

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUN 10 2013

CERTIORARI TO SPARTANBURG COUNTY
COURT OF COMMON PLEAS

S.C. Supreme Court

The Honorable Brooks P. Goldsmith, Circuit Court Judge
Case No. 2010-CP-42-4181

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-42-4181. 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
IN THE SUPREME COURT

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CERTIORARI TO SPARTANBURG COUNTY
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Case No. 2010-CP-42-4181

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.

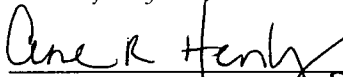
Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
P.O. Box 12725
Columbia, South Carolina 29211

Jeremy A. Thompson, Esquire
Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
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.



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

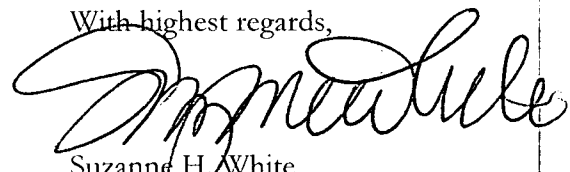
**RE: Nathaniel Teamer v. State of South Carolina
2010-CP-42-4181**

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)

Spartanburg County

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



Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

May 13, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Nathaniel Turner # 25309

Applicant

7TH JUDICIAL CIRCUIT

CASE # 2010CPA 4181

Steele^{VS}
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Quota Book
In this action dated May 6, 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:

Quinn Miller
Suzanne White
Nathaniel Turner
Tricia Blanchette & Jerry Thompson

May 13, 2013
(Date)

Corrie Seay
(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-42-4181

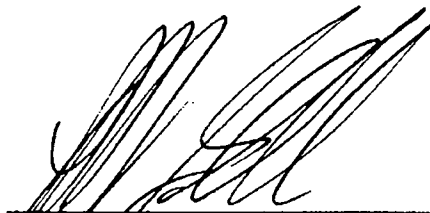
AMENDED ORDER

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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SPARTANBURG COUNTY
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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 Tramer
Applicant # 285309

CASE # 2010CP42-4181

Steel
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Ord. Art. 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 McElree
Suzanne White
Nathaniel Tramer
Tricia Blanchette / Jenn Thompson

2-11-13
(Date)

Cecilia Seay
(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-42-4181

ORDER GRANTING APPLICATION
 FOR POST CONVICTION RELIEF

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 SPARTANBURG COUNTY
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 JIM L. BELMONTLEY

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 April 26, 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 making a motion to sever which allowed the State to stream line the case against Applicant, eliminated defenses and allowed evidence from charges related to the first trial to be used during the trial at issue. Ineffective assistance of counsel for failure

to be prepared to proceed after motion to sever was granted in prior trial and to properly preserve the issue for appellate review.

3. Ineffective assistance of trial counsel for failure to utilize the prior trial testimony of James Young and Christina Hoggle or call them as a witness for the defense.
4. Ineffective assistance of trial counsel regarding the cell phone records, testimony and argument, specifically, but not limited to the following:
 - a. Failure to utilize the discovery materials, call all necessary witnesses, thoroughly cross-examine the State's witness and raise all viable arguments during the pre-trial motion to suppress the evidence located in the Chevy Caprice by law enforcement.
 - b. Failure to effectively utilize the phone records introduced by the State and present the jury with a timeline of the calls and events question.
 - c. Failure to effectively cross-examine the State's witnesses regarding the cell phone records and refute the State's arguments regarding the implications of such records.
 - d. Failure to make contemporaneous objections to the introduction and testimony regarding the cell phones and cell phone records.
5. Ineffective assistance of trial counsel for failure to present a pre-trial motion for suppression of the prior bad act testimony offered by Kelvin McKinney and Dawn Hunter. Ineffective assistance of counsel for making an untimely objection on the basis of prior bad act testimony during the testimony of Dawn Hunter.
6. Ineffective assistance of trial counsel for failure to impeach Kelvin McKinney's testimony regarding Applicant's motive with the statement of the victim, which identifies "Snow" (Kelvin McKinney) not Applicant. Failure to effectively use the video of Kelvin McKinney's statement on cross-examination.
7. Ineffective assistance of trial counsel for failure to utilize testimony and/or evidence to refute Kelvin McKinney's testimony that Applicant confessed to him while located in the detention center.
8. Ineffective assistance of trial counsel for failure to advise Applicant that Dawn Hunter would be called as a witness by the State and discuss the substance of her testimony.

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9. Ineffective assistance of trial counsel for failure to thoroughly cross-examine David Procter regarding the identification of the house where the suspect was picked up from, the streets in question, the sketch of the suspect and the identifying information of the suspect.
10. Ineffective assistance of counsel for failure to object to testimony regarding the drug evidence found in the Chevy Caprice on the grounds of illegal search and seizure, chain of custody or use of an uncharged "bad act."
11. Ineffective assistance of counsel for failure to fully explore the access Carlos Fuller had to the murder weapon and calls made to Carlos Fuller on the phone records introduced at trial.
12. Ineffective assistance of counsel for failure to investigate the DNA evidence, utilize a DNA expert and effectively cross-examine Agent Fields regarding the DNA evidence.
13. Ineffective assistance of counsel for opening the door and/or eliciting testimony regarding Applicant's bad reputation during the testimony of Keith Letmon. Failure to properly review the criminal history of Keith Letmon and make necessary objections and/or arguments when the State utilized his criminal history on cross-examination.
14. Ineffective assistance of counsel for failure to call Mrs. Feaster.
15. Ineffective assistance of counsel for failure to provide the court with a third party guilt instruction.
16. 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 request to charge the jury on third party guilt.
17. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

HONORABLE BROOKS P. GOLDSMITH
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 SPARTANBURG COUNTY
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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:

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 Lee Connelly, James Humphries, Elaine Feaster, Teresa Speller, Dr. Robert Bennett and Joshua Shultz, Esquire to the stand. The State called SLED Agent Rhonda Fields. Applicant's counsel introduced twenty-six exhibits. The parties agreed that the trial transcript from State v. Nathaniel Teamer, Docket No.: 2006-GS-42-1719, 1720, 1732 & 1733, 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. Therefore, this Court was 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 April 2007 term of the Spartanburg County Grand Jury, Applicant was indicted for Murder (Indictment No.: 2007-GS-42-1407), and Assault and Battery with Intent to Kill

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HONORABLE BROOKS P. GOLDSMITH

(Indictment No.: 2007-GS-42-1408). On January 14-16, 2008, 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 guilty as indicted. The Honorable J. Derham Cole sentenced Applicant to confinement for life for Murder and a term of twenty (20) years consecutive for the Assault and Battery with Intent to Kill.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert Dudek, South Carolina Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Teamer, Op. No. 2010-UP-062 (S.C. Ct. App. filed January 28, 2010). Applicant filed a Petition for Rehearing, which was denied on April 21, 2010. The Court of Appeals withdrew the Opinion issued on January 28, 2010 and substituted it with an Opinion issued on April 21, 2010. Applicant filed a Petition for Writ of Certiorari with the South Carolina Supreme Court, which was denied on May 18, 2010. The Remittitur was issued on May 19, 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), SCRCPP).

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

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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.

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 conduct a reasonable investigation. The Court held that a reasonable investigation includes interviewing witnesses and conducting an independent investigation of the facts

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IN THE DISTRICT COURT

of the case. *Id.*, 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.. This Court finds that trial counsel was not deficient for failing to prepare with Applicant by going over the discovery materials and fully discussing trial strategy and failing to investigate the witnesses and evidence put forth by the State. 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. United States v. Pitino, 887 F.2d 42, 48 (4th Cir. 1989); Yohey v. Collins, 985 F.2d 222 (5th Cir. 1993). 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).

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

2. 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 related to the first trial to be used during the trial at issue. Ineffective assistance of counsel for failure to be prepared to proceed after motion to sever was granted in prior trial and to properly preserve the issue for appellate review

At the beginning of Applicant's trial called on September 10, 2007, 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 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

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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 on the night in question. Applicant referenced counsel's closing argument regarding "two Charlies" and explained how the severance impaired that argument. Murder Transcript p. 432. Additionally, Applicant explained that he did not realize that the witnesses and evidence from the DUI and traffic offenses would be used against him in the 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 the 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 thought it would be prejudicial for all the charges to be tried together. He explained that he believed the prejudice of trying all charges together was greater to the Applicant because the jury could assume that if Applicant committed one of the alleged charges then he committed all of the charges, so he made the strategic decision to make the motion to

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SPARTANBURG COUNTY



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 rework 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.

3. Ineffective assistance of trial counsel for failure to utilize the prior trial testimony of James Young and Christina Hogle or call them as a witness for the defense.

By way of his amendment and through his testimony at the evidentiary hearing, Applicant alleged that trial counsel was ineffective when he failed to utilize the burglary trial testimony of James Young and Christina Hogle from his prior trial or call them as a witnesses for the defense. It is well established that a PCR applicant must produce the testimony of a favorable witness or offer the testimony in accordance with the rules of

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JIMMY D. DELANEY



evidence at the evidentiary hearing to establish prejudice from the witness' failure to testify. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

At the burglary trial, 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. Applicant contrasted this testimony against the officer's testimony in this case and alleged that counsel should have utilized James Young to contradict the officer's testimony.

At the burglary trial, Christina Hoggle testified about booking Applicant when he was arrested on the night in question. Burglary Transcript p. 408. During his testimony, Applicant explained that counsel should have called Ms. Hoggle and asked her about his appearance when he was arrested.

Upon review of both trial transcripts, this Court finds that trial counsel was not ineffective when he failed to call James Young or Christina Hoggle at trial. As indicated above, this Court finds that Applicant has failed to show that either witness was a necessary witness or how their testimony would have impacted the outcome of the trial. Id. Therefore, this claim must fail.

4. Ineffective assistance of trial counsel regarding the cell phone records, testimony and argument. Specifically, as follows: 1) Failure to utilize the discovery materials, call all necessary witnesses, thoroughly cross-examine the State's witness and raise all viable arguments during the pre-trial motion to suppress the evidence located in the Chevy Caprice by law enforcement; 2) Failure to effectively utilize the phone records introduced by the State and present the jury with a timeline of the calls and events in question; 3) Failure to effectively cross-examine the State's witnesses regarding the cell phone records and refute the State's arguments regarding the implications of such records; 4) Failure to make contemporaneous objections to the introduction and testimony regarding the cell phones and cell phone records.

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M. HOPE BLANCHETT

Due to the complexity of this issue, this Court will address each subpart as listed above. First, Applicant alleged that trial counsel was ineffective when he failed to utilize the discovery materials, call all necessary witnesses, thoroughly cross-examine the State's witness and raise all viable arguments during the pre-trial motion to suppress the evidence located in the Chevy Caprice by law enforcement.

At the beginning of trial, counsel made a motion to suppress the cell phone (864-921-0826) located during Investigator Guthro's search of the Chevy Caprice on February 22, 2006 Murder Transcript p. 39. The State called Investigator Guthro and the defense called no witnesses. When called, Investigator Guthro testified that two search warrants were executed on the Chevy Caprice that yielded a Verizon cell phone, a jacket and a red rag. Murder Transcript pp. 44-45. On February 22, 2006, he chose to conduct a search after being informed that the prior searches had been completed. Murder Transcript p. 46. He admitted that the phone he recovered was not in plain view and he did not know the inventory policy. Murder Transcript pp. 47-8. As a result of the search, he obtained a third search warrant that yielded a green leafy substance, camera box, cigarette butts, and other items. Investigator Guthro concluded that his search was necessary because the prior searches were not properly done. After hearing his testimony, the trial court found the evidence admissible since the purpose of the search was "inventory." Murder Transcript p. 62, ln. 10.

Applicant, through discovery, obtained a copy of the Spartanburg City Police Department inventory policy. Applicant's Exhibit #9. Through his testimony and exhibits, Applicant explained how trial counsel should have handled the motion differently. Applicant's Exhibit #8. Trial counsel conceded that he did not obtain a copy

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of the inventory policy, and he testified that that it could have bolstered his suppression argument. He also responded that there was "no reason" he did not ask Investigator Guthro about the documentation that indicated that he was involved in the second search warrant.

This Court has reviewed the pertinent portions of the record, examined the exhibits, heard the testimony and considered State v. Brown, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010), which was submitted by PCR counsel. As a result, this Court finds that trial counsel's performance during the suppression motion did not fall below professional norms. "[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 failed to provide evidence or testimony to prove that if Counsel made any additional objections, called any witnesses, or obtained the inventory policy of the Spartanburg City Public Safety, the outcome of the pre-trial motions and his trial would have been different. Therefore this claim must fail.

Second, Applicant alleged that trial counsel was ineffective in how he utilized and addressed the phone records that were admitted at trial. Applicant understood that counsel was going to make a chart of the phone records to demonstrate inconsistencies to the jury in the State's interpretation of the records and to show how the records aided his defense. In support of his allegation, PCR counsel prepared and admitted a demonstrative chart, which Applicant went through and explained the benefits of having a chart at trial. Applicant's Exhibit #15. Additionally, Applicant referenced David

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Proctor's testimony and explained that counsel should have used the records to question him about his assertion that the victim was talking to the suspect for thirty minutes and that the suspect was picked up five minutes before the shooting. Murder Transcript pp. 109, 113.

In response, counsel testified that he "wished" he would have made a chart that corresponded with the phone records. He also admitted that he did not ask David Proctor about the brevity of the calls reflected on the phone records or about the phone records showing that the suspect might have made a call while in the vehicle. However, Counsel also testified that the testimony regarding thirty minutes of phone calls could refer to the fact that there were several calls over a thirty minute period, rather than thirty minutes of consecutive talking.

This Court has considered the testimony and assertions of Applicant, but does not find ineffective assistance of counsel in this instance. In every trial, counsel may wish they had done something more or differently but wishing is not an admission of deficiency. Furthermore, based upon a complete review of the records pertaining to these allegations, this Court finds trial counsel rendered effective assistance in his handling of the telephone records and corresponding testimony. Therefore, Applicant's claim must fail.

Third, Applicant alleged that trial counsel was ineffective when he failed to make contemporaneous objections to the introduction and testimony regarding the cell phones and cell phone records. Despite making a suppression motion regarding the cell phone belonging to number 864-921-0826, counsel acknowledged that he did not enter a contemporaneous objection to the introduction of the records for it or any other phone

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SPRINGFIELD, MASSACHUSETTS



records admitted by the State. However, Counsel testified that he believed the phone records would have been admissible independently because the ABWIK victim called that number prior to the shooting. This Court finds that Applicant has failed to establish that had counsel made a contemporaneous objection to the introduction of the phone records after his suppression motion was unsuccessful, the outcome of his trial would have been different. Additionally, the record reflects that counsel attempted to question Investigator Guthro on cross-examination about the searches that yielded the phone in question, but the State's objection was sustained. In sum, Applicant has failed to show how counsel's handling of the introduction of the phone records and corresponding testimony was deficient. Therefore, this claim must fail.

5. Ineffective assistance of trial counsel for failure to present a pre-trial motion for suppression of the prior bad act testimony offered by Kelvin McKinney and Dawn Hunter. Ineffective assistance of counsel for making an untimely objection on the basis of prior bad act testimony during the testimony of Dawn Hunter.

By way of his amendment and through his testimony at the evidentiary hearing, Applicant alleged that trial counsel was ineffective for failing to address prior bad act testimony offered by Kelvin McKinley about a prior shooting. He further alleged that trial counsel was ineffective for making an untimely objection to Dawn Hunter's testimony about seeing Applicant with a gun and failing to address testimony about a prior shooting.

At trial, Kelvin McKinney testified about a shooting that occurred on January 14, 2006 while he was with Applicant and Tony Hunter (victim). McKinney testified that the shots were fired by Applicant. Murder Transcript pp. 237-8.

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When Dawn Hunter took the stand, she explained that she had a child with McKinney and Tony Hunter was her brother. Murder Transcript p. 262. Trial counsel objected when she testified that Applicant inquired about her brother's whereabouts and that she had seen the Applicant with a gun and latex gloves. Murder Transcript pp. 263-4. Counsel argued that her testimony involved a prior bad act and was more prejudicial than probative. Murder Transcript 269. The State responded about the prior shooting and explained they were going into it to establish motive. Murder Transcript pp. 269-71. Trial counsel informed the court that the only bad act he could see was the testimony about the gun. Murder Transcript p. 273, lns. 1-10. In response, the court stated that whether it was a bad act or not, it was relevant. Murder Transcript p. 272, lns. 14-17.

Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006), State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal. Peeler v. Spartan Radiocasting, 324 S.C. 261, 478 S.E.2d 282, 283 (1996).

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Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Finally, the determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007), State v. Bell, 302 S.C. 18, 30, 393 S.E.2d 364, 371 (1990).

Here, Applicant alleged that trial counsel should have made a pre-trial motion regarding the admissibility of the testimony about the prior shooting and that counsel untimely raised a motion to another "bad act" during the testimony of Dawn Hunter. In response to trial counsel's motion during the testimony of Dawn Hunter, the State made it clear that they were offering the testimony regarding the prior shooting to establish motive, and Applicant has failed to show how such testimony would not be admissible under this exception. Additionally, counsel entered an objection during the testimony of Dawn Hunter, and the trial court ruled against him. As a result, this Court cannot find any support for Applicant's claim that trial counsel was ineffective for failing to raise a pre-trial motion or in his handling of his motion during the testimony of Dawn Hunter, so this claim must fail.

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6. Ineffective assistance of trial counsel for failure to impeach Kelvin McKinney's testimony regarding Applicant's motive with the statement of the victim, which identifies "Snow" (Kelvin McKinney) not Applicant. Failure to effectively use the video of Kelvin McKinney's statement on cross-examination.

At the evidentiary hearing, Applicant explained the State's theory was that he murdered Tony Hunter since Hunter had implicated him in a prior shooting. Applicant further explained that his primary defense was that Kelvin McKinney was in fact the one with motive to murder Tony Hunter since McKinney was the person implicated in Hunter's statement. As a result, Applicant alleged that trial counsel was ineffective when he failed to ask McKinney about Hunter's statement when McKinney testified about Applicant's motive to murder Hunter. Additionally, Applicant explained that it was his understanding that counsel was going to utilize the entire video of McKinney's interrogation to demonstrate inconsistencies and attack his credibility.

Counsel testified that he did cross-examine McKinney about his motives from authorities, which required McKinney to acknowledge that Tony Hunter had given a statement about him and tried to find out his "government name." Murder Transcript p. 245-7. Counsel was also able to ask McKinney about several inconsistencies between McKinney's prior video recorded statement and his testimony at trial. Counsel also testified that he pointed out during the cross-examination of Investigator Bryant that the only person directly implicated in Tony Hunter's statement was "Snow," who was identified as McKinney. Murder transcript p. 278-9. As it directly relates to the video recorded statement, trial counsel acknowledged that he should have clearly stated what portions of the video were played on the record or proffered the entire video, but that the jury did see the parts that were inconsistent with McKinney's testimony.

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This Court has reviewed the video, in conjunction with the record, and finds that Applicant's claim boils down to an allegation that counsel should have done better not that counsel was ineffective. Applicant's Exhibit #16. Rule 613(b), SCRE, states:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination. State v. Copeland, 278 S. 572, 300 S.E.2d 63 (1982). This Court finds that Counsel properly utilized the video recorded statement of McKinney, so there is no deficient performance.

Additionally, testimony was elicited from Officer Bryant that Hunter's statement only referenced "Snow" (AKA McKinney) not Applicant. Murder Transcript p. 279.

Therefore, Applicant's claims must fail under the first prong of the Strickland analysis.

7. Ineffective assistance of trial counsel for failure to utilize testimony and/or evidence to refute Kelvin McKinney's testimony that Applicant confessed to him while located in the detention center.

By way of his amendment and through his testimony, Applicant alleged that trial counsel was ineffective when he failed to utilize witnesses and evidence to refute Kelvin McKinney's testimony that Applicant confessed to him while located in the Spartanburg Detention Center. At trial, Kelvin McKinney recounted meeting up with Applicant in Pod Six at the Spartanburg Detention Center, and Applicant confessing to shooting the

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victims. Murder Transcript p. 241. McKinney explained: "We just in the room talking, and I asked him." Murder Transcript p. 242, ln. 6.

During the evidentiary hearing, Applicant, through testimony and exhibits, explained that Teresa Speller had been subpoenaed from the detention center and it was his understanding that she was going to be utilized to testify about the rotations in Pod Six. Applicant's Exhibits #1, 3-4, 19. He testified that he could have never had the conversation with McKinney as McKinney described because of security measures at the detention center. He also testified that he asked counsel to talk to his roommate (James Humphries) about it.

Teresa Speller and James Humphries were called as part of the Applicant's case. Both testified to their knowledge of the pod rotation and/or the ability for inmates to access each other's rooms for a conversation like the one described by McKinney. Capt. Speller testified that it was possible for inmates from separate pods to have contact and even potentially conversations in each other's cell. Speller testified that at that time, there was one officer to approximately 130-170 inmates and because of rotations, booking, screening, and other reasons, inmates could access another inmate in a separate pod. Additionally, Speller testified that inmates often utilized various systems in ensuring the doors would not lock or fully latch. Though he testified that there was no way the Applicant could have talked with McKinney because of pod rotations, also testified that he had no knowledge of what occurred in McKinney's cell because he was Applicant's roommate.

When trial counsel took the stand, he recalled speaking with Teresa Speller, as well as people in pods four, five, and six, along with reviewing the detention center

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diagram introduced by Applicant. Applicant's Exhibit #4. Counsel also testified that from his own experience in the detention center, he was aware of the ability of the inmates to travel to other pods. Counsel testified that he did not want to call Speller as a witness because he thinks her testimony would have opened the door to many more issues. Counsel testified that he and the Applicant discussed this and the fact that Counsel did not intend to call Speller as a witness. Counsel also testified that he did not speak with Humphries, as he was Applicant's roommate for only a short time. He surmised that the testimony of James Humphries and Teresa Speller was not helpful to Applicant's defense, and this Court agrees. This Court finds Counsel's testimony credible that he contacted Teresa Speller, that he subpoenaed documents from the detention center, and he reviewed the documents received prior to trial. Even though Applicant testified that he believed that counsel was going to utilize the documents and testimony of Teresa Speller and requested that counsel speak with James Humphries, this Court does not find that credible and finds that counsel made an informed strategic decision to not utilize the testimony or evidence presented by Applicant. As a result, counsel did not render ineffective assistance as alleged by Applicant, and this claim must fail under the first prong of the Strickland analysis.

8. Ineffective assistance of trial counsel for failure to advise Applicant that Dawn Hunter would be called as a witness by the State and discuss the substance of her testimony.

This Court finds that this issue falls under issue #1 discussed above.

Therefore, this claim must fail as addressed in issue #1.

9. Ineffective assistance of trial counsel for failure to thoroughly cross-examine David Procter regarding the identification of the house where the suspect was picked up from, the streets in question, the sketch of the suspect and the identifying information of the suspect.

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At the evidentiary hearing, Applicant explained that David Proctor was shown a picture of Feaster's home and identified it as the location where the suspect was picked up. Applicant's Exhibit #5, Murder Transcript pp. 107-9. Applicant alleged that counsel was ineffective when he failed to object or ask Proctor any questions about it on cross-examination. Applicant explained, through incident reports, that Proctor had given various reports and street names to law enforcement and counsel failed to ask him about it. Applicant's Exhibit #20. Additionally, Applicant, through the testimony of Lee Connelly and Daisy Feaster, introduced pictures of several homes located on Breeze Street, which was one of the streets contained in the incident reports, and Applicant alleged that counsel should have utilized those pictures in his cross-examination of Proctor. Applicant's Exhibit #3. When asked, trial counsel testified that he went by the houses himself, but he did not get pictures for trial. Counsel did cross-examine Proctor about giving a statement where he identified Breeze Street as the location he picked up the suspect and was able to elicit testimony where Proctor acknowledged he did not know the name of the street and it could have been Breeze Street or Wofford Street. Murder Transcript p. 119. Counsel also testified that he brought out to the jury during cross-examination of several officers, the fact that Proctor had once identified Wofford Street as the location he picked up the suspect and had also been unsure of where he picked the suspect up. Murder Transcript p. 152; 157.

Applicant also testified about the admission of a sketch of the suspect during the testimony of Proctor and his failure to make an in court identification of Applicant. Applicant's Exhibit #21. Applicant alleged that trial counsel should have contrasted the sketch and description of the suspect in the incident reports against the information about

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his appearance when he was arrested that night. Counsel testified that he made a strategic decision to get Proctor off of the witness stand as soon as possible, because he specifically did not want Proctor making an identification of the Applicant from the witness stand.

Upon consideration of the transcript, exhibits, and evidentiary hearing testimony, this Court finds that trial counsel was not ineffective when he failed to address the identification of the house or suspect in the manner Applicant proposed. 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 Proctor's answers at trial would have been different.

Counsel testified that he conducted an investigation into the matter involving the house identification and chose to not utilize pictures at trial. Additionally, this Court is not convinced that these matters were raised by Applicant to counsel prior to trial, so counsel cannot be held accountable for strategies created post hoc. Additionally, Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense.

As a result, this Court finds that counsel was not ineffective in his handling of these matters at trial, and this claim must fail under the first prong of the Strickland analysis.

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10. Ineffective assistance of counsel for failure to object to testimony regarding the drug evidence found in the Chevy Caprice on the grounds of illegal search and seizure, chain of custody or use of an uncharged "bad act."

By way of his amendment and testimony at the evidentiary hearing, Applicant alleged that trial counsel was ineffective when he failed to make a motion or object to the admission of the drug evidence located in the Chevy Caprice. Trial counsel readily admitted that he did not object to the admission of the drug evidence, but testified that he had concluded that it was one of the least of his concerns at the trial

In consideration of the Rule 404(b), SCRE, and pertinent case law analysis contained in the discussion of issue #5 above, this Court finds that Applicant has failed to show how, even if Counsel were deficient for failing to object to the drug evidence, Applicant was prejudiced due to the admission of the marijuana evidence. Despite counsel's admission that he should have made a motion, this Court finds that this claim must fail as this Court does not find that counsel's omission affected the outcome of Applicant's trial.

11. Ineffective assistance of counsel for failure to fully explore the access Carlos Fuller had to the murder weapon and calls made to Carlos Fuller on the phone records introduced at trial.

At the evidentiary hearing, Applicant addressed Amy Hunter's testimony regarding Carlos Fuller's access to her car and the gun used as the murder weapon. Murder Transcript pp. 285-7, 291. Applicant alleged that counsel failed to fully explore the issue. He also alleged that counsel failed to utilize the phone records introduced by the State, which included calls to Carlos Fuller's number.

During the trial, not only did the State question Amy Hunter about the fact that both the Applicant and Carlos Fuller had access to her car and gun, but counsel cross-

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examined Amy Hunter about Carlos Fuller's access to her vehicle, which contained the murder weapon. Murder Transcript p.287; 290-294. Due to counsel's cross-examination, this Court does not agree with Applicant's allegation as it is clear that counsel addressed the issue in question. Additionally, this Court finds that the State questioned Amy Hunter about Fuller's number and the phone records on direct examination. Murder Transcript pp. 288-9. The calls of concern to Applicant were presented to the jury even if counsel failed to specifically address them. Based upon how this issue was addressed in the trial record, counsel did not render ineffective assistance as alleged by Applicant. Therefore, this claim must fail under the first prong of the Strickland analysis.

12. Ineffective assistance of counsel for failure to investigate the DNA evidence, utilize a DNA expert and effectively cross-examine Agent Fields regarding the DNA evidence.

In support of his claim that counsel ineffectively handled the DNA evidence, Applicant called Dr. Robert Bennett as an expert at the evidentiary hearing, with the State objecting to his qualifications. The Court ruled that Dr. Bennett was admitted as an expert in forensic science and DNA analysis, subject to the limitations that an expert "should" have been brought in to assist Counsel in preparing for trial, but not for the mode or method of testing or to question SLED's DNA analysis. In response, the State called Rhonda Fields, SLED Agent, who processed the evidence and testified at trial, and who was qualified as an expert in DNA analysis. Counsel testified that he did not consult with an expert about this case and the office policy was to review the need for an expert on a case by case basis. Counsel testified that it is possible an expert could have helped clarify the report from SLED, but he did not believe that it would have contradicted the analysis or evidence.

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This Court has reviewed the trial record and considered the testimony offered at the evidentiary hearing. This Court finds that while it may have been helpful to utilize an expert for assistance with cross-examination and to testify at trial; this Court finds that counsel's well informed decision not to utilize an expert is reasonable. Additionally, this Court is not convinced that Dr. Bennett's testimony would have aided the jury in reaching a different outcome since Agent Fields directly refuted any concerns with the evidence raised by Dr. Bennett. Therefore, this claim must fail under both prongs of the Strickland analysis.

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continuance upon learning that Applicant's alibi witness (Mrs. Feaster) was sick and could not testify. Recently in Walker v. State, 397 S.C. 226, 238, 723 S.E.2d 610, 616 (Ct. App. 2012) the South Carolina Court of Appeals addressed the issue of failure to investigate and utilize an alibi witness and reasoned:

When a PCR applicant alleges trial counsel failed to investigate or present an alibi witness, the PCR court must make two findings to determine if counsel's deficient performance constitutes prejudice under Strickland. First, the court must find as a matter of law whether the witness's testimony meets the legal definition of an alibi. Second, the court must assess the witness's credibility. In making the first finding, the court must consider the entire record to determine what the testimony would have been if it had been presented at trial. The PCR court must consider the testimony as a whole, take it as true and credible, and view it in the light most favorable to the PCR applicant.

At the evidentiary hearing, Mrs. Feaster recalled meeting with a paralegal prior to trial, and testified that she was present for the first two days of trial, but she got sick and was unable to testify on the day she was scheduled to do so. She affirmed that she would have been willing to testify if counsel had requested and obtained a continuance of the trial. When asked, trial counsel recalled Mrs. Feaster's testimony at the burglary trial and that she was sick and unable to testify at the murder trial. Counsel candidly admitted that he failed to make a motion or request a continuance due to her unavailability.

While on the stand, Mrs. Feaster identified the homes reflected in Applicant's Exhibit #2, and she testified that she recognized the homes. She explained that the homes were within five minutes walking distance of her home. She also explained that the pictures depicted the homes similar to how they appeared in 2006.

Although this Court is concerned about Mrs. Feaster's testimony in which she adamantly denies even testifying at the burglary trial, this Court can only assume that Mrs. Feaster was confused about her testimony at the prior burglary trial. Burglary

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Transcript pp. 403-8. In pertinent part, Mrs. Feaster testified that Applicant called her to say he had arrived at her home around 8:00 p.m. because she was inside the home in the tub, and when she got out of the tub, he remained there until she left for the store before 9:00 p.m. Burglary Transcript pp. 404-405. She also testified that Applicant was at her home when she arrived back from the store around 12:00 a.m. Burglary Transcript p. 405. She admitted that she did not know where Applicant was from around 9:00 p.m. to 12:00 a.m. Burglary Transcript pp. 405-6.

To qualify as an alibi, a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995). Interestingly, the crime at issue in the burglary trial allegedly occurred around 11:00 p.m., whereas the crime at issue in the murder trial allegedly occurred just prior to 8:49 p.m.¹ Counsel failed to ask for a continuance mid-trial to utilize Mrs. Feaster for the murder trial when her testimony established an alibi for the time the crime was allegedly committed.

Pursuant to the requirements set forth in Walker, this Court finds that Mrs. Feaster's testimony at the burglary trial meets the legal definition of an alibi. . . Because an alibi is a complete defense to a criminal charge, there is no conception of sound judgment that would permit counsel to choose not to request a continuance to procure the testimony of a witness whom counsel has reason to believe could provide an alibi. Therefore, this Court finds that Applicant must be granted a new trial.

¹ The records reflect that the first officer arrived at the scene at 8:49 p.m.

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15. Ineffective assistance of counsel for failure to provide the court with a third party guilt instruction.

During the colloquy regarding the jury charge, trial counsel asked if the trial court had a third party guilt instruction in its charge. Murder Transcript p. 420. The trial court responded that it did not. Murder Transcript p. 420. After the charge to the jury, trial counsel stated that he had no objection to the charge as given. Murder Transcript p. 476.

On appeal, appellate counsel argued, pursuant to Anders, that the trial court had erred by refusing to give a jury charge on third party guilt. In that brief, appellate counsel stated that the issue was likely not preserved for appeal. Anders Brief p. The Court of Appeals dismissed the appeal pursuant to Anders. State v. Teamer, Op. No. 2010-UP-062 (S.C. Ct. App. filed January 28, 2010).

At the evidentiary hearing, Applicant alleged that trial counsel was ineffective for failing to provide the trial court with a third party guilt instruction. Trial counsel testified that he has never heard of or seen a third party guilt instruction in a trial, but he was able to present the third party guilt evidence to the jury and the judge presented the reasonable doubt jury instruction. However, Counsel did acknowledge that he did not prepare a proposed instruction to present to the judge.

This Court finds that defense counsel was ineffective for failing to provide the trial court with a proposed instruction on third party guilt. Rule 20(a), SCRCrimP requires that all proposed instructions “must include accurate citation to authorities relied upon.” Trial counsel’s failure to provide “accurate citation[s]” to any decision pertaining to third party guilt constituted deficient conduct.

Furthermore, an instruction on third party guilt should have been given. “The trial court is required to charge only the current and correct law of South Carolina.” State



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v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). “A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused.” Id. (quoting State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)). A charge on third party guilt was warranted because the identity of the perpetrator was an essential issue in the case and because evidence that a third party committed the crime was admitted. Although there is no established third party guilt charge currently in South Carolina, the Supreme Court of Connecticut has held:

[I]f the evidence pointing to a third party's culpability, taken together and considered in the light most favorable to the defendant, establishes a direct connection between the third party and the charged offense, rather than merely raising a bare suspicion that another could have committed the crime, a trial court has a duty to submit an appropriate charge to the jury.

State v. Arroyo, 284 Conn. 597, 610, 935 A.2d 975, 984 (Conn. 2007). Consequently, defense counsel was deficient for failing to request a charge on third party guilt,

This Court finds that defense counsel's deficient performance prejudiced Applicant. While the trial court did give a charge on alibi, the trial court did not give a specific charge to the jury that required the jury to identify the perpetrator of the offense because there was no testimony from a witness identifying Applicant as the shooter. State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (Finding that in single witness identification cases, the trial court should instruct the jury that the burden of proving the identity of the defendant rests with the State). Therefore, the trial court's charge failed to adequately convey the defense of third party guilt to the jury. Since it is ineffective assistance of counsel to request a charge on the defense of alibi when it is warranted, see

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generally Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992); Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995), it is similarly ineffective assistance of counsel to fail to request a charge on third party guilt. See also Arroyo, *supra*, 284 Conn. at 614-615, 935 A.2d at 9686-987 (Finding the failure to charge the jury on third party guilt was reversible error). . Accordingly, Applicant was prejudiced by his trial attorney's failure to ensure that the jury was instructed on one of his central defenses, and a new trial is warranted.

16. 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. Murder Transcript p. 454. 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, 343 S.C. 20, 29, 538 S.E.2d 248, 252-3 (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.

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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 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.

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[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 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.³

³ 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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17. 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 request to charge the jury on third party guilt.

This Court finds that the Applicant has failed to offer any testimony or evidence to show 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 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.

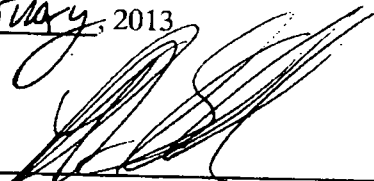
IT IS THEREFORE ORDERED:

1. That Applicant has met his burden of proof as to his allegation of ineffective assistance of trial counsel in the particular areas addressed above and has failed to meet his burden in those remaining issues as discussed;
2. That Applicant has not met his burden of proof as to his allegation of ineffective assistance of appellate counsel;

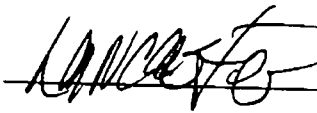
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SPARTANBURG, S.C.
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M. J. ELLIOTT

3. That the Application for Post Conviction Relief be granted and his convictions be vacated and granted a new trial;
4. That Applicant be released from the custody of South Carolina Department of Corrections and transferred to the custody of Spartanburg County pending the disposition of his criminal case, with normal bond proceedings.

AND IT IS SO ORDRED this 8 day of February, 2013



Honorable Brooks P. Goldsmith
Circuit Court Judge

, South Carolina

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