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May 27, 2014

Daniel Shearouse
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

RE: Robert Hooker #00347354 v. State of South Carolina
Case No.: 2013-CP-46-1483

Daniel:

Enclosed is the Order of Dismissal, Notice of Appeal and request for transcript. I have enclosed an extra copy of the notice and request. Please file the Notice of Appeal and request and return a clocked copy of each in the envelope provided.

Please feel free to contact our office should you have any questions.

Bobby G. Frederick
Attorney at law

CC: Rutledge Johnson

THE STATE OF SOUTH CAROLINA
SUPREME COURT

APPEAL FROM YORK COUNTY Court of Common Pleas

John C. Hayes, Circuit Court Judge

Case No. 2013-CP-46-01483

Robert Hooker #00347354.....Appellant,

v.

The State,.....Respondent.

NOTICE OF APPEAL

Robert Hooker appeals the denial of post conviction relief in this case. The Order of Dismissal was served on Appellant on May 4, 2014.

May 27, 2014

Bobby G. Frederick, Esq.
P.O. Box 8219
Myrtle Beach, SC 29577
843-444-6122

Other Counsel of Record:
Attorney General's Office
J. Rutledge Johnson
P.O. Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS OF THE SIXTEENTH JUDICIAL CIRCUIT**
COUNTY OF YORK	)	
ROBERT HOOKER #00347354	)	**Case No.: 2013-CP-46-1483**
v.	)	**Certificate of Service**
SOUTH CAROLINA	)	

I certify that on the 27th day of May, 2014, a copy of the Notice of Appeal and request for transcript in the above referenced matter was served by U.S. mail to the following addresses:

York County Common Pleas
Clerk of Court
P.O. Box 649
York, SC 29745

Attorney General's Office
J. Rutledge Johnson
P.O. Box 11549
Columbia, SC 29211

Daniel Shearouse
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

Mindi Ellison
Legal Assistant

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4601483

PLAINTIFF(S)	DEFENDANT(S)
Robert Hooker	South Carolina State Of
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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

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

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

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: **ORDER**

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.**

s/ John C. Hayes, III.	2049	4/28/2014
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **April 30, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **April 30, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Bobby G. Frederick PO Box 8219 Myrtle Beach, SC 29578-8219

ATTORNEY(S) FOR THE PLAINTIFF(S)

James Rutledge Johnson PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

David Hamilton

David Hamilton - 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.

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Robert Hooker #350619 Applicant, v. State of South Carolina, Respondent.	C.A. No.: 2013-CP-46-1483 **ORDER**

This is a post-conviction relief application filed May 13, 2013. The case appeared before the undersigned at the Moss Justice Center in York, SC, on April 16, 2014. Applicant was represented by Bobby G. Frederick, Esq., the State by J. Rutledge Johnson, Esq.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. The applicant was indicted by the June 2011 term of the York County Grand Jury for Malicious Injury to Real Property (2011-GS-46-1837), Burglary, 1st Degree (2011-GS-46-1838), and Stalking (2011-GS-46-1839). The Applicant was represented by Melissa Inzerillo, Esquire. On August 10, 2011, the Applicant proceeded to a jury trial pursuant to which he was found guilty of all charges as indicted. The Honorable Lee S. Alford sentenced the Applicant to confinement for fifteen years (15) years for Burglary, 1st Degree, five (5) years for Stalking, and thirty (30) days for Malicious Injury to Real Property.

A notice of appeal was filed on the Applicant's behalf pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. *State v. Hooker,* Op. No. 2013-UP-100 (Filed March 13, 2013). The Remittitur was issued on April 5, 2013.

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

1. "Ineffective Assistance of Counsel"
   a. "Petitioner's counsel's (sic) was ineffective during the course of his criminal case in General Sessions Court."

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 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. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for

counsel's alleged errors, she would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Applicant alleges ineffective assistance of trial counsel based on the following reasons: (1) Trial counsel's failure to object to an indictment amendment, (2) Trial counsel's failure to object to prior bad acts entered into evidence, (3) Trial counsel's failure to impeach a witness's credibility based on the witness's alleged drug use, (4) Trial counsel's failure to object to the admission of telephone messages, (5) Trial counsel's failure to object to certain hearsay statements, (6) Trial counsel's failure to argue a directed verdict motion with specificity, (7) Trial counsel's abandonment of trying to establish what months certain photographs were taken during cross-examination, (8) Trial counsel's failure to argue, object, or say anything further to trial judge after Judge made a statement on certain issues, and finally, (9), what PCR counsel indicated was the "real issue" in this matter, Trial counsel's failure to attempt to introduce any evidence that the Applicant lived or had a right to live at the house he was charged with Burglarizing. Applicant contends that he has four witnesses that would have testified to this ninth issue.[1]

I

The Court will begin by addressing issue (1), that being Applicant's contention that trial counsel was ineffective based on her failure to object to the State's amended stalking indictment.[2] In *State v. Fonseca*, 383 S.C. 640, 646-47, 681 S.E.2d 1, 4 (Ct. App. 2009) aff'd, 393 S.C. 229, 711 S.E.2d 906 (2011), the Court held:

[1] At the conclusion of the hearing PCR counsel stated to the Court the only conviction he wished for the Court to address was the Applicant's burglary conviction. The Court feels compelled to address the issues raised by Applicant's application since the burglary trial was joined with and there is an interplay of issues with the stalking and malicious injury to personal property charges.

[2] Based on PCR counsel's abandonment of issues relating to the stalking indictment this issue is to a degree moot, however, since it interplays with Applicant's concern regarding the introduction of "prior bad acts" evidence the Court needs to address this issue.

> Appellant argues the trial court erred in allowing the State to proceed under the amended indictment, arguing it provided insufficient notice. We disagree...
>
> An indictment is a notice document. Id. at 101, 610 S.E.2d at 499. "The primary purpose of an indictment [is] to put the defendant on notice of what he is called upon to answer, i.e., to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted." Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005). An indictment may be amended if: (1) it does not change the nature of the offense; (2) the amended charge is a lesser included offense of the original crime charged in the indictment; or (3) the defendant waives presentment to the grand jury and pleads guilty. State v. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993)....
>
> Here, the substance and nature of the crime charged was not affected by amending the indictment. Appellant conceded the language in the amended indictment was the same as the original. The only change made to the indictment concerned the year of the alleged act. Therefore, the amendment did not prejudice Appellant. State v. Horton, 209 S.C. 151, 155, 39 S.E.2d 222, 223–24 (1946) (permitting the striking through of "surplusage" in an indictment where the amendment worked no prejudice on the defendant). Thus, we find the amended indictment provided Appellant with sufficient notice.

The logic set forth in *Fonseca* is directly applicable to the case at hand. Here, in the initial stalking indictment, the State alleged that the Applicant committed the crime of stalking during the time span of October 1, 2010, through February 28, 2011. Prior to the start of the trial, the State amended the indictment to change the October 1, 2010 start date to a later date, that being December 1, 2010. During the trial, the State then amended the start date back again to October 1, 2010.

Applicant alleges trial counsel was ineffective by failing to object to the amended indictment. The Court disagrees with this assertion. The Applicant was put on notice of the time frame in which the State alleged that stalking occurred by the dates listed in the original indictment. Since the indictment date was not amended until the day the trial began, trial counsel was obviously prepared to move forward with the trial based on the dates listed in the original indictment. Additionally, during the trial, upon the State's request to amend the indictment for the second time, the Honorable Lee S. Alford stated "Any objection from the defense? Obviously

you are not prejudiced by that. You were already aware of those dates." (Trial TR. p. 26, lines 2-4). The Court finds no error on trial counsel's failure to object to the amended indictment dates as trial counsel and the Applicant were already aware of such dates. There is no question the Applicant was on notice and additionally, the Court finds that Applicant failed to establish any prejudice resulting from trial counsel's failure to object to such amendments.

II

In issue (2), Applicant alleges ineffective assistance of counsel by trial counsel's failure to object to "prior bad acts" of Applicant being entered into evidence throughout the trial. The Court finds that the "prior bad acts" Applicant is referring to were introduced by the State as proof of the elements of the crime of stalking rather than for impeachment purposes. These incidents were all relevant to the crime of stalking and the fact that they happened to be other crimes in and of themselves is just the reality of the situation. There was no proper basis for objection as these acts were being introduced to prove the elements of stalking, not to impeach the Applicant based on prior bad acts. For example, during the direct examination of Ms. Shanna Graham, the solicitor asked the following question:

> Okay. How often do you think total – through the whole time, let's say from October, when your relationship became rocky, through the time that the police arrested him inside your house in February, how many times could you estimate that he was inside your house when you did not give him permission to be there?

The witness responded "twenty to thirty times." (Trial TR. p. 154, lines 13-19). Applicant contends trial counsel should have objected to this testimony as it constitutes prior bad acts of the Applicant coming into evidence. At the PCR hearing trial counsel testified that her reasoning in not objecting to this testimony was to establish that there was a lengthy pattern of the Applicant being told to leave the victim's house and the victim then allowing him to come back to the house. Additionally, the pattern of behavior is very relevant to the crime of stalking. Also, the

time framed by the question is within the time frame of the indictment. The Court finds that trial counsel was not ineffective by failing to object to specific incidents of conduct that the State introduced into evidence in order to prove the elements of stalking.

III

In issue (4), Applicant alleges ineffective assistance of counsel by trial counsel's failure to impeach the victim of the State, that being Shanna Graham, based on her alleged drug use. Applicant contends that the witness's unconvicted drug use is relevant to her credibility. Additionally, Applicant contends that introducing evidence of her drug use would have helped explain to the jury why the Applicant got into a fist fight with another man and broke the other man's nose.

The Court requested PCR counsel to submit any case law within ten (10) days that would support the argument that evidence of a witness's unconvicted drug use is relevant to their credibility. The Court has not received any precedent from PCR counsel that supports this notion. Additionally, the Court has not found any case law supporting this argument in its' own research. Rule 608 of the South Carolina Rules of Evidence provides:

> (a) **Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. (S.C. R. Evid. 608).

South Carolina case law has made clear that "for impeachment purposes, narcotics offenses are generally not considered probative of truthfulness." *State v. Cheeseboro* (S.C. 2001) 346 S.C. 526, 552 S.E.2d 300. Here, the witness did not have any drug convictions; rather, the Applicant contends trial counsel should have attempted to impeach the witness based on her alleged drug

usage that did not result in any convictions. It has been a long established legal principle that "evidence as to a witness's drug use may not be used to attack a witness's credibility unless the evidence relates to direct observation of the effect of drug consumption on the witness' capacity to perceive or recall." (65 A.L.R.3d 705). There is nothing in the record indicating that the victim was on drugs when the Applicant committed the crimes in this case and therefore the victim's unconvicted drug use is not relevant to this case. The Court finds that the victim's unconvicted drug use in this case is not probative of truthfulness and further finds that trial counsel was not ineffective by failing to impeach the victim based on her alleged drug usage. In sum, the victim's unconvicted drug use is not relevant to this case and is not probative of truthfulness. Therefore, this argument is also without merit.

IV

The Court will now address issue (4), whereby the Applicant claims trial counsel was ineffective for failing to object to the admission of certain telephone messages. Applicant contends that the voice messages were not properly authenticated. The State relies on *State v. Aragon*, 354 S.C. 334 (2003), in maintaining that a proper foundation was laid and the voice messages were properly authenticated. In *Aragon* the Court held

> We think the State, consistent with the requirements of Rule 901, SCRE,[2] regarding authentication, sufficiently established that the tape in question is what it claimed. The victim who made the call to Aragon testified that she had known him for over ten years and once had a relationship with him, that she telephoned Aragon from the sheriff's office and knew the conversation was taped, that she listened to the tape, that she recognized the tape from her initials on it, that the tape fairly and accurately represented the phone conversation, and that the tape had not been edited or altered in any way. *Id. at 336.*

At the PCR hearing Applicant's counsel argued that it is not enough for one to simply say they recognize another's voice; rather, there needs to be "something more" to authenticate a voice message. The Court disagrees with this contention and finds that a proper foundation was laid to

authenticate the voice messages in this case. Here, the victim testified that she was in a relationship with the Applicant from July of 2009 until December of 2010. (Trial TR. p. 150, lines 1-2). The victim also testified that the Applicant would call her as many as fifty times in one day and would leave approximately five to six voice mail messages for every twenty phone calls he would make to her. (Trial TR. p. 152, line 17, p. 153 -153, line 4). Additionally, the witness testified that she recognized the voice messages, which were marked as State's exhibits 1-7, and that the recordings truthfully and accurately reflect the messages she received from the Applicant. She also signed each recorded statement and listened to them prior to trial. (TR. p. 165, lines 5-23). "Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." (Rule 901, SCRE). The Court finds that trial counsel was not ineffective by failing to object to the admission of the voice messages as it appears to the undersigned that a proper foundation was laid. The victim's testimony and prior interactions with the Applicant sufficiently establish that the voice messages in question are what the State claims they are. This argument is also without merit.

V

In issue (5), Applicant alleges ineffective assistance of counsel by trial counsel failing to object to certain hearsay statements. Applicant specifically alleges ineffective assistance by trial counsel failing to object to the following statement made by the Applicant's mother: "and she says . . .tell him you are going to call the police." (Trial TR. p.190, line 5). Trial counsel testified that she did not object to this statement because she believed this helped establish a lack of fear from the victim. Trial counsel testified that her case strategy was to show that the victim was not actually in fear. The fact that the victim ignored the Applicant's mother's request for her to call

the police supports the defense's overall case theory that the victim was not actually in fear, otherwise she would have called the police. The undersigned finds no fault on trial counsel's failure to object to hearsay statements that inure to the benefit of her client and support her overall case strategy.

In *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002), the South Carolina Supreme Court held:

> Where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Stokes v. State,* 308 S.C. 546, 419 S.E.2d 778 (1992); *Whitehead v. State,* 308 S.C. 119, 417 S.E.2d 529 (1992). However, counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial. *See Dawkins v. State,* 346 S.C. 151, 551 S.E.2d 260 (2001)(Counsel's failure to object to prejudicial hearsay because he did not want to "confuse or upset the jury" was not valid strategy); *Gallman v. State,* 307 S.C. 273, 414 S.E.2d 780 (1992)(Trial counsel's failure to object to judge's comments inviting jury to prematurely discuss the case was not "strategic" where error of law involved and such comments are inherently prejudicial).

The Court finds that trial counsel articulated valid reasons for employing her trial strategy, that strategy being to disprove the element of fear in the victim. Trial counsel's failure to object to hearsay statements that actually support the defense's theory of the case do not constitute prejudice to the Applicant. Therefore, this claim is also without merit.

Applicant also alleges ineffective assistance of counsel by trial counsel's failure to object to the following statement made by Alice Broome: "She called crying and said that he had broken into her house. She came in and went back out because she was scared of him." (Trial TR. p. 212, line 4). Applicant contends that this statement is prejudicial hearsay. The undersigned finds that this statement does not rise to the level of prejudice. Additionally, the undersigned finds that even if this statement is deemed to be prejudicial hearsay, it would likely fall into one, if not all, of the following exceptions to hearsay: (1) Present Sense Impression, (2) Excited Utterance, and (3) Then Existing Mental, Emotional, or Physical Condition. (SCRE,

Rule 803). The statement would fall into the Present Sense Impression exception since the victim made the statement to Alice Broome immediately after discovering the Applicant had broken into her home. The statement would also fall into the Excited Utterance exception because the victim made the statement after perceiving a startling event, that event being that the Applicant had broken into her home through a second floor bedroom wall, and while still under the stress caused by the event. Additionally, the statement would fall into the Then Existing Mental, Emotional, or Physical Condition exception as the declarant's statement to Alice Broome indicated that she was "scared" of the Applicant. This statement directly speaks to the victim's then existing state of mind, specifically her mental or emotional condition. For the above stated reasons the undersigned finds that trial counsel was not ineffective in failing to object to Alice Broome's statement and further finds that this contention is also without merit.

VI

The Court will now address issue (6), whereby the Applicant claims trial counsel was ineffective by failing to make any specific and non-general arguments during her motion for a directed verdict. Upon the closure of the State's case-in-chief, trial counsel did, in fact, make a motion to the Court for a directed verdict, "just for the record." (Trial TR. 249, lines 9-11). Upon said motion, the trial judge ruled that "therefore, it's a jury issue. The court would, therefore, deny your motion for directed verdict on each of these three charges and submit it to the jury." (Trial TR. p. 255, lines 15-18). The Court is well aware that it is common practice for counsel to, at various stages of trials, make motions "for the record." These hollow motions establish no grounds for relief and actually concede the absence of grounds as the motion itself acknowledges it is perfunctory. A review of the record in this case clearly demonstrates that the State produced sufficient evidence to survive a motion for directed verdict and submit the

evidence to the jury. Counsel had no law or facts which she could articulate to the Court as grounds for a directed verdict. (See SCACR 407, Rule 3.1). The undersigned finds that trial counsel was not ineffective in failing to make any specific directed verdict arguments and additionally finds that this contention is without merit.

VII

Regarding issue (7), Applicant contends that trial counsel was ineffective by "abandoning" her attempt to establish what months certain photographs were taken during cross-examination of the victim. During the cross examination of Ms. Shanna Graham, trial counsel asked the witness if she knew whether the pictures were taken sometime during the month of January, to which she responded "I don't know the date of these pictures." (Trial TR. p.199, lines 10-15). Next, trial counsel again asked whether the witness knew if the pictures had been taken sometime during the month of February, to which the witness responded "I don't know the date of any of the pictures." (Trial TR. p. 200, line 3). Applicant contends trial counsel was ineffective by failing to further question the witness as to the dates of the photographs.

The Court finds that the trial strategy analysis set forth above in issue (5), from the *Matthews* opinion, is directly applicable to this issue as well. Trial counsel's alleged "abandonment" of attempting to establish what months these photographs were taken does not amount to an "error of law" and additionally does not prejudice the Applicant. Trial counsel asked the witness about the photograph dates not once, but twice, and the witness could not provide an answer. It appears to the undersigned that the witness did not have any personal knowledge as to when these photographs were taken and nothing could have been gained by continuing to ask the witness a question in which she already stated she did not know the answer to. At worse, this so called "abandonment" would be considered trial strategy. The Court finds

that such strategy does not constitute any error of law or amount to ineffective assistance of counsel. This claim is also without merit.

VIII

Next, the Court will address issue (8), whereby Applicant claims trial counsel was ineffective by failing to argue, object, or say anything further to the trial judge upon the judge's statement "that trespass is a crime which would be sufficient to establish" burglary. (Trial TR. p. 252, lines 18-19). In *McMillian v. State*, 383 S.C. 480, 486, 680 S.E.2d 905, 908 (2009), a PCR applicant asserted a claim of ineffective assistance of counsel on the basis that "[t]here is ambiguous precedent on whether one can infer intent [to commit a crime] from trespassing." *Id.* In *McMillian*, the Court stated:

> This Court has previously held that for a charge under the old statute of housebreaking, i.e., breaking and entering into a dwelling with the intent to commit a felony or a crime of a lesser grade, found in section 1139 of the South Carolina Code of 1932, the element of intent to commit a crime of a lesser grade could be satisfied by a trespass. *See State v. Christensen,* 194 S.C. 131, 9 S.E.2d 555 (1940). In *Christensen,* "the defendant was convicted of breaking and entering with the intent to commit a misdemeanor, to wit, a trespass" after the defendant, who was an agent of the landlord, went into a tenant's dwelling with the specific intent of taking personal property to sell for overdue rent. *Id.* at 138, 9 S.E.2d at 558....
>
> The *Christensen* Court cited a prior decision that stated the mere breaking and entering of a house is not a crime under the statute prohibiting the breaking and entering into a dwelling with the intent to commit a felony or a crime of a lesser grade, but found that if Christensen were guilty of a trespass, "[i]t was for the jury to say whether such breaking and entry under the circumstances constituted a crime under Section 1139 and the finding of the jury on this issue will not be disturbed by this Court." *Id.* at 137–39, 9 S.E.2d at 558–59. *Id.*

Based on *McMillian*, the undersigned finds that the trial judge's statement that "trespass is a crime which would be sufficient to establish [burglary]" was a correct statement of the law. The Court finds that trial counsel was not ineffective in failing to object to, or argue with, a trial judge's correct statement of the law. In addition to the judge's statement not having any objectionable basis, the South Carolina Rules of Professional Conduct also require that a lawyer

shall not "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." (SC R A CT RULE 407 RPC Rule 3.4.) The undersigned finds no fault on trial counsel's part in failing to make a meritless objection to a trial judge's accurate statement of the law. Additionally, the undersigned finds that Applicant was in no way prejudiced by trial counsel's failure to object to the trial judge's statement. This ground is also without merit.

IX

Finally, the Court will address issue (9), that being Applicant's contention that trial counsel was ineffective by failing to attempt to admit any evidence proving that the Applicant resided in the house, or had a right to reside in the house, which he was ultimately charged with burglarizing. Trial counsel testified at the PCR hearing that when she met with the Applicant he informed her that he knew he was not supposed to be at the victim's house. The Court finds trial counsel's testimony credible as to this issue. Applicant contends that even after informing trial counsel that her client knew he was not supposed to be at the house, trial counsel should have still called four witnesses during trial that would have testified that Applicant did in fact live, or have a right to live, with the victim in the house. The Court disagrees with this contention as this would place trial counsel in a situation in which trial counsel would have knowledge that either her client or a witness was not being honest with the court. The undersigned cannot find fault in trial counsel for building her case strategy off of information that the Applicant told her. To require trial counsel to call witnesses to the stand that would contradict what her own client told her in confidence would serve no beneficial purpose to her client's case. The undersigned finds that trial counsel was not ineffective by failing to call witnesses to the stand to testify under oath to a different story than what her client told her. Additionally, none of Applicant's proffered

witnesses could address Applicant's right to be in the victim's house at the time of the alleged burglary. Also, regardless of what these witnesses would have presented as testimony, Applicant, at the time of the alleged burglary, was subject to a no trespassing order, and entered the victim's residence by way of knocking a hole in the wall of a second floor bedroom, and then made an attempt to conceal the hole. The witness's testimony at the PCR hearing failed to establish in any way that there is a reasonable probability that the outcome would have been different had they testified as witnesses during the trial.

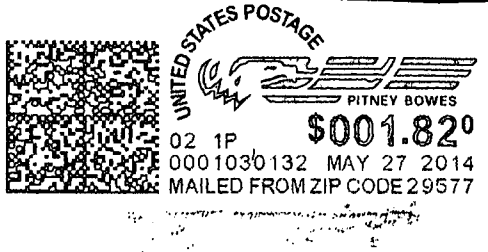
CONCLUSION

Wherefore, Applicant's application for Post-Conviction Relief is denied and dismissed with prejudice. Applicant failed to prove trial counsel was deficient and additionally failed to establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rule 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge

April 28th, 2014
York, South Carolina



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