VOLUME V OF V

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
D Garrison Hill, Circuit Court Judge

Case No 2008-CP-01-0085

RECEIVED
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S C Supreme Court

OTIS JAMES COMPTON, 262807,

PETITIONER,

v

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W MCINTOSH
Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

HARRISON BRANT
Assistant Attorney General
Post Office Box 11549
Columbia, S C 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite D
Columbia, S C 29204
(803)738-8622 Phone
(803)738-1600 Fax
Email tdslaw@bellsouth net

ATTORNEY FOR PETITIONER

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* This Petitioner's Exhibit was marked as admitted on September 18, 2009 by the Court Reporter The actual date of the hearing was August 18, 2009

** Exhibit listed on Exhibit Record and Receipt Form and in PCR hearing transcript index as being a letter dated December 15, 2002 The letter is in fact dated November 15, 2002

Q Barn door?
A Right
MS SHURLING Thank you
No further questions
THE COURT Cross-examination
MR GRIGG Thank you, Your Honor

CROSS-EXAMINATION

BY MR GRIGG
Q Mr Grose, what was your strategy heading into this trial?
A My strategy heading into this trial was I hoped that the Court would have suppressed the statement and we never would have had a trial Because without the statement, they didn't really have any evidence
Q And, in fact, you tried to do that, is that correct?
A I did And then the second strategy would be to ask the jury not to believe the statement beyond a reasonable doubt because of the circumstances under which it was obtained And that's, I think, reflected by the record that that was the strategy at trial
Q And do you think that that was reasonable, sound strategy?
A I do
Q Okay And, in fact, everything that you and Ms Shurling have been talking about here, the possibility

of redacting the agreement, the possibility of if you had remembered this November 15, 2002, letter earlier than what you've testified you recalled having that, that's all retrospective, is that not correct?

A Which letter?

Q I'm sorry --

A Because we talked about a couple of letters

Q I'm sorry November 15, 2002, to Judge Saunders --

A Okay

Q -- which you testified was the eve of trial, and that you wished you had remembered -- that you wished you had remembered that that existed?

A Right

Q The possibility of redacting the agreement, I can't even begin to recall all the questions Ms Shurling asked you But all of that is retrospective, correct? I mean, this trial occurred almost seven years ago, correct?

A Well, if the question is is everything in retrospect, I mean, we're talking about something that happened seven years ago

Q Correct And my point of that is, isn't it fair to say that all of that is you looking in hindsight and saying, yes, I could have, potentially, done something different, this different, or that different, correct?

A I don't think -- I mean, I don't want to get into a

debate with you about it or not I mean, I don't think you can say it's entirely hindsight when I wrote Judge Saunders a letter about it before the trial started

Q No, sir But I'm --

A But, certainly, we're talking about it in hindsight But that letter was not in hindsight in November of 2002

Q No, sir And I'm not saying the letter is hindsight I'm saying you testifying today saying, I wish I had remembered that, or I -- you're right I could have considered something to redact the agreement You're looking back thinking with some hindsight, correct?

A Yeah I mean, obviously --

Q Thank you

A Yeah

Q Thank you

And there comes a point in every trial that -- or hearing, or otherwise that a lawyer loses that, at some point, you always look back and say, I wish I would have done something different Is that not largely accurate?

A Yeah I think that that's fairly accurate You know, this is a case that has troubled me a lot over the years, too

Q Sure And, again, I believe you've testified and I think, prior to you, Mr Dudek testified that you assisted in the appeal process, is that correct?

A That's correct
Q All right And I believe you testified for Ms Shurling that you, in fact -- whether you wrote it or not, you were involved in preparing the brief and signed off on that brief before it went to the Court, is that correct?
A That's correct I mean, this was not a case where my name just simply appeared on the brief, you know It was something that -- I mean, in fact, one of the reasons that Bob handled the appeal was I had, actually, started talking to him about this case, you know, even before the trial
So he agreed to, you know -- or, actually, wanted to stay on and do the appeal So we, certainly, communicated about it and have communicated about this case a good bit while it was pending
Q Thank you
And, at the trial, during the course of the trial, you did, in fact, raise Fifth and Sixth Amendment issues, is that -- was that your testimony earlier? I thought that's what I understood
A I believe so There's a document, I believe it was Defendant's Exhibit No 1 that's referenced repeatedly in the trial transcript And that has the crux of the legal arguments that I raised And I have not looked at that

this morning or in preparation for this hearing
Q Did you raise any issues with regard to this plea or immunity agreement that has been discussed at length this morning?
A I did
Q And did you raise issues regarding the conflicting statements?
A What do you mean by the "conflicting statements"?
Q I believe you testified earlier that it's your opinion that the two statements given by the Applicant --
A The two -- the October statements being inconsistent with the evidence, yes, we raised that I just -- the statement was broad and I wasn't sure what you meant
Q No, I apologize But -- and I used a word that you didn't use You testified as to them, in your opinion, that they were inconsistent, correct?
A There was inconsistencies between those and the evidence And they were, certainly, inconsistent with each other, too
Q And you did raise that during the trial, is that correct?
A Yes
Q And as I believe I understood your testimony previously -- did I understand that your testimony just a few minutes ago was that you still would have advised your

client to testify?
A Yes And the reason for that is, you know, I felt that since he had made those statements that -- since we were in front of a jury, if there was any chance of them acquitting him that they needed to hear from him about his explanation about those statements and why he made them
Q The trial took place on November 23rd, 2002, is that correct?
A The pre-trial hearing was on a Thursday in Greenwood
MS SHURLING The 18th
BY MR GRIGG
Q The 18th
A And the trial started on the next Monday and went through Saturday So whatever those dates are reflected in the transcript I counted it, basically, as a seven-day trial because the pre-trial motions started in the afternoon and went until probably 9 00 at night And then we were in court every day Monday through Saturday of the following week
Q Thank you
Leading up to that, how long prior to that was your representation of Mr Compton?
A The first date that appears in my notes is October 26th of 2000
Q So two years give or take a little over?

A Yes, slightly over two years
Q How many times during that period did you meet with your client?
A I couldn't tell you the precise number What I can tell you is that I met with him here in Abbeville, that he was in the Department of Corrections, initially, at Kershaw Correctional Institute, which is, actually, in Lancaster County I made several trips over there to see him

And then later, he was at McCormick I made, you know, multiple trips there to see him And he was brought back here sometime before the trial and was in the Greenwood jail And I saw him there as well But I don't -- I couldn't tell you the number of times
Q Did you do any investigation in preparation for this trial?
A Yes
Q And would you explain to the Court what you did?
A To summarize, you know, obviously, I had talked with, you know, Otis, you know, fairly early on and, you know, got information from him about his family and, you know, people who were potentially witnesses The -- I met with the investigators I have some notes from that meeting That's where they were talking to me about other things that they would like him to help with

We -- it took some time, but we got the State's initial discovery, which was more or less the SLED report with the attachments that laid out the theory of their case I had some initial motions to get more information about the various leads that the Sheriff's Department had followed I, eventually, got -- I think it came to me in one box, but it was a pretty big box It takes up a part of two bankers boxes in my -- not completely, but parts of two bankers boxes in my file

I traveled on a number of occasions to the Lowndesville-Iva area of Abbeville and Anderson County I rode around on a number of the roads trying to get the geographic layout of various things out there I went to Ms Woody's house, Otis' mother's house, where, you know, it was part of the alibi, you know I think I interviewed other witnesses, also, up in that area

We had -- we retained Don Gearns as a crime scene consultant, a retired SLED agent He and I went to -- with the cooperation of the Solicitor and the Sheriff's Department and the -- honestly, the Hanna family, and the tenants that they had in that house at the time were able to go out and view the crime scene You know, that's a summary of it

Q Thank you

And, during your multiple conversations with your

client, did you have an opportunity to go over the results of your investigation with him?
A Yeah I mean, I talked to him at the prisons and the jail
Q Would -- is it fair to say that your client was involved in the development of your trial strategy?
A Yeah Well, I mean, it's fair to say in -- I mean, that's sort of a broad question I mean, yes, he was involved in it, you know, in telling me his side of the story, you know, the alibi witnesses, and that sort of thing
But as far as all of these legal things, you know, Otis is a -- and I don't mean any disrespect to Otis But Otis is a pretty simple guy, you know He's -- I'm not trying to suggest he wasn't competent by any stretch of the imagination But he's not -- you know, he's not somebody who's schooled in the legal things and what motions to bring and that sort of thing
So he was involved But the actual development of the strategy was things that I was responsible for in talking to him about what I planned to do
Q But I -- and I guess, ultimately, that's my point You did keep him informed You did talk with him about those plans?
A Yes

MR GRIGG No further questions, Your Honor

MS SHURLING Briefly

REDIRECT EXAMINATION

BY MS SHURLING

Q The Respondent has characterized your answers concerning the prior bad act evidence as hindsight In fact, the letter we've introduced shows that you intended to pursue exclusion of that evidence at trial?

A Right And that's what I was trying to allude to when I was talking about the letter I mean, obviously, if I wrote that letter before the trial started and sent it to Judge Saunders, it is something that I considered prior to it

Our discussions of it today, obviously, we're sitting here looking backwards in time But my opinion is it's not entirely hindsight because of that letter, which I found after we -- you and I had this conversation earlier

Q You intended to pursue exclusion of the evidence?

A I think that's clear in that letter

Q And you had no tactical or strategic reason for never getting around to doing that?

A Right I mean, I -- you know, I was focused on, you know, the suppression hearing, you know, I -- obviously, I anticipated that we might lose that, but -- and we did And I had raised that, but it never --

Q Sure
A -- I can give you no real justification for not pursuing that Whether we would have prevailed on that or not, I don't know But we would have had a hearing And we would be able to sit here and look back and talk about it
Q And your failure to do that may have been, at least, somewhat colored by the fact that you didn't consider asking for an appropriate redaction of the language in the agreement itself Is that fair?
A That's fair Because it really -- we keep using the analogy of when the horse got out of the barn That's when the horse was running out of the barn at that point And so, you know, everything sort of builds after that
Q Okay Now, if, hypothetically, you had gotten the agreement redacted and had won -- or prevailed on a pre-trial motion in limine and you got to the stage of the trial where your client was going to testify You've conceded that there would have been another hurdle to get the Judge to limit under Green, and other related cases, the impeachment process, correct?
A Correct
Q And if you had been ruled against on that issue and the Judge said he was going to allow specific impeachment with regard to burglaries, even though this was a

burglary-related homicide under the State's theory?
A Right
Q Okay Starting from that premise When you impeach someone with a prior record, are you allowed to go into details of the prior conviction?
A You are not
Q You're limited to asking them whether or not they have, in fact, been previously convicted or if they have a judgment for X, correct?
A Right
Q You're not allowed to ask them whether the MO of those crimes match the one for which they're on trial, are you?
A Not under Rule 609
Q And you're, certainly, not allowed to ask if any of those previous burglaries was at a residence located near the victim's house, are you?
A You're not
Q So even if the Judge had ruled against you on the Green issue with regard to impeachment, some of them were prejudicial aspects of the burglary testimony and couldn't have come in in the context of impeachment?
A That's correct
Q That's fair to say?
A Right That's correct

MS SHURLING One moment's indulgence

(Pause)

MS SHURLING No further questions, Your Honor

THE COURT Any recross?

MR GRIGG Just one question, Your Honor

RECROSS-EXAMINATION

BY MR GRIGG

Q With regard to this November 15, 2002, letter, was it not your testimony when Ms Shurling was going through this, originally, with you, did you not say, looking back, I can't think of a justification as to why I didn't pursue that? Was that not --

A Oh, I'm sure I said those words But, you know, what I take that you're trying to do is say that everything that we're saying here today is in retrospect, looking back on the record, wouldn't you have liked to have done X, Y, and Z, and second guessing yourself I mean, the reality is that I wrote that letter And that shows that it was something that was thought of prospective prior to the trial And so --

Q And, sir --

A -- while the answer to some of my questions is sitting here in retrospect looking back, that's something that was written before the trial So that is not -- that's evidence of my thinking at the time and not today

Q Correct And that was not my question, was it? My question was, what was your testimony, correct?
A Yes But I think --
MR GRIGG Thank you
No further questions
THE WITNESS -- you're trying to mischaracterize it
MS SHURLING No further questions, Your Honor
THE COURT So what was the Fifth Amendment theory at the trial? Because I'm -- I need to get a better understanding of -- I understand there are a number of statements made And I understand the letter from Mr Smithdeal, and some of the background But I need to have a better understanding of what your theory was at trial regarding the Fifth Amendment And I know that it's in the record But I'm just --
THE WITNESS Right And, obviously, that would be my best evidence
THE COURT Right
THE WITNESS Or the best evidence of that
What you have here is -- I don't know if you have a copy of the agreement
THE COURT I do I've read that
THE WITNESS There's the agreement that we've talked about So what you have there is a document My recollection is that it has the caption for the burglary

cases with the case number The -- I think under the Gillespie case that you talked about before, counsel -- and Anderson, that's our precedent in South Carolina -- that the Sixth Amendment right to counsel attaches at the beginning of the adversarial proceeding

So with regard to the burglary cases, if the representations are being made to them and if the discussion is being made, you know, regarding the burglary cases, that is definitely post-adversarial procedure on those With regard to the burglary -- I mean, the murder charge, Mr Hanna's murder, one of the things that I was trying to establish for a variety of reasons was that they had zeroed in on Otis as the prime suspect in the beginning But it really -- until whatever the date is on the warrants when they were served, there was no formal adversarial process with regard to those

So the Fifth Amendment would -- I think would still apply to the prior burglaries So the Fifth and Sixth would have been attached to both of those The fact that they were interviewing Otis with regard to the murder implicated his Fifth Amendment rights like it would in any other case, even if the Sixth Amendment had not attached

So that's the significance of the Fifth Amendment being involved with regard to the burglaries Because it -- like I say, I don't think there's any dispute that

Otis had asked to be taken to Joe Smithdeal's office before the agreement was signed Joe signed the agreement Joe was involved with the statement that was made then So he had asserted his right to counsel

You know, we had some factual issues about, you know, what happened with regard to Tracey Black and, you know, when they were in the jail cell there at Kershaw I mean, Otis and Tracey were the only ones that were there And there's no doubt in my mind that he was some sort of state agent Then, you know, we have a factual record, circumstantial evidence, you know, what Otis might have been being told by Tracey, what Tracey was telling Otis' sister I think there was some evidence of that

So, you know, at that point, you have a state actor with the Fifth Amendment involved Then you have him coming back here where Otis had asked that Tracey be brought back Because, obviously, at that point, it was not known to Otis -- I don't think anybody suggested that Otis knew, at that point, that Tracey Black was working in capacity for law enforcement

And they bring Otis back to Abbeville He's trying to feel more secure because he's got Tracey Black with him, instead of his lawyer, Joe Smithdeal And you have these interviews taking place involving Otis without the assistance -- or without the presence of counsel and

advice of counsel It's probably more than you wanted, but that's

THE COURT Well, I guess -- no, I appreciate the answer

I'm a little confused on the chronology as far as the initial interview And I call it an "interview " But Detective Alford testified at the trial and he's talking about November 1999, when they're here in this courthouse doing a plea And that's when they're taking him back to the cell and he starts talking about the Hanna homicide Your argument is not going to this It's going to the later --

THE WITNESS Right And the chronology -- I don't know that I can give you all the dates without looking at the record

THE COURT Right

THE WITNESS But as far as, you know, I think Otis had been interviewed as a suspect when he was out on bond on the burglaries My argument is not really going to that so much And Otis didn't give any statements that implicated himself, you know -- well, I mean, I think they tried to suggest he did But there, certainly, was no admissions, nothing that placed him at the crime and being involved with the crime And they may have interviewed him more than once

Then you get to the guilty plea on the burglaries And I believe surrounding that, there was some talk with him there And, certainly, the Fifth Amendment attaches to the Hanna murder there But that's not part of the argument yet

There was -- later on, I think Otis' wife went to trial or had two proceedings One, where she was partially acquitted and convicted of, maybe, petit larceny And then another that was going to be a trial And she ended up entering a plea agreement Otis was brought back probably by her lawyers, but whoever He was brought back in connection with those trials July of 2000 stands out in my mind That's the time when the sheriff and Otis had a conversation and Otis requested to go to Joe Smithdeal's office

And so that -- while the Fifth would be applicable up to that point, that's where the implication of the right to counsel in the Fifth Amendment context takes place It was, I believe, that same day I mean, this was a priority for the Sheriff's Office, as you might imagine

THE COURT Right

THE WITNESS So, you know, that wasn't something that they were just going to sit and delay on So they take Otis to Joe's office The Solicitor is contacted And you have that agreement that the four of them, the

Solicitor, the sheriff, Otis, and his lawyer entered

And my view was, at that point, that, you know, Joe was Otis' lawyer, not just in connection with the murder that -- I mean, in connection with the burglaries where he had, originally, been involved He was now Otis' lawyer in connection with the murder investigation

THE COURT Okay So that's kind of a dividing line?

THE WITNESS That is a very significant point And, up to that point, while, you know, there's some statements that had been made, he maybe had some suspicions that he was involved or knew something about it, they really have nothing that they can go on as far as being able to convict Otis at that point And they, really, don't after that interview with Joe where Joe is present It's not until October when Joe is excluded and Tracey Black is here that Otis makes statements to put him at the scene that leads to them, you know, dropping the warrants on him and the proceedings beginning in the Sixth Amendment context

THE COURT Okay Thank you very much

MS SHURLING Your Honor, if I could clarify real briefly

THE COURT Sure

MS SHURLING One of the interesting things about the record is that it -- and I don't have all the

locations off the top of my head But the State very clearly indicated that Otis Compton was their lead suspect, even way back in 1999 when this thing happened But they didn't have any evidence That's just what they thought

And then the sheriff, very specifically, testified at trial on Page 642 going over to 643 of the record that the Defendant stated that he wanted an attorney pregnant -- present, pardon me So they all went to Joe Smithdeal's office in Greenwood That's significant, in our view, because they have admitted that Otis Compton was their number one suspect He's now wanting to talk to them about this homicide They've engaged him in a colloquy But he has said, I want a lawyer present

So not withstanding the convoluted argument that, well, the thing he was trying to get in exchange for his cooperation was some help with his burglary sentence, and so it's only the burglary that he had a right to a lawyer on The reality is they've acknowledged that although it's pre-critical stage for purposes of Sixth Amendment analysis, for purposes of Fifth Amendment analysis, he was, clearly, a person of interest, a key suspect, their number one suspect And he had said he wanted a lawyer And that's why the Fifth Amendment versus the Sixth Amendment comes so strongly into play

Thank you

THE COURT Thank you

And I suppose we'll have an opportunity to let both sides brief this issue But refresh my memories Is the Fifth Amendment offense specific?

MS SHURLING I don't believe that it is In fact, it isn't It's the Sixth Amendment that's offense specific The Fifth Amendment is not But I would argue, Your Honor, the Fifth Amendment is not offense specific Even if it were, you have a fact pattern here where, clearly, both the police, Solicitor Jones, everyone was seeking the cooperation of Otis Compton in solving -- in giving a statement about a homicide at a point in time when he was their number one suspect They planned on questioning him, not about those burglaries, about that murder

And when he said he wanted a lawyer and they took him to Joe Smithdeal, it was -- the argument that was made at trial, which I think is well taken, that at that point, Joe Smithdeal's role as counsel of record in the burglaries became expanded to include the homicide

THE WITNESS And just to pick up on that The agreement, while it's captioned as to burglary, it talks about the Johnny Hanna murder investigation The statement that Joe witnesses -- and the agreement,

obvıously, contemplates Otıs beıng ıntervıewed and makıng statements The statement that Joe was a wıtness to that day was only about the murder It wasn't about any of the stuff -- one moment

(Pause)

THE WITNESS All rıght And just scannıng ıt, I mean, paragraph number two, you know, ıs of that agreement and ıs, you know, gettıng ınto the -- you know, what the murder ınvestıgatıon was goıng to be And so ıs paragraph one

MS SHURLING Thank you

If the Court has no further questıons, I have none

THE COURT Mr Grıgg?

MR GRIGG No, Your Honor

THE COURT All rıght Thank you, Mr Grose

You may step down

MS SHURLING Your Honor, may I have one moment wıth my clıent

THE COURT Yes, ma'am

(Pause)

MS SHURLING Your Honor, I have advısed my clıent that he, certaınly, has a rıght to present testımony here today I have, also, advısed hım that, ın my opınıon, the legal ıssues upon whıch thıs case hangs are just that, matters of law, that the testımony of the lawyers ınvolved

in the case and Solicitor -- former Solicitor Jones is crucial to deciding those issues But that I really don't feel there's anything that he can add by way of his testimony

I would ask that the Court swear him and put on the record that he has been fully advised of his right to testify and has elected to waive the right to testify And while the Court is at it, if you wouldn't mind just putting on the record that he was advised of my former position with the Office of Appellate Defense and waived any possible conflict of my representing him with regard to the claim of ineffective assistance of counsel against one of their lawyers

May he do it in place, Your Honor?

THE COURT Sure Absolutely

We're just going to have you --

MS SHURLING Raise your right hand

WHEREUPON,

OTIS JAMES COMPTON,

after first having been duly sworn, testified as follows

THE COURT Now, I understand, from Ms Shurling, that you wish to give up your right to present your own testimony in this case You, certainly, have the right to take the stand and testify under oath But, of course, you would be subject to being cross-examined as to

anything relevant or that might bear on your credibility or otherwise permissible under the rules of evidence

But do you understand the risks of testifying, and the risks of not testifying, and the consequences of choosing not to testify?

MR OTIS COMPTON Yes, sir

THE COURT All right Do you have any questions of me about your right to testify or not testify in this civil proceeding?

MR OTIS COMPTON No, sir

THE COURT And is your decision not to testify?

MR OTIS COMPTON Yes, sir

THE COURT Okay And you heard earlier today when Mr Dudek --

Is it Dudek or --

MS SHURLING Dudek

THE COURT Okay Mr Dudek testified that he had worked with Ms Shurling in the past for some 14 years And Ms Shurling's office had disclosed that to you previously And she, obviously, doesn't feel, as a matter of her professional ethical responsibility, that there's any type of impairment of her ability to represent you due to the fact that she worked with Mr Dudek in the past

But to the extent there may be some kind of conflict, and I can't imagine what it would be, you understand

that -- you want to go forward with her as your lawyer, regardless of the fact that she used to work with Mr Dudek and was a colleague and a friend of his

MR OTIS COMPTON Yes, sir, 100 percent

THE COURT Do you have any questions of me about that issue?

MR OTIS COMPTON No, sir

THE COURT Okay Thank you very much, sir

MR OTIS COMPTON Thank you

MS SHURLING Your Honor, I would note for the record that there are 14 references to the prior burglary judgments in this trial transcript If it is acceptable with the Court, what I would propose to do is provide the Court with a memorandum in support of this application in the format of a proposed order And I will, certainly, reference each and every one of those references to the prior burglaries in that order I see no need to burden the Court with a review of those at this time, if I may be permitted to

THE COURT Yes

I would just prefer that both sides submit any kind of brief they wish to --

MS SHURLING Okay

THE COURT Within --

MS SHURLING Yes, sir

MR GRIGG Your Honor, the only thing with that is the State would ask time to receive her brief since it is their burden and -- as opposed to -- because if she's not going to bring up today what those cites are -- and I'm fine with her doing it that way But, you know, depending on what the cites are, there may be something specific that I would like the opportunity to reply to

MS SHURLING Your Honor, I don't see any reason for the State to be allowed to submit a responsive memorandum I'll be happy to provide them this afternoon by e-mail a comprehensive list of all the references to the burglaries

THE COURT Well, how long do you need to supply -- submit the brief?

MS SHURLING Your Honor, I would -- in the interest of doing the best possible briefs, in this case, I would ask that I be permitted to order the transcripts from these two proceedings and get them as quickly as the court reporter can get them to my office, and that we be given two weeks from the receipt of the transcripts to provide Your Honor with our briefs

THE COURT Well, I don't know how long that's going to take We might be talking about next year in that instance And I do take notes I mean, I understand --

MS SHURLING In that case, Your Honor, if we're going to do it without a record, I would say 30 days

THE COURT Okay

MR GRIGG And, Your Honor, if I may My position is, again, since it is their burden, the State should have the full opportunity to fully understand their argument, not just an e-mail or some such of references they're going to make And I understand much of their argument has been presented in court And I, like the Court, have taken as detailed notes as I know how But I still think the appropriate way to approach that would be to allow us the opportunity to reply to their argument in sufficient detail

THE COURT Okay Well, I'm going to allow -- I'm going to give Ms Shurling up to December 1st to submit any post-hearing memorandum she wishes to And the State will have until December 10th to respond

MR GRIGG I'm sorry December 10th?

THE COURT Yes, sir

MR GRIGG Thank you, Judge

MS SHURLING Your Honor, while it would never -- it would not be my intent to reinvent the wheel In the event of any specific misstatement of fact or -- certainly, unintentional misstatement of fact, but misstatement of fact or other error in the State's

memorandum, I would reserve the right to file a brief reply

THE COURT Yes That's fine You can have within five days of receipt of the State's memorandum to reply

MS SHURLING That should be more than adequate, Your Honor

Thank you

THE COURT Thank you, ma'am

Okay Anything further?

MS SHURLING Not a thing, Your Honor

MR GRIGG Nothing from the State, Your Honor

THE COURT All right Thank you very much

MR GRIGG Thank you, Judge

THE COURT We're in --

MS SHURLING Your Honor, I'm sorry

THE COURT Yes, ma'am

MS SHURLING The only thing, we did introduce one exhibit today And I did not know the number we left off at at the last proceeding

THE COURT I don't --

MS SHURLING So I just think we should agree that once Madam Court Reporter has had an opportunity to check the last number from the previous proceeding that the exhibit be numbered sequentially

Thank you, Your Honor

THE COURT Is that okay with you, Mr Grigg?

MR GRIGG That's fine, Your Honor

THE COURT Is that okay with you, Ms Jenkins?

THE COURT REPORTER Yes, sir

THE COURT Okay Thank you very much

**********END OF TRANSCRIPT OF RECORD**********

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Abbeville County, South Carolina, on the 29th day of October, 2009

I do further certify that I am neither of kin, counsel, nor interest to any party hereto

May 20, 2010

Hollie M Jenkins

Hollie M Jenkins, Court Reporter

My Commission Expires 11-17-10

COURT OF COMMON PLEAS AND GENERAL SESSIONS
EXHIBIT RECORD AND RECEIPT FORM

PLAINTIFF Otis Compton
ATTORNEY Tara Shurling
CASE NO 2008-CP-01-0085
DATE STARTED 10-29-09
DATE ENDED 10-29-09

DEFENDANT State of SC
ATTORNEY David Bragg
JUDGE G Hill
COURT REPORTER Hollie Jenkins

~~PLAINTIFF'S~~ Applicant's EXHIBITS	DEFENDANT S EXHIBITS
1 1-A Letter dated 12-15-02	1
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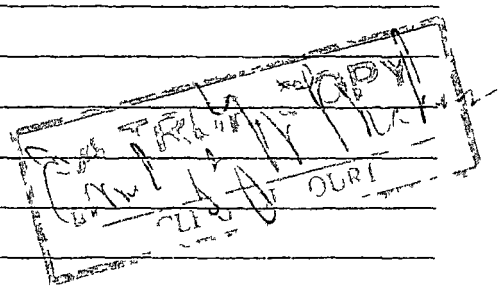

Hollie Jenkins
COURT REPORTER

Virginia N Purvis
CLERK OF COURT

PAGE 1 OF 1

DATE 10-29-09

OFFICE OF THE PUBLIC DEFENDER
Greenwood and Abbeville Counties
Suite 208 Park Plaza
600 Monument Street Box P 133
Greenwood South Carolina 29646

(864) 229 9505
Fax (864) 227 1104

PUBLIC DEFENDER
E Charles Grose Jr

ASSISTANT PUBLIC DEFENDERS
W Alexander Buergey
Tammy L Besherse
Michael S Gambrell

November 15 2002

The Honorable Wyatt T Saunders, Jr
Judge, Eighth Judicial Circuit
Greenwood County Courthouse
Greenwood South Carolina 29646

Re State v Otis James Compton
Indictment number 00-GS-01-0464

Dear Judge Saunders

Last night you asked that the attorneys let you know of any pre trial matters that may need to be resolved on Monday I have several possible matters that may require your attention, most of which should not require testimony Rather than call you I decided it would be better to write I am faxing this letter to Mr McMahon prior to delivering it to your office in order to avoid an ex parte situation

First I was provided with the results of some additional DNA testing this week Apparently a blood sample that previously existed no longer exists Over the weekend I will be contemplating a motion to dismiss for failure to preserve the evidence I do not think that the facts will be in dispute

Second, I will have a motion asking that the State not refer to Mr Compton as an "outlaw" or "murder" in front of the jury

Third, I do not know if the State will try to introduce polygraph results I expect that they will not If they do, however, I will move for a hearing pursuant to State v Council and State v Jones, requiring the State to demonstrate the reliability of the technique This concern arises because the State relied so heavily on the polygraph results in the non-jury matters

Finally we will need to discuss what is admissible about the prior burglary convictions I will be discussing with my client today and over the weekend what position we should take I do not think that any testimony will be required on this matter

Thank you for your attention to this matter

APP EXHIBIT
1-A
10 29 09

With kindest regards I am

Yours very truly

E Charles Grose II

Cc Knox McMahon Esquire (Via fax 803-748-4936)

748-4790

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF ABBEVILLE	)	Case No 2008-CP-01-0085
	)	
Otis James Compton, #262807,	)	
	)	
Applicant,	)	
	)	
v	)	**ORDER DENYING**
State of South Carolina,	)	**POST-CONVICTION RELIEF**
	)	
Respondent	)	
	)	

Otis James Compton (Compton) petitions this court to grant him post conviction relief For the reasons that follow the court respectfully denies the petition

I PROCEDURAL HISTORY

On October 30, 2000, the Abbeville County Grand Jury returned a five count indictment charging Compton with Murder, Burglary in the First Degree, Armed Robbery, Malicious Injury to Property, and Possession of a Firearm or Knife during the Commission of a Violent Crime (2000-GS-01-0464) On November 18-23, 2002,[1] Compton proceeded to trial by jury, and was represented by E Charles Grose Jr , Esquire, of the Eighth Circuit Public Defender's Office The jury convicted Compton of all charges as indicted The Honorable Wyatt T Saunders, Jr , sentenced him to life without parole pursuant to S C Code Ann §17-25-45 for the murder, burglary, and armed robbery charges, to thirty days imprisonment for the malicious injury charge, and to five years imprisonment, to be served consecutively, on the weapon charge [2]

Compton appealed his conviction and sentence Robert M Dudek, Assistant Appellate Defender, and Mr Grose represented him on the appeal In a published opinion, the South

[1] Pretrial hearings were also held on July 15 2002 and November 14 2002 Unless otherwise noted all references to the transcript will be to the transcript of the actual trial

[2] Compton is presently confined in the South Carolina Department of Corrections

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Carolina Court of Appeals affirmed Compton's convictions and sentences State v Compton, 366 S C 671, 623 S E 2d 661 (Ct App 2005) After his Petition for Rehearing was denied Compton sought certiorari in the Supreme Court of South Carolina, which was also denied State v Compton, S C Sup Ct Order filed August 9, 2007 The Remittitur was issued on August 15, 2007 On November 7, 2007, Compton sought certiorari in the United States Supreme Court That Petition was denied on January 7, 2008 Compton v South Carolina, 128 S Ct 926 (2008) [3]

Compton then filed this Application for Post-Conviction Relief with the Abbeville County Clerk of Court on March 27, 2008 The State made its Return and Motion to Dismiss on September 30, 2008 Evidentiary hearings were convened on August 17, 2009, and October 29, 2009 At the conclusion of the October 29 hearing, this Court took the matter under advisement and requested both parties to submit post-hearing briefs

II ALLEGATIONS RAISED ON PCR

In his Application for Post-Conviction Relief, Compton alleged that he is being held in custody unlawfully for the following reasons

1 Ineffective assistance of counsel prior to trial,

2 Ineffective assistance of trial counsel, and

3 Ineffective assistance of appellate counsel

He alleged generally that his rights pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, were violated prior to and during his trial, as well on his direct appeal

[3] Attorneys Dudek and Grose also represented Compton on the subsequent appeals

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At the evidentiary hearings, Compton added additional allegations through the testimony of his attorneys, thereby amending his Application for Post-Conviction Relief made pursuant to the evidence adduced at the hearing See Simpson v Moore, 367 S C 587, 599, 627 S E 2d 701, 708 (2006), Rule 15(b), SCRCP At the evidentiary hearings, Compton specifically claimed

1 Smithdeal was ineffective for failing to obtain a definitive immunity agreement with the State before permitting Compton to provide a statement to the police concerning the murder of the Johnny Hanna,

2 Smithdeal was ineffective for failing to assert Compton's Fifth Amendment right to remain silent and for failing to establish his position as counsel for Compton in connection with anything relating to the murder and any charges which might be brought relating to it,

3 Trial counsel was ineffective for failing to object to the State's use of Compton's prior burglary convictions,

4 Appellate counsel was ineffective for failing to raise on direct appeal the ground that Compton's Fifth Amendment rights had been violated

III STATEMENT OF FACTS

On August 6, 1999, the victim, Johnny Hanna, came home to find that his house was in the midst of being burglarized The burglars were caught by surprise, and assaulted and murdered Hanna by hitting him with a bat, stabbing him twice, and shooting him five times The final shot to the Hanna s head was fired while the assailant was standing over him The burglars then fled the scene Although investigators submitted blood samples, hair samples, and fingerprints from the crime scene for analysis, none of that evidence conclusively pointed to any of the suspects [4] Shortly thereafter, Otis Compton heard that he was a suspect in the Hanna burglary and murder At the time of the victim's killing, Compton had pending first degree

[4] However Sheila Hanna Wildes testified that after the murder she found a black glove in her house that did not belong to anyone who lived there Tr p 265 line 14 p 266 line 6 Michelle Dixon explained during her expert testimony that gloves can mask fingerprints See Tr p 202 line 25 Tr p 265 line 14 p 266 line 6

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burglary charges from other incidents Joseph Smithdeal, Esquire, represented Compton on those charges

On August 13, 1999 - one week after the crimes occurred - Compton called Abbeville County Chief Deputy Sheriff Marion Johnson After being read and waiving his right to remain silent, and after speaking with Smithdeal, Compton gave a voluntary, incriminating statement [5] See Tr p 299, line 4-p 302, line 8, p 563, line 1-25 On November 30, 1999, he ultimately pled guilty to the unrelated burglary charges and was sentenced to fifteen years confinement

On January 18, 2000, while Compton was in court to plead guilty to another unrelated third degree burglary, he spoke with Tracy Black in the holding cell at the Anderson County courthouse Compton had known Black "almost all of my life" See Tr p 972, lines 4-7 According to Black, Compton told him that he pled guilty to the prior burglary charges to cover for his wife, Angel, so that she would keep quiet about another burglary he was involved in that "had went bad" Black testified that Compton told him he was a suspect in the victim's murder because the victim came home during the burglary, and that they had to do what they had to do See Tr p 407, lines 2 p 408, lines 1-19 Compton testified at trial that he talked with Black that day, but that all he told him about the murder was that he was a suspect See Tr p 972, lines 15-23, p 975, line 24-p 973, line 5

On March 9, 2000, a SLED officer went to speak with Black, who was incarcerated at McCormick Correctional Institution, about an unrelated matter Black told the SLED officer that he had heard some information about Hanna's death and asked to be put in touch with Abbeville County Sheriff Charles Goodwin See Tr p 409, line 8-p 410, line 13 Later that day, four

[5] According to Chief Johnson and Agent Gambrell when the subject of hair samples blood samples and fingerprints came up Compton responded How could it be mine if I stayed in the car? See Tr p 302 lines 1 8

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police officers came to interview Black Black told the officers about his conversation with Compton at the Anderson County courthouse on January 18th regarding the murder, and that he felt Compton was involved in it See Tr p 413, lines 2-14 Black told them that he was getting transferred soon, and that if he were placed at Kershaw he could listen for other things Compton might say See Tr p 413, line 25-p 414, line 25 The following week, Black was transferred to Kershaw Correctional Institution, where Compton was housed [6] See Tr p 416, lines 2 4 As the Court of Appeals found, Black "was told by investigators to 'listen to Mr Compton and see if he would talk about the case any more or what he had done or any involvement in it They told me that I could not question the guy or pursue nothing toward him, just listen' Black was eventually placed in a cell with Compton and relayed to police several conversations in which Compton admitted taking part in the burglary and murder of Hanna'" State v Compton, 366 S C 671, 676, 623 S E 2d 661 (Ct App 2005)

On July 12, 2000, Compton was brought back to Abbeville County because his wife was to appear in court on the unrelated first-degree burglaries While at the courthouse, he contacted Sheriff Goodwin and told him that he would tell the police what he knew about the murder in exchange for a sentence reduction Sheriff Goodwin asked Compton if he wanted an attorney Per Compton's request, he was then taken to attorney Joseph Smithdeal's office See Tr p 640, line 8-p 643, line 17 After speaking with Smithdeal alone for approximately an hour, and after signing a waiver of rights form, Compton, Sheriff Goodwin, Solicitor Towne's Jones, and Smithdeal signed a document captioned "plea agreement' See Tr p 644, line 2-p 645, line 24 At Compton's request, the plea agreement provided that he would provide truthful information

[6] Black was transferred the north yard while Compton was housed in the south yard They were not cellmates until some months later See Tr p 417 lines 2 25 Tr p 979 lines 22

about the murder of the victim in exchange for a reduction in sentence "by all reasonable means" on the other burglary charges from fifteen years to seven-and-a-half years imprisonment See Tr p 856, line 6-25 The plea agreement did not include any express promise made by the State to not prosecute Compton for the murder of the victim The agreement in fact had no provisions relevant to any future plea or any criminal charges other than the prior burglaries to which Compton had already pled guilty

As part of the plea agreement, Compton gave a statement to the police in which he stated that Shane Rice had confessed to him the details of the crime after he, Otis Compton, and Robert Compton had all gone out drinking together See Tr p 976, lines 3-22 In particular, Rice told Otis Compton that while he and Robert Compton were robbing Hanna's home, Hanna came home and surprised them See Tr p 977, lines 19-22 When they saw Hanna, Robert Compton stabbed him and Rice shot him several times See Tr p 977, lines 22-24 At trial, Compton maintained this statement was true, and that he was not present at the time the crime was committed See Tr p 948, line 17-p p 998, line 6 [7]

After giving his statement, Compton was transported back to Kershaw Correctional Institution Eventually, he and Black became cellmates Several witnesses, including Black, testified that while they were all incarcerated together, Compton talked about his involvement in the victim's murder See p 419, line 17-p 422, line 1, p 536, line 18-p 544, line 15, p 555 line 2-p 556, line 14 Compton first testified that he knew details about the crime because Black told him, but then later that he knew details from Shane Rice not Black Tr p 1016, lines 4-25, p 1021, lines 3-6, p 1033, line 9-11

[7] Compton presented the testimony of numerous family members who testified that he was with them during the robbery and murder See Trial Tr p 872 line 11 p 948 line 16 Compton also testified that he was at the courthouse on July 12 2000 for his wife s trial on unrelated burglaries and that he planned to lie for his wife on the witness stand and say she wasn t there or that she didn t go in the house See Tr p 1021 lines 7 25

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On October 9, 2000, Compton contacted SLED agent Steve Gambrell and told him that he had something he needed to get off his chest, but that he wanted to be taken to Abbeville See Tr p 569, line 16-p 573, line 5 He also stated that he wanted Black to accompany him See Tr p 573, lines 22-23 Agents Gambrell and Templeton then picked up Compton and Black and transported them to Abbeville, where they met with Sheriff Goodwin and Chief Deputy Marion Johnson See Tr p 575, line 7 p 577, line 15 In the late evening of October 9th, after being advised of his rights and waiving them, Compton gave a statement that he was present at Hanna's house when the crimes were committed, but that he did not go inside See p 489, line 6-p 492, line 13

The following day, after resting and being advised of his rights again, Compton waived his rights and gave another statement to the police in which he stated that he was riding around with Shane Rice and Robert Compton when Rice suggested that they could rob the victim's home See Tr p 582, line 21-p 586, line 6, p 576, lines 8-13 Compton further stated that he remained in Rice's truck while Rice and Robert Compton went into the home to rob it See Tr p 586, line 23-p 587, line 4 Compton then told the police that he watched as Rice and Robert Compton killed Hanna when he came home See Tr p 588 line 9-p 590, line 3

Compton was arrested for the Hanna burglary and murder on October 12, 2000 Smithdeal testified that he wrote a letter the next day to the police stating that he had formerly represented Compton on other charges, and requested that the police not contact Otis until he had an attorney representing him The letter did not claim that Smithdeal represented Compton on the murder charge, or that the police needed his approval before speaking with Compton

After the October 9-10, 2000 statements, Compton agreed to go back to the scene of the crime with the pathologist and agent Derrick to lay out for them what happened when the crimes

were committed See Tr p 494, lines 16 22 On October 25, 2000, Compton went back to Abbeville to walk through the victim's home with Dr Brett Woodward the pathologist who conducted the victim's autopsy, as well as with SLED agent Steve Derrick, who reconstructed the scene based on his analysis of the blood spatter evidence Compton was advised of his rights again, waived them, and spoke voluntarily with Dr Woodward and Agent Derrick See, Tr p 745, lines 3-10 Agent Derrick testified at trial that on August 16, 1999 he formed an initial opinion about how the victim was shot, but that as additional evidence became available, including the autopsy report, his opinion about how the victim was shot became more precise although both were accurate [8] See p 760, line 1 p 762, line 17 Significantly, both Dr Woodward and Agent Derrick testified at trial that Compton's description of the assault was consistent with their ultimate findings

In addition, there was evidence that Compton was not being truthful in certain statements he gave during the October 25 meeting For example, while at the scene, Compton stated that he was waiting in Shane Rice's truck when the burglary was taking place, however, he changed his story to state that he was in a 1980 Monte Carlo after he was informed that Rice's truck could not have made the tracks that were found in the victim s back yard See Tr p 714, line 21-p 716, line 21

On October 30, 2010, Compton was indicted by the Abbeville County Grand Jury Prior to trial, defense counsel moved to recuse Solicitor Jones and his office from prosecuting Compton because the Solicitor was a witness defense counsel intended to call at the subsequent suppression hearing See July 15, 2002 Motion Tr p 6, lines 1-8 As a result, Solicitor Jones was subsequently recused Defense counsel also argued a pre-trial motion to quash the

[8] Dr Woodward did not change opinions See Tr p 3 p 811 line 22

indictment based on an immunity agreement or, in the alternative, to suppress all of Compton's statements made to law enforcement after he entered into the July 12, 2000 plea agreement See 11/14/02 Motion Tr p 14, lines 15-23 In support of his motion, defense counsel argued four grounds that the plea agreement granted Compton immunity, that Compton s incriminating statements were inadmissible under Rule 410 of the South Carolina Rules of Evidence, and that the statements were inadmissible on both Fifth and Sixth Amendment grounds See 11/14/02 Motion Tr p 235, line 15-p 244, line 17 The trial court denied both motions, and specifically ruled that Compton was not deprived of his right to counsel at any time, and was in no way caused to make self-incriminating statements against his will See 11/14/02 Motion Tr p 259, line 2-p 260, line 4

The following day, defense counsel wrote the trial judge stating that "we will need to discuss what is admissible about the prior burglary convictions " After jury selection, defense counsel made several pretrial motions, and specifically addressed what information about the prior burglary convictions would be admissible, although the trial court determined the issue was premature to discuss at that time [9] See Tr p 57, line 21-p 58, line 18 The issue was revisited during a discussion, outside the presence of the jury, early in the trial At that time, both Solicitor McMahon and defense counsel determined that the prior burglaries had to be addressed given the trial court's prior rulings See Tr p 307, line 19-p 309, line 18 The issue was not raised again

On direct appeal to the South Carolina Court of Appeals, appellate counsel raised several issues including immunity, the promise of leniency, Rule 410, SCRE, violation of the Sixth

[9] Defense counsel motioned to dismiss a juror offered to stipulate to the contents of the 911 tape so Compton would not be prejudiced by the jury hearing the tape and objected to the jury being sworn for the reasons previously argued on November 14 2002 Tr p 54 line 13 p 59 line 23 All of defense counsel s motions were denied

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Amendment, right to counsel, and cross-examination of a witness However, the Court affirmed Compton's convictions

IV STANDARD OF REVIEW

This Application for Post-Conviction Relief raises numerous specific allegations of ineffective assistance of counsel The burden of proof is on Compton to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing Bell v State, 321 S C 238, 467 S E 2d 926 (1996), Rule 71 1(e), SCRCP To prevail, Compton must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters, and (2) that he was prejudiced by errors and omissions of counsel such that he was deprived of a fair trial Strickland v Washington, 466 U S 668 (1984) In other words, Compton must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different Id , Johnson v State, 325 S C 182, 480 S E 2d 733 (1997) A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial Ard v Catoe, 372 S C 318, 330, 642 S E 2d 590, 596 (2007)

Where trial counsel articulates a valid reason for employing certain trial strategies, such conduct will not be deemed ineffective assistance of counsel Roseboro v State, 317 S C 292, 454 S E 2d 312 (1995), Stokes v State, 308 S C 546, 419 S E 2d 778 (1992) An Applicant may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective Simpson v Moore, 367 S C 587, 598, 627 S E 2d 701, 707 (2006) Furthermore judicial scrutiny of counsel's performance is highly deferential and is not subject to the distorting effects of hindsight Id In reviewing counsel s performance, there is a strong presumption that

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counsel's conduct falls within the wide range of reasonable professional assistance Id *citing* Strickland, 466 U S at 668, 104 S Ct 2052

The Sixth Amendment s guarantee of effective assistance of counsel includes the effective assistance of counsel in the defendant's first appeal as of right Evitts v Lucey, 469 U S 387 (1985) Appellate counsel has a professional duty to choose among potential issues according to their merit Jones v Barnes, 463 U S 745 (1983) Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel Griffin v Aiken, 775 F 2d 1226 (4th Cir 1985) The two-prong test of Strickland v Washington applies to claims of ineffective assistance of appellate counsel Bennett v State, 383 S C 303, 680 S E 2d 273 (2009)

Compton must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency Thrift v State, 302 S C 535, 537, 539, 397 S E 2d 523 (1990), Gilchrist v State, 364 S C 173, 612 S E 2d 702 (2005), Anderson v State, 354 S C 431, 581 S E 2d 834 (2003) When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal " Gray v Greer, 800 F 2d 644, 646 (7th Cir 1986) Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal Id

V DISCUSSION

A Allegations of Ineffective Assistance of Counsel Prior to Trial

Compton alleges that Smithdeal was ineffective for failing to obtain a specific immunity agreement for the murder charge and for failing to assert Compton s Fifth Amendment right to an attorney for all future conversations with Compton He also claims that he never would have made the incriminating statements if Smithdeal had taken either action, and that consequently the State would not have been able to prosecute him

1 Specific Immunity Agreement

Compton argues that Smithdeal should have insisted on a specific immunity provision in the July 12, 2000 ' plea agreement " Smithdeal testified that he did speak with Solicitor Jones about immunity, but that Solicitor Jones was not willing to consider it Smithdeal further testified that as counsel for Compton on pending burglary charges, and per Compton's request to help him get his existing sentence on prior burglary convictions reduced, he was trying to get the best deal he could for Compton on the charges for which he *did* represent Compton [10] He stated that, regardless, he could not have negotiated a deal for Compton on the murder charge, because Compton was not charged with murder [11] Furthermore, Solicitor Jones testified that he could not recall a single instance during his tenure as Solicitor when he granted a defendant total immunity in exchange for information

Compton contends he never would have given information for which he could be prosecuted if he knew the July12, 2000 plea agreement did not afford him immunity First, the

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[10] In the plea agreement Smithdeal was able to negotiate a seven and a half year sentence for Compton on the burglary charges for which he did represent Compton seven and a half years being *half* of the fifteen years to which Compton was originally sentenced However Compton was ultimately sentenced to the fifteen years because he failed to adhere to the terms of the plea agreement

[11] Compton was not arrested for the murder until October 12 2000 See Arres' Warrant

agreement never uses the word immunity, or any variation thereof, and therefore Compton cannot credibly claim he was lulled into believing the agreement prevented the State from prosecuting him for murder [12] Second, it cannot be surmised that Compton only gave statements because he believed the July 12th plea agreement offered immunity considering that Compton began voluntarily talking with law enforcement on August 13, 1999-within one week of the murder and almost a year before entering into the agreement Indeed, in the August 13, 1999 statement Compton had already placed himself at the scene of the crime See, Tr p 302, lines 1-25, p 563, lines 19-25

Compton made another voluntary statement on November 30, 1999, well before entering into the plea agreement, in which he gave officers the names of Robert Compton and Shane Rice On July 12, 2000, Compton initiated contact with law enforcement again, and gave another voluntary statement, telling the officers that Shane Rice confessed to him that he (Shane) and Robert burglarized the Hanna's home and killed Johnny Hanna See Tr p 976, line 18-p 977, line 24 Compton gave further voluntary statements on October 9-10, 2000 and on October 25, 2000 In addition, several witnesses testified at trial about incriminating statements Compton made to fellow inmates, in addition to law enforcement, both before and after entering into the July 12, 2000 agreement [13] Moreover, every time Compton gave a statement to law

[12] The trial court determined that the document could not be interpreted in any reasonable way to affect charges that may result from actions and doings by Compton but directly affects the charges that arose out of the prior indictments See Motion 11/14/02 p 256 line 23 p 257 line 4 This conclusion was affirmed by the Court of Appeals

[13] Compton initiated contact with law enforcement and gave voluntary statements after being advised of and waiving his rights on August 13 1999 November 30 1999 July 12 2000 October 9 10 2000 and October 25 2000 See Tr p 284 line 16 25 p 299 line 23 p 302 line 20 p 965 line 23 966 line 18 p 1000 lines 4 18, p 1007 lines 18 24 Tr p 974 line 23 978 line 2 p 1003 line 24 p 1004 line 3 p 1007 lines 18 24 p 974 line 23 978 line 2 p 1003 line 24 p 1004 line 3 p 974 line 23 978 line 2 p 1003 line 24 p 1004 line 3 p 1024 line 12 p 1036 line 16 It is worth noting that these citations refer only to statements Compton gave to law enforcement and do not include the additional voluntary statements Compton made to three fellow inmates on several occasions

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enforcement, he did so after being advised of his Miranda rights, particularly that anything he said could be used against him in a court of law

Therefore, Smithdeal was not ineffective for failing to obtain immunity for Compton Even if Smithdeal were found to have rendered ineffective assistance during the negotiations of the plea agreement, Compton was not prejudiced by Smithdeal's alleged deficient performance Smithdeal testified that he told Compton not to talk with the police, but that Compton insisted on giving a statement One can infer that this is the same advice Smithdeal would have given Compton if he had been more formally retained or appointed Nonetheless, despite Smithdeal's advice, Compton entered into the July 12, 2000 plea agreement and gave a statement That statement was preceded by and followed by several other incriminating statements, all initiated and made voluntarily by Compton Clearly, Smithdeal could not prevent Compton from waiving his rights, and could not protect Compton from the consequences of his voluntary statements Thus, Smithdeal's alleged failure to do so did not prejudice Compton

2 Fifth Amendment Right to Counsel

The sojourn of Compton's Fifth Amendment right is circuitous, but essentially simple Compton undoubtedly invoked his Fifth Amendment rights when he requested that Mr Smithdeal be present at the July 12, 2000 meeting with police From that point, Edwards v Arizona, 451 U S 477 (1981) prevented law enforcement from initiating contact with Compton unless he was accompanied by counsel As Edwards explained

> When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further

> communication, exchanges, or conversations with the police 451 U S at 484-485

Indeed, the police could not approach him about any offense unless counsel was present McNeil v Wisconsin, 501 U S 171, 177 (1991) Any attempt by the police to surreptitiously approach Compton and secure a waiver of his Fifth Amendment rights would have been presumptively invalid See Minnick v Mississippi, 498 U S 146 (1990) [14]

These "prophylactic" rules, however, do not apply if Compton himself initiated contact with police For while Miranda and McNeil expressly prohibit the police from "badgering" a criminal suspect who has previously embraced the protections of the Fifth Amendment, Michigan v Harvey, 494 U S 344, 350 (1990), nothing prevents the suspect from independently approaching the police See Miranda v Arizona, 384 U S 436 (1966) To hold otherwise would effectively declare that an individual's invocation of Fifth Amendment rights is per se irrevocable [15] Id Miranda did not prohibit voluntary statements, it only provided that a suspect be warned of and voluntarily waive his Fifth Amendment rights before his custodial statement could be considered voluntary and admissible in court To show that Compton voluntarily waived his Fifth Amendment right after invoking it, the State must prove by the greater weight of the evidence that Compton (1) initiated further communication, exchanges or conversations with the police and (2) voluntarily, knowingly and intelligently abandoned his right to counsel Oregon v Bradshaw, 462 U S 1039 (1983)

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[14] The Supreme Court recently retreated from this bright line rule In Maryland v Shatzer 559 U S ____ (Op No 08 680 U S Sup Ct Feb 24 2010) the Court held that a break in Miranda custody exceeding 14 days removes the presumptive invalidity of a subsequent waiver of a suspect s Miranda rights Under Shatzer if a suspect invokes his Miranda rights when first approached by police then the police may still re approach the suspect for questioning provided at least 14 days have elapsed since the suspect s release from the confines of custodial interrogation

[15] Taken to its logical ends such a result would mean for example that a defendant who had previously claimed his right to counsel or to remain silent could not later testify at his own trial As has been observed in another context to adopt such an approach would imprison a man in his privileges and call it the Constitution Adams v United States ex rel McCann 317 U S 269 280 (1942)

The record easily demonstrates that Compton, exercising his free will, reopened dialogue with police about the Hanna murder In addition, after he sought the audience with police he knowingly, and intelligently and voluntarily waived his Miranda rights to counsel His decision to discard his rights was the product of a free and deliberate choice, made with full awareness of both the nature of the rights and the consequences of abandoning them Moran v Burbine, 475 U S 412 (1986)

Because Compton on his own initiative voluntarily approached the police seeking to give subsequent statements - and because he was thereafter specifically advised of his Miranda rights and voluntarily chose to waive them – the Fifth Amendment was not offended

To escape this conclusion, Compton contends that Mr Smithdeal was ineffective for not expressly advising police that he represented Compton for all purposes related to the murder investigation Had Smithdeal done so, Compton alleges that the police would never have been allowed to take any subsequent statement from him

Among the flaws embedded in this argument is the stubborn fact that Smithdeal was not retained or appointed to represent Compton on the yet to be lodged murder charge It must be remembered that, at that point, Smithdeal was representing Compton on unrelated burglary charges Because Smithdeal never formed an attorney-client relationship with Compton to cover the murder charge, it is unclear how Compton can allege his Sixth Amendment right to the effective assistance of counsel has been infringed The Sixth Amendment is offense specific and its rights do not attach until a defendant is formally charged

Compton cites Smithdeal's letter to Sheriff Goodwin, dated October 13, 2000, to support his position that Smithdeal could have asserted Compton s Fifth Amendment rights before that

time, and therefore should have done so sooner This letter was clearly Smithdeal's best effort at protecting Compton, despite the fact that he did not represent him on the murder charge, and despite the fact that the law does not allow a third party to invoke Fifth Amendment rights on behalf of another Close analysis reveals that any attempt by Smithdeal to more formally invoke Compton's Fifth Amendment rights would have been superfluous As noted above, Compton unambiguously claimed his Fifth Amendment right on July 12, 2000, which as a matter of law was a blanket assertion for any criminal matters See McNeil, 501 U S at 177 ("Once a suspect invokes the Miranda right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present ") (citing Arizona v Roberson, 486 U S 675 (1988) (emphasis in original)) There was nothing Smithdeal could have done to further establish Compton's Fifth Amendment rights, particularly when Compton had announced he was waiving them [16]

The State contends that Smithdeal could not anticipatorily invoke Compton's Fifth Amendment rights for future police interrogations Compton counters that his October 2000 statements would have been deemed inadmissible as fruit of the poisonous tree "had Smithdeal ensured that the police knew that the invocation was anticipatory " Reply Brief at 2

Both the State and Compton miss the mark The Supreme Court has hinted – but never flatly held – that a suspect cannot anticipatorily invoke his Fifth Amendment rights McNeil, 501 U S at 182 n 3 (dicta) Other courts, however, have ruled that an accused – much less his counsel – cannot invoke his Fifth Amendment right unless he is in the throes of custodial

[16] Given the abrogation of the Edwards rule announced in Shatzer it is unclear what duty if any an accused s lawyer now has to constantly reassert his client s Fifth Amendment rights every 14 days Even if Shatzer applied to Compton s 2000 conduct this court need not address this issue because Compton on his own volition reopened the dialogue with law enforcement

interrogation or such interrogation is imminent State v Hambly, 745 N W 2d 48 (Wis 2008) (collecting cases), See Alston v Redman, 34 F 3d 1237 (3d Cir 1994), United States v LaGrone, 43 F 3d 332 (7th Cir 1994), United States v Grimes, 142 F 3d 1342 (11th Cir 1998) This court need not address the validity or scope of anticipatory invocation, for Compton is correct that he effectively claimed his Miranda rights on July, 12 2000 What Compton is now claiming, however, is that Smithdeal was somehow incompetent for not attempting to re-invoke the very rights Compton had voluntarily abandoned This syllogistic argument chases its own tail, and has no basis in logic or precedent

As the credible evidence demonstrates, Compton spurned Smithdeal's advice to remain silent and insisted on talking to police And he did not seek Smithdeal's counsel (or the assistance of any lawyer) after that time, despite being repeatedly given Miranda warnings that reminded him he had the absolute right to counsel and to remain silent

Statements that are freely and voluntarily given are of course admissible Miranda, 384 U S at 476 Furthermore, it is well settled that the Fifth Amendment privilege against self-incrimination is personal and may not be invoked by, or on behalf of, a third person Moran v Burbine, 475 U S 412 (1986), State v Hughes, 328 S C 146, 493 S E 2d 821 (1997), United States v Wise, 603 F 2d 1101 (4th Cir 1979) (recognizing that Fifth Amendment rights are personal and cannot be vicariously asserted)

B Allegation of Ineffective Assistance of Counsel on Direct Appeal

Compton further alleges that his Sixth Amendment right to effective appellate counsel was violated by appellate counsel's failure to raise the issue that Compton s Fifth Amendment right to counsel had been violated While a defendant is constitutionally entitled to effective

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assistance of appellate counsel, appellate counsel is not required to raise every non frivolous issue presented by the record Evitts v Lucey, 469 U S 387, 105 S Ct 830, 83 L Ed 2d 821 (1985), Thrift v State, 302 S C 535, 539, 397 S E 2d 523 (1990) Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel Griffin v Aiken, 775 F 2d 1226 (4th Cir 1985)

In Compton's case, Appellate counsel raised several issues including immunity, the promise of leniency, Rule 410, SCRE, Sixth Amendment right to counsel, cross-examination of a witness Appellate counsel testified that the central theory of Compton's appeal was whether the agreement included immunity

Compton now claims his appellate counsel was ineffective for failing to raise the issue that the State infringed on his Fifth Amendment rights by deploying Black as a government agent to initiate contact with Compton after he had invoked his Miranda rights at the July 12 meeting For support, Compton relies on United States v Henry, 447 U S 264 (1980), which forbade the State from interfering with an accused's right to counsel by use of a government agent posing as a cellmate Henry, however, was premised on the Sixth Amendment Because Compton was not charged with the murder at the time Black was eliciting information from him about that crime, the Sixth Amendment cannot aid Compton

Nor can the Fifth Amendment provide comfort It was long ago settled that the government may plant an undercover policeman in a suspect's cell for the express purpose of gathering incriminating information without running afoul of the suspect s Fifth Amendment rights Illinois v Perkins, 496 U S 292 (1990) Like Compton, Perkins was incarcerated on unrelated charges at the time he voluntarily spoke to the undercover agent and confessed to a

murder Observing that, "Miranda forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner," the Court further reasoned

> Miranda was not meant to protect suspects from boasting about their criminal actions in front of persons whom they believe to be their cellmates [Perkins] had no reason to feel that [the] undercover agent had any legal authority to force him to answer questions or that [the undercover agent] could affect [Perkins'] future treatment [Perkins] viewed the cellmate/agent as an equal and showed no hint of being intimidated by the atmosphere of the jail In recounting the details of the murder, [Perkins] was motivated solely by the desire to impress his fellow inmates He spoke at his own peril

Perkins, 496 U S at 298, see also United States v Stubbs, 944 F 2d 828 (11th Cir 1991) ("Miranda and Fifth Amendment concerns are not implicated when a defendant misplaces his trust in a cellmate who then relays the information - whether voluntarily or by prearrangement - to law enforcement officials "), Alexander v Connecticut, 917 F 2d 747 (2d Cir 1990)

Perkins relied on Hoffa v United States, 385 U S 293 (1966), which held the Fifth Amendment posed no impediment to law enforcement placing an undercover informant near a suspect who was free on bond awaiting trial The controlling authority of Perkins and Hoffa soundly refutes Compton's claim that law enforcement's placement of Black violated Compton's Fifth Amendment rights [17]

Finally, even assuming this Court finds that appellate counsel was ineffective for not raising the Fifth Amendment issue on appeal with regard to Black, Compton suffered no prejudice from this alleged deficient performance Two other inmates testified against Compton

[17] Perkins noted that the Henry rule – while unavailable to Perkins who had not yet been charged for the murder – still survived within the context of the Sixth Amendment i e after the State has filed formal adversary proceedings

at trial Both inmates testified that Compton confessed to them his involvement in the victim's murder There is no evidence anywhere in the record, nor does Compton allege, that either of these two inmates was government agents eliciting incriminating information from Compton in violation of his Fifth Amendment rights As a result, Compton was not prejudiced by the admission at trial of statements he made to Black, given the testimony of the two other inmates, and any error in the admission would have been deemed harmless

C Allegations of Ineffective Assistance of Counsel During Trial

Compton claims that Mr Grose should have requested an order from the trial judge to prohibit the State from referencing his prior burglary convictions during his trial on the Hanna burglary and murder Pointing to the record, Compton notes that the fact that he had prior burglary convictions "was explicitly stated no less than fourteen times, including multiple occasions where the witnesses explained that [Compton] was the primary suspect because of the similarities between the prior burglaries and the instant offense "

At the PCR hearing, Mr Grose testified that while he moved in limine to limit reference to prior burglary convictions, he did not pursue the issue because he realized that a main plank of his defense theory was that the plea agreement afforded Compton immunity from prosecution, and that statements made by Compton were involuntary due to police trickery Therefore, Mr Grose reasoned that the jury would inevitably learn of Compton s previous burglary convictions

While conceding that this may have been valid trial strategy, Compton asserts that competent counsel would have sought a ruling from the trial court redacting the exact nature of his prior convictions, thereby minimizing the prejudicial impact Compton notes this approach of sanitizing a defendant s admissible record was specifically encouraged by State v Elmore,

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368 S C 230, 239 n 5, 628 S E 2d 271 (Ct App 2006) and Green v State, 338 S C 428, 527 S E 2d 98 (2000)

While there may be instances where the Elmore approach can benefit a defendant, merely limiting references to a defendant s prior record to unspecified felonies does not in all cases magically remove any undue prejudice Indeed, by not disclosing the exact nature of the prior crimes, the jury's imagination is free to roam and the resulting speculation may enhance rather than blunt the prejudice that concerned Elmore

This court is not persuaded that the trial judge here would have granted a motion to redact Compton's prior burglary convictions To be sure, inherent prejudice flows from using similar prior convictions for impeachment It follows that the more similar the prior conviction is to the crime charged, the more prejudice ensues This is what State v Colf, 337 S C 622, 525 S E 2d 246 (2000) reminds us, and why trial courts are required to conduct an on – the – record balancing test encompassing numerous factors Id

Yet, SCRE 609 mandated that once Mr Compton took the stand his prior burglary convictions "shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused" This court cannot say that, after applying this Rule and performing the Colf calculus, Judge Saunders would have chosen to exclude or sanitize Compton s burglary record

The record also supports the admission of prior burglaries as proof of identity See Gillion, 373 S C at 609-610 (prior burglaries committed by defendant admissible to prove identity), State v Good, 308 S C 308, 417 S E 2d 640 (Ct App 1992) Moreover, they were allowable under the common scheme or plan' exception of SCRE 404(b) It would have been

reasonable for a trial judge utilizing his discretion to conclude that there was a close degree of similarity between the Hanna crimes and the prior burglaries, and that, pursuant to SCRE 403, such evidence was not substantially outweighed by the danger of unfair prejudice State v Wallace, 384 S C 428, 683 S E 2d 275 (2009) (establishing test for admissibility of "common scheme or plan" bad act evidence) Given the significant factual similarity between Compton s prior burglaries and the Hanna burglary, it is reasonably likely that Compton's objections to such evidence would have been overruled [18] Chief Johnson testified about the similarities at trial the proximity of the victim's house to where the majority of the other burglaries occurred, when the burglaries occurred, the fact that burglaries almost stopped while Compton was incarcerated, how the door was pried open and window broken, and the items that were taken [19]

In any event, even assuming Grose was deficient in failing to object to the introduction of Compton's prior burglary convictions, the error did not contribute to the verdict Among its proof, the State had Compton's own sworn confession that placed him at the scene of the crime, and his boastful remarks to Black and other fellow prisoners concerning his participation in the Hanna crime While there was no physical evidence, the record was replete with proof of Compton's guilt

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[18] The court is not persuaded however, by the State s alternate theory that the prior burglary record was independently admissible under the res gestae exception The Supreme Court has rejected this precise argument in another case involving the admission of a defendant s prior burglaries State v Gillian 373 S C 601 646 S E 2d 872 (2007)

[19] Chief Johnson elaborated If you were a crow you would fly behind the Hanna house and slightly to the right and that s where the majority of these burglaries occurred See Tr p 374 lines 2 4 p 374 line 6 p 375 line 25 Chief Johnson further explained Because of the proximity of Johnny Hanna s house due to the fact that Otis had only been out of jail for a little over a week They were in the same area Basically our burglaries had stopped not completely but basically had stopped in that area the whole time he was in jail and then they started kind of started back and we had two burglaries that same week that Johnny was killed in that same area So yes sir that s why he was considered our number one suspect See Tr p 376 lines 13 21 p 376 line 22 p 377 line 6

Furthermore, Judge Saunders provided a limiting instruction to the jury that evidence of prior convictions went only to witness credibility and "is not evidence of guilt of any of the matters contained in this indictment" T 1147

Mr Grose testified that by the time he was appointed to Compton's case, the plea agreement already existed He stated that he had to decide how to strategically handle the agreement, particularly given that the trial court had deemed it admissible He further stated that because Compton had given inconsistent statements and had recanted others was because he was trying to get the benefit of his plea agreement Mr Grose's strategy was to maintain that his client was not present at the scene, point out the holes and inconsistencies in the State's case, and argue that any statement Compton gave stating he involved in the murder was induced by the State's illusory promise in the plea agreement to reduce his sentence on the other burglaries

Defense counsel clearly articulated a valid defense strategy, particularly in light of Compton's numerous voluntary, yet inconsistent statements, and given the fact that the plea agreement already existed by the time defense counsel was appointed to Compton's case This strategy was the product of reasonable and experienced professional judgment, made after a thorough investigation Cf Wiggins v Smith, 539 U S 510 (2003)

Above all, Compton has failed to show any prejudice that may have resulted from defense counsel's alleged deficient representation Any error in counsel's alleged failure to object to the introduction of Compton's prior burglary convictions was harmless, given other overwhelming evidence of Compton's guilt See State v Keenon, 356 S C 457, 590 S E 2d 34 (2003) Compton has presented no evidence that his counsel's representation was so deficient that the outcome would have been different had he objected to admission of Compton's prior bad acts

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CONCLUSION

For all of the above reasons, Compton has failed to prove his entitlement to post-conviction relief and his application must therefore be denied

IT IS THEREFORE ORDERED

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

2 The Applicant is hereby remanded to the custody of the State

AND IT IS SO ORDERED!

February 25, 2010
Greenville, SC

D Garrison Hill
Circuit Judge

STATE OF SOUTH CAROLINA,	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE	)	
Otis James Compton, #262807	)	
	)	
Applicant,	)	
	)	
v	)	CERTIFICATE OF SERVICE BY MAIL
	)	
State of South Carolina,	)	08-CP-01-085
	)	
	)	

The undersigned, an employee of the Abbeville County Clerk of Court's Office, does hereby certify that copy of Order Denying Post Conviction Relief in the above-referenced PCR case was made upon the following persons by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 1 day of March, 2010, addressed as follows

Attorney General's Office
ATTN Jennifer Kinzeler, PCR Dept
Post Office Box 11549
Columbia, SC 29211

Tara Dawn Shurling, Esq
3614 Landmark Dr , Ste D
Columbia, SC

Peggy A Payne, Common Pleas Clerk

002060

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
D Garrison Hill, Presiding Judge

2008-CP-01-00085

OTIS JAMES COMPTON, 262807 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 Application filed March 1, 2010

Tara Dawn Shurling
Attorney and Counselor at Law

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

ATTORNEY FOR APPLICANT

This 18th day of March, 2010

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

002061

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
D Garrison Hill, Presiding Judge

2008-CP-01-00085

OTIS JAMES COMPTON, 262807, 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, Jennifer Kinzeler, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 18th day of March, 2010

Suzanne Graham
Paralegal to Tara Dawn Shurling

SWORN TO BEFORE me this 18th day of March 2010

Sharon H McCollister (L S)
Notary Public for South Carolina
My Commission Expires Jan 16, 2017