

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
THE HONORABLE Robin B. Stilwell

CA No. 2013-CP-23-0765

SAMUEL LAMONT WHITNER,  
APPELLANT,  
vs.  
STATE OF SOUTH CAROLINA  
RESPONDENT.

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMMER  
2014 SEP 8 PM 2 13

NOTICE OF APPEAL

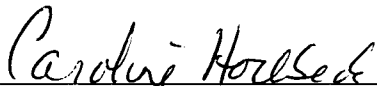
Appellant SAMUEL LAMONT WHITNER, appeals from the Order of the Honorable Robin B. Stilwell, Circuit Court Judge clocked August 13, 2014.

Respectfully submitted,

**RECEIVED**

SEP 16 2014

**S.C. SUPREME COURT**

  
Caroline M. Horlbeck, Esq.  
101 Whitsett St  
Greenville, SC 29601

Date: September 8, 2014

Other Counsel of Record: Karen Ratigan, Esq.  
Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Samuel Lamont Whitner, )  
 S.C.D.C. No. 263066, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2013-CP-23-0765

**ORDER OF DISMISSAL**

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMMER  
 2014 NOV 13 PM 3 50

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 8, 2013. The Respondent made its return on October 23, 2013 and an amended return on June 16, 2014. An evidentiary hearing into the matter was convened on June 19, 2014 at the Greenville County Courthouse. The Applicant was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Christopher D. Scalzo, Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.<sup>1</sup>

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections. The Applicant was indicted at the February 2009 term of the Greenville County Grand Jury for first-

<sup>1</sup> At the conclusion of the hearing, the record was left open for thirty days in order to allow PCR counsel to obtain telephone records. These records were unavailable.

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degree criminal sexual conduct with a minor (2009-GS-23-1072). He was represented by Christopher D. Scalzo, Esquire.

A.

The State brought the case to trial on March 11, 2009 before the Honorable C. Victor Pyle, Jr. On that date, Judge Pyle granted the Applicant's motion to suppress an audio recording of a telephone conversation between the Applicant and the victim.

The State filed a notice of appeal and a motion to vacate Judge Pyle's order. On June 11, 2009, the South Carolina Court of Appeals issued an order vacating Judge Pyle's order and finding he lacked subject matter jurisdiction. On July 22, 2009, a three-judge panel of the Court of Appeals presided over a suppression hearing pursuant to the procedure set forth in the South Carolina Homeland Security Act. See S.C. Code Ann. §§ 17-30-10 et seq. Mr. Scalzo represented the Applicant at this hearing. By order issued July 27, 2009, the Court of Appeals denied the Applicant's motion to suppress.

B.

After the State brought the case to trial before the Honorable John C. Few, the Applicant was found guilty. On November 4, 2009, Judge Few sentenced the Applicant to thirty years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals and – upon the Applicant's motion – the case was certified to the South Carolina Supreme Court. Robert M. Dudek, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Supreme Court affirmed the Applicant's conviction and sentence on July 11, 2012. State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012). The Remittitur was sent on July 27, 2012.

## ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:<sup>2</sup>

1. Ineffective assistance of trial counsel.
  - a. "Trial counsel acted jointly in concert with the State and illegally gain jurisdiction of the South Carolina Court of Appeals/6 amendment violation."
2. Ineffective assistance of appellate counsel.
  - a. "Appellate counsel failed to challenge this jurisdictional defect."

At the PCR hearing, the Applicant proceeded solely upon several allegations of ineffective assistance of trial counsel.

## 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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

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<sup>2</sup> This Court notes the Applicant filed a pro se document titled "Supplement of Issues to the Above Cited Civil Post Conviction Relief" on February 17, 2014. As the Applicant was represented by counsel, however, this document cannot be considered by the Court. See Rule 11(a), SCRPC; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (holding there is no constitutional right to hybrid representation either at trial or on appeal).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he was arrested because of a recorded telephone call between him and the victim. The Applicant stated this was illegal because he did not know he was being recorded. The Applicant stated trial counsel failed to obtain his telephone records. The Applicant stated trial counsel should have requested a mistrial (both before Judge Pyle and Judge Few) because the State knew the wiretap law had been violated. The Applicant stated trial counsel should have objected to the audiotape under the Fourth Amendment. The Applicant stated trial counsel should have argued prosecutorial misconduct because the State was not truthful in its motion to the Court of Appeals. The Applicant stated trial counsel did not argue adequate facts to the Court of Appeals to show the audio recording was illegal. The Applicant stated trial counsel did not object to the reference to the library book at the Court of Appeals. The Applicant stated he considered pleading guilty at trial but felt pressured and that he could not do so.

Trial counsel testified he filed discovery motions and received those materials (including

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audio recordings of telephone calls). Trial counsel testified he reviewed those materials with the Applicant, who explained his side of the story. Trial counsel testified he did not recall the Applicant asking him to obtain telephone records and said there were no such subpoenas in his file. Regardless, trial counsel testified he did not believe he would have needed those records. Trial counsel testified he did not know how he could have moved for a mistrial when the case was before Judge Pyle. Trial counsel testified there was no basis to move for a mistrial when the case was before Judge Few because the Court of Appeals had already ruled upon the wiretap issue. Trial counsel testified he discussed the suppression motion with the Applicant and that the basis of the motion was a technical legal issue. Trial counsel testified he argued neither the Applicant nor the victim consented to the telephone calls being recorded. Trial counsel testified the biggest issue in the case was the potential suppression of the audio recordings. Trial counsel testified that, once the Court of Appeals ruled against him, he could not re-litigate this issue. Trial counsel testified they were aware of the issue with the library book before the case was first brought before Judge Pyle. Trial counsel testified there were plea negotiations throughout the appeal process to the Court of Appeals, that he relayed those negotiations to the Applicant, and that the Applicant rejected them and went to trial. Trial counsel testified the Applicant spoke of pleading guilty during the victim's testimony and that this was a normal reaction. Trial counsel testified he spoke to the assistant solicitor at that point but could not recall whether there was a specific offer.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not make proper arguments in challenging the legality of the recorded telephone calls. The Applicant's complaints are centered around his belief that the recordings of his telephone calls with the victim were illegally obtained and inadmissible. Trial counsel moved to suppress these

recordings, arguing neither the Applicant nor the victim consented to being recorded. The Court of Appeals, however, presided over the suppression hearing and found that – through the doctrine of vicarious consent – the victim’s mother consented to the recording on her daughter’s behalf.<sup>3</sup> Trial counsel testified he did not know what else he could have argued with regard to this issue. This Court notes trial counsel is an experienced criminal defense lawyer who expertly argued this legal issue. The Applicant has failed to demonstrate what else trial counsel could have argued that would have led to a different result. See, e.g., Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have moved for a mistrial before both Judge Pyle and Judge Few. The Applicant, furthermore, has failed to “show error and resulting prejudice.” State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). As the Applicant failed to articulate a legal error that would support the granting of a mistrial in his case, he cannot prevail on this issue.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have obtained his telephone records. This Court cannot speculate as to what impact these records may have had upon the defense case because they were unavailable. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense). Regardless, as the

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<sup>3</sup> The South Carolina Supreme Court upheld this ruling in the Applicant’s subsequent direct appeal. See State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012).

telephone conversations between the Applicant and the victim were recorded – and not disputed by the Applicant – this Court does not believe the telephone records would have been relevant to the defense case. This Court notes trial counsel’s testimony that the issue was the content of the calls and that they were never planning to challenge the timing or dates.

This Court finds the Applicant failed to meet his burden of proving there was prosecutorial misconduct. Prosecutorial misconduct. “[T]he test for reversible prosecutorial misconduct generally has two components: that (1) the prosecutor’s remarks or conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant’s substantial rights so as to deprive the defendant of a fair trial.” United States v. Chorman, 910 F.2d 102, 103 (4th Cir. 1990). In order to establish prejudicial misconduct on the part of the prosecutor the alleged misconduct must have “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Darden v. Wainwright, 477 U.S. 168, 180-81, 106 S. Ct. 2464, 2471 (1986) (quotation omitted). While the Applicant argued there was prosecutorial misconduct in his case because the State was not truthful in its representations to the Court of Appeals, this Court finds this allegation is unfounded. This Court finds this allegation is without merit, as the Applicant has failed to articulate either improper conduct or any resulting prejudice.

This Court finds the Applicant failed to meet his burden of proving he had considered pleading guilty but felt pressured into continuing with the trial. Trial counsel testified there were ongoing plea negotiations in this case – including during the trial. Trial counsel testified any offers were conveyed to the Applicant, who turned them down. Trial counsel testified the parties could not reach a disposition the Applicant would agree to. This Court finds trial counsel’s testimony is credible. This Court finds trial counsel fulfilled his obligations and responsibilities

in conveying plea offers to the Applicant. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance); see also Rule 1.2(a), RPC, Rule 407, SCACR (an attorney cannot force his client to accept a plea offer and that the decision whether to accept or reject such an offer rests solely with the client). This Court does not find credible the Applicant's assertion that he was pressured into proceeding with trial instead of pleading guilty. The Applicant did not mention feeling any such pressure to either the trial judge or trial counsel.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing

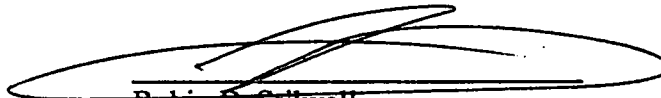
proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 12 day of AUG, 2014.



Robin B. Stilwell  
Presiding Judge  
Thirteenth Judicial Circuit

Givice, South Carolina.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

IN THE SUPREME COURT

Samuel Lamont Whitner )  
 )  
Appellant, )

C.A. No. 2013-CP-23-0765

-vs- )

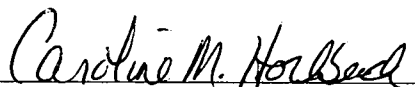
CERTIFICATE OF SERVICE

State of South Carolina, )  
 )  
Respondent. )

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Appellant, and that I have this day caused to be served upon the person(s) named below Appellant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Loriene French  
S.C. Office of Appellate Defense  
P.O. Box 11433  
Columbia, SC 29211

Karen Ratigan, Esq.  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

  
Caroline M. Horlbeck

Greenville, South Carolina

September 11, 2014

CAROLINE M. HORLBECK  
ATTORNEY AT LAW

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GREENVILLE, SOUTH CAROLINA 29601  
horlbecklawfirm@gmail.com

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(864) 315-9919  
Fax(864) 232-4756

**RECEIVED**

September 11, 2014

SEP 16 2014

**S.C. SUPREME COURT**

**Via Regular Mail**

Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: SAMUEL LAMONT WHITNER v. State

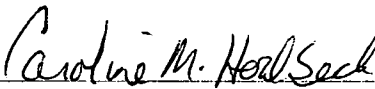
Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,

  
Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General  
Office of Appellate Defense

CAROLINE M. HORLBECK

*Attorney At Law*

101 WHITSETT ST.

GREENVILLE, SOUTH CAROLINA 29601

Via Regular Mail

Mr. Daniel E. Shearouse

Clerk, The S.C. Supreme Court

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