

LAW OFFICE OF



**TARA DAWN SHURLING, PA**

Attorney and Counselor at Law

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(803) 738-8622

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March 4, 2014

**RECEIVED**

MAR 05 2014

**S.C. SUPREME COURT**

The Honorable Daniel E. Shearouse  
South Carolina Supreme Court Clerk  
Post Office Box 11330  
Columbia, South Carolina 29211-1330

Re: Jarvis DeQuan Gibbs, 255871 v. State of South Carolina; 2012-CP-28-317.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal on behalf of the above-captioned Post-Conviction Relief client. I would appreciate your returning two (2) clocked copies to me in the envelope provided. Inasmuch as I was court-appointed in this matter, I will now be turning this file over to the South Carolina Commission on Indigent Defense, Office of Appellate Defense for perfection of this appeal. I would note that Judge Barber issued a written Order of Dismissal on this case which was filed with the Kershaw County Clerk of Court's Office on January 17, 2014, however my subsequent 59(e) Motion was not denied until February 11, 2014. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours,

A handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is written in a cursive style with a large initial "T".

Tara Dawn Shurling  
Attorney and Counselor at Law

TDS/sg

Enclosures

cc: Megan Harrigan, Assistant Attorney General  
Lorienne French, South Carolina Office of Appellate Defense

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM KERSHAW COUNTY  
Court of Common Pleas  
James R. Barber, III, Presiding Judge

2012-CP-28-317

JARVIS DEQUAN GIBBS, 255871

Applicant,


v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

**NOW COMES** the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal denying his Post-Conviction Relief filed January 17, 2014, and the Order Denying the Applicant's Motion to Alter or Amend pursuant to Rule 59(e) SCRCP which was filed with the Kershaw County Clerk of Court on February 11, 2014.

  
Tara Dawn Shurling  
Attorney and Counselor at Law

3614 Landmark Drive, Suite A  
Columbia, South Carolina 29204  
(803)738-8622  
(803)738-1600 FAX

ATTORNEY FOR APPLICANT

This 4<sup>th</sup> day of March, 2014.

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

**RECEIVED**

MAR 05 2014

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM KERSHAW COUNTY  
Court of Common Pleas  
James R. Barber, III, Presiding Judge

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2012-CP-28-317

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JARVIS DEQUAN GIBBS, 255871

Applicant,

v.

THE STATE OF SOUTH CAROLINA,

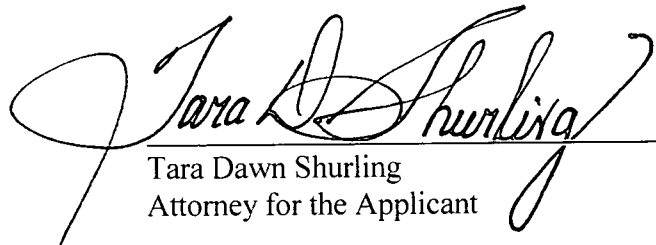
Respondent.

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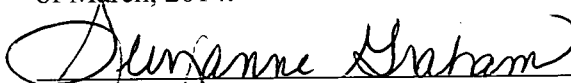
CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Megan Harrigan, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 4<sup>th</sup> day of March, 2014.

  
Tara Dawn Shurling  
Attorney for the Applicant

SWORN TO BEFORE me this 4<sup>th</sup> day  
of March, 2014.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: 2/28/2024

FORM 4

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

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2012-CP-28-317

Jarvis Dequan Gibbs

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for:  Plaintiff  Defendant  
 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.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settle);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other: \_\_\_\_\_

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

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

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge

Judge Code  
 For Clerk of Court Office Use Only

Date  
 ATTEST True, Correct & Certified  
 Copy of Original on File in this  
 Court.

*James McDonald*  
 Clerk of Court Kershaw County

FILED FOR RECORD  
 2012 JAN 17 PM 12:08  
 JOYCE MCDONALD  
 CLERK OF COURT  
 KERSHAW COUNTY, S.C.

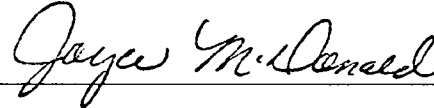
This judgment was entered on 17th day of January, 2014, and a copy mailed first class or placed in the appropriate attorney's box on 17th day of January, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Tara Dawn Shurling 3614 Landmark Drive Suite A  
Columbia, SC 29204

Megan E. Harrigan PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter

Joyce McDonald - Clerk of Court

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA )  
 COUNTY OF KERSHAW )  
 )  
 Jarvis Gibbs, #255871, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2012-CP-28-0317

**ORDER OF DISMISSAL**

FILED FOR RECORD  
 2014 JAN 17 PM 12:00  
 JUDGE PROCTER  
 CLERK OF COURT  
 KERSHAW COUNTY, S.C.

**PROCEDURAL HISTORY**

This matter comes before this Court by way of an application for post-conviction relief filed March 26, 2012 and amended on June 3, 2013. An evidentiary hearing into the matter was held on June 6, 2013 at the Richland County Courthouse, the Honorable James R. Barber, III, presiding. Applicant was present at the hearing and represented by Tara D. Shurling, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. The Applicant was indicted by the Kershaw County Grand Jury during the October 2008 term for Kidnapping (2008-GS-28-01555), Use of a Firearm during a Violent Crime (2008-GS-28-01556) and during the November 2009 term for Entering a bank with Intent to Steal (2009-GS-28-1548). Samuel Ogburn, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr., where he was found guilty as indicted. On November 18, 2009, Judge Cooper sentenced him to eighteen years imprisonment for both Kidnapping and Entering a Bank with Intent to Steal and five years imprisonment for Use of a Firearm during a Violent Crime; all sentences were order to be served concurrently.

ATTEST True, Correct & Certified  
 Copy of Original on File in this  
 Court.

*Jessie McDaniel*  
 Clerk of Court Kershaw County

A notice of appeal was filed and an appeal perfected. The conviction and sentence were affirmed after briefing. State v. Jarvis Gibbs, Op. No. 2011-UP-511 (S.C. Ct. App. filed December 19, 2011). The Remittitur was sent on December 19, 2011.

In Applicant's post-conviction relief application, he alleged that he is being held in custody unlawfully based on the following claims:

1. "Ineffective Assistance of Counsel – failure to call witnesses own [sic] my behalf";
2. "Failure to move to suppress line up identification evidence";
3. "Failure to question State witness, pro-trial [sic], and investigate"; and
4. "Under the compulsory process I the defendant my lawyer never moved to suppress a line up my lawyer never questioned the State witness"

In his amendment, filed by counsel, Applicant added the following grounds for relief:

1. Trial Counsel was ineffective for failing to impeach state witness Chad Moore concerning his own pending charges, his sentencing exposure on his charges, and his motivation to testify against the Applicant in hopes of earning a favorable deal with the State;
2. Trial Counsel provided the Applicant ineffective assistance of counsel in that they failed to seek to exclude the identification testimony of Melissa Roberts from evidence despite facts and circumstances which rendered her identification inherently unreliable;
3. Trial Counsel was ineffective for failing to cross-examine Melissa Roberts concerning her testimony on direct in which she stated, "when I *thought* I saw him prior";
4. Trial Counsel was ineffective for failing to point out during closing argument that although Melissa Roberts claimed to be certain of her identification of the Applicant *in a mask* she acknowledged that she "thought" she saw him in the bank previously without a mask;
5. Trial Counsel was ineffective for failing to object the first and every time the State introduced testimony asserting the Applicant's admission to the distribution of crack cocaine;
6. Trial Counsel failed to provide the Applicant reasonable professional assistance of counsel when they neglected to request an appropriate curative charge after their request for a mistrial, based upon the introduction of improper testimony concerning drugs, was denied;
7. Trial Counsel was ineffective [sic] for failing to object to a line of testimony in which a key witness for the prosecution, Arthur Macklin, was allowed to testify that he had been threatened and physically assaulted as a consequence of his cooperation with the Applicant's prosecution thereby improperly bolstering the witnesses' credibility and attacking the Applicant's character where there was no evidence connection between the Applicant and the behavior in question;
8. Trial Counsel was ineffective for failing to object to testimony that the three wheeler allegedly used in this robbery was stolen;

9. Trial Counsel was ineffective for failing to ask the jury to specifically observe multiple tattoos and scars [sic] on the Applicant's arms where the eye witness testimony presented at trial made no mention of these obvious physical traits;
10. Trial Counsel was ineffective for neglecting to object to an improper and highly inflammatory closing argument in which the State emphasized threats to witness Macklin where there was no evidence tying the Applicant to any such activity;
11. Trial Counsel was ineffective for failing to introduce testimony to refute the claim of witness Melissa Roberts that the Applicant and his family had been in a restaurant owned by her in-laws "at times" since she knew the Applicant at school;
12. Trial Counsel was ineffective for inaccurately repeating the testimony of Melissa Roberts during his closing argument in a manner [sic] which actually bolstered the testimony of this key State witness;
13. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecutor erroneously claimed that the witness Melissa Roberts has testified that the Applicant had been in her branch of the bank "a couple of days earlier" where the record did not support that claim;
14. Trial Counsel was ineffective for neglecting to object to a portion of the prosecutor's closing argument in which he erroneously claimed that witness Melissa Roberts had said that when she saw the Applicant at the bank, on a different date from the robbery, he was wearing what . . . could have been even the same white shirt";
15. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution erroneously argued that the Applicant's testimony wasn't credible because he claimed to have heard about the bank robbery before he left the barber shop at 11:00 a.m. when the robbery actually took place at 11:00 a.m.

At the evidentiary hearing, Applicant proceeded forward on the grounds raised in his amended application. Applicant testified on his own behalf, as well as presented testimony from trial counsel, Samuel Ogburn, Esquire (herein "Counsel") and his half-sister, Jada Gibbs. Applicant also presented an Affidavit from Ronald W. Moak, the former Assistant Solicitor who prosecuted this case. This Court also had before it a copy of the Applicant's trial transcript, the records of the Kershaw County Clerk of Court, and Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

#### **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).

### *Ineffective Assistance of Counsel*

In a post-conviction relief action, an applicant has the burden of proving the allegations in his application. Rule 71.1(e), SCRPC; 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, an 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

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. An 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, an 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.

After careful review based on the standard discussed above, Applicant has failed to carry his burden in this action. Specifically, this Court finds that Counsel's testimony is credible while Applicant's testimony is not credible. Applicant has failed to prove that Counsel was ineffective in his representation of the Applicant and that he was prejudiced by any of Counsel's alleged deficiencies. Below are the following findings of this Court regarding Applicant's specific allegations of ineffective assistance of counsel<sup>1</sup>:

*"Trial Counsel was ineffective for failing to impeach state witness Chad Moore concerning his own pending charges, his sentencing exposure on his charges, and his motivation to testify against the Applicant in hopes of earning a favorable deal with the State"*

Applicant alleged that Counsel was ineffective for failing to impeach State's witness Chad Moore (herein "Moore") regarding possible benefits derived from his testimony against Applicant. Specifically, Applicant alleges that Counsel was ineffective for failing to cross-examine Moore regarding the possible minimum and maximum sentences he faced and how his testimony against Applicant would favorably affect his sentence. In support of this allegation, Applicant presented this Court with an Affidavit of prosecuting Assistant Solicitor Ronald W. Moak<sup>2</sup> stating that Moak informed the Federal Probation Office handling Moore's federal bank robbery charges that Moore had provided "substantial assist[ance]" to the State.

At the evidentiary hearing, Counsel testified that Moore was a "jailhouse snitch" who testified at Applicant's trial. He testified he learned that Moore would be testifying a few days before Applicant's trial and he requested Moore's "rap sheet" with his prior convictions. Counsel testified that he was aware that Moore gave a statement to law enforcement regarding Applicant's involvement in the crime based on a discussion that Applicant allegedly had with

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<sup>1</sup> Applicant raised fifteen specific allegations of ineffective assistance of counsel in his amended application; however, many of these allegations deal with the same general deficiency and have been grouped together accordingly in this Order.

<sup>2</sup> Ronald W. Moak is no longer employed by the Fifth Circuit Solicitor's Office.

Moore while a pre-trial detainee. Counsel testified that his strategy during his cross-examination of Moore was to show the jury Moore's motivation in testifying was purely self-interest, with the hope he would receive a more lenient sentence. Counsel testified that during his closing argument, he highlighted to the jury that Moore was not a credible witness and was merely implicating Applicant for his own benefit. He testified that he did not cross-examine Moore specifically regarding the maximum and minimum sentences for Armed Robbery because the charge had been dismissed at the time of trial and he did not think it was necessary to do so. Counsel testified that he believes he was able to convey to the jury the substantial benefits Moore was receiving in exchange for his testimony against Applicant, and that any failure to cross-examine Moore specifically regarding sentencing range for a dismissed charge had no impact on Applicant's case.

This Court finds that Applicant has failed to carry his requisite burden in regards to this allegation. The record shows that Counsel cross-examined Moore regarding likely benefits he would receive in exchange for his testimony and his self-interested motivation. See Tr. pp. 236-237. Additionally, the record reflects that Counsel highlighted this motivation to the jury during his closing argument. See Tr. pp. 388-390. This Court finds that Counsel's performance was reasonable and effective. Therefore, this allegation must be denied and dismissed with prejudice.

*Trial Counsel's alleged deficiencies regarding the testimony of  
State's Witness Melissa Roberts*

Applicant made several allegations regarding Counsel's alleged deficient performance regarding the testimony of State's witness Melissa Roberts (hereafter "Roberts"). See Amended Application for post-Conviction Relief Allegations No. 2, 3, 4, 12, 13, and 14. Specifically, Applicant alleges that Counsel was ineffective for: failing to seek to exclude the identification

testimony of Roberts; failing to adequately cross-examine Roberts; failing to adequately highlight inconsistencies in Roberts' testimony and for inaccurately repeating her testimony during his closing argument; and failing to object the State's closing argument regarding Roberts. This Court finds that Applicant has failed to satisfy his necessary burden of deficiency regarding Counsel's performance involving State's witness Roberts.

Applicant contends that Counsel was ineffective for failing to request a Neil v. Biggers hearing regarding Roberts's in-court identification of Applicant. However, this Court finds that Counsel's performance was not deficient, as a Neil v. Biggers hearing was unnecessary because there was no lineup for the trial court to consider. In Neil v. Biggers, 409 U.S. 188 (1972), the United States Supreme Court addressed whether a show-up identification was so suggestive that it violated the defendant's right to due process. *Id.* at 196–201, 93 S.Ct. 375. In State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004), our supreme court noted “[t]he United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an *out-of-court identification*.” *Id.* at 81, 600 S.E.2d at 526 (citing Biggers) (emphasis added). Our courts now consistently recognize the general rule that a trial court must, when identification of a defendant is an issue, hold an in camera hearing “when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and *the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation*.” State v. Miller, 359 S.C. 589, 596, 598 S.E.2d 297, 301 (Ct.App.2004) (emphasis added), *aff'd*, 367 S.C. 329, 626 S.E.2d 328 (2006).

In the present case, the identification in question was from State's witness Melissa Roberts, a teller at the bank. Roberts, nor any other witness, was ever shown a lineup. Roberts testified at trial that she knew Applicant from junior high school and occasionally seeing him at a

local restaurant and that she identified Applicant on her own. She testified at trial that she could identify him by “his mannerisms and the shape of his head.” (Tr. pp. 126 ln. 24-25). She testified during cross-examination that she was never shown a photo lineup or “a physical line up with physical people there.” (Tr. pp. 136 ln. 21 – pp. 137 ln. 1). She elaborated that she thought about the robbery for a few days, then voluntarily approached police and gave a statement identifying Applicant as the perpetrator. (Tr. pp. 138-39). As there was no lineup and the identification came from a witness with prior knowledge of the suspect, a Neil v. Biggers hearing was unnecessary because there was absolutely no risk of “*taint by a previous, illegal identification or confrontation.*” Miller, 359 S.C. 589, 596, 598 S.E.2d 297, 301. Counsel cannot be found deficient for failing to request a Neil v. Biggers hearing when such a hearing was unnecessary.

Additionally, Applicant cannot show prejudice from Counsel’s alleged deficiency in failing to request a Neil v. Biggers hearing. Counsel was able to vigorously cross-examine Roberts regarding the unreliability and incredibility of her identification. Additionally, Counsel was able to highlight to the jury during his closing argument that Roberts’ testimony and identification of Applicant was undependable at best. At the post-conviction relief hearing, Counsel testified that it was his trial strategy to show the jury how wholly unbelievable Roberts’ identification was and that it could not be relied upon, much like the State’s case as a whole. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Therefore, this Court finds that Applicant cannot establish prejudice in regards to Counsel’s handling of Roberts.

As discussed above, this Court also finds that Applicant has failed to establish any deficiency regarding Counsel's cross-examination of Roberts. Counsel was able to point out inconsistencies in Roberts' testimony and how highly unlikely it was that Roberts would remember Applicant based on extremely limited interaction more than fifteen years ago. See e.g., Tr. pp. 120-122; p. 131. Counsel was also able to highlight this to the jury during his closing argument. See e.g., p. 383; pp. 385-386. Additionally, Counsel testified that the tone he used during his closing argument was sarcastic and almost mocking of Roberts, exemplifying to the jury how incredulous it was multiple times. Therefore, this Court finds these allegations must be denied and dismissed with prejudice.

*Trial Counsel's alleged deficiencies regarding Applicant's use and sale of drugs*

Applicant alleges that Counsel was ineffective for failing to object when the State introduced testimony regarding Applicant's admission to the distribution of crack cocaine and for failing to request a curative instruction based on the introduction of this evidence. Counsel testified he moved to suppress evidence in the form a videotaped admission of Applicant where Applicant references distributing crack cocaine. Counsel elaborated that during this videotaped interview with law enforcement, Applicant stated several times that he did not need to rob a bank because he made his money selling crack cocaine. Additionally, Counsel testified the videotape references Applicant borrowing a bicycle from a witness, Arthur Macklin, in exchange for a \$20 piece of crack cocaine. Counsel testified that he moved to suppress this videotape and any reference to Applicant's distribution of crack cocaine, arguing to the trial court that these statements are more prejudicial than probative. See Tr. pp. 19-23; pp. 199-205. Counsel testified, and the record confirms, that the trial court granted Counsel's motion, but did allow the

State to reference Applicant borrowing Arthur Macklin's bicycle for a \$20 piece of crack cocaine. Counsel again objected when the State sought to introduce this testimony during the trial. See Tr. pp. 270-276; p. 278. Additionally, Counsel moved for a mistrial, which was denied by the trial court. See Tr. pp. 278. Counsel testified that after his objections and motion for a mistrial were overruled, he made a strategic decision not to move for a curative instruction because he did not want to highlight Applicant's drug involvement to the jury yet again, particularly so close to deliberations.

This Court finds that Counsel appropriately moved to suppress any reference to Applicant's distribution of crack cocaine, correctly objected and moved for a mistrial when such evidence was admitted, and when these objections and motions were overruled, he made a valid strategic decision not to move for a curative instruction. See Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (“[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an ‘objective standard of reasonableness.’” Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)). The United States Supreme Court has cautioned that “every effort be made to eliminate the distorting effects of hindsight” and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, we must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)). This Court finds that counsels' performance went well beyond the standard of reasonableness according to professional norms, and therefore, Applicant has failed to establish any deficiency regarding this allegation. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

*Trial Counsel's alleged deficiencies regarding threats to State's witness Arthur Macklin*

Applicant alleges that Counsel was ineffective for failing to object when State's witness Arthur Macklin (hereafter "Macklin") testified he had been threatened and physically assaulted for cooperating with law enforcement and for failing to object when such comments were made during the State's closing. This Court finds that Applicant has not satisfied his burden in regards to these allegations. Counsel testified that Macklin had a reputation as unreliable and was well-known as a significant drug user, which was easily conveyed to the jury by Macklin's disposition while on the witness stand. Counsel testified that Macklin's comments were completely irrelevant to Applicant's case and did not harm Applicant whatsoever. Additionally, Counsel testified that during his cross-examination of Macklin, he highlighted to the jury that Applicant had never hurt or attempted to hurt him and that Applicant was not related to his current harassment. See Tr. p. 184 lns. 13-15; p. 186 lns. 13-18. Counsel testified that he did not object to the State's closing argument comments on this because he did not find the comments objectionable. He elaborated that the State's comments were innocuous to Applicant's case, as Macklin readily admitted during cross-examination that Applicant had never harassed him in any manner and was not responsible for the current harassment. This Court finds that Counsel's performance was reasonable and effective. Counsel appropriately cross-examined Macklin, who freely admitted that Applicant was in no way responsible for any harassment. Additionally, this Court finds Counsel's decision not to object to the State's closing comments to be reasonable. See Humphries v. State, 351 S.C. 362, 570 S.E.2d (2002) (The relevant question in determining whether counsel was deficient for failing to object to the State's closing argument is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a

denial of due process). Therefore, these allegations must be denied and dismissed with prejudice.

*Trial Counsel's alleged deficiency regarding testimony that a stolen four-wheeler was used to commit the robbery*

Applicant alleges that Counsel was ineffective for failing to object to testimony that the four-wheeler allegedly used to leave the bank following the robbery was stolen. See Tr. 282 lns. 17-21. Counsel testified that his theory of the case and defense presented was not that a robbery did not occur, but that Applicant was not the assailant. He testified that the defense centered on Applicant's alibi and that he was in no way involved with the robbery. He testified that whether or not the four-wheeler used to commit the crime was completely irrelevant to Applicant's defense and therefore he did not find the comment objectionable. A review of the record in its entirety supports Counsel's testimony. This Court finds Counsel's decision not to object to this comment to be reasonable, as it was completely irrelevant and harmless to Applicant's defense. Therefore, this allegation must be denied and dismissed with prejudice.

*Trial Counsel's alleged deficiency for failing to ask the jury to observe the multiple tattoos and scars on Applicant's arms*

Applicant alleges that Counsel was ineffective for failing to ask the jury to observe the multiple tattoos and scars on Applicant's arm, as these tattoos and scars are readily visible and were not mentioned by eyewitnesses from the bank. This Court finds that this allegation must be denied and dismissed with prejudice. The record reveals that Counsel questioned Pamela Moore, one of the State's witnesses and a Sargent with the City of Camden Police Department, regarding the inconsistencies in the suspect's description, most notably that eyewitnesses observed "tattoos on both arms;" however, no witnesses testified regarding these visible markings. Tr. p. 194 ln. 19- p. 195 ln. 11. Additionally, Counsel highlighted this to the jury during his closing argument,

citing that no bank teller or other eyewitness from the bank noticed tattoos on the assailant wearing a short-sleeved shirt, despite Applicant having visibly noticeable tattoos. Counsel testified that he made a strategic decision not to show Applicant's tattoos to the jury, as the tattoos were extremely vulgar and included phrases like "thug life." He testified that Applicant's tattoos were visible to the jury from a distance during the trial, so that the jury could see that Applicant had tattoos without viewing the "very explicit" nature of the tattoos. Counsel testified that any probative value to possibly be gained by asking the jury to closely view the tattoos would be outweighed by the significant prejudice of observing tattoos with such widely-known negative connotations, which he feared the jury would interpret as "thug equals guilty." This Court finds that Counsel has articulated a valid strategic reasoning for not presenting such tattoos closely for the jury's review, which was more than reasonable and prudent based on the circumstances. See Edwards, supra. Therefore, this allegation must be denied and dismissed with prejudice.

*Trial Counsel's alleged deficiency for failing introduce testimony to refute claim of Roberts that Applicant and his family frequented a restaurant owned by her in-laws "at times."*

Applicant alleges that Counsel was ineffective for failing to introduce testimony to refute Roberts' claim that she recognized Applicant from him and his family visiting her in-laws' restaurant "at times" since high school. In support of this allegation, Applicant and his half-sister, Jada Gibbs, testified that their family has never been to this restaurant. Applicant's sister elaborated that this restaurant is widely known to be "racist" with confederate flags and other like memorabilia throughout, and because of this, her family would not patronize such a business. However, Applicant testified during the trial that he had never been to this restaurant. Tr. p. 319 lns. 14-20. Additionally, Counsel testified that he did not believe such additional

citing that no bank teller or other eyewitness from the bank noticed tattoos on the assailant wearing a short-sleeved shirt, despite Applicant having visibly noticeable tattoos. Counsel testified that he made a strategic decision not to show Applicant's tattoos to the jury, as the tattoos were extremely vulgar and included phrases like "thug life." He testified that Applicant's tattoos were visible to the jury from a distance during the trial, so that the jury could see that Applicant had tattoos without viewing the "very explicit" nature of the tattoos. Counsel testified that any probative value to possibly be gained by asking the jury to closely view the tattoos would be outweighed by the significant prejudice of observing tattoos with such widely-known negative connotations, which he feared the jury would interpret as "thug equals guilty." This Court finds that Counsel has articulated a valid strategic reasoning for not presenting such tattoos closely for the jury's review, which was more than reasonable and prudent based on the circumstances. See Edwards, supra. Therefore, this allegation must be denied and dismissed with prejudice.

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testimony was necessary, as Applicant himself testified not only that he had never been to this restaurant, but that he had never seen Roberts in his life. Counsel testified that he highlighted this several times to the jury during his closing argument, once again showing the jury that Roberts' entire story was incredible, embellished and that, ultimately, Roberts was not a credible and reliable witness. This Court finds that Counsel's performance was reasonable based on professional standards. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Therefore, this allegation must be denied and dismissed with prejudice.

*Trial Counsel's alleged deficiency for failing to object to  
comments during the State's closing argument regarding time he  
left the barber shop*

Applicant alleges that Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution argued that Applicant's testimony was not credible because Applicant claimed to have heard about the bank robbery before he left the barber shop at 11:00 a.m. when the robbery took place at 11:00 a.m. Counsel testified that Applicant never provided him or law enforcement a clear timeline of his whereabouts on the day of the robbery. This is supported by the record. See Tr. p. 277 Ins. 2-8. Counsel testified that because Applicant had given differing times for his arrival to and departure from the barber shop, he did not think the solicitor's closing argument comments were objectionable. This Court finds Counsel's decision not to object to the State's closing comments to be reasonable. See Humphries v. State, 351 S.C. 362, 570 S.E.2d (2002) (The relevant question in determining whether counsel was deficient for failing to object to the State's closing argument is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process). Therefore, this allegation must be denied and dismissed with prejudice.

## 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 dismissed with prejudice.

This Court notes that that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant 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 14<sup>th</sup> day of JANUARY, 2014.



JAMES R. BARBER, III  
Presiding Judge  
Fifth Judicial Circuit

Columbia, South Carolina.

STATE OF SOUTH CAROLINA )  
COUNTY OF KERSHAW )

IN THE COURT OF COMMON PLEAS )  
FOR THE FIFTH JUDICIAL CIRCUIT )

Jarvis Gibbs, #255871, )  
Applicant, )

Case No: 2012-CP-28-0317

v. )

ORDER DENYING APPLICANT'S )  
"RULE 59(e) SCRCP, MOTION )  
TO ALTER OR AMEND" )

State of South Carolina, )  
Respondent. )

FILED FOR RECORD  
2014 FEB 11 AM 11:49  
CLERK OF COURT  
KERSHAW COUNTY, S.C.

This matter comes before this Court by way of Applicant's "Rule 59(e) SCRCP, Motion to Alter or Amend," asking this Court to alter or amend its Order of Dismissal denying Applicant post-conviction relief.

I.

The records before this Court show that Applicant was indicted by the Kershaw County Grand Jury during the October 2008 term for Kidnapping (2008-GS-28-01555); Use of a Firearm during a Violent Crime (2008-GS-28-01556) and during the November 2009 term for Entering a bank with Intent to Steal (2009-GS-28-1548). Samuel Ogburn, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr., where he was found guilty as indicted. On November 18, 2009, Judge Cooper sentenced him to eighteen years imprisonment for both Kidnapping and Entering a Bank with Intent to Steal and five years imprisonment for Use of a Firearm during a Violent Crime, with all sentences to be served concurrently.

A notice of appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence after briefing. State v. Jarvis Gibbs, Op. No. 2011-UP-511 (S.C. Ct. App. filed December 19, 2011). The Remittitur was sent on December 19, 2011.

ATTEST True, Correct & Certified  
Copy of Original on File in this  
Court

*Olivia Williams*  
Clerk of Court Kershaw County

II.

Applicant filed an application for post-conviction relief on March 26, 2012, alleging that four grounds of ineffective assistance of counsel. Respondent made its Return on June 20, 2012, requesting an evidentiary hearing be held. Thereafter, Applicant, through his counsel, filed an amended application on June 3, 2013, alleging fifteen additional grounds of ineffective assistance of counsel. An evidentiary hearing into the matter was convened on June 6, 2013, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. By written order signed on January 14, 2014 and filed on January 17, 2014, the Court denied and dismissed Applicant's post-conviction relief application with prejudice. A copy of this Order was served on Applicant's counsel of record, Tara D. Shurling, by the Kershaw County Clerk of Court as well as Respondent.

On January 30, 2014, Applicant served an electronic copy of his "Rule 59 SCRCP, Motion to Alter or Amend" on Respondent and the Court. Respondent made its Return to Applicant's motion on January 31, 2014.

III.

This Court's Order of Dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRCP. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Having carefully reviewed the entire record in this matter, this Court finds that no basis for altering or amending is prior ruling.<sup>1</sup> Therefore, this Court hereby denies the Applicant's Motion in its entirety, and affirms the previous Order of Dismissal.

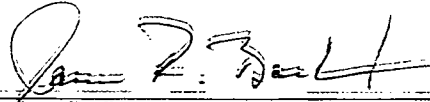
This Court notes that if the Petitioner desires to secure appellate review of this Order and the Order

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<sup>1</sup> The Court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction relief file, since oral argument will not aid the Court in reaching its decision. See Rule 59(f), SCRCP.

of Dismissal; a notice of appeal must be filed and served within thirty days of the service of this Order. Petitioner is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

**AND; IT IS SO ORDERED** this 6<sup>th</sup> day of FEBRUARY, 2014



JAMES R. BARBER, III  
Presiding Judge  
Fifth Judicial Circuit

Columbia, South Carolina

FIRST-CLASS



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The Honorable Daniel E. Shearouse  
South Carolina Supreme Court Clerk  
Post Office Box 11330  
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