

# VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

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**RECEIVED**

MAR 31 2014

**S.C. Supreme Court**

WILLIE GILMORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002383

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APPENDIX

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ROBERT M. PACHAK  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON  
Attorney General

MEGAN HARRIGAN  
Assistant Attorney General  
P. O. Box 11549  
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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MARY D. LAFAVE, ESQ. -- DIRECT BY MR. SCHNEE

18

1 Q Ms. LaFave, can you explain your involvement in the  
2 representation of Mr. Gilmore?

3 A I believe that Megan Lee was originally assigned  
4 Mr. Gilmore's case when the Public Defender's  
5 Office was brought on board. And I was brought in  
6 as co-counsel at some point. Mr. Gilmore always  
7 maintained his innocence. And so I think from very  
8 early on the case was going to be a trial. So I  
9 was brought in pretty early on the case, from what  
10 my memory serves.

11 Q Okay. Do you remember meeting with Mr. Gilmore  
12 before trial a number of times?

13 A It's been a number of years. I know that I did  
14 meet with him at the jail. But I couldn't tell you  
15 how many times I met with him.

16 Q Okay. Do you have any idea -- I mean, I know you  
17 can't give me an exact number -- how often Ms. Lee  
18 would have met with him?

19 A I know that she did meet with him for a number of  
20 times, but I could not even venture a guess.

21 Q Okay. In your meetings with him, did you believe  
22 at that point -- up until that point -- what would  
23 typically be done had already been done in terms of  
24 talking to a client and interviewing him and  
25 figuring out strategy, and things like that?

1 A You mean up to the point of trial?

2 Q Up to the point of trial and even before when you  
3 first started to visit him with Ms. Lee? Did it  
4 seem like there was an appropriate attorney-client  
5 relationship, that things had been discussed  
6 appropriately?

7 A Yes, I think so, uh-huh.

8 Q Okay. Mr. Gilmore just brought up the issue of  
9 Bruce Hunter. Do remember his testimony?

10 A I was actually looking at that while he was  
11 testifying. And I did not recall the name right  
12 off, but did find his testimony in the record. So  
13 I do have that in the trial transcript in front of  
14 me.

15 Q Okay. And I remember there was a lengthy pretrial  
16 issue regarding character evidence. I believe  
17 Mr. Hunter is the one that testified about how  
18 Willie always had the knife or had a knife that  
19 was -- matched the description that Rosa gave. Is  
20 that your recollection of it?

21 A Yes. Now that you say that, yes, faintly.

22 Q Okay. Did you know about Mr. Hunter's testimony  
23 before trial?

24 A You know, as a -- I was a Public Defender for two  
25 years, and I tried a couple of -- a few cases, and

1 I do remember, you know, receiving evidence on the  
2 eve of trial or, you know, the day before trial.  
3 But as far as the specific witness, I don't recall  
4 when we learned of that particular witness, I'm  
5 sorry.

6 Q Okay. That's fine. There were a number of  
7 witnesses, for instance, Rosa's son, the nurse at  
8 the hospital, and at least a couple of others that  
9 testified as to what Rosa had told them about the  
10 rape itself, even like the neighbor down the  
11 street.

12 Why did you -- neither you nor Ms. Lee object  
13 to the whole string at that point?

14 MR. CORNEY: Your Honor, I am going to object  
15 to that question. I don't think the allegation was  
16 set forth in the application, nor did the applicant  
17 testify that that was an allegation he was raising.  
18 He had a chance to set forth anything he wanted to  
19 the application and through his testimony and never  
20 raised that issue.

21 MR. SCHNEE: General ineffective assistance of  
22 trial counsel. I asked if there was a strategy or  
23 what the issue was.

24 MR. CORNEY: The statute sets forth that it  
25 has to be specifically pled, and that is not

1 specifically pled.

2 THE COURT: He has got to address what he has  
3 alleged the ineffective situations were.

4 MR. SCHNEE: Okay, Judge.

5 BY MR. SCHNEE:

6 Q Did you talk to Mr. Gilmore about his right to  
7 testify?

8 A No, not in the sense that I fully advised him of  
9 his rights, if that is what you are getting at.

10 I did talk to Mr. Gilmore about testifying. I  
11 know that he did express an interest in testifying  
12 at his trial.

13 Q Okay. Were you present with Ms. Lee during a  
14 discussion about his right to testify and advising  
15 him of those rights?

16 A I was not.

17 Q Okay. So you are not sure if that happened or not?

18 A I cannot testify to that, no.

19 Q Okay.

20 MR. SCHNEE: Judge, I think that is all the  
21 questions I have.

22 CROSS-EXAMINATION

23 BY MR. CORNEY:

24 Q Ms. LaFave, clearly his burglary second degree  
25 charge, just based on the record, was a big issue

1           throughout trial as to whether it would be allowed  
2           in for impeachment purposes of Mr. Gilmore, is that  
3           your recollection of it?

4    A    I mean, not specifically for this case, but I could  
5           say that prior burglary convictions are always a  
6           concern if someone is testifying and can be  
7           impeached with them.

8    Q    Okay. And what about where there is multiple  
9           charges that can be brought in for impeachment  
10          purposes. In your experience as a former Public  
11          Defender and defense attorney, would that be a big  
12          concern of yours?

13   A    Absolutely.

14   Q    Would that be something that generally would be a  
15          very big factor in advising a client whether or not  
16          to take the stand in their defense?

17   A    I would say that it is a factor in whether a  
18          particular Defendant should take the stand in their  
19          own defense. There is -- I would say there is a  
20          litany of things that are evaluated at that point.  
21          And that would be one of them, yes.

22   Q    Do you recall -- and I know this has been years now  
23          since this happened, but do you recall ever having  
24          discussions with Ms. Lee about that being something  
25          that she was concerned about, something that you

1           were both concerned about with Mr. Gilmore?

2    A    Not specifically. I mean, I'm sure we did, but I  
3           do not specifically remember talking about that  
4           with her.

5    Q    Okay.

6                   MR. CORNEY: Beg the Court's indulgence for  
7           just one minute, Your Honor.

8                   (Pause.)

9    BY MR. CORNEY:

10   Q    In this particular case there was DNA evidence  
11           linking Mr. Gilmore to some sort of sexual act with  
12           the victim, is that correct?

13   A    I don't recall that particular piece of evidence.  
14           I know that our theory of this particular case did  
15           have to do with the fact that this was consensual  
16           sex with -- between Mr. Gilmore and his formal --  
17           or former, excuse me -- former girlfriend. I want  
18           to say that there was another woman involved, or  
19           something of that nature. I think we kind of had a  
20           lover scorned theory in this particular case.

21                   So as to whether there was specific DNA  
22           evidence, I don't recall that, but could see that  
23           there could be, given our theory.

24                   I'm glad to look at the transcript here to  
25           find it, if you need me to.

1 Q And I think the transcript will speak for itself.  
2 I believe Judge Kinard is very good about reading  
3 transcripts. That will speak for itself in that  
4 regard.

5 In these types of cases, and specifically in  
6 this case, if you can recall, is it fairly common  
7 for the victim's statement against the Defendant to  
8 be the main evidence against them, or to be a very  
9 damaging piece of evidence against the Defendant?

10 A This is the only CSC first degree that I ever  
11 tried, so I can't -- I can't speak to that.

12 Q Okay. Do you recall specifically in this case  
13 whether she had made statements, or anything along  
14 those lines, to point the finger at Mr. Gilmore?

15 A Absolutely. I mean, I think she was the main --  
16 she was the main witness in this particular case,  
17 for sure. I think that there -- it was -- we felt  
18 it was a weak case in general, but that she was the  
19 only direct -- had the only direct testimony --

20 Q Okay.

21 A -- about the event.

22 Q So calling her credibility into question would be a  
23 strategy to impeach that testimony or to call, at  
24 least call reasonable doubt into the jurors' mind?

25 A I'm sorry, I didn't quite understand your question.

1 Q And I'll rephrase that. You would want to impeach  
2 her testimony at trial or her statements before  
3 trial if she was the main accuser?

4 A Absolutely.

5 Q And one way to do that would be by calling  
6 inconsistencies in her story as it changed  
7 throughout time, correct?

8 A Absolutely.

9 Q If you were able to impeach her testimony through  
10 direct examination or cross-examination of the  
11 State's witnesses effectively, would you have any  
12 need for the Defendant to take the stand  
13 necessarily?

14 A I don't know that I can answer your question,  
15 which, to me -- and if I am misunderstanding your  
16 question, please let me know -- seems to draw a  
17 hard line rule about whether Defendants should  
18 testify. And I don't -- I can't speak to that. I  
19 don't know the answer to your question. I would  
20 disagree with what you are saying.

21 Q I guess my question is, is it possible -- do you  
22 believe it would be possible to sufficiently  
23 impeach a victim's testimony through the State's  
24 witnesses on cross-examination to the point that  
25 you don't have to call the Defendant in the

1 defense?

2 A Sure. In some circumstances, sure.

3 Q And you think that the possibility of being  
4 impeached through prior convictions if he took the  
5 stand would be a factor in that as well, in whether  
6 or not to call him with that consideration?

7 A I could imagine a scenario where that would be the  
8 case.

9 MR. CORNEY: That's all the questions I have,  
10 Your Honor. Thank you.

11 MR. SCHNEE: Just very briefly, Judge.

12 REDIRECT EXAMINATION

13 BY MR. SCHNEE:

14 Q Other than Rosa's statement, was there any physical  
15 evidence that indicated this was a non-consensual  
16 sexual act?

17 A I was reading back through my opening statement  
18 about this case, and it was -- we argued that it  
19 was consensual sex because there was no physical  
20 evidence that this was a sexual encounter that was  
21 any different than a consensual situation. There  
22 was no bruising or tearing or any violent signs  
23 that this had been a forcible rape. So I do recall  
24 that from reading the transcript. I don't remember  
25 anything else specifically.

1 Q Okay. And since the Attorney General just asked  
2 you about impeaching a number of different  
3 witnesses and that being an aspect of getting  
4 reasonable doubt, would it be a fair statement to  
5 say that a person getting on the stand and telling  
6 the jury that it was consensual and that he didn't  
7 rape her would also be something that would assist  
8 the jury in making a decision?

9 A Sure.

10 MR. SCHNEE: Thank you, Judge.

11 MR. CORNEY: Just one question, Your Honor.

12 RECROSS-EXAMINATION

13 BY MR. CORNEY:

14 Q Did you -- in your capacity as a Public Defender,  
15 was it normal to go over an advisement of rights  
16 form or something? Do you have a form that you go  
17 over for constitutional rights with the Defendant?

18 A The only time I ever used a form as a P.D. was when  
19 it was a guilty plea. If it was a case that we  
20 were trying, we would have numerous discussions  
21 about the Defendant's right to testify. And I  
22 personally did have that conversation with the  
23 clients that I represented, both that I both  
24 pled -- took in front of the Court to plead guilty  
25 and that I tried, whether that be bench or a jury

1 trial. I just don't -- I just didn't have occasion  
2 to do it in this case.

3 Q Do you have any reason to believe that Ms. Lee  
4 didn't discuss that with him?

5 A I have no way to know either way.

6 Q Did Mr. Gilmore ever bring it to your attention  
7 that he didn't know anything about it when you  
8 discussed it with him?

9 A Mr. Gilmore -- and this is no disrespect to him --  
10 is not educated in legal principles, so he did not  
11 discuss that with me either way. So I -- but it  
12 wouldn't surprise me if he didn't bring it up to  
13 me, I guess is my point.

14 MR. CORNEY: I believe that is all the  
15 questions I have, Your Honor.

16 THE COURT: You can step down.

17 THE WITNESS: Thank you, Judge.

18 (Witness steps down.)

19 MR. SCHNEE: Judge, I have no further  
20 witnesses. I would like to point out a few things  
21 in the transcript.

22 THE COURT: Well, I'm going to take a five  
23 minute break. I'll be right back.

24 MR. SCHNEE: Yes, sir.

25 (WHEREUPON, a break was taken.)

1           MR. SCHNEE: I want to point out in the  
2 transcript the last witness for the State, his  
3 testimony finishes the bottom of Page 280.

4           After that, there is a number of legal  
5 discussions, appears to be just general motions,  
6 directed verdict, and there is a very lengthy  
7 discussion yet again about the burglary prior for  
8 Mr. Gilmore in terms of whether it is going to be  
9 admitted for impeachment. That is the first --  
10 that is probably the third time in the transcript  
11 that there are arguments about it and the judge  
12 reviewing it.

13           Finally, Page 299, the Court ruled and said it  
14 is admissible if he testified.

15           At the very top of 300, the Court asks, okay,  
16 has the Defendant made a decision to testify?

17           Ms. Lee said, he does not wish to testify.

18           And that is the only discussion.

19           Based on the testimony that has been presented  
20 here and looking in the transcript, there is no  
21 evidence that my client was advised about his  
22 rights regardless of his right to testify. He  
23 obviously expressed an interest to testify and was  
24 never told it was his decision.

25           So I would ask you to reverse and remand for

1 new trial.

2 MR. CORNEY: Your Honor, just in response to  
3 that. Of course Mr. Gilmore wants to testify now.  
4 He doesn't like the outcome of his trial. It is  
5 easy to say in hindsight, I want to go back and  
6 testify. If he had been acquitted he wouldn't have  
7 come back and said, oh, I wish I would have  
8 testified. It is easy to say now.

9 Under the case of Brown v. State, and that  
10 is -- I don't have but one copy of it, and can hand  
11 it up to Your Honor. I marked and highlighted it.  
12 But it is 340 S.C. 590.

13 The South Carolina Supreme Court held that  
14 specifically, I'll just quote right from the  
15 opinion for you: The issue was whether the trial  
16 court established on the record that the Defendant  
17 understands his right not to testify.

18 The Court specifically noted, we have  
19 previously addressed this question in the Brown v.  
20 State underlying action. And it says,  
21 essentially -- while we -- it says -- this is -- it  
22 kind of goes through -- he orates -- it goes  
23 through several other cases, and it says --  
24 essentially it said: An on record waiver of  
25 constitutional or statutory right is but one method

1 of determining whether the Defendant knowingly and  
2 intelligently waived that right. And they declined  
3 to have the holding that waiver of the right to  
4 testify needs to be on the record. They said that  
5 is just one way to determine whether or not he was  
6 adequately advised.

7 So I don't think the fact that absent from the  
8 record is necessarily telling in this instance, and  
9 I don't think it should be considered by the Court  
10 to prove that he wasn't advised of his right to  
11 testify.

12 He was facing two prior convictions that were  
13 going to be brought in for impeachment purposes.  
14 And throughout the course of this trial, I think  
15 the Court will read in the testimony, clear to see,  
16 their strategy was to get up there and call  
17 inconsistencies in the victim's story throughout  
18 the course of trial and impeach her testimony  
19 through that without having to put Mr. Gilmore up  
20 there and be impeached of his prior convictions.

21 I think the testimony speaks for itself. I  
22 understand Ms. Lee doesn't live here. She lives in  
23 England. She is overseas. I have had several  
24 cases come up with her, and she is essentially  
25 unavailable to provide testimony as lead counsel in

1 this case. Ms. LaFave is the next best option to  
2 bring her in and have her testify.

3 Your Honor, there is a presumption of  
4 regularity in proceedings, and I believe that the  
5 practice of the Public Defender's Office, and it  
6 can be assumed in this particular instance, and for  
7 what Ms. LaFave said and the facts that were  
8 brought out in the transcript before this Court, is  
9 Mr. Gilmore knew that he had a right to testify and  
10 he shouldn't do so because he had two prior  
11 convictions that would be brought in for  
12 impeachment and that counsel had done an effective  
13 job of essentially calling the victim's statement,  
14 which is one of the most damaging pieces of  
15 evidence in the case, into question through  
16 cross-examination.

17 For those reasons, Your Honor, the State would  
18 request that you deny the application for PCR.

19 Thank you very much.

20 THE COURT: Well, hand me that case you are  
21 talking about.

22 MR. CORNEY: Yes, sir, Your Honor. If I may  
23 approach the bench?

24 (Complies.)

25 THE COURT: You know it won't take me but a

1 minute to read it.

2 MR. CORNEY: And that just talks about on the  
3 record waiver of constitutional rights, Your Honor.

4 (Pause.)

5 MR. CORNEY: And, Your Honor, if I may add --  
6 I don't want to interrupt your reading. I  
7 apologize.

8 (Pause.)

9 THE COURT: In the Brown case the guy was  
10 testifying the other way. He testified and said he  
11 hadn't been advised of his right not to testify.

12 MR. CORNEY: Right, Your Honor. I think it  
13 still stands on the same proposition.

14 THE COURT: Same proposition of law. I can't  
15 believe Judge Childs didn't go into that colloquy,  
16 which I have been through with every case I have  
17 ever had, whether they testified or not, before --  
18 in fact, I cover it with them two times.

19 MR. CORNEY: Yes, sir, Your Honor. And I  
20 think that it is -- I mean, it is very unusual to  
21 not see that on the record.

22 THE COURT: Right.

23 MR. CORNEY: The only other thing I just  
24 wanted to add is, I don't think he can prove  
25 resulting prejudice from his testifying not -- his

1 not taking the stand. The exact scenario he is  
2 setting forth is what Ms. Lee said in her closing.  
3 That was the exact situation at that point. This  
4 was consensual. She went over there looking for  
5 furniture. She rubbed -- you know, he rubbed her  
6 feet. They drank together. That was the exact --  
7 that was the entire basis of the defense in this  
8 case. So it just would have been cumulative to  
9 everything else that they argued at trial. I don't  
10 think it would have resulted in prejudice or  
11 changed the outcome at trial, I should say.

12 MR. SCHNEE: Very briefly, Judge. In terms of  
13 the advisement of rights, my client's testimony at  
14 this hearing is the only person that testified. He  
15 said he wanted to testify. Ms. Lee told him he  
16 can't. That is not a knowing and intelligent  
17 waiver.

18 In terms of prejudice, you know, we certainly  
19 can't go back into that jury room and figure out  
20 what they were thinking, but I think it is also a  
21 fair assumption to say the jury is probably  
22 wondering, why didn't he tell us he didn't do it.  
23 That is certainly something that a jury can  
24 consider and needs to consider and will consider.

25 MR. CORNEY: Your Honor, they are instructed

1 not to consider his not taking the stand. It is in  
2 the jury instruction. I think that is a  
3 mischaracterization. And not only is it  
4 speculative, but it is a mischaracterization when  
5 the judge specifically tells them, you can't  
6 consider that.

7 MR. SCHNEE: Judge, common sense dictates that  
8 jurors don't always follow every instruction. They  
9 still want to hear someone say --

10 THE COURT: Well, I meant, that is a position.

11 MR. SCHNEE: Right.

12 THE COURT: That is a position. As you know,  
13 the majority of defense counsel never want the  
14 Defendant to testify, in my experience. They  
15 testify over my objection and against my advice,  
16 whether they have a record or not, just because it  
17 is tough on cross-exam.

18 MR. SCHNEE: Yes, sir.

19 THE COURT: It would be helpful if we had  
20 Ms. Lee's testimony, but we don't have it.

21 And the case says you have to take all the  
22 circumstances into account. He was in the  
23 courtroom during all that colloquy with Judge  
24 Childs on bringing that out. Obviously that was a  
25 concern and a trial strategy, it would have to be.

1 If they were going to suppress it, they were going  
2 to put him up, just reading the record. If she let  
3 that in, they were going to advise him not to  
4 testify. That is what happened.

5 I don't think he can win. I read all the  
6 colloquy with Judge Childs about the burglary, and  
7 so forth, but I haven't read the whole transcript.  
8 If you want me to read the whole transcript, I'll  
9 be happy to read it.

10 MR. SCHNEE: Well, Judge, I think this is a  
11 case, even based on Ms. LaFave's testimony, she  
12 thinks that it should have been the other way  
13 around in terms of the verdict, and I --

14 THE COURT: Having heard him testify to the  
15 extent that he testified, even though I don't  
16 consider that, it couldn't have possibly changed  
17 the outcome of the trial, I don't think.

18 I'm not going to give him a new trial. I  
19 would have made a record on somebody looking at  
20 life without parole, but the Brown case says they  
21 don't have to. And all of his positions were  
22 adequately argued. There is a trial strategy. All  
23 of his positions.

24 MR. SCHNEE: There was no trial strategy  
25 argued about his lack of testimony, I guess is my

1. only issue.

2. THE COURT: Well, I understand, but why would  
3. they go into all of that if he was -- if it was not  
4. a big deal? I mean, they went in there three  
5. times.

6. MR. CORNEY: Yes, sir. It is brought up over  
7. and over in the transcript. Thank you, Your Honor.

8. THE COURT: It is obvious that they went into  
9. it three times because they wanted to keep it out  
10. so they would advise him to testify.

11. MR. CORNEY: Thank you, Your Honor.

12. THE COURT: It would have helped were Ms. Lee  
13. here, but she is not here, and there is nothing I  
14. can do about that.

15. MR. SCHNEE: Yes, Judge. I understand.

16. MR. CORNEY: Thank you very much, Your Honor.

17. THE COURT: Okay.

18. (WHEREUPON, the proceedings were concluded.)

19.

20.

21.

22.

23.

24.

25.

(END OF TRANSCRIPT)



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STATE OF SOUTH CAROLINA )  
 COUNTY OF RICHLAND )  
 )  
 Willie Gilmore, #281735, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FIFTH JUDICIAL CIRCUIT

2012-CP-40-00599

ORDER OF DISMISSAL

JEANETTE W. McBRIDE  
 J.C.P. & S.S.

2013 OCT 21 AM 11:11

RICHLAND COUNTY  
 CLERK OF COURT

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed January 23, 2012. An evidentiary hearing into the matter was convened on Thursday, September 13, 2012, at the Richland County Courthouse. The Applicant was present at the hearing with counsel, Mark E. Schnee, Esquire. The Respondent was represented by Robert D. Comey of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying was Applicant's former second-chair trial counsel, Mary LaFave, Esquire ("counsel"). This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, Applicant's direct appeal documents and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the August 2006 term of the Richland County Grand Jury for Criminal Sexual Conduct – First Degree (2006-GS-40-02809)<sup>1</sup>. Richland County

<sup>1</sup> The indictment was amended thereafter on February 16, 2007.

Assistant Public Defenders Megan Lee, Esquire, and Mary LaFave, Esquire, represented Applicant on the charge. On June 16, 2008, Applicant proceeded to jury trial before the Honorable J. Michelle Childs. After a three day trial, Applicant was found guilty as indicted and sentenced to life imprisonment without the possibility of parole.

A notice of appeal was filed on Applicant's behalf and an appeal was perfected. Applicant was represented on the appeal by Assistant Appellate Defender M. Celia Robinson. After briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences by order filed November 2, 2011. State v. Gilmore, 396 S.C. 72, 719 S.E.2d 688 (Ct. App. 2011). The remittitur was issued November 18, 2011.

In the current Application, Applicant alleged he is being held in custody unlawfully for the following reasons:

(2) Counsel failed to attack the Grand jury empanelment for errors.

(3) Counsel failed to attack the indictment(s) where the Grand juror convened on August 16, 2006 - and true Billed Aug 17, 2006. Although, on the very same charge - another indictment - where the Grand juror convened on August 16, 2006. But this indictment was not true Billed until Feb 16, 2007. although not the same elements of the first indictment.

(4) Counsel failed to investigate or subpoena witnesses on my behalf to attack Brian and Rose McCullough; Alberta Coins and "Dooley" Bruce Gene Hunter character and or credibility

Stevens prejudiced my appeal by arguing issues that was not preserved and or properly preserved for appeal review, even argued same issue upon oral argument. SEE: Appellant's brief; the Respondent's brief and the Court of Appeal ruling

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the arguments presented by both parties at the evidentiary hearing. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), 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, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

#### *Advisement of Right to Testify*

The sole allegation raised to this Court at the PCR hearing was that counsel was ineffective for failing to adequately advise Applicant of his right to testify on his own behalf at trial to allow him to make a voluntary decision whether to do so.

Applicant testified he was aware he had the option to testify at trial as part of his defense, but said he did not do so because his main trial attorney, Megan Lee, advised him not to. Applicant stated Lee told him if he were to take the stand in his defense, the state would be able

to impeach his testimony by bringing out a prior conviction for Burglary –Second Degree. He noted the trial judge did rule on the admissibility of that prior conviction at trial and found it would be allowed in for impeachment purposes if Applicant took the stand in his defense, but alleged he and counsel never discussed the matter thereafter. Applicant stated he was unaware it was ultimately his decision whether to testify and only did not do so because of Lee's advice.

From there, Applicant proffered the testimony he would have allegedly given at trial had he taken the stand to testify. Applicant stated the sexual encounter with victim was consensual. And it was victim who initiated the physical contact with him after the two shared several drinks at her house. Applicant stated he never had a knife during the incident and that victim's testimony was simply not true.

Applicant then called Mary LaFave, Esquire, to testify to this Court. LaFave noted she served as second-chair counsel to Megan Lee in the matter.<sup>2</sup> She stated she came on as Lee's co-counsel early on in the case and said they knew it was a trial from the outset as Applicant maintained his innocence in their discussions. LaFave said she met with Applicant many times at the jail to discuss the case, in addition to Lee's numerous meetings with him as well. LaFave said she did not recall a specific discussion with Applicant about his right to testify, but that Lee may have done so in one of her many meetings where LaFave wasn't present. She noted Applicant had voiced a desire to testify at trial early on in the matter, but said the court's ruling on admission of the prior conviction for impeachment was a big factor in that decision. LaFave also stated it was customary for the attorneys of the public defender's office to do a thorough review of a defendant's constitutional rights with him/her early on in their representation, which would have included an advisement on the right to testify at trial. LaFave then noted that, in her

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<sup>2</sup> Since Applicant's trial, Megan Lee relocated overseas to England and has rendered herself incapable of being reached to provide testimony in the matter. Respondent made several attempts to contact Ms. Lee via e-mail via an address she had previously corresponded to, but never received any response from Lee.

experience, there are many times it is not in a defendant's best interest to testify because of the state's ability to do a thorough cross-examination and introduce prior convictions for impeachment purposes.

Based on a thorough review of the record, the relevant law and the testimony presented at the PCR hearing, this Court finds Applicant has failed to prove counsel was ineffective in this regard. Having heard the testimony Applicant *would have* presented to the jury had he taken the stand in his defense, this Court can find no reasonable probability the outcome of the case would have been different had Applicant testified. Applicant's testimony, including his rendition of the how the incident occurred, is wholly **not** credible and would have done nothing to persuade the jury to find him not guilty of the charges. Applicant's demeanor, delivery and substantive testimony firmly convince this Court that Applicant would have only further damaged his chances of acquittal had he taken the stand before the jury.

This finding is only further established when taken in conjuncture with the introduction of Applicant's prior Burglary conviction. Therefore, this Court can find no reasonable probability that, had counsel been adequately advised of his right to testify and chosen to exercise that right, the outcome of trial would have been different. Accordingly, this Court finds Applicant has failed to prove resulting prejudice. See Strickland v. Washington, 466 U.S. at 697, 104 S.Ct. at 2069 ("[T]here is no reason for a court deciding an ineffective assistance claim to...address both components of the inquiry if the defendant makes an insufficient showing of one; [i]n particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered...as a result of the alleged deficiencies.").

Additionally, while unnecessary given the above finding, this Court notes Applicant has failed to sufficiently carry his burden in proving counsel's performance was deficient or

otherwise objectively unreasonable. The record before this Court clearly reflects the introduction of Applicant's prior conviction for impeachment purposes was a critical concern of counsel's as she made repeated, vigorous arguments against its introduction throughout the course of the trial. With those portions of the record in mind, this Court finds is highly unlikely Applicant's right to testify was never once discussed with him, and Applicant's testimony to that end are not credible to this Court. While the trial judge did not affirmatively advise Applicant of that right on the record, the case law is clear such an on record waiver of the right to testify is not always necessary. See Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000). Further, it is not objectively unreasonable for trial counsel to await the trial court's ruling on the admissibility of a prior conviction at trial to advise a defendant whether to testify or not, and the record reflects counsel requested additional time after the state rested to discuss the right to testify with Applicant. (Trial Tr. p. 281). Accordingly, this Court finds no credible evidence to either confirm or deny Applicant was ever advised of that right and, therefore, Applicant has failed to carry his burden in proving such.

Regardless of the deficiency finding, this Court adheres to the above finding that Applicant would not have been a beneficial or credible witness at trial and, therefore, suffered no prejudice in failing to take the stand in his defense. Therefore, the current application for PCR is denied.

#### CONCLUSION

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


Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

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

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 8 day of Oct, 2013.

  
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J. ERNEST KINARD, JR.  
Presiding Judge  
Fifth Judicial Circuit

Camden, South Carolina.

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WITNESSES

(S) G.J. Bullock, CPD

DOCKET NO. 2006-GS-40-2809

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

AUGUST TERM 2006

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THE STATE  
vs.

WILLIE GILMORE

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

ARREST WARRANT NUMBER

H-760904

TRIEBELL  
FOR THE GRAND JURY

Foreperson of Grand Jury

AUG 17 2006

VERDICT

Foreperson of Petit Jury  
Date:

Indictment for  
CRIMINAL SEXUAL CONDUCT  
1<sup>ST</sup> DEGREE

SC Code: 16-3-652  
CDR Code: 0160  
Class FEL(A)(V)

CERTIFIED TRUE COPY  
OF ORIGINAL FILED,  
C.C.C. PLS. AND G.S.  
RICHLAND COUNTY  
SOUTH CAROLINA

STATE OF SOUTH CAROLINA )  
  )  
COUNTY OF RICHLAND )

INDICTMENT

At a Court of General Sessions, convened on AUGUST 16, 2006, the Grand Jurors of Richland County present upon their oath:

**CRIMINAL SEXUAL CONDUCT 1<sup>ST</sup> DEGREE**

That WILLIE GILMORE did in Richland County on or about AUGUST 18, 2004, engage in sexual battery, to wit: sexual intercourse upon and with the body of ROSA McCOLLOUGH, without her consent; such sexual battery was accomplished by the use of force of a high and aggravated nature and/or the victim submitted to such battery while being kidnapped and/or forcibly confined; all in violation of SC Code of Laws § 16-3-652.

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Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Warren B Giese  
Warren B. Giese, SOLICITOR