

LAW OFFICE OF



**TARA DAWN SHURLING, PA**

Attorney and Counselor at Law

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E-Mail: [tdslaw@shurlinglaw.com](mailto:tdslaw@shurlinglaw.com)

January 19, 2015

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

Re: Kevin C. Bradley, 339031 v. State of South Carolina; 2010-CP-45-389.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal on behalf of the above-captioned Post-Conviction Relief client. I would appreciate your returning two (2) clocked copies to me in the stamped self-addressed envelope provided. I have been *retained* by the family to handle this appeal. I have already ordered and received the transcript of the PCR hearing held in this matter. I would therefore ask that my time limits for filing the Petition for Writ of Certiorari be run from the date the Notice of Appeal is filed. *Please note that this one of two separate PCR appeals currently pending before the Court.* The other appeal is from an order on lower court docket no. 2013-CP-45-098. I have courtesy copied the Appellate Division of the South Carolina Commission on Indigent Defense on this correspondence so they will make note that I am retained in this case, and won't need to send me an inquiry concerning this appeal. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours,

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

Tara Dawn Shurling  
Attorney and Counselor at Law

TDS/sg

Enclosures

cc: Daniel Gourley, Assistant Attorney General  
Lorienne French, South Carolina Office of Appellate Defense

**RECEIVED**

JAN 22 2015

**S.C. SUPREME COURT**

LAW OFFICE OF



**TARA DAWN SHURLING, PA**

Attorney and Counselor at Law

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Suite A

Columbia, South Carolina 29204

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January 19, 2015

**RECEIVED**

JAN 22 2015

**S.C. Supreme Court**

Daniel Gourley, Assistant Attorney General  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211-

RE: Kevin C. Bradley, #339031 v. State of South Carolina; 2010-CP-45-389.

Dear Mr. Gourley:

Enclosed please find for your records a copy of the Notice of Appeal that was filed in the above-captioned matter. I have been retained by the family to handle this appeal. Please address all future communication concerning this case to my attention. I already have the PCR hearing transcript necessary for this appeal. For that reason, I am calendaring the due date for the Petition for Writ of Certiorari from the date of the Notice of Appeal. You may recall that this is one of two PCR cases heard concerning this client on the same date. I am representing Mr. Bradley in both cases. I remain,

Sincerely yours,

A handwritten signature in cursive script that reads "Tara Dawn Shurling".

Tara Dawn Shurling  
Attorney and Counselor at Law

TDS/sg

Enclosure

cc: The Honorable Daniel E. Shearouse, Clerk, Supreme Court of South Carolina  
Kevin C. Bradley, #339031  
Carol Bradley

**RECEIVED**

JAN 22 2015

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY  
Court of Common Pleas  
R. Ferrell Cothran, Jr., Presiding Judge

RECEIVED

JAN 22 2015

2010-CP-45-389

S.C. Supreme Court

KEVIN C. BRADLEY, 339031

Applicant,

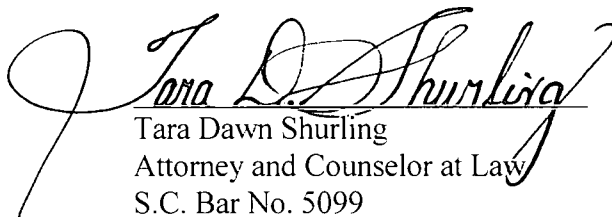
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

**NOW COMES** the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal denying his Post-Conviction Relief filed August 25, 2014, and the Order Denying the Applicant's Motion to Alter or Amend pursuant to Rule 59(e) SCRPC which was filed with the Williamsburg County Clerk of Court on December 5, 2014 and served on Counsel December 31, 2014.

  
Tara Dawn Shurling  
Attorney and Counselor at Law  
S.C. Bar No. 5099

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

ATTORNEY FOR APPLICANT

This 19<sup>th</sup> day of January, 2015.

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

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY  
Court of Common Pleas  
R. Ferrell Cothran, Jr., Presiding Judge

RECEIVED

JAN 22 2015

2010-CP-45-389

S.C. Supreme Court

KEVIN C. BRADLEY, 339031

Applicant,

v.

THE STATE OF SOUTH CAROLINA,

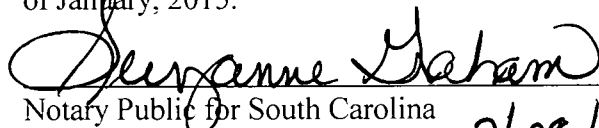
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Daniel Gourley, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 19<sup>th</sup> day of January, 2015.

  
Tara Dawn Shurling  
Attorney for the Applicant

SWORN TO BEFORE me this 19<sup>th</sup> day  
of January, 2015.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF WILLIAMSBURG )  
 )  
 KEVIN BRADLEY, #339031 )  
 Plaintiff, )  
 vs. )  
 )  
 STATE OF SOUTH CAROLINA )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 THIRD JUDICIAL CIRCUIT  
 CASE NO.: 2010-CP-45-389

**MOTION AND ORDER INFORMATION  
 FORM AND COVERSHEET**

FILED  
 2014 DEC -5 AM 11:19  
 SHARON H. HARRIS  
 CLERK OF COURT  
 KINGSTREE, S.C.

Plaintiff's Attorney: Tara Dawn Shurling, Bar No. _____ Address: 3614 Landmark Drive, Suite A Columbia, SC 29204 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Daniel Gourley, Bar No. _____ Address: PO Box 11549 Columbia, SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____
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- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

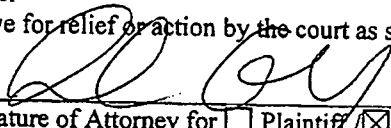
**SECTION I: Hearing Information**

Nature of Motion: \_\_\_\_\_  
 Estimated Time Needed: \_\_\_\_\_ Court Reporter Needed:  YES /  NO

**SECTION II: Motion/Order Type**

Written motion attached  
 Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

  
 Signature of Attorney for  Plaintiff /  Defendant

October 30, 2014  
 Date submitted

**SECTION III: Motion Fee**

PAID - AMOUNT: \$ \_\_\_\_\_  
 EXEMPT: (check reason)

- Rule to Show Cause in Child or Spousal Support
- Domestic Abuse or Abuse and Neglect
- Indigent Status  State Agency v. Indigent Party
- Sexually Violent Predator Act  Post-Conviction Relief
- Motion for Stay in Bankruptcy
- Motion for Publication  Motion for Execution (Rule 69, SCRPC)
- Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: \_\_\_\_\_  
 Other: \_\_\_\_\_

<b>JUDGE'S SECTION</b> <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
--	---------------------------------

**CLERK'S VERIFICATION**

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_  
 MOTION FEE COLLECTED: \$ \_\_\_\_\_  
 CONTESTED - AMOUNT DUE: \$ \_\_\_\_\_

STATE OF SOUTH CAROLINA )  
COUNTY OF WILLIAMSBURG )

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

Kevin Bradley, #339031 )

2010-CP-45-389 )

Applicant, )

vs. )

ORDER )

State of South Carolina, )

Respondent. )

FILED  
2014 DEC -5 AM 11:50  
SHARON S. HIGGINS  
CLERK OF COURT  
KINGSTREE, S.C.

This matter comes before the Court by way of Applicant's Motion to Reconsider. The Respondent made its Return to this response on or about October 30, 2014.

The Order of Dismissal in this matter was signed by this Court on August 19, 2014. This Court finds that as it relates to all issues, other than the claims that Trial Counsel was ineffective for failing to object to hearsay testimony of Robin Griggs (hereinafter "Griggs") and for failing to object to opinion testimony from Griggs that Victim was competent at time of her taped interview, this Order contains the required findings of facts and conclusions of law as required by S.C. Code Ann. §17-27-80 (1976), and Rule 52(a) SCRPC. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

*ASL*  
This Court finds that the original order signed August 19, 2014 and filed August 25, 2014, shall be amended to include the findings on the allegations of whether Trial Counsel was ineffective for failing to object to hearsay testimony of Griggs and whether Trial Counsel was ineffective for failing to object to opinion testimony from Griggs that Victim was competent at time of her taped interview.

Specifically, this Court finds Applicant's allegation that Trial Counsel was ineffective for failing to object to hearsay testimony of Griggs to be without merit. This Court notes Trial Counsel objected to the hearsay testimony of Griggs. (Tr. t. p. 156 line 14—p. 157 line 9).


Specifically, Trial Counsel stated “The jury has the absolute right of hearing what the child has to say, and we don’t need [Griggs] to tell what the child testified to on the video. It’s what the Jury hears.” (Tr. p. 156 lines 16-19). Trial Counsel further stated “she cannot testify as to what somebody else said.” (Tr. p. 156 lines 23-24). The trial judge overruled Trial Counsel’s objection. This Court notes Trial Counsel is not required to “harass the judge by parading the issue before him again.” State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995). This Court finds Trial Counsel properly objected to the hearsay testimony presented by Griggs and was not required to repeatedly object to every instance of hearsay testimony as asserted by Applicant. Furthermore, this Court notes Griggs testimony was cumulative to Victim’s testimony already presented. Based on the foregoing, this Court finds Trial Counsel’s actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

This Court finds Applicant can show no prejudice due to Trial Counsel’s alleged error of failing to object to the hearsay testimony of Griggs as the only issue Applicant disputed was whether Applicant began raping the Victim when she was ten years old. As noted in Applicant’s memorandum, Griggs was properly allowed to testify to the *time* and place of the incident. Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631-632 (2010) (emphasis added). Griggs corroborated Victim’s testimony that the incident began in 2008 when Applicant was ten years old. (App. p. 114 lines 22-25; p. 158 lines 1-11). The fact that Griggs was allowed to testify to the details of the incident is of no consequence as Applicant did not dispute the fact that he raped the Victim. To the contrary, Applicant readily admitted that he engaged in sexual intercourse with the minor Victim. (Trial tr. p. 236—p. 246). Applicant admitted that he “felt terrible” and what he did was “wrong.” (Trial. tr. p. 239). Applicant admitted to raping Victim on the couch in his then girlfriend’s apartment. (Trial tr. p. 243). Furthermore, DNA evidence proved that

Agcj

Victim was pregnant with Applicant's child. (Trial tr. p. 204). Applicant further admitted to raping the Victim during this evidentiary hearing. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). Therefore, this Court finds that there is clear evidence of overwhelming guilt based on a review of the entire record and the evidence presented during the PCR hearing. As such, Applicant cannot show any resulting prejudice from Trial Counsel's alleged deficiency.

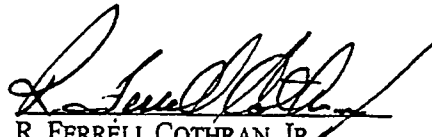
This Court further finds Applicant's allegation that Trial Counsel was ineffective for failing to object to testimony from Griggs stating that Victim was competent at the time of the interview to be without merit. Applicant argues that Griggs testimony stating Victim was "competent" at the time of the interview creates too great of a risk that the jury would equate an assessment of competence with an opinion as to credibility. This Court finds Griggs was merely testifying to her own personal observations regarding the Victim's behavior and demeanor when stating that she had no concerns regarding her competency. State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 501 (2013).

 Furthermore, this Court finds Applicant can show no prejudice from Trial Counsel's alleged deficiency. As noted in Applicant's memorandum, Griggs was properly allowed to testify to the *time* and place of the incident. Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631-632 (2010) (emphasis added). Griggs corroborated Victim's testimony that the incident began in 2008 when Applicant was ten years old. (App. p. 114 lines 22-25; p. 158 lines 1-11). The fact that Griggs stated in her opinion Victim was competent at the time of the interview is of no consequence as Applicant did not dispute the fact that he raped the Victim. To the contrary, Applicant readily admitted that he engaged in sexual intercourse with the minor Victim. (Trial

tr. p. 236—p. 246). Applicant admitted that he “felt terrible” and what he did was “wrong.” (Trial. tr. p. 239). Applicant admitted to raping Victim on the couch in his then girlfriend’s apartment. (Trial tr. p. 243). Furthermore, DNA evidence proved that Victim was pregnant with Applicant’s child. (Trial tr. p. 204). Applicant further admitted to raping the Victim during this evidentiary hearing. Where there is overwhelming evidence of guilt, a trial counsel’s deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). Therefore, this Court finds that there is clear evidence of overwhelming guilt based on a review of the entire record and the evidence presented during the PCR hearing. As such, Applicant cannot show any resulting prejudice from Trial Counsel’s alleged deficiency.

Based upon careful reconsideration of all the evidence in this case and upon full consideration of Applicant’s Motion, this Court is not persuaded to alter or amend the judgment as it relates to any other allegation or issue raised in Applicant’s Motion. Therefore, this Court finds that the Order of Dismissal, which was served on September 30, 2014, shall only be amended by this Order to reflect the dismissal of Applicant’s allegation regarding Trial Counsel’s ineffectiveness for failing to object to Griggs testimony. This Order shall be incorporated as part of the Order of Dismissal in this matter.

AND IT IS SO ORDERED this 24 day of Nov., 2014.

  
R. FERRELL COTHRAN, JR.  
Presiding Judge  
Third Judicial Circuit

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

---

KEVIN BRADLEY, #339031

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Order** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Tara Dawn Shurling, Esquire  
Law Office of Tara Dawn Shurling, PA  
3614 Landmark Drive, Suite A  
Columbia, SC 29204**

This 31<sup>st</sup> day of December, 2014.

  
\_\_\_\_\_  
Caroline Collins, Legal Assistant  
For Respondent

SWORN to before me this 31<sup>st</sup> day of December, 2014.

  
\_\_\_\_\_  
Notary Public for South Carolina.  
My Commission Expires: 5/14/2024

STATE OF SOUTH CAROLINA )  
COUNTY OF WILLIAMSBURG )

Kevin C. Bradley, #339031, )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

Case No. 2010-CP-45-389

ORDER OF DISMISSAL

2014 AUG 25 PM 12:01  
WILLIAMSBURG COUNTY  
CLERK OF COURT  
KINGSTREE, S.C.

FILED

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on September 29, 2010 and amended on February 25, 2013 and May 20, 2014. Respondent made its amended return on October 28, 2013. An evidentiary hearing into the matter was convened on May 27, 2014, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

#### PROCEDURAL HISTORY

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 Williamsburg County Clerk of Court. Applicant was true bill indicted at the January 2010 term of the Williamsburg County Grand Jury for Criminal Sexual Conduct with a Minor—First Degree and Criminal Sexual Conduct with a Minor—Second Degree (2009-GS-45-249). Richard Strobel, Esquire represented Applicant. Applicant proceeded to a jury trial before the Honorable Clifton Newman and on January 27, 2010, Applicant was found guilty. Judge Newman sentenced Applicant to twenty-five years imprisonment for Criminal Sexual Conduct with a Minor—First

Degree and twenty years for Criminal Sexual Conduct with a Minor—Second Degree. The sentences were to run concurrently. Applicant did not appeal his conviction or his sentence.

### ALLEGATIONS

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

1. "The Applicant received Ineffective Assistance of Counsel Prior and during his trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution."
  - a. "Counsel failed to provide client effective assistance of counsel prior to and during his trial proceeding. Inasmuch as Counsel failed to recognize errors which occurred during his trial, and therefore failed to make appropriate objections and supporting legal arguments relating thereto. Counsel's failure to make these objections may have changed the outcome of the Applicant's trial and deprived him of the opportunity to have these issues addressed on their merits on direct appeal."
2. "Trial counsel deprived the Applicant of his right to a direct appeal by failing to file a Notice of Appeal on his behalf following his jury trial on Indictment No. 2009-GS-45-0249."
  - a. "Trial Counsel neglected to file a direct appeal for the Applicant and the Applicant did not knowingly and voluntarily waive his right to a direct appeal."

Applicant amended his application on May 20, 2014, alleging that he was being held in custody unlawfully based on the following allegations:

1. Trial Counsel was ineffective for failing to sufficiently argue the validity of the race neutral explanations given by the Applicant for striking jurors during the selection of the first jury selected in his case.
2. Trial Counsel was ineffective for failing to fully argue against the selection of a second jury panel in the Applicant's case where the reasons given by the Applicant for striking the jurors in question during the State's *Batson* challenge were sufficiently race neutral pursuant to known precedent in South Carolina at the time of the Applicant's trial.

3. Trial Counsel was ineffective for failing to repeat and fully articulate for the record the Applicant's reasons for striking each of the jurors in dispute at his trial during the *Batson* hearing held pursuant to motion by the State.
4. Trial Counsel was ineffective for failing to explain to the Applicant that all of his reasons for striking each juror against whom he exercised a peremptory strike had to be fully stated for the record *as to each juror* when the strike used against that particular juror was addressed during the *Batson* hearing held pursuant to the State's motion.
5. Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to advise the Applicant, who being allowed by Trial Counsel to participate in decisions concerning the use of peremptory strikes in the selection of his jury, that in order to preserve a record for appeal from the trial court's ruling on a potential *Batson* motion by the State, he needed to be prepared fully articulate his reasons for using strikes against each juror.
6. Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to restate for each juror addressed during the *Batson* hearing the Applicant's reasons for using strikes against each juror as articulated in Trial Counsel's general response to the State's *Batson* motion.
7. Trial Counsel was ineffective for neglecting to exercise a peremptory strikes to remove five (5) jurors from the Applicant's jury who had been previously struck by the Applicant in the selection of his first jury where the explanations given by the Applicant for the use of a strike against each of these jurors, if properly articulated, provided a race neutral justification for the use of a peremptory strike against each of these jurors.
8. Trial Counsel was ineffective for characterizing the Applicant's reason for striking Juror number 96, Kenneth Lancaster, as an excuse, where this statement supported the prosecution's position that the reasons proffered by the Applicant for striking this juror were pretextual.
9. Trial Counsel was ineffective for failing to fully articulate the Applicant's objection to the testimony of State witness Barbara Gregg and for failing to present appropriate authority in support of the Applicant's objection to this testimony.

10. Trial Counsel was ineffective for failing to research and present potential character witnesses to testify in the Applicant's behalf at trial; specifically Sgt. Robert McClary, Debra Black, Manager at Skyes in Kingstree, South Carolina, Sgt. Stagers, employed with the 1052<sup>nd</sup> Transportation Company Army National Guard, and Frederick Davis of the Kingstree Police Department.
11. Trial Counsel was ineffective for failing to present testimony from Sgt. Robert McClary, Army National Guard, who would have been able to present alibi evidence for some of the dates the Applicant was accused of committing sexual battery upon the victim, Shataria G. and where said witness could have presented character testimony for the Applicant.
12. Trial Counsel was ineffective for failing to request a continuance after a material amendment to Applicant's indictment where the new indictment was presented to the Grand Jury days before the Applicant's trial, and where he was not made aware of the more serious charge brought in the new indictment until immediately before his trial.

During the evidentiary hearing, Applicant stated that he did not intend to pursue issues regarding alibi witnesses or character witnesses. Therefore, this Court finds Applicant has abandoned issues # 10 and # 11. Additionally, Applicant verbally amended his application to include an allegation of ineffective assistance of counsel for failing to object to the testimony of Trina Hamlet. Applicant further amended his application claiming Trial Counsel was ineffective for failing to have him tested for Sexually Transmitted Diseases and for failing to file a direct appeal.

#### **SUMMARY OF TESTIMONY PRESENTED**

At the evidentiary hearing, Applicant called Trial Counsel, Richard Strobel, Esquire, (hereinafter "Trial Counsel"). Applicant further testified on his own behalf. This Court also had before it a copy of the trial transcript, the Williamsburg County Clerk of Court records, Applicant's South Carolina Department of Correction records, the PCR application, amended allegations, and amended return.

During the evidentiary hearing, Applicant called Trial Counsel to testify. Trial Counsel testified that he was the only attorney of record for these charges. Trial Counsel stated that he represented Applicant for years and met with him several times prior to trial. Trial Counsel stated that he filed and reviewed all Brady and Rule 5 materials. Trial Counsel stated that he and Applicant discussed the elements of the charges. Trial Counsel stated Applicant was out on bond until he violated a condition of his bond by contacting Shateria G (hereinafter "Victim"). Trial Counsel stated that he had the assistance of a paralegal. Trial Counsel stated that the issue at trial was whether Applicant raped the Victim when she was ten years old. Trial Counsel explained that Victim was pregnant with Applicant's child at the age of eleven. Trial Counsel stated that the fetus was approximately fourteen weeks old in utero which meant the Victim was eleven years old at the time of conception. Trial Counsel stated they attempted to argue to the jury that Applicant did not have sex with Victim when she was ten years old, thereby negating the Criminal Sexual Conduct – First Degree charge.

Trial Counsel recalled that Applicant was originally charged with Criminal Sexual Conduct – Second Degree, but the indictment was amended on January 21, 2010. Trial Counsel stated that they proceeded to trial on January 25, 2010. Trial Counsel could not recall the exact date that he informed Applicant of the amended indictment. Trial Counsel clarified that Applicant was prepared to plead guilty as indicted to all charges and had given an affidavit admitting to raping the Victim at age ten and eleven. Trial Counsel explained that Applicant further admitted his guilt during the course of the guilty plea but later stated that he wanted to proceed to trial. Trial Counsel stated that he did not request a continuance after the indictment was amended because he was prepared to go forward with trial.

Trial Counsel stated that jury selection immediately followed the attempted guilty plea. Trial Counsel stated at the end of the first jury panel selection, the State made a Batson motion. Specifically, Trial Counsel stated the State asked for specific reasons as to why each juror was struck. The State argued that Applicant exhausted all of his preemptory challenges; and in doing so struck a total of eight Caucasians and nine females (Trial Tr. p. 21). Trial Counsel stated that Applicant requested certain potential jurors be struck because of the way they looked at him. Trial Counsel clarified that some of the potential jurors refused to look at Applicant or would turn their head. Trial Counsel stated Applicant would not give a more detailed explanation outside of the fact that they would not look at him. Trial Counsel stated that he articulated Applicant's reasoning for striking the jurors to the best of his abilities. Trial Counsel further stated the trial court did not request a more detailed explanation from him. Trial Counsel stated that he had no other reason to request the potential jurors be struck outside of Applicant's reasoning. Trial Counsel stated jurors # 128, 92, 196, 66, 131, and 96 were struck solely because Applicant wanted them struck. Trial Counsel stated he was not concerned with the fact that his response to striking juror #96 was "same excuse" because he was referring to the same reason given by Applicant in regards to the previously mentioned jurors. (Trial Tr. P. 25 line 22). Trial Counsel stated that the first jury panel was ultimately quashed and they selected a second jury panel.

Trial Counsel stated that five jurors originally struck during the first jury selection were seated on the second jury. Trial Counsel stated that he had no concerns with those jurors being seated on the second jury. Trial Counsel further clarified that had Applicant wanted those jurors struck a second time, he would have requested that they be struck. Trial Counsel further stated

that he had no new basis to strike the jurors a second time. Trial Counsel opined that Applicant had a fair and impartial jury.

Trial Counsel stated that he continually objected to Barbara Gregg's (hereinafter "Nurse Gregg") testimony during trial. Trial Counsel stated Nurse Gregg testified that the child was screaming and emotionally upset at the time of the meeting, because she found out that she was pregnant. Trial Counsel stated that he did not object as to whether some of Nurse Gregg's comments would inflame the passions of the jury nor did he object to her testimony as hearsay on hearsay. Trial Counsel stated that in his opinion he articulated the proper objection to the best of his abilities, and the trial judge overruled some of his objections. Trial Counsel further stated that he knew that the Victim would be testifying and anything elicited from Nurse Gregg would be corroborated from the Victim. Trial Counsel stated that he did not attempt to impeach the Victim's credibility due to trial strategy. Specifically, Trial Counsel stated he did not want to appear "mean" when questioning the Victim, an eleven year old rape victim.

Trial Counsel stated that the Victim said she was ten years old when Applicant first raped her. Trial Counsel stated that the Victim was babysitting her cousin's infant child. Trial Counsel stated that he attempted to develop a timeline with the Victim by establishing the date that the infant child's father died. Trial Counsel further recalled the Victim's grandmother taking her to the doctor in the summer of 2008 due to irregular vaginal discharge. Trial Counsel reiterated that it was his trial strategy not to attack the testimony of the minor child for fear of the jury developing a poor opinion of him.

Trial Counsel stated that Applicant took the stand and admitted having sex with the Victim when she was eleven years old. Trial Counsel stated that there was no question that Applicant had sex with the Victim when she was eleven years old because she was pregnant with

his child. Trial Counsel reiterated that the only thing in dispute was when the sexual assault of the Victim began. Trial Counsel recalled during his representation that Applicant gave him several statements admitting that he had no knowledge of her age. Trial Counsel further stated that Applicant continually questioned him about the age differentiation of ten or eleven as applied to the law. Trial Counsel stated that during their conversation, Applicant never disputed that he raped the Victim when she was ten years old.

Trial Counsel could not recall whether the forensic expert Robin Griggs (hereinafter "Griggs") was ever qualified as a forensic expert. Trial Counsel stated that he had no reason to object to the video of the interview being played. Trial Counsel opined that the video was not cumulative or prejudicial. Trial Counsel further stated that he did not object to the testimony presented by Griggs regarding the Victim's recounting of the events on the day of the incident. Trial Counsel reasoned that he did not object because Applicant was not disputing that he had sex with the Victim. Trial Counsel further stated that he did not have a reason for not objecting to Griggs' testimony that it was her recommendation that the Victim not be around Applicant. Trial Counsel testified that he did not recall any testimony from the forensic interviewer regarding her personal belief in the credibility of the Victim in the forensic interview. If there would have been any such testimony, Trial Counsel stated he would have objected.

Trial Counsel further stated that he was not going to object and draw attention to the fact that Trina Hamlet, a Kingstree police officer, stated that Victim claimed during their interview that Applicant forced her to have sex with him. Trial Counsel further reasoned that Victim had already testified that she had sex with Applicant and Trina Hamlet's testimony was redundant. Trial Counsel stated it was not in dispute that Applicant had sex with the Victim. Trial Counsel stated that he did not have Applicant tested for Sexually Transmitted Diseases (STD) because it

did not matter whether he tested positive for STDs as he admitted to having sex with the Victim. Trial Counsel stated that he did not want to harp on the issue of STDs in front of the jury. Trial Counsel reasoned that it may inflame the passions of the jury to hear about the Victim suffering from various STDs.

Trial Counsel further recalled discussing with Applicant his right to a direct appeal. Trial Counsel recalled telling Applicant that he had ten days to file a notice of appeal. Trial Counsel stated Applicant did not tell him that he wanted to appeal the case. Trial Counsel stated that he would not file a notice of appeal unless Applicant requested him to do so.

Following Trial Counsel's testimony, Applicant was called to testify on his own behalf. Applicant testified that he met with Trial Counsel approximately three or four times prior to his trial. Applicant stated that he did not review any discovery materials or discuss any possible defenses with Trial Counsel. Applicant stated Trial Counsel told him about the new Criminal Sexual Conduct – First Degree charge either the week prior to trial or the morning of trial. Applicant stated that he was unaware that there was a new indictment. Applicant stated that he was entering a guilty plea to Criminal Sexual Conduct – Second Degree not Criminal Sexual Conduct – First Degree. Applicant stated that he was under the impression that they had been preparing for a guilty plea and had no idea that they would be going to trial. Applicant stated Trial Counsel did not inform him that there would be a trial that same day and he was not prepared for trial. Applicant stated Trial Counsel never discussed asking for a continuance.

Applicant stated he desired for certain jurors to be struck because they looked mean. In Applicant's opinion they appeared stern and pro-state. Applicant further stated he could not hear where various jurors were employed. Applicant recalled that juror # 29 was a professor and he did not want him to sit on his jury. Applicant stated that jurors # 29, 196, 96, 128, and 82 were

originally struck during the first jury selection but were seated on his second jury. Applicant stated that he wanted jurors # 29, 196, 96, 128, and 82 struck from his second jury panel because they had been previously struck. Applicant stated Trial Counsel was "nonchalant" about articulating reasons for striking the jurors.

Applicant stated that he wanted Trial Counsel to object to Nurse Gregg's testimony because it bolstered the Victim's testimony and was prejudicial. Applicant further testified that Trial Counsel refused to object to the State playing the video recording of the forensic interview. Applicant stated that Trial Counsel should have objected to Trina Hamlet stating Victim told her during an interview that Applicant forced her to have sex.

Applicant recalled testifying at trial and admitting to having sexual relations with the Victim. Applicant stated as a result of their sexual relations, the Victim became pregnant with his child. Applicant recalled telling the jury that he felt terrible and was morally wrong for raping the Victim. Applicant again did not deny that he had sex with the Victim. Applicant recalled stating that the sexual assault occurred on Victim's cousin's, Dasheia McBrides, couch. Applicant recalled testifying during trial that he was nowhere near Victim in 2008 (when Victim was ten years old). Applicant further recalled the State introducing a filed police report naming Applicant as Dasheia McBride's boyfriend in October 2008.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Specifically, this Court finds Trial Counsel's testimony credible

and Applicant's testimony not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

### **INEFFECTIVE ASSISTANCE OF COUNSEL**

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; 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, (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.

*Trial Counsel was ineffective for failing to sufficiently argue the validity of the race neutral explanations given by the Applicant for striking jurors during the selection of the first jury selected in his case.*

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to argue the validity of the race neutral and gender neutral reason is without merit. A review of the record reveals that the trial court found Trial Counsel articulated valid race neutral and gender neutral reasons for striking juror's # 104, 80, and 16. (Trial Tr. pages 26-31). Trial Counsel specifically stated that he struck those jurors without the consultation of Applicant. The nine additional preemptory strikes used during the first jury selection were done so at the request of Applicant. Trial Counsel specifically stated that he had no other reason to strike the remaining nine potential jurors outside of Applicant's request. The fact that Applicant was unable to provide Trial Counsel with a race neutral and gender neutral reason for striking the jurors is of no consequence.

This Court finds Trial Counsel's performance did not fall below professional norms. This Court notes that the process of jury selection inherently falls within the expertise and experience of Trial Counsel. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516, 511 S.E.2d at 68. The court in Palacio further noted that "a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. at 516, 511 S.E.2d at 68.

Based on the foregoing, this Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, Applicant did not present sufficient

evidence to support a finding that Trial Counsel's alleged error's resulted in a violation of Applicant's right to a trial by a competent and impartial jury.

*Trial Counsel was ineffective for failing to fully argue against the selection of a second jury panel in the Applicant's case where the reasons given by the Applicant for striking the jurors in question during the State's Batson challenge were sufficiently race neutral pursuant to known precedent in South Carolina at the time of the Applicant's trial.*

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to fully argue against the selection of a second jury panel in Applicant's case is without merit. Trial Counsel stated at the end of the first jury panel selection, the State made a Batson motion. Trial Counsel stated the State asked for specific reasons as to why each juror was struck. The State argued that Applicant exhausted all of his preemptory challenges; and in doing so, struck a total of eight Caucasians and nine females (Trial Tr. p. 21). Trial Counsel stated that Applicant requested certain potential jurors be struck because of the way they looked at him. Trial Counsel clarified that some of the potential jurors refused to look at Applicant or would turn their head. Trial Counsel stated that he articulated Applicant's reasoning to the best of his abilities.

This Court finds Trial Counsel's testimony credible while Applicant's testimony is not credible. Furthermore, Trial Counsel stated that he articulated Applicant's reasoning to the best of his abilities. A review of the record reveals that Trial Counsel relayed to the trial judge the reasons given to him by Applicant for using nine of the twelve preemptory strikes. The remaining three strikes were done so by Trial Counsel without Applicant's involvement and notably withstood the State's Batson challenge. This Court finds Trial Counsel argued the reasons relayed to him by Applicant to the best of his abilities. The fact that the trial judge granted the State's Batson motion after hearing the reasons given is beyond the control of Trial Counsel. Additionally, this Court notes that the process of jury selection inherently falls within

the expertise and experience of Trial Counsel. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516, 511 S.E.2d at 68. The court in Palacio further noted that “a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.” Id. at 516, 511 S.E.2d at 68.

This Court finds Trial Counsel’s actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds Applicant has failed to allege “what more” Trial Counsel should have argued to the trial court in support of his request to strike the nine jurors. Furthermore, Applicant did not present sufficient evidence to support a finding that Trial Counsel’s alleged error resulted in a violation of Applicant’s right to a trial by a competent and impartial jury.

*Trial Counsel was ineffective for failing to repeat and fully articulate for the record the Applicant’s reasons for striking each of the jurors in dispute at his trial during the Batson hearing held pursuant to motion by the State.*

This Court finds Applicant’s allegation that Trial Counsel was ineffective for failing to repeat and fully articulate for the record Applicant’s reasons for striking each of the jurors is without merit. This Court finds Trial Counsel’s testimony credible while Applicant’s testimony is not credible. Furthermore, Trial Counsel stated that he articulated Applicant’s reasoning to the best of his abilities. A review of the record reveals that Trial Counsel relayed to the trial judge the reasons given to him by Applicant for using nine of the twelve preemptory strikes. The remaining three strikes used were done so by Trial Counsel without Applicant’s involvement and notably withstood the State’s Batson challenge. Additionally, this Court notes that the process of jury selection inherently falls within the expertise and experience of Trial Counsel. Palacio v.

State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516, 511 S.E.2d at 68. The court in Palacio further noted that “a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.” Id. at 516, 511 S.E.2d at 68.

This Court finds Trial Counsel’s actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds Applicant has failed to allege “what more” Trial Counsel should have argued to the trial court in support of his request to strike the nine jurors. Furthermore, Applicant did not present sufficient evidence to support a finding that Trial Counsel's alleged error resulted in a violation of Applicant’s right to a trial by a competent and impartial jury.

*Trial Counsel was ineffective for failing to explain to the Applicant that all of his reasons for striking each juror against whom he exercised a preemptory strike had to be fully stated for the record as to each juror when the strike used against that particular juror was addressed during the Batson hearing held pursuant to the State's motion.*

This Court finds Applicant’s allegation that Trial Counsel was ineffective for failing to explain to him that all of his reasons for striking each juror against whom he exercised a preemptory strike had to be fully stated for the record is without merit. This Court finds Trial Counsel’s testimony credible while Applicant’s testimony not credible. Trial Counsel stated that Applicant requested certain jurors be struck because of the way they looked at him. Trial Counsel clarified that some of the potential jurors refused to look at Applicant or would turn their head. Additionally, Trial Counsel explained to the Court that Applicant was unable to hear where various jurors were employed and that was a cause for concern with the Applicant.

During the evidentiary hearing, Trial Counsel stated that he articulated to the best of his abilities, Applicant's reasons for striking the jurors. A review of the record reveals Trial Counsel gave reasons for each of the struck jurors. This Court notes, Trial Counsel stated that he articulated Applicant's reasons for striking the jurors to the best of his abilities. The mere fact that the trial court found Applicant's reasons for striking the jurors pretextual is beyond the control of Trial Counsel. Additionally, this Court notes that the process of jury selection inherently falls within the expertise and experience of Trial Counsel. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516, 511 S.E.2d at 68. The court in Palacio further noted that "a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. at 516, 511 S.E.2d at 68.

This Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds Applicant has failed to allege "what more" Trial Counsel should have argued to the trial court in support of his request to strike the nine jurors. Furthermore, Applicant did not present sufficient evidence to support a finding that Trial Counsel's alleged error resulted in a violation of Applicant's right to a trial by a competent and impartial jury.

*Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to advise the Applicant, who being allowed by Trial Counsel to participate in decisions concerning the use of preemptory strikes in the selection of his jury, that in order to preserve a record for appeal from the trial court's ruling on a potential Batson motion by the State, he needed to be prepared fully articulate his reasons for using strikes against each juror.*

This Court finds Applicant's allegation that Trial Counsel failed to inform him that he needed to fully articulate his reasons on the record for appeal purposes to be without merit. This Court finds Trial Counsel's testimony credible, while Applicant's testimony not credible. Specifically, Trial Counsel testified that he articulated Applicant's reasoning for striking each juror to the best of his abilities. Trial Counsel stated Applicant would not give a more detailed explanation outside of the fact that they would not look at him. Trial Counsel further stated the trial court did not request a more detailed explanation from him. Additionally, this Court notes that the process of jury selection inherently falls within the expertise and experience of trial counsel. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516, 511 S.E.2d at 68. The court in Palacio further noted that "a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. at 516, 511 S.E.2d at 68.

This Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds Applicant has failed to allege "what more" Trial Counsel should have argued to the trial court in support of his request to strike the nine jurors. Furthermore, Applicant did not present sufficient evidence to support a finding that Trial

Counsel's alleged error resulted in a violation of Applicant's right to a trial by a competent and impartial jury.

*Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to restate for each juror addressed during the Batson hearing the Applicant's reasons for using strikes against each juror as articulated in Trial Counsel's general response to the State's Batson motion.*

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to restate for each juror addressed during the Batson hearing Applicant's reasons for using strikes to be meritless. This Court finds Trial Counsel's testimony credible, while Applicant's testimony not credible. Trial Counsel testified that he stated Applicant's reasons for striking each juror to the best of his abilities. Trial Counsel further stated the trial court did not request a more detailed explanation from him outside of what was already stated. After hearing the reasons for striking the jurors, the trial court granted the State's Batson motion. To require Trial Counsel to merely repeat the already stated reasons as to why the jurors were struck would simply be redundant and have no impact on the trial court's decision. Furthermore, Applicant has failed to show how Trial Counsel's reassertion of his reasons for striking the jurors would have had any impact on the trial court's decision to grant the State's Batson motion. Additionally, this Court notes that the process of jury selection inherently falls within the expertise and experience of trial counsel. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516, 511 S.E.2d at 68. The court in Palacio further noted that "a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. at 516, 511 S.E.2d at 68.

This Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds Applicant has failed to allege "what more" Trial Counsel should have argued to the trial court in support of his request to strike the nine jurors. Furthermore, Applicant did not present sufficient evidence to support a finding that Trial Counsel's alleged error resulted in a violation of Applicant's right to a trial by a competent and impartial jury.

*Trial Counsel was ineffective for neglecting to exercise a peremptory strikes to remove five (5) jurors from the Applicant's jury who had been previously struck by the Applicant in the selection of his first jury where the explanations given by the Applicant for the use of a strike against each of these jurors, if properly articulated, provided a race neutral justification for the use of a peremptory strike against each of these jurors.*

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to strike five jurors during the second jury selection that were previously struck during the first jury selection to be without merit. In State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995), the circuit court quashed a jury, finding the defendant struck a juror in a discriminatory manner. Subsequently, upon starting the jury selection process de novo, the defendant attempted to strike the same juror again, and the circuit court seated the juror. Id. at 51, 456 S.E.2d at 359. The court noted that defense counsel conceded that there were no new facts supporting the constitutionality of the second attempt to strike the same juror. Id.

Trial Counsel stated at the end of the first jury panel selection, the State made a Batson motion. Specifically, Trial Counsel testified that the State asked for specific reasons as to why each juror was struck. The State argued that Applicant exhausted all of his preemptory challenges; and in doing so, struck a total of eight Caucasians and nine females (Trial Tr. p. 21).

Trial Counsel stated that Applicant requested certain potential jurors be struck because of the way they looked at him. Trial Counsel clarified that some of the potential jurors refused to look at Applicant or would turn their head. Trial Counsel stated Applicant would not give a more detailed explanation outside of the fact that they would not look at him. Trial Counsel stated that he articulated Applicant's reasoning for striking the jurors to the best of his abilities. Trial Counsel further stated the trial court did not request a more detailed explanation from him. Trial Counsel stated that he had no other reason to request the potential jurors be struck outside of the Applicant's reasoning. Trial Counsel stated jurors # 128, 92, 196, 66, 131, and 96 were struck solely because Applicant wanted them struck. Trial Counsel testified that he had no new or additional reasons to strike the five prospective jurors during the second jury selection. Trial Counsel stated that the first jury panel was ultimately quashed, and they selected a second jury panel.

Trial Counsel stated that five jurors originally struck during the first jury selection were seated on the second jury. Trial Counsel stated that he had no concerns with those jurors being seated on the second jury. Trial Counsel further clarified that had Applicant wanted those jurors struck a second time, he would have requested that they be struck. Trial Counsel further stated that he had no new basis to strike the jurors a second time.

Therefore, as held in Franklin, Trial Counsel could not have struck the five prospective jurors again, because Trial Counsel conceded that there were no new facts supporting the constitutionality of striking the five prospective jurors a second time. As such, this Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, Applicant has failed to show he was prejudiced such that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

*Trial Counsel was ineffective for characterizing the Applicant's reason for striking Juror number 96, Kenneth Lancaster, as an excuse, where this statement supported the prosecution's position that the reasons proffered by the Applicant for striking this juror were pretextual.*

This Court finds Applicant's allegation that Trial Counsel was ineffective for stating Applicant's reason for striking Juror number 96, Kenneth Lancaster, as an excuse, is without merit. Trial Counsel stated he was not concerned with the fact that his response to striking juror #96 was "[Applicant] said the same excuse, no different" because he was referring to the same explanation stated previously. (Trial Tr. P. 25 line 22). Additionally, this Court notes that the process of jury selection inherently falls within the expertise and experience of trial counsel. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516, 511 S.E.2d at 68. The court in Palacio further noted that "a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. at 516, 511 S.E.2d at 68.

This Court finds Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds Applicant has failed to allege "what more" Trial Counsel should have argued to the trial court in support of his request to strike the nine jurors. Furthermore, Applicant did not present sufficient evidence to support a finding that Trial Counsel's alleged error resulted in a violation of Applicant's right to a trial by a competent and impartial jury.

*Trial Counsel was ineffective for failing to fully articulate the Applicant's objection to the testimony of State witness Barbara Greggs and for failing to present appropriate authority in support of the Applicant's objection to this testimony.*

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to fully articulate Applicant's objection to the testimony of Nurse Greggs is without merit. This Court finds Trial Counsel's testimony credible, while Applicant's testimony not credible. Trial Counsel stated Nurse Gregg testified that the child was screaming and emotionally upset at the time of the meeting, because she found out that she was pregnant. Trial Counsel stated that in his opinion he articulated the proper objection to the best of his abilities, and the trial judge overruled some of his objections.

A review of the record reveals that Trial Counsel made timely objections to Nurse Gregg's testimony where appropriate. (Trial tr. p. 57 line 18-19; p. 58 line 20; p. 60 line 2; page 69-71). Trial Counsel argued against the State's assertion that Victim's statement to Nurse Gregg fell within Rule 803(2). This Court finds Trial Counsel articulated a sufficiently specific reason to preserve the issue for appellate review. See State v. Byers, 392 S.C. 439, 446, 710 S.E.2d 55 (2011). It is apparent from reviewing the record that Trial Counsel was objecting to the hearsay nature of Nurse Gregg's testimony. Counsel stated that, in his opinion, he articulated the proper objection to the best of his abilities. As such, this Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, Applicant has failed to show sufficient resulting prejudice as a result of Trial Counsel's alleged deficiency.

*Trial Counsel was ineffective for failing to request a continuance after a material amendment to Applicant's indictment where the new indictment was presented to the Grand Jury days before the Applicant's trial, and where he was not made aware of the more serious charge brought in the new indictment until immediately before his trial.*

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to request a continuance after Applicant's indictment was amended to be without merit. This Court finds Trial Counsel's testimony credible, while Applicant's testimony not credible. "Where there is no showing that any other evidence on behalf of the [Applicant] could have been produced or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial," a continuance is unnecessary. State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51-52 (1996).

Trial Counsel stated that he did not request a continuance after the indictment was amended because he was prepared to go forward with trial. This Court notes that Applicant's indictment was amended to add a charge of Criminal Sexual Conduct—First Degree. Applicant had been previously indicted for Criminal Sexual Conduct—Second Degree. Both charges involved the same Victim. Trial Counsel credibly testified that he was prepared to go forward with the trial. As such, this Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, Applicant has failed to allege or provide any additional evidence that Trial Counsel would have been able to offer if he had requested and been granted a continuance. Applicant presented no additional witness, introduced no additional evidence, and only made a bare assertion that Trial Counsel could have investigated into the crime. As such, this Court finds Applicant has failed to show sufficient resulting prejudice as a result of Trial Counsel's alleged deficiency.

*Ineffective assistance of counsel for failing to object to the hearsay testimony of Trina Hamlet stating Applicant forced Victim to have sex.<sup>1</sup>*

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to object to Trina Hamlet's (hereinafter "Hamlet") testimony is without merit. This Court is well aware that "the rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001). One exception to the rule allows limited corroborative testimony in criminal sexual conduct cases when the victim testifies. Id.; Rule 801(d)(1)(D), SCRE. The corroborative testimony is restricted to the victim's complaint of the time and place of the sexual assault. Dawkins, 346 S.C. at 156, 551 S.E.2d at 262. Any other details or particulars, including the perpetrator's identity, must be excluded. Id. at 156, 551 S.E.2d at 263. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984). With this framework in mind, this Court finds Trial Counsel's decision not to object was reasonable. Specifically, this Court notes that Applicant argues Trial Counsel should have objected to Hamlet's testimony that Applicant "forced having sex with her" as corroborative and cumulative. However, the fact that Applicant had sexual relations with Victim was not in dispute. Additionally, the fact that Hamlet testified the raping

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<sup>1</sup> Applicant requested the opportunity to amend his post-conviction relief application to include the above mentioned allegation because Applicant's Counsel discovered the allegation during the course of the evidentiary hearing. The State objected to the amendment citing the fact that Applicant had previously filed two amended applications, lack of notice, and the lack of ability to properly prepare to refute such an allegation. This Court in interest of finality and judicial economy addresses the merits of the issue in this Order.

began in the Summer of 2008 is appropriate testimony. See Dawkins, 346 S.C. at 156, 551 S.E.2d at 262.

Additionally, Applicant cannot show any resulting prejudice as a result of Counsel's alleged deficiency as there is clear overwhelming guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). The record reveals Applicant readily admitted to the fact that he engaged in sexual intercourse with the Victim. (Trial tr. p. 236—p. 246). Applicant admitted that he “felt terrible” and what he did was “wrong.” (Trial. tr. p. 239). Applicant admitted to raping this Victim on the couch in an apartment. (Trial tr. p. 243). Furthermore, DNA evidence proved that Victim became pregnant with Applicant's child. (Trial tr. p. 204). Applicant further admitted to raping the Victim during this evidentiary hearing. Applicant only disputed whether he raped the Victim when she was ten years old. However, it is apparent that the jury did not find Applicant credible. As the trial judge instructed the jury:

And as the jurors then it is your duty to determine the facts, the value, the weight and the truth of evidence presented during this trial. You are also the judges, the sole judge, of the credibility, that is, the believability of the witnesses who have testified in this case. And passing upon their credibility you may take into consideration many things such as demeanor or the manner of testifying; whether the witness had a reason to be biased or prejudiced; whether a witness's testimony was contradicting on the one hand or supportive and corroborative on the other hand. You may believe a small portion of a witness's testimony and disregard the large part or vice versa. You may believe one witness against many or many against one. All of these things you will consider, bearing in mind that you should give the defendant the benefit of any reasonable doubt.

Based on the verdict of the jury, it is apparent that they did not find Applicant's testimony credible. This Court finds that there is clear evidence of overwhelming guilt based on a review

of the entire record and the testimony and evidence presented during the PCR hearing. As such, Applicant cannot show any resulting prejudice from Trial Counsel's alleged deficiency.

*Trial Counsel was ineffective for failing to have Applicant tested for Sexually Transmitted Diseases (hereinafter "STD's") when Victim tested positive for various STD's.<sup>2</sup>*

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to have Applicant tested for STDs to be without merit. This Court finds Trial Counsel's testimony credible while Applicant's testimony is not credible. Trial Counsel stated it was not in dispute that Applicant had sex with the Victim. Trial Counsel stated that he did not have Applicant tested for Sexually Transmitted Diseases (STD) because it did not matter whether he tested positive for STDs as he admitted to having sex with the Victim. Trial Counsel stated that he did not want to harp on the issue of STDs in front of the jury. Trial Counsel reasoned that it may inflame the passions of the jury to hear about the Victim suffering from various STDs. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Trial Counsel articulated valid strategic reasons for not having Applicant tested for STDs. This Court finds Counsel's reasons valid, as it was not in dispute that Applicant raped Victim. Therefore, whether or not Applicant tested positive for STDs is of no consequence. Based on the foregoing, this Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry,

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<sup>2</sup> Applicant requested the opportunity to amend his post-conviction relief application to include the above mentioned allegation because Applicant's Counsel discovered the allegation during the course of the evidentiary hearing. The State objected to the amendment citing the fact that Applicant had previously filed two amended applications, lack of notice, and the lack of ability to properly prepare to refute such an allegation. This Court in interest of finality and judicial economy addresses the merits of the issue in this Order.

300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds that Applicant has failed to establish the requisite prejudice required for relief pursuant to Strickland. Therefore, this Court finds that Trial Counsel was not ineffective and that this allegation must be denied and dismissed with prejudice.

*Trial Counsel was ineffective for failing to advise and file a Notice of Appeal on Applicant's behalf.*

This Court finds Applicant's allegation that he received ineffective assistance of Trial Counsel for failing to advise him and file a direct appeal to be without merit. This Court finds Trial Counsel's testimony credible while Applicant's testimony is not credible. Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citation omitted) (Turner I); see also Turner v. State, 384 S.C. 451, 456, 682 S.E.2d 792, 794 (2009) (finding counsel must inform criminal defendant found guilty of a crime after a trial about the possibility of an appeal) (Turner II ). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)." Turner, 380 S.C. at 224, 670 S.E.2d at 374 (citation omitted).

In the instant case, Trial Counsel credibly testified that he discussed Applicant's right to a direct appeal. Trial Counsel recalled telling Applicant that he had ten days to file a direct appeal. Trial Counsel stated Applicant did not ask him to file a notice of appeal on his behalf. Based on the foregoing, this Court finds Applicant knowingly and intelligently waived his right to a direct appeal. This Court finds Applicant was fully advised of his right to a direct appeal and based on his conduct waived his appellate rights. This Court further finds Counsel's actions were reasonable under the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds that

Applicant has failed to establish the requisite prejudice required for relief pursuant to Strickland. Therefore, this Court finds that Trial Counsel was not ineffective and that this allegation must be denied and dismissed with prejudice.

Accordingly, this Court finds Applicant failed to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance of counsel under prevailing professional norms. Applicant failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant failed to prove the second prong of Strickland – that he was prejudiced by Trial Counsel’s performance. This Court concludes Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance. See Frazier 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, the Court finds 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**

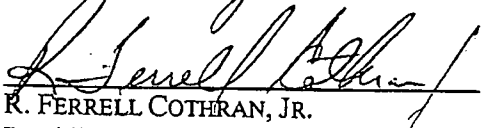
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Plea counsel rendered effective assistance and Applicant’s plea was knowingly and voluntarily entered. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

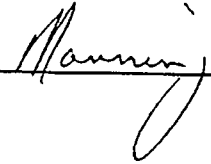
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 19 day of Aug, 2014.

  
R. FERRELL COTHRAN, JR.  
Presiding Judge  
Third Judicial Circuit

  
Manning, South Carolina

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

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KEVIN BRADLEY, #339031

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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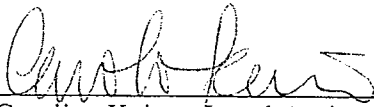
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Tara Dawn Shurling, Esquire  
Law Office of Tara Dawn Shurling, PA  
3614 Landmark Drive, Suite A  
Columbia, SC 29204**

This 29<sup>th</sup> day of September, 2014.

  
\_\_\_\_\_  
Caroline Kaiser, Legal Assistant  
For Respondent

SWORN to before me this 29<sup>th</sup> day of September, 2014.

  
\_\_\_\_\_  
Notary Public for South Carolina.  
My Commission Expires: 5/14/2024

FIRST-CLASS



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Law Office of

**TARA DAWN SHURLING, PA**

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COLUMBIA, SOUTH CAROLINA 29204



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