior conduct was admissible under *Lyle*.

b. Trial counsel was ineffective by failing to object or move for a mistrial based upon the testimony of a defense witness who was contacted by the alleged victim, Lauren Byrd, during the trial and in violation of the Court's sequestration order, (ROA p. at 63, at p. 165). Ms. Byrd's actions were contempt of court and denied Applicant a fair trial.

c. Trial counsel erred in failing to object to the Solicitor's improper argument that Applicant fled after the alleged crime. In an *in camera* setting, counsel for the state and defense agreed not to mention Applicant's hospitalization at a mental health facility to which he had been "committed" after the alleged crimes and prior to his arrest. Applicant did not "flee" from law enforcement. The lapse of time between the alleged crimes and Applicant's arrest was not due to anything even remotely akin to "flight" but was done by way of a mental health commitment. The prosecution knew this and either though inadvertence or intent argued "facts" that were erroneous and highly prejudicial to the Applicant. These types of arguments have been universally condemned. *See Napue v. Illinois 360 US 264 (1959), Giglio v. United States, 450 U.S. 150 (1972).*

d. Trial counsel was ineffective by failing to present positive character evidence to rebut the character evidence introduced by the State. The character of a Defendant is generally admissible under South Carolina Rule of Evidence 404(a)(1). Furthermore, once the State was allowed to enter evidence of prior bad acts against the Applicant to disparage his character, the Defense would have been further entitled to submit evidence of character to rebut same. Defense counsel stated in mitigation that she was in possession of "16 letters of character references" which were provided prior to trial. Terry Burnett, an employee of the South Carolina Bar Association, provided one of these letters and was present in court and spoke during the sentencing proceeding. The statement of Mr. Burnett in the transcript reflects what Mr. Burnett would have stated if called to testify in front of the jury and establishes prejudice.

e. Trial counsel was ineffective by failing to request a mistrial or even object in response to the State offering testimony regarding the magistrate's denial of bond. An objection or request for a mistrial would have been necessary and proper under the South Carolina Rules of Evidence Rule(s) 401, 403 and the law regarding hearsay. This testimony was overly prejudicial as it informed the jury that another judge had reviewed the case and determined it was appropriate to deny bond for the Applicant as it implied that he was a danger to the community and/or a flight risk.

f. Appellate counsel failed to raise the trial court's error in denying defense counsel's request for a charge of false imprisonment as a lesser charge to kidnapping. There were sufficient in the record to support Applicant's entitlement to the lesser-included jury charge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient

performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. This Court finds Applicant has failed to satisfy his burden in proving those elements as they relate to each of the allegations set forth by Applicant.

Cumulative Error Analysis

As a preliminary note, this Court would note it is an unsettled question in South Carolina at this time whether multiple deficiencies which, standing alone, do not sufficiently satisfy the prejudice requirement of the Strickland v. Washington test for ineffectiveness may be combined to prove resulting "cumulative prejudice". To date, this so-called "cumulative error analysis" has not been recognized as a sufficient legal standard by either the South Carolina Court of Appeals or South Carolina Supreme Court for satisfying the prejudice prong of Strickland v. Washington. See Lorenzen v. State, 376 S.C. 521, 535 n. 3, 657 S.E.2d 771, 779 n. 3 (2008); Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318 (2002); Walker v. State, 397 S.C. 226, 243, 723 S.E.2d 610, 619 (Ct. App. 2012). Accordingly, this Court declines to conduct its analysis under such an unendorsed standard, but rather will adhere to the sanctioned legal standard set forth in Strickland v. Washington. Additionally, as set forth below, this Court finds no instances of deficiency in counsel's performance; therefore, even if cumulative error analysis were proper for evaluating multiple deficiencies, such a standard is inapplicable in this instance.

Violation of Sequestration Order

Applicant first contends counsel was ineffective for failing to object to and move for a mistrial based upon the testimony of a state's witness which Applicant alleges showed the court's sequestration order was violated by Victim during trial.

On February 2, 2006, a pretrial hearing was held on Applicant's case at which counsel made a motion for sequestration of witnesses. The trial judge responded by saying they would "deal with [that request] on Monday", when the trial was scheduled to start. At the start of trial that following Monday, a pretrial Lyle[2] hearing was held for the court to determine the admissibility of a prior sexual assault on Victim by Applicant. At the start of that hearing, prior to Victim's testimony, the trial judge granted counsel's motion for sequestration and instructed the courtroom that "all other witnesses, State and defense witnesses cannot be in the courtroom during the trial [a]nd...cannot discuss [their] testimony or anybody else's testimony with any other witnesses." The next morning, after clarifying the Lyle rulings admitting the prior incident, the Court reminded the two witnesses who remained in the courtroom of the sequestration order, its meaning and the penalties associated with violation of that order.

At the PCR hearing, Applicant contended counsel was ineffective for failing to object to the testimony of James Aakhus where he revealed Victim had contacted him during the course of the trial in violation of the sequestration order. Aakhus was a friend of Applicant's whose testimony was, in large part, related to his observations of Applicant and Victim's relationship. Aakhus testified he lived "right across" from Victim in her apartment complex in Clemson. Aakhus noted he was friends with both Victim and Applicant, and briefly discussed a visit he made to see Applicant in Columbia in 2004. Aakhus testified that visit occurred in 2004 and, although he wasn't "really sure of the time", he knew one of the trips he made to Columbia occurred in August. He testified Victim and Applicant were no longer together at the time of one visit, but described riding to Victim's house with Applicant for Applicant to speak with Victim.

On cross-examination, Aakhus stated he "wasn't really sure" when the trip to Victim's house occurred and said he "[didn't] recollect" talking to Victim on the phone on "Monday

[2] State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

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night". When questioned further, Aakhus agreed he remembered telling Victim at one point he believed that visit was in June or July of 2004, but later clarified, saying he wasn't "real sure" what month the visit occurred in and he "never really state[d] what month to be exact". Applicant did note Victim had "called [him] up asking...if [that visit] was in September", but said he "hadn't even thought about the timing at all at that point". Aakhus finished by noting he and Victim had talked about the case in the past and said Applicant had asked him to discuss the case with Victim previously.

Applicant contends this testimony from Aakhus should have been objected to by counsel and a motion for mistrial made as the testimony goes to show Victim contacted Aakhus during the trial to discuss his testimony in violation of the sequestration order. Applicant argues the timing of Aakhus's visit to Columbia was a "big part" of the trial as it went to show Applicant and Victim had personal interaction in the time between the two sexual assaults. At the PCR hearing, counsel testified she did not believe Aakhus's testimony was "that damaging" and stated she did not believe it changed the outcome of the case as there was plenty of evidence to convict Applicant, regardless of the timing set forth through Aakhus's testimony.

After a thorough review of the trial transcript, along with the arguments made at the PCR hearing, this Court finds Applicant has failed to carry his burden in proving counsel was ineffective in this regard. First, the failure to object to and/or move for a mistrial based upon Aakhus's testimony was not objectively unreasonable. The testimony given by Aakhus was imprecise and vague as to timing, and failed to establish a sufficient timeline to have any *real* impact on the outcome of the case, especially when considered with the entirety of the evidence and testimony presented against Applicant at trial. Therefore, counsel was not deficient in failing to object to the testimony given by Aakhus as a result of the alleged improper contact.

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Further, this Court finds the record does not give any clear indication as to whether Victim *actually* spoke with Aakhus during the trial in violation of the sequestration order. Aakhus readily conceded at trial he and Victim spoke about the case over the year-and-a-half between the incident date and the start of trial as the two were neighbors and close friends. Aakhus's testimony about his conversations with Victim is unclear as to whether those conversations occurred prior to trial or during trial.

(From Trial Transcript Cross Examination of Witness James Sheldon Aakhus by Ms. Garfield):

Q: So did you go to Lauren's family home?

A: Yes, I did.

Q: Do you recall about when that was?

A: I'm not really sure.

Q: Do you remember talking to Lauren on the phone Monday night regarding that particular time?

A: I don't recollect.

Q: Do you recall telling Lauren that you believed that you went to the home around June or July of 2004?

A: Yes.

Counsel made this clear in her PCR testimony where she noted the state *contended* such a conversation had occurred, but she was unable to confirm such a conversation ever actually occurred. Based on the trial testimony, I am not convinced that there was a violation of the Sequestration Order sufficient to serve as a ground for PCR relief.

Applicant also failed to establish how Victim's alleged "improper communication" with Aakhus affected the testimony he presented. In fact, this Court's review of the transcript reveals Aakhus could not provide a clear, precise timeframe of his visit to Victim's house with Applicant. Rather, the *only* clear testimony Aakhus could give regarding his visit(s) to Columbia was that they occurred while Applicant and Victim were no longer in a relationship. That testimony, if believed by the jury, clearly established Applicant and Victim maintained personal interaction after their July 2004 break-up. Additionally, it is important to note Victim herself readily conceded she and Applicant had personal interaction during that time, as she testified she had spoken with Applicant in-person at her parents' house while Aakhus waited in the car. Victim, too, stated she was "not sure about the date" of that visit, or if it occurred before or after the sexual assault in Clemson in August. With the entirety of the record and PCR testimony considered, this Court cannot find counsel's failure to object and/or move for mistrial to have been objectively unreasonable. Therefore, Applicant has not proven deficient performance.

This Court further finds Applicant has failed to prove that, had counsel objected and/or moved for a mistrial, there is a "reasonable probability" the outcome of the case would have been different. Counsel's objection to Aakhus's vague and non-specific testimony at trial would not have likely changed the outcome of the trial. Applicant was facing strong evidence of guilt at trial based upon Victim's detailed testimony and the multiple witnesses and pieces of evidence introduced to corroborate Victim's already very condemning testimony. Even had Applicant been able to unequivocally establish he and Victim spoke in-person between the August and October sexual assaults as alleged, this Court can find no reasonable probability the outcome of the trial would have been any different when taken in light of the entirety of the record. Accordingly, Applicant has failed to prove resulting prejudice.

Evidence of Flight

Applicant next claims counsel was ineffective for failing to pose an objection to the state's closing argument on the jury's ability to consider evidence of flight. In particular, Applicant argues counsel should have objected to the state's commentary on evidence of flight after the crime as evidence of guilt as it violated the parties' pretrial agreement not to mention Applicant's hospitalization at a mental health facility after the incident.

At the PCR hearing, Applicant testified he is currently thirty-four years old and has been housed with the Department of Corrections for roughly eight (8) years at McCormick Correctional Institution. Applicant said after the incident with Victim in Irmo, he left the scene and drove to his family's home in Fort Mill, South Carolina, where he and his family discussed the mental health issues he was allegedly suffering from as a result of the incident, including suicidal thoughts and extreme distress. As a result of those conversations, Applicant said, he decided to commit himself to a mental institution in Charlotte, North Carolina. Applicant said his family drove him to Carolina Medical Center in Charlotte some time that same weekend, where he checked himself in for treatment. On the way to Charlotte, Applicant alleged, he called his probation officer to get permission to cross the border into North Carolina, which was approved.[3]

Applicant stated he was at the Carolina Medical Center institution for roughly two (2) weeks before being moved to a different institution. He said sometime in late 2004, he became aware he was wanted by authorities in South Carolina and informed the institution he would not fight extradition to South Carolina. On cross-examination, Applicant conceded there was testimony presented at trial he had jumped in his car and driven away from the scene when

[3] Applicant failed to produce the testimony of his probation agent, cell phone records or any other tangible evidence at the PCR hearing (other than the probation violation warrant) to corroborate that this conversation ever actually occurred or to affirm he did in fact have his agent's permission to leave the state.

Victim ran to the neighbor for help, but stated he did not believe that was sufficient "flight" from the scene for the state to pose such an argument in closing.

Counsel testified she took over representation of Applicant from another attorney in the public defender's office in August of 2005. She noted Applicant claimed the sexual encounter was consensual, but denied committing the other charges. Counsel testified Victim was an extremely beautiful, very articulate and well-educated woman whose testimony the jury seemed to find very honest. Counsel said Victim's close friend, Ashley Mishoe, also testified at trial corroborating the precise details of Victim's story, and counsel noted she believed Mishoe also came across to the jury as a very well-educated, articulate and reliable witness for the state.

Regarding the state's commentary on evidence of flight, counsel stated she didn't object to the statement as she didn't want to draw further attention to that portion of the evidence. She noted her pretrial motion was made in an effort to suppress any mention of Applicant's *hospitalization* to avoid the jury questioning Applicant's credibility as a witness and mental health, but said the motion was never intended to suppress the state's argument on evidence of flight. Counsel agreed the undisputed evidence showing Applicant sped away from Victim's house while Victim ran for help was, by itself, likely sufficient to allow the state's argument on evidence of flight, regardless of Applicant's subsequent travel to Charlotte. She further noted she did not recall any conversations with Applicant regarding the alleged phone call to the probation agent on his drive to Charlotte.

On cross-examination, counsel stated she did not object to the introduction of Applicant's extradition form as they were not contesting anything related to Applicant's arrest including the time frame or way in which Applicant was ultimately detained. She stated that looking back in hindsight, perhaps she should have objected to the solicitor's argument on evidence of flight, but

said at the time she didn't want to draw any further attention to the issue by doing so. She also noted that without the state's argument on evidence of flight, the extradition form introduced at trial likely very wasn't relevant to the case.

This Court finds counsel was not ineffective in this regard. As a preliminary note, this Court finds Applicant's testimony to be **not** credible on the subject, while conversely finding counsel's testimony to be credible. Based upon the record and counsel's credible testimony, it is clear the pretrial agreement Applicant uses as the foundation for his argument was confined solely to restrain commentary on Applicant's commitment at a mental institution, but in no way was intended to restrict argument on Applicant's fleeing the scene and state after the incident. Therefore, Applicant's contention that counsel should have objected because the state violated the pretrial agreement is without merit.

Further, counsel was not ineffective for failing to object to the solicitor's argument on evidence of flight as such an argument was properly based upon the evidence submitted at trial. "Flight from prosecution is admissible as evidence of guilt." State v. Walker, 366 S.C. 643, 654, 623 S.E.2d 122, 127 (Ct. App. 2005); see also State v. Crawford, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005). "Flight or evasion of arrest is an issue for the jury to consider." Walker at 655, 623 S.E.2d at 128. "In South Carolina, we recognize that evidence of flight [is] proper [and] [w]e also recognize that it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight." Id.; *citing* State v. Byers, 277 S.C. 176, 177 – 178, 284 S.E.2d 360, 361 (1981). The testimony and evidence introduced at trial were clear in showing the following: Applicant fled Victim's house in his car as Victim broke loose and ran to a neighbor yelling "help"; Applicant immediately left the Irmo area and drove to Fort Mill, South Carolina; Applicant then made the voluntary and independent decision to leave the state, and only returned

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through the extradition process to face prosecution on the charges. Proof of any one of those instances alone would have properly set the stage for the state's argument on flight from prosecution as evidence of guilt.[4] Therefore, the state properly argued flight in closing argument and counsel's failure to object was not objectively unreasonable.

Additionally, counsel was able to articulate a reasonable and valid trial strategy for not posing such an objection, stating she "did not want to highlight" the evidence of Applicant's immediate flight to the jury by objecting. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) ("Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective."). The Supreme Court has previously noted counsel cannot assert trial strategy as a defense for a failure to object to comments which "constitute an error of law" and are "inherently prejudicial". Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002). However, as set forth above, the solicitor's comments in closing argument were proper and did not constitute an error of law. Therefore, counsel's decision not to pose a meritless and likely unsuccessful objection to avoid highlighting evidence of Applicant's post-incident flight was a reasonable, valid trial strategy. Therefore, this Court finds no deficiency.

Further, Applicant has failed to convince this Court such an alleged deficiency resulted in prejudice. Based on the record and relevant case law, any objection counsel posed would likely not have been successful as the state's argument was properly based upon the evidence presented. Assuming *arguendo* such an objection had been argued and the state's commentary was successfully stricken from the jury's consideration, this Court can find no reasonable probability verdict returned would have been any different when taken in light of the evidence and testimony presented at trial. See Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009)

[4] This Court finds Applicant's testimony that he only became aware he was wanted by South Carolina authorities once he was admitted to the North Carolina hospital to be **not** credible.

("Although we find the PCR judge correctly determined that trial counsel was deficient in failing to object to the solicitor's...closing argument, we hold [Applicant] failed to prove that there was a reasonable probability that but for this error, the result of his trial would have been different."). Accordingly, this contention is without merit and must be denied.

Character Witnesses at Trial

Applicant argues counsel was also ineffective in choosing to present numerous character witnesses on his behalf during the sentencing phase rather than during the guilt phase before the jury. Applicant testified he provided counsel with several letters written by character witnesses on his behalf prior to trial, but stated counsel told him because his character was not in issue, there would be no need to have those witnesses testify before the jury. Applicant said he did not recall counsel ever saying she would call any character witnesses at trial, aside from potentially Applicant's mother and father. Applicant now contends he thought it would have been a good idea to present those witnesses during the defense case rather than in mitigation. On cross-examination, Applicant acknowledged none of the character witnesses he referred to were present during the incident, nor did any of them have any personal knowledge of the details of the incident.

In addition to the numerous letters introduced to this Court on behalf of Applicant, Applicant also called two character witnesses at the PCR hearing to testify on his behalf. The first was Terry Burnette, the CLE Director of the South Carolina Bar Association. Burnette testified he met Applicant in 1996 when Applicant was serving as Burnette's son's recreation league basketball coach. Burnette stated he wrote a letter on Applicant's behalf on November 25, 2005, which was given to Applicant's attorney before trial. He said he was never asked to appear or testify at Applicant's trial, but stated he was present for the trial and would have testified for

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Applicant had he been asked to. Burnette testified based on his several years interaction with Applicant, he believed Applicant was a "fair", "hardworking" person with a "good character". He went on, saying he never saw Applicant lose his temper, abuse a child or otherwise behave improperly during the high stress situations involved in his son's basketball games. On cross-examination, Burnette conceded he had no personal knowledge of the facts of the underlying charges, nor was he present at the scene when the incident occurred.

The second character witness presented was Kim Clasnik, a self-employed business owner who met Applicant in 1999 while Applicant worked as a referee for recreation league sports. Clasnik noted three (3) of her children play baseball and/or basketball through the league. Clasnik stated she wrote a letter on Applicant's behalf on October 27, 2005, which she mailed to Applicant's mother to pass along to counsel. Clasnik said she was never contacted to testify at trial, but said she would testified at trial had counsel requested her to. She testified she believed Applicant was a very positive role model for her children. On cross-examination, Clasnik also acknowledged she had no personal knowledge of the facts associated with Applicant's charges, nor was she present at the scene when the sexual assault was alleged to have occurred.

Counsel testified she recalled introducing roughly sixteen (16) character reference letters to the trial judge during sentence mitigation, as well as the testimony of Terry Burnette and his son, Knox. She noted in retrospect, perhaps she should have called the witnesses as part of the defense's case before the jury, but said there are substantial risks associated with calling character witnesses as their testimonies may open the door for the state's introduction of evidence to rebut the character traits presented. Counsel understandably testified there was no way for her to account for everything Applicant had done in his lifetime and could never be sure

whether the state would be able to obtain and elicit extremely damaging testimony to rebut the character traits presented.

Further, counsel testified that even when she believes she knows exactly what a character witness will testify, it is risky to call such a witness at trial as his/her cross-examination could lead to detrimental testimony. Therefore, counsel said, calling the witnesses as part of the defense would have been a very risky choice which she chose to avoid in favor of presenting those witnesses in mitigation. Counsel stated she believed the presentation of the character witnesses' letters and testimony in mitigation was extremely effective as there was a common expectation Applicant would receive at least a forty (40) year sentence after being convicted, but was only given twenty-two (22) years. Counsel testified it appeared introducing the character witnesses' reference letters and statements during sentencing was a very effective use of those resources as it helped to significantly mitigate the sentence imposed.

This Court finds counsel was not ineffective in making the strategic decision to present Applicant's character reference letters and character witnesses to the trial judge during sentence mitigation rather than as part of the defense's case before the jury. First, this Court would find counsel was able to credibly articulate a valid, reasonable strategic rationale for not calling character witnesses on Applicant's behalf during the guilt phase of the trial. See Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) ("Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective.").

Under Rule 404(a), SCRE, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except...[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." Evidence of such a character trait may be made "by testimony as

to reputation or by testimony in the form of an opinion", and on "cross-examination, inquiry is allowable into relevant specific instances of conduct" to rebut that trait. See Rule 405(a), SCRE. Applicant contends it was in fact the Victim who first impugned Applicant's character through her testimony about Applicant's work history and unwillingness to help "pay the bills". However, it is important to note such testimony would merely raise a question as to Applicant's character for hard work or ambition.[5] Those character traits are *not* pertinent character traits of any of the crimes Applicant was charged with, nor do they in any way assist the jury in determining the veracity of Applicant's testimony. Therefore, this Court finds Applicant's argument to be of very little persuasion.

Additionally, in reviewing the character letters and character witness testimony presented to this Court at the PCR hearing, it appears that while all reference Applicant's overall good character or reputation as a role model for young athletes, they do not provide any insight to Applicant's character for veracity or truthfulness[6]. That trait alone would have been the "pertinent character trait" most useful to establish to the jury as the case turned in large part on his credibility versus Victim's credibility. Therefore, in addition to finding counsel was able to articulate a valid trial strategy in this regard, this Court also finds Applicant has failed to establish that counsel was objectively unreasonable in electing to present the character references in sentencing mitigation, as they would have done very little to assist in Applicant's defense other than to either rebut Victim's testimony that Applicant did not work, or to generally portray Applicant as a "good guy".[7]

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[5] Applicant did not allege counsel was ineffective for failing to object to the testimony of Victim regarding Applicant's inability to keep a job or unwillingness to help pay the bills associated with the apartment.

[6] One character letter introduced does reference the term "trustworthy"; however, in context, the term is used in relation to Applicant's ability to be a good confidant and not to establish his veracity or honesty.

[7] It is also important to note there was testimony presented to the jury by both James Aakhus and Applicant which referenced Applicant's prior work history and involvement in the community as a coach and referee in youth sports. Therefore, character references rebutting the testimony that Applicant "didn't have a job" would have likely been

Finally, after a thorough review of the character witnesses' statements and letters, this Court finds Applicant has failed to establish a reasonable probability that had these witnesses been presented during trial rather than sentencing, the outcome of the case would have been different. The testimony presented to the jury at trial by Victim and Ashley Mishoe created an extremely high hurdle for Applicant to overcome, especially in light of the state's evidence and additional witness testimony to corroborate Victim's recount of the incident. Counsel's credible testimony clearly indicated the two girls' made very appealing, convincing and reliable witnesses. With these things in mind and the entirety of the record considered, this Court finds Applicant cannot prove there is a reasonable likelihood the outcome at trial would have been different had the character witnesses been presented to the jury.

Testimony on Denial of Bond

Applicant alleges counsel was ineffective for failing to object to and/or request a mistrial based upon the testimony of Investigator Brian Godfrey concerning the magistrate judge's denial of Applicant's request for bond. Applicant argues this testimony was overly prejudicial as it allowed the jury to infer that another judge had considered the matter and determined Applicant was a danger to the community and/or flight risk. After evaluating Godfrey's testimony in its entirety, along with the testimony and arguments presented at the PCR hearing, this Court finds counsel was not ineffective in this regard.

During his trial testimony, lead investigator Brian Godfrey stated he met Victim on November 15, 2004, at the Alvin S. Glenn Detention Center for Applicant's bond hearing at 8:00 p.m. Upon learning the hearing wouldn't take place until 10:00 p.m., Godfrey and Victim met with the presiding magistrate judge in chambers to discuss having the hearing held earlier for

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nothing more than cumulative or bolstering to Applicant's testimony, but as set forth above almost certainly would have had no impact on the outcome of the case.

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Victim's convenience. According to Godfrey's trial testimony, he did not attend Applicant's bond hearing that night, but knew "[e]ventually the judge denied his bond". It is this mention of the denial of bond that Applicant contends counsel should have objected to and/or moved for a mistrial upon.

Counsel testified she didn't object to the testimony from Godfrey as his testimony ultimately went on to reveal Applicant *was* granted bond by a circuit court judge after review of the magistrate's denial. She noted Godfrey readily admitted at trial he had participated in inappropriate *ex parte* communication with the magistrate judge by discussing the matter privately in chambers, which was the reason for the circuit court's subsequent review of the denial. Counsel agreed she believed Godfrey's testimony regarding Applicant's bond was, when taken in its entirety, advantageous for the defense as it called the lead investigator's credibility and character into question. Further, counsel acknowledged it would have been a reasonable analysis for the jury to conclude Applicant's bond was initially denied by the magistrate *only* as a result of Godfrey's improper conduct, especially in light of the circuit court's grant of bond once Godfrey was not involved.

This Court finds counsel's failure to object to Godfrey's testimony to not be "objectively unreasonable". As stated by counsel, Godfrey's testimony ultimately showed Applicant *was* granted bond. Further, when taken in its entirety, Godfrey's testimony in the matter was beneficial to the defense as it allowed Applicant to effectively call Godfrey's credibility and character into question as he readily conceded he had been involved in improper *ex parte* communications with the magistrate. Counsel's testimony at the PCR hearing, in conjunction with the record of her cross-examination of Godfrey, firmly convince this Court counsel undertook a valid and reasonable trial strategy in allowing Godfrey to testify about the initial

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bond hearing without objection to then allow counsel to highlight Godfrey's improper conduct to the jury. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective"). Accordingly, this Court finds counsel was not deficient in this regard.

Further, this Court finds no "reasonable probability" that had counsel objected to the testimony, the outcome of Applicant's trial would have been different. As stated by counsel, Godfrey's testimony clearly reflected Applicant *was* ultimately granted bond by the circuit court. Additionally, as set forth previously herein, Applicant was facing the very detailed, corroborated condemning testimony of a well-educated and articulate Victim. After reviewing the entirety of the record, this Court can find no reasonable probability that had Godfrey not testified as to Applicant's denial of bond, the outcome of the case would have been any different. Therefore, Applicant has failed to prove resulting prejudice as well.

Ineffective Assistance of Appellate Counsel – False Imprisonment

Applicant finally argues appellate counsel was ineffective for failing to challenge the trial court's denial of request to charge the jury on false imprisonment as a lesser included offense to kidnapping on direct appeal. Applicant alleges had appellate counsel raised the issue, there is a reasonable likelihood the outcome of the case would have been different.[8]

This Court disagrees with Applicant's contention and finds appellate counsel was not ineffective in this regard. First, appellate counsel is not required to raise every non-frivolous issue properly preserved for appeal to be found effective in his representation. See Jones v. Barnes, 463 U.S. 754 (1983) (citation omitted). In fact, it is appellate counsel's professional duty to choose among the potential issues to be raised on appeal according to his judgment of their

[8] As a side note, Applicant did not raise any issue regarding whether trial counsel appropriately preserved this issue for appeal; regardless, the record seems to reflect the issue was in fact properly preserved.

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merit and the tactical approach counsel intends to use. Id. Here, appellate counsel opted to raise arguments challenging the Lyle evidence introduced from Applicant's alleged prior sexual assault on Victim, as well as a chain of custody issue caused by an absent witness in the chain. Both issues were meritorious challenges to be raised on appeal. This Court can find no deficiency in counsel's performance in failing to raise the trial court's denial of false imprisonment as a lesser included offense.

More importantly, false imprisonment is *not* a lesser included offense of kidnapping. See State v. Bernsten, 295 S.C. 52, 367 S.E.2d 152 (1988) ("The kidnapping statute is broad enough to include, yet not require, proof of the elements constituting false imprisonment...[t]hus, the crime of false imprisonment has been incorporated into § 16-3-910 as one method of proving kidnapping."). Therefore, appellate counsel was not "objectively unreasonable" in failing to challenge the trial court's ruling in that regard, nor can Applicant prove resulting prejudice as the trial judge properly denied the request and there is no "reasonable probability" the outcome of the case would have been different had appellate counsel raised the issue to the Court of Appeals. Accordingly, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway

Ex. 21

Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

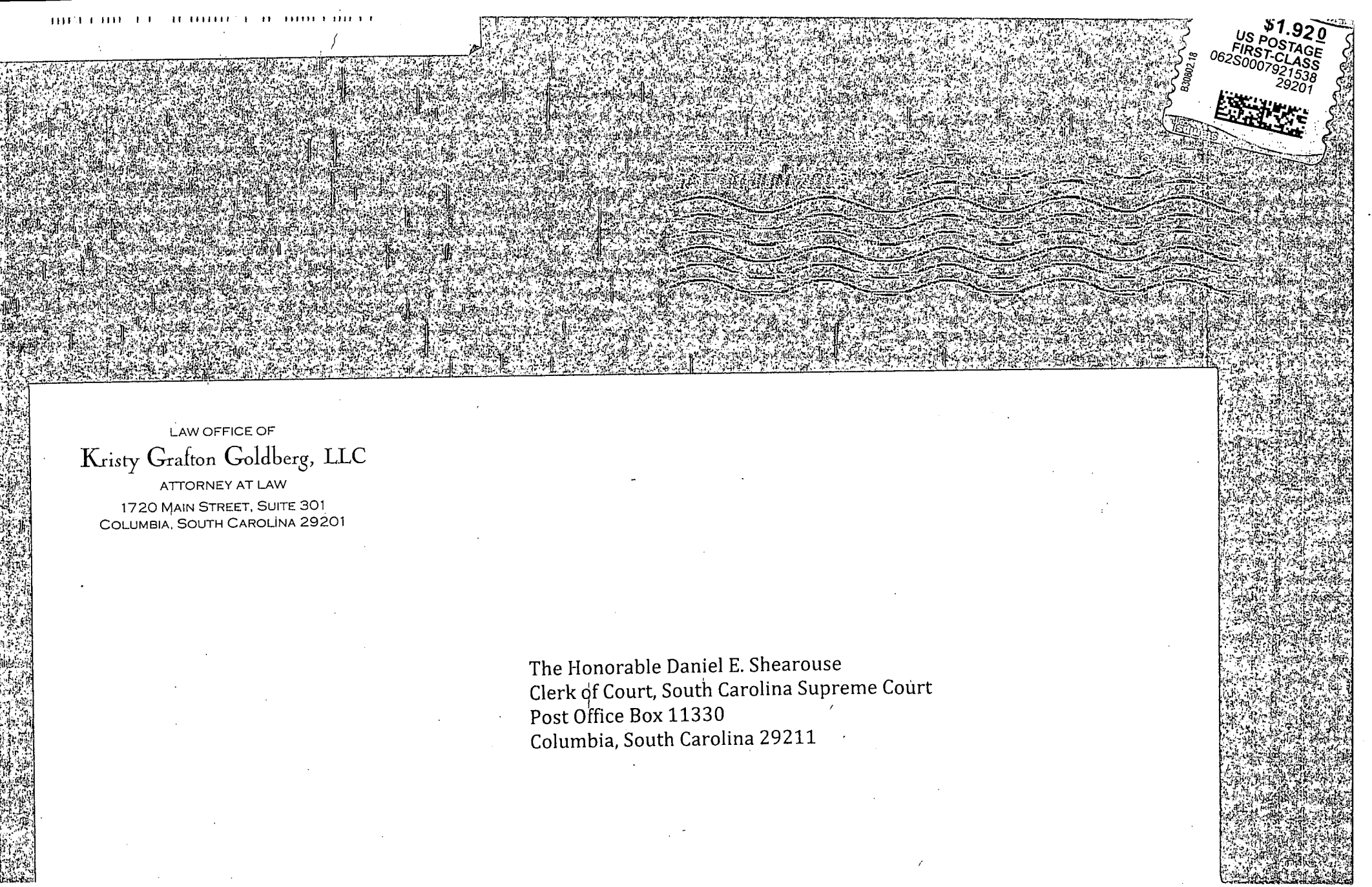
1. That the Application for Post-Conviction Relief must be denied and dismissed **with prejudice**; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 6th day of May, 2013.

G. THOMAS COOPER, JR.
Presiding Judge
Fifth Judicial Circuit

Columbia, S.C.



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