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March 30, 2015

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

The Honorable Liz Godard
Clerk of Court
P.O. Box 583
Aiken, SC 29802-0583

RE: Darrin Darrell Holston, #288828, v. State of South Carolina
2013-CP-02-856

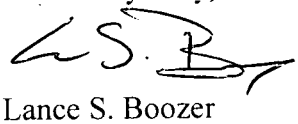
Dear Mr. Shearouse and Ms. Godard:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

(1) Proof of Service of the Notice of Appeal;
(2) A copy of the Order which is to be challenged on appeal; and
(3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Holston in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Holston in this appeal.

Yours very truly,



Lance S. Boozer

Enclosure

cc: Daniel Gourley, AAG
Office of Appellate Defense
Darrin Darrell Holston, #288828

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
APR 01 2015
S.C. Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon Circuit Court Judge

Case No. 2013-CP-02-856

Darrin Darrell Holston, #288828, ...Petitioner,

v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable R. Knox McMahon's Order dated October 9, 2014, denying post-conviction relief to the Petitioner. Petitioner's Motion to Reconsider was denied March 20, 2015, and received by undersigned counsel on March 24, 2015. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,

Lance S. Boozer
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Columbia, SC 29201
Tele: 803-608-5543

March 30, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM AIKEN COUNTY
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The Honorable R. Knox McMahon Circuit Court Judge

Case No. 2013-CP-02-856

Darrin Darrell Holston, #288828, ...Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Daniel Gourley, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 30th day of March, 2015.

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Tele: 803-608-5543

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
Darrin Darrell Holston, #288828, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2013-CP-02-00856 **ORDER OF DISMISSAL** FILED 10:9 14 Liz Boland C.C.P. & G.S. Anita Knowles Deputy Clerk

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on April 15, 2013 and amended on July 24, 2013. Respondent made its return on September 5, 2013. An evidentiary hearing into the matter was convened on August 1, 2014, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Lance Boozer, 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 Aiken County Clerk of Court. Applicant was true bill indicted during the December 2010 term of the Aiken County Grand Jury for Burglary in the First Degree (2010-GS-02-1899), Kidnapping (2010-GS-02-1903), and Attempted Armed Robbery (2010-GS-02-1905). Wallis Alves, Esquire, represented Applicant. On May 9-12, 2011, a jury trial was held before the Honorable Doyet A. Early, III. The jury convicted Applicant as indicted. On May 12, 2011, Judge Early sentenced Applicant to life imprisonment for each offense, with all three sentences to run concurrently.

A Notice of Appeal was filed with the South Carolina Court of Appeals and Robert M. Pachak, Esquire, perfected an appeal on Applicant's behalf. The Court of Appeals affirmed Applicant's sentences and convictions on December 28, 2012. State v. Holston, No. 2012-UP-678 (Ct. App. December 28, 2012). The Remittitur was issued on January 23, 2013.

ALLEGATIONS

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

1. Trial counsel denied Applicant effective assistance in violation of the South Carolina Constitution Article One Section Three and Fourteen and the United States Constitution Sixth and Fourteenth Amendments.
    a. Counsel elicited corroborative hearsay testimony from prosecution witnesses and defense witnesses as to what the victim said that bolstered alleged victim's credibility.
    b. Counsel failed to interview defense witnesses to ascertain whether they would support defendant's theory of the case.
    c. Counsel failed to motion the courts for a Rule 403 analysis on evidence that prosecution and trial counsel submitted that had the propensity to mislead and confuse the jury.
    d. Counsel denied the Applicant the opportunity to confront witnesses against him by stipulated forensic Inv. Clay Adams and forensic examiner Cathey Leisy reports instead of calling them as witnesses.
    e. Counsel failed to object to the trial courts admitting a CD into evidence without a proper foundation for that evidence being laid.
    f. Counsel failed to motion the courts for Rule 609 balancing analysis.
    g. Counsel failed to object to misstatements made by alleged victim Willie Walker.
2. Cumulative prejudice.
3. Conspiracy.
4. Police misconduct.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from Wallis Alves, Esquire (hereinafter "Trial Counsel"). This Court also had before it a copy of the trial transcript, the Aiken County Clerk of Court records, Applicant's South Carolina Department of Correction records, the PCR application, appellate records and return.

During the evidentiary hearing Applicant testified on his own behalf. Applicant stated he met with Trial Counsel numerous times prior to his trial. Applicant recalled meeting with Trial Counsel prior to his preliminary hearing and on August 18, 2010. Applicant stated that he reviewed some of the discovery material prior to trial. Applicant stated that he did not discuss any possible defenses with Trial Counsel. Applicant stated that he did not give Trial Counsel any leads or witnesses to investigate.

Applicant stated that he testified at his trial. Applicant stated that he went to the Victim's place of work to sell him marijuana. Applicant stated Victim offered to drive them to the ATM to withdraw the necessary money to purchase the marijuana. Applicant stated while he was waiting on Victim to get his wallet, he put on gloves and began to divide out some cocaine. Applicant stated while on the way to the ATM the Victim pulled a gun from underneath the driver seat and robbed Applicant. Specifically, Applicant stated that Victim first made him strip off his clothes, then jumped out of the moving vehicle, and fled to a third party house. Applicant stated the car ended up crashing and he suffered some serious injuries as a result. Applicant stated that there was no disputing that he was in the Victim's vehicle. Applicant stated it was his version of events versus the Victim's version of events.

Applicant stated Trial Counsel was ineffective for eliciting corroborating hearsay testimony from multiple witnesses. Specifically, Applicant stated Victim had already testified

during trial and Trial Counsel continued to elicit the Victim's version of events from various witnesses. Applicant referenced the fact that Trial Counsel called witnesses Renee Tyler and Mary Sharp to discuss the Victim's statement and work history.

Applicant further argued that Trial Counsel failed to request a 403 analysis on certain pieces of evidence including pictures of the front door that was allegedly locked. Applicant explained that the pictures supported the Victim's version of events that the front door was broken into. Applicant stated that Investigator James Sanders (hereinafter "Investigator Sanders") testified that the front door was locked when he arrived at the scene. Applicant further pointed out that Investigator Sanders stated "other than the seven being down from the outside there wasn't really any apparent of any other damage there." (Tr. p. 174 lines 16-18). Applicant concluded Trial Counsel should have objected and requested a 403 analysis in an effort to keep the photos depicting damage to the front door out of evidence because it supported the Victim's version of events.

Applicant stated Trial Counsel should have challenged the DNA and Fingerprint reports during trial. Applicant stated the blood found at the scene was a mixture of both his and Victim's DNA. However, Applicant did not dispute that he was in the car when it crashed and suffered serious injuries. Applicant further stated Trial Counsel should have objected to a CD containing photos being introduced into evidence. Applicant argued that the proper foundation was not laid. Applicant stated Trial Counsel should have motioned the court to conduct a 609 SCRE balancing analysis after she objected to Applicant being impeached with his prior Criminal Sexual Conduct charge. Applicant further stated Trial Counsel should have objected to Victim's inconsistent statements and challenged the Victim with the various photos introduced into trial.

Applicant stated there was misconduct by the police due to their inconsistent versions of events. Specifically, Applicant stated there were three separate officers at the Tri County house and their descriptions of the scene varied. Applicant stated Trial Counsel was ineffective for arguing during the preliminary hearing that Applicant did not meet the threshold elements for armed robbery, but instead argued for a charge of attempted armed robbery. Applicant stated that Trial Counsel arguing that the charge should be attempted armed robbery was a sign that Trial Counsel believed he was guilty. Applicant argued that Trial Counsels actions created a conflict of interest because she believed he was guilty of attempted armed robbery. Applicant stated he was offered twenty years but did not accept the offer because he was innocent.

Following Applicant's testimony, Trial Counsel was called to testify. Trial Counsel testified that she has been practicing law for twenty two years. Trial Counsel stated she was appointed in this case. Trial Counsel stated she met with Applicant "a lot." Trial Counsel stated she filed for and reviewed all Rule 5 and Brady material with Applicant. Trial Counsel stated she discussed Applicant's version of facts. Specifically, Trial Counsel stated Applicant alleged that he went to the Tri County home to sell Victim some marijuana. While Applicant was waiting on Victim to get money, he began to bag cocaine. According to Applicant, Victim did not have any money and offered to drive them to the ATM. While on the way to the ATM, Victim pulled out a gun from underneath the front seat and robbed Applicant. According to Applicant, Victim first required Applicant to strip off his clothes, then bailed out of the moving vehicle, and took Applicant's clothes, cocaine, and marijuana. Trial Counsel stated the car crashed and Applicant received serious injuries.

However, Trial Counsel stated Victim's version of events contradicted Applicant's version of events. Specifically, Trial Counsel stated Victim testified Applicant broke down the

front door wearing nothing but boxers, socks, and gloves. Victim testified that Applicant demanded four hundred dollars, but he did not have any money on his person. As a result, Applicant demanded Victim drive him to the ATM. While on the way to the ATM Victim jumped out of the car, ran up to a third party's house, and called police. Trial Counsel stated two additional witnesses testified that they saw Victim jump out the moving car, saw the vehicle crash, and saw Applicant in the car with a gun in his lap after the crash. One of the witness testified that a white SUV pulled up behind the crashed car, an unknown person got out the SUV, took the gun from the Applicant and fled the scene. Trial Counsel stated the case boiled down to the credibility of the stories by both Applicant and Victim. Trial Counsel stated it was her trial strategy to discredit the statements of the Victim and argue that this was a drug deal gone bad and not a kidnapping. Trial Counsel stated she attempted to point out the various inconsistencies within the Victim's statement as compared to the statements of the various witnesses and officers.

Trial Counsel stated that she stipulated to the DNA and fingerprint evidence because it was never in dispute that the Applicant was at the Victim's place of work or in the Victim's car. Trial Counsel further stated Applicant's finger prints were not found and the report did not hurt Applicant. Trial Counsel stated she did not have any objection to the introduction of the CD and did not feel the need to object to the CD's introduction.

Trial Counsel stated Applicant wanted to testify during trial and the court informed him that he would be impeached with his prior offenses. Trial Counsel stated Applicant had a prior 2006 criminal sexual conduct conviction. Trial Counsel stated she explained to Applicant that he was going to be impeached with his prior conviction if he chose to testify. Trial Counsel stated she objected to the use of conviction and argued that it would be more prejudicial than probative.

However, Trial Counsel stated that charge was within the ten year time period necessary for impeachment purposes. Trial Counsel further stated the court had a side bar where he explained that he was going to allow the Applicant to be impeached with the prior conviction, but to remind him to place on the record his 403 analysis. Trial Counsel stated the court does not like to send the jury out unnecessarily and requested counsels to remind the court to place his findings on the record. Trial Counsel stated she forgot to remind the court to place his findings on the record until the end of the trial. Trial Counsel stated she brought up the criminal sexual conduct conviction on direct to "take the wind out of the prosecutor's sails."

Trial Counsel stated her notes reflect that Applicant was offered a thirty year plea offer on April 15, 2011. However, Trial Counsel stated that Applicant was only interested in a five year plea offer. Trial Counsel stated Applicant received another offer of twenty years on May 7, 2011. However, Applicant rejected that offer and reiterated that he would only accept a five year plea offer.

Trial Counsel stated Victim was the first person to testify. Trial Counsel stated there were other witnesses who spoke with Victim about his version of events. Trial Counsel stated it was her trial strategy to bring out the inconsistency of Victim's version of events through the testimony of the various witnesses. Trial Counsel stated she was trying to show that Victim was lying about what actually took place that night. Trial Counsel stated she did not feel the witnesses' testimonies bolstered Victim's credibility, but instead made the Victim look less credible because of the inconsistencies. Trial Counsel stated she called Renee Tyler and Mary Sharp to show Victim had falsified documents for mentally handicap people. Trial Counsel explained that Victim was responsible for filling out a log book at various points during the night after he checked on the tenants. However, Victim filled out the log book in advance and

received a disciplinary action.

Trial Counsel stated she introduced defense exhibits ten, eleven, and twelve in an effort to show that the front door was not busted open as alleged by the Victim. Trial Counsel stated the pictures showed helped point out the inconsistencies in the description of the scene at the Tri-County house. Trial Counsel stated she could have gotten this information out during cross-examination of the Victim, but felt it would carry more weight with the jury when it came from Victim's employers.

Trial Counsel stated she was aware that Victim received a monetary reward for his bravery from his employer and was aware that his employers were going to testify that he was a good employee. Trial Counsel reasoned that no employer is going to testify that they employ a poor employee. Trial Counsel further stated Applicant was consulted on the trial strategy and knew which witnesses were going to be called to testify. Trial Counsel stated Applicant wanted the witnesses to testify as well.

Trial Counsel testified that Investigator Sanders stated there was no damage to the front door. However, Trial Counsel stated the police took pictures of damage to the front door. Trial Counsel stated it was her trial strategy to bring out these types of inconsistencies. Trial Counsel further stated she did not know of any objection that would keep the photographs out of evidence. Trial Counsel stated there was no evidence of police misconduct. Trial Counsel stated she requested the lesser charge of attempted armed robbery during the preliminary hearing. Trial Counsel stated her request for a lesser charge did not mean that she felt Applicant was guilty.

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

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).

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).

> *Counsel elicited corroborative hearsay testimony from prosecution witnesses and defense witnesses as to what the victim said that bolstered alleged victim's credibility.*

This Court finds Applicant's allegation that Trial Counsel was ineffective for eliciting corroborative hearsay testimony from prosecution witnesses and defense witnesses as to what the victim said thereby bolstering Victim's credibility is without merit. Trial Counsel stated Victim

was the first person to testify followed by various witnesses who spoke with Victim about his version of events. Trial Counsel stated it was her trial strategy to bring out the inconsistency of Victim's version of events through the testimony of the various witnesses. Trial Counsel stated she was trying to show that Victim was lying about what actually took place that night. Trial Counsel stated she did not feel the witnesses' testimonies bolstered Victim's credibility, but instead the witnesses' testimonies made the Victim look less credible because of their inconsistencies. Trial Counsel stated she called Renee Tyler and Mary Sharp to show Victim had falsified documents for mentally handicap people. Trial Counsel explained that Victim was responsible for filling out a log book at various points during the night after he checked on the tenants. However, Victim filled out the log book in advance and received a disciplinary action. Trial Counsel further stated Applicant was consulted on the trial strategy and knew which witnesses were going to be called to testify. Trial Counsel stated Applicant wanted the witnesses to testify as well. 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 eliciting the testimony from both prosecution and defense witnesses as to what the Victim said. This Court finds Applicant failed to meet his burden of proving Trial Counsel was ineffective.

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 Plea Counsel's performance. The Court concludes the Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance.

Counsel failed to interview defense witnesses to ascertain whether they would support defendant's theory of the case.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to interview defense witnesses to ascertain whether they would support defendant's theory of the case is without merit. Applicant stated that he did not provide any witnesses or leads for Trial Counsel to investigate on his behalf. Trial Counsel confirmed Applicant's testimony, stating that Applicant did not provide any witnesses or leads to investigate. This Court would note that Applicant provided no testimony from any additional witnesses. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992). The Applicant's mere speculation as to what a witness's testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness's failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court finds Applicant failed to meet his burden proving Trial Counsel was ineffective for failing to interview defense witnesses.

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. The Court concludes the Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance.

Counsel failed to motion the courts for a Rule 403 analysis on evidence that prosecution and trial counsel submitted that had the propensity to mislead and confuse the jury.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to motion the courts for a Rule 403 analysis on evidence that prosecution and trial counsel submitted to be without merit. This Court notes Applicant was specifically referring to various pictures depicting the condition of the front door that was busted in by Applicant. Trial Counsel stated that she was unaware of any proper objection that would keep the pictures out of evidence. Trial Counsel further stated she did not object to the pictures because they depicted the front door as being broken, yet Investigator Sanders testified the front door was locked. Trial Counsel stated that she was able to cross examine the investigating officers on these inconsistences. 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). This Court finds Trial Counsel articulated valid strategic reasons not objecting to the introduction of the pictures.

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. The Court concludes the Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance.

> *Counsel denied the Applicant the opportunity to confront witnesses against him by stipulated forensic Inv. Clay Adams and forensic examiner Cathey Leisy reports instead of calling them as witnesses.*

This Court finds Applicant's allegation that Trial Counsel was ineffective for stipulating the DNA and Fingerprint reports to be without merit. Trial Counsel stated that Applicant's involvement in the incident was not in contention. Applicant freely admitted to being present at the Victim's place of work and riding in Victim's car. Therefore, the fact that Applicant's DNA was found at the scene of the car wreck was inconsequential. Additionally, Trial Counsel stated that Applicant's fingerprints were not found. Trial Counsel stated that she did not object to either the DNA report of fingerprint report because Applicant's presence was not in dispute. 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 not objecting to the DNA report and fingerprint report. Additionally, this Court finds Applicant failed to provide any basis that would prevent both the DNA report and Fingerprint analysis from being introduced into evidence.

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. The Court concludes the Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance.

Counsel failed to object to the trial courts admitting a CD into evidence without a proper foundation for that evidence being laid.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to object to the introduction of a CD to be without merit. This Court notes and the record reflects that the CD contained pictures of the various photos already introduced into evidence. (Tr. t. p. 194 lines 1-5). Trial Counsel stated she did not object to the pictures because they depicted the front door as being broken into, yet Investigator Sanders testified the front door was locked. (Tr. t. p. 174 lines 12-20). Trial Counsel stated it was her strategy to point out to the jury the inconsistency in between the photographs and Investigator Sanders statement. 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's strategy is clear from her closing arguments.

During closing arguments, Trial Counsel argued to the jury that "Now going to the lock. Why is it so important? Because first according to [Victim's] statement this door was kicked in...Investigator Sanders testified that when they went to the house they were not able to open the door. Now he didn't remember trying the door, but Deputy Williams testified that he did try the door and he was unable to open the door." (tr. t. p. 298 line 16—p. 299 line 4). Trial Counsel continued her argument pointing out that "We know we have two different stories about

how they (police) got in the house, though. Excuse me. One different story and one person who says he doesn't know. He is the lieutenant. He is in charge. He coordinates. Yet, he doesn't know how they got into the house." (Tr t. page 301 lines 6-11). This Court finds Trial Counsel articulated valid strategic reasons not objecting to the introduction of the pictures. Additionally, this Court finds Applicant failed to provide any objectionable basis that would prevent the CD from being introduced into evidence.

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. The Court concludes the Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance.

Counsel failed to motion the courts for Rule 609 balancing analysis.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to motion the court for a Rule 609 balancing analysis to be without merit. Counsel stated Applicant wanted to testify during trial and the court informed him that he would be impeached with his prior offenses. Trial Counsel stated Applicant had a prior 2006 criminal sexual conduct conviction. Trial Counsel stated she explained to Applicant that he was going to be impeached with his prior conviction if he chose to testify. Trial Counsel stated she objected to the use of conviction and argued that it would be more prejudicial than probative. However, Trial Counsel stated that charge was within the ten year time period necessary for impeachment purposes. Trial Counsel further stated the court had a side bar where he explained that he was going to

allow the Applicant to be impeached with the prior conviction, but to remind him to place on the record his 403 analysis. Trial Counsel stated the court does not like to send to the jury out unnecessarily and requested counsels to remind the court to place his findings on the record. Trial Counsel stated she forgot to remind the court to place his findings on the record until the end of the trial. Trial Counsel stated she brought up the criminal sexual conduct conviction on direct to "take the wind out of the prosecutor's sails." This Court finds Trial Counsel's representation of Applicant well within the bounds of "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). This Court finds Trial Counsel properly objected to the State impeaching Applicant with his prior 2006 criminal sexual conduct conviction.

Furthermore, this Court finds Applicant can show no prejudice as a result of Trial Counsel's alleged deficiency. This Court finds that Applicant could be impeached with his 2006 conviction for first degree criminal sexual conduct ("CSC") because the Colf factors support that the probative value of the prior conviction outweighed the prejudicial effect. See State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000); See Rule 609(a)(1), SCRE. Clearly, the offense was punishable by more than one year in prison and it occurred within the last ten years. See id. Although the crime was not a crime of dishonesty, the rule itself recognizes that impeachment value exists simply because of the fact that Applicant was convicted of a felony offense. See id. Here, since Applicant's other prior convictions were too remote to be used for impeachment, the jury would have been misled into believing Applicant had a totally clean record - and was therefore more credible than he actually was - absent evidence of the CSC conviction. (Tr. t.. p. 195-96). The CSC conviction's impeachment value was enhanced for this reason. In addition, the CSC conviction took place fairly close to the time of the crime and the time of trial, since it occurred in 2006.

Importantly, the prior conviction for criminal sexual conduct in the first degree had absolutely no similarity to attempted armed robbery, kidnapping, and burglary in the first degree, the offenses for which Appellant was on trial. Therefore, it was not at all likely that the jury would believe that, because Appellant had a previous conviction for CSC, he was more likely to have committed the crimes for which he was on trial. See Green v. State, 338 S.C. 428, 433, 527 S.E.2d 98, 100-101 (2000) (pointing out that federal courts have held that prior convictions for the same or similar offenses are highly prejudicial and should be admitted sparingly); State v. Howard, 396 S.C. 173, 181, 720 S.E.2d 511, 515-16 (Ct. App. 2011) ("[G]iven the similarity between Howard's prior convictions and the offense charged, we cannot conclude Howard was not prejudiced by the admission of his prior convictions."). In sum, this Court finds that the Colf factors supported admission of Applicant's CSC conviction for impeachment and that the Trial Counsel was not ineffective for failing to motion the court for a Rule 609 balancing test.

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. The Court concludes the Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance.

Counsel failed to object to misstatements made by alleged victim Willie Walker.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to object to Victim's misstatements to be without merit. Applicant stated that Trial Counsel should have objected to Victim's statement that he did not lock the door when they exited the tri-county

home. This Court notes that an objection to a misstatement by a witness is not proper. The proper procedure would have been to cross-examine the Victim on the statement. A review of the trial transcript reveals Trial Counsel thoroughly cross examined Victim regarding his statement about not locking the door. (Tr. t. p. 101 line 18—p. 102 line 25). However, Trial Counsel elicited testimony from James D. Sanders (Investigator Sanders) and Michael Williams (Deputy Williams) who both stated that the door was locked when they arrived at the tri-county homes (Tr. t. p. 190 lines 15-19; p. 204 line 23-25). As evidence by the trial transcript, Trial Counsel was able to elicit contradictory statements regarding whether the door was locked at the tri-county home, thereby bringing into question the veracity of the Victim's testimony. See Craven v.Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) ("The credibility of witnesses is for the triers of fact."). Trial Counsel further argued the issues of the door lock during closing arguments. (Tr. t. p. 298 line 16—p. 301 line 11). Based on the foregoing, this Court finds Trial Counsel's representation of Applicant well within the bounds of "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

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. The Court concludes the Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance.

CONCLUSION

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

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

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 3 day of Oct, 2014.

R. KNOX MCMAHON
Presiding Judge
Second Judicial Circuit

Lexington, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP0200856

Darrin Darrell Holston	South Carolina State Of
PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

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

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

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

10/9/2014

Circuit Court Judge **Judge Code** **Date**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on **10-9-14**, and a copy mailed first class or placed in the appropriate attorney's box on **10-9-14**, to attorneys of record or to parties (when appearing pro se) as follows:

Lance S. Boozer 807 Gervais Street Suite 203 Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

Daniel Francis Gourley II P.O Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Liz Godard

Liz Godard - Clerk of Court

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

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

STATE OF SOUTH CAROLINA COUNTY OF AIKEN Darrin Darrell Holston, #288828, Applicant, V. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT Case No. 2013-CP-02-00856 **ORDER DENYING APPLICANT'S MOTION TO RECONSIDER AND MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(E)**

Applicant, by and through counsel, moved this Court to Alter or Amend Judgment Pursuant to Rule 59(e) and to Reconsider its denial of the Applicant's request for post-conviction relief.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was true bill indicted during the December 2010 term of the Aiken County Grand Jury for Burglary in the First Degree (2010-GS-02-1899), Kidnapping (2010-GS-02-1903), and Attempted Armed Robbery (2010-GS-02-1905). Wallis Alves, Esquire, represented Applicant. On May 9-12, 2011, a jury trial was held before the Honorable Doyet A. Early, III. The jury convicted Applicant as indicted. On May 12, 2011, Judge Early sentenced Applicant to life imprisonment for each offense, with all three sentences to run concurrently.

A Notice of Appeal was filed with the South Carolina Court of Appeals and Robert M. Pachak, Esquire, perfected an appeal on Applicant's behalf. The Court of Appeals affirmed Applicant's sentences and convictions on December 28, 2012. State v. Holston, No. 2012-UP-678 (Ct. App. December 28, 2012). The Remittitur was issued on January 23, 2013.

Applicant filed an application for post-conviction relief on April 15, 2013 and amended on July 24, 2013. An evidentiary hearing into the matter was convened August 1, 2014, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by counsel, Lance

Boozer, Esquire. The Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office. By written Order signed October 3, 2014 and filed October 9, 2014, this Court denied and dismissed Applicant's post-conviction relief action with prejudice. A copy of this Order was served on Applicant by the Aiken Clerk of Court.

On October 17, 2014 and amended on November 17, 2014, Applicant filed a Motion to Alter or Amend Judgment Pursuant to Rule 59(e) and Motion to Reconsider.

In these motions, Applicant asserts that several of his allegations are not addressed sufficiently and asks this Court to reconsider its ruling. After reviewing the Applicant's Motion, testimony, facts, and circumstances presented to the Court, the Court finds its Order of Dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRCP. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). The Court properly ruled on all issues presented at the post-conviction relief. Therefore, it is **ORDERED** that the Applicant's Motion to Reconsider and Motion to Alter or Amend Judgment pursuant to Rule 59(e) are DENIED, and the prior ruling is reaffirmed in toto.

BY: _____

The Honorable R. Knox McMahon
Presiding Judge
Eleventh Judicial Circuit

March 20th, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	2nd JUDICIAL CIRCUIT
Darrin Darrell Holston,	)	CASE NO.: 2013CP0200856
Plaintiff(s),	)	APPOINTMENT OF COUNSEL OR GAL
-vs-	)	(*Select one.*)
South Carolina State Of,	)	☒ ORDER
Defendant(s).	)	☐ AMENDED ORDER

TYPE OF CASE/PROCEEDING: (*Check one.*)

☒ Post-Conviction Relief (PCR)/habeas case	☐ Adoption	☐ Juvenile
☐ SVP case	☐ Custody and/or Visitation	☐ Abuse and Neglect
☐ Minor Name Change	☐ Other: Post Convict Rel 500	

It appears Darrin Darrell Holston, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: *(Select only one.)*

☒ counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.

☐ counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:

☐ counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.

☐ court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.

☐ Other: .

FILED Apr 30 2013
Lisa Godard
C.C.C.P.&G.S.
Lisa Comer
Deputy Clerk 12:00pm

Therefore, it is ordered that Lance Boozer hereby is appointed as (*Select one.*)

☒ counsel ☐ lead counsel (*if capital PCR case*) ☐ guardian ad litem for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

☐ (*If Death Penalty PCR Case*) It is further ordered that , Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED
April 30, 2013

Lisa Godard by Lisa Comer/DC

☐ Circuit Judge ☒ Clerk of Court

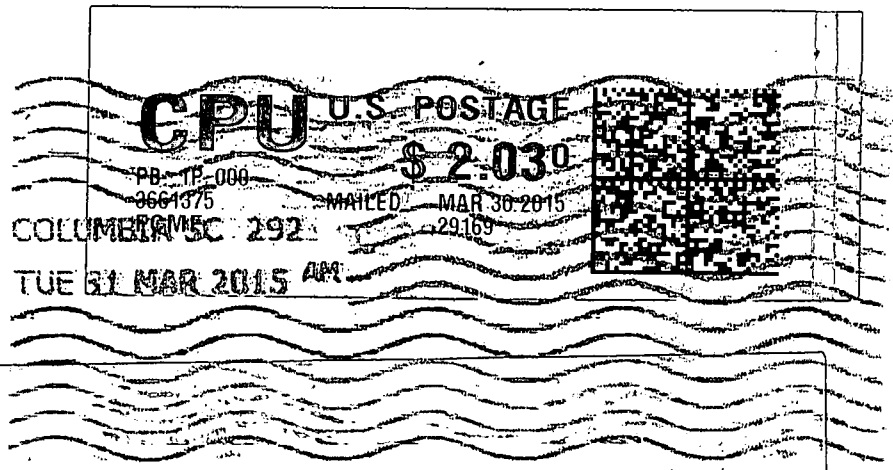
Plaintiff Attorney:

Lance Boozer	Darrin D. Houston #288828
1331 Park Street	430 Oaklawn Road
Columbia, SC 29201	Q4A 101
	Pelzer, SC 29669

Defendant Attorney:

Daniel Gourley	
PO Box 11549	
Columbia, SC 29211	

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.



THE BOOZER LAW FIRM, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211