

**FORM 4**

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

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2011CP0702946

Alfonzo J Howard		South Carolina State Of	
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<b>PLAINTIFF(S)</b>	<b>DEFENDANT(S)</b>
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> 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), SCRPC;
  - Rule 41(a), SCRPC (Vol. Nonsuit);
  - Other: Relief Denied, Dismissed With Prejudice
- ACTION STRICKEN (CHECK REASON):**
  - Rule 43(k), SCRPC (Settled);
  - Rule 40(j) SCRPC;
  - Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
  - Affirmed;
  - Reversed;
  - Remanded;
  - Other:

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

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

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk: ORDER OF DISMISSAL

**INFORMATION FOR THE JUDGMENT INDEX**

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

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

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

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

s/ P. M. Buckner	2122	9/14/2016
Circuit Court Judge	Judge Code	Date

**For Clerk of Court Office Use Only**

This judgment was entered on **September 23, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **September 26, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

**Alfonzo J Howard** # 333399 Liebert Corr. Inst., E B-29 P O  
Box 205 Ridgeville, SC 29472  
**Scott Wayne Lee** PO Box 2124 Beaufort, SC 29901-2124

**Ruston Wesley Neely** PO Box 11549 Columbia, SC 29211

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**ATTORNEY(S) FOR THE PLAINTIFF(S)**

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**ATTORNEY(S) FOR THE DEFENDANT(S)**

    Melissa Kilby    

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**Court Reporter**

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**Jerri Ann Roseneau - Clerk of Court**

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**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.

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STATE OF SOUTH CAROLINA )  
COUNTY OF BEAUFORT )  
) )  
) )  
Alfonzo Howard, #333399, )  
) )  
Applicant, )  
) )  
v. )  
) )  
State of South Carolina, )  
) )  
Respondent. )

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IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT

2011-CP-07-2946

**ORDER OF DISMISSAL**

2016 SEP 23 PM 12:12  
CLERK OF COURT  
BEAUFORT COUNTY, SOUTH CAROLINA

#1  
P.B.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 14, 2011. The Respondent made its Return on March 20, 2011. An evidentiary hearing on the matter was convened on April 2, 2013 at the Beaufort County Courthouse. The Applicant was present at the hearing and represented by Scott W. Lee, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying were James A. Brown, Jr., Esquire, and Angela McCall-Tanner, Esquire. The Court had before it the trial transcript, the Beaufort County Clerk of Court records, and the Applicant's records from the South Carolina Department of Corrections, the Applicant's original and amended application, the Respondent's Return, the exhibits submitted by the Applicant during the hearing, and the appellate records.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. The Applicant was indicted at the June 2006 term of the Beaufort County Grand Jury for criminal sexual conduct-first degree (2006-GS-07-1097), possession of a weapon during the commission of a violent

crime (2006-GS-07-1096), carjacking (2006-GS-07-1095), two counts of kidnapping (2006-GS-07-1093, -1094), and two counts of armed robbery (2006-GS-07-1098, -1099). He was represented by James A. Brown, Jr., Esquire.

The Applicant proceeded to trial and was found guilty. On February 27, 2009, the Applicant was sentenced by the Honorable Carmen T. Mullen to life without parole.<sup>1</sup>

A Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Lanelle Durant, Esquire of the South Carolina Office of the Appellate Defense perfected the appeal. The South Carolina Supreme Court affirmed the Applicant's convictions and sentences. State v. Howard, Op. No. 2011-MO-006 (S.C. Sup. Ct. filed February 22, 2011).

### ALLEGATIONS

In his original application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

- #2  
RMB
1. "Egregious and inappropriate conduct during trial."
  2. "Failure to present case at trial."

In his amended application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
  - a. Trial counsel failed to properly challenge the issue of probable cause at the April 23, 2007 Schmerber<sup>2</sup> hearing, which led to the State obtaining a blood sample from Defendant.
  - b. Trial counsel failed to timely request authorization for funds from SCCID for experts to rebut testimony presented by the State.
  - c. Trial counsel failed to argue and obtain a ruling on the admissibility of Defendant's prior record for purposes of impeachment.
  - d. Trial counsel failed to raise and preserve the issue of suppressing DNA evidence after it was revealed that the SLED DNA lab had contaminated samples related to the case.

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<sup>1</sup> The Applicant's 5 year sentence for possession of a weapon was subsumed into his life without parole sentence.

<sup>2</sup> Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966).

- #3  
RMB
- e. Trial counsel failed to properly raise, renew and preserve the issue of the conflict of interest between himself and Defendant with regard to the issue of compensation from SCCID.
  - f. Trial counsel argued in opening statement that an unknown assailant was to blame, but did not ensure that the case law supported a jury charge on third party guilt and did not receive a third party guilty instruction.
  - g. Trial counsel failed to obtain the case file from the Defendant's first appointed lawyer, Anthony Dore, Esquire.
  - h. Trial counsel failed to locate and interview potential exculpatory witnesses.
  - i. Trial counsel failed to properly investigate co-defendant Lorenzo Hicks' prior mental health history.
  - j. Trial counsel failed to properly raise, renew, and preserve the State's violation of discovery obligations.
  - k. Trial counsel failed to request continuance to properly investigate discovery material that was presented on the eve of trial.
  - l. Trial counsel failed to seek remedies for the prosecution's failure to timely reveal exculpatory and/or relevant discovery.
  - m. Trial counsel failed to raise the issue of the State's failure to reveal contamination in the SLED DNA lab at the Schmerber hearing.
2. Ineffective assistance of appellate counsel.
    - a. Appellate counsel failed to raise the issue of whether trial counsel's actions during Defendant's trial so tainted the proceedings so as to amount to a denial of due process and prevented Defendant from receiving a fair trial.
    - b. Appellate counsel failed to address the issue of the conflict of interest between trial counsel and Defendant.
    - c. Appellate counsel failed to raise the issue of whether probable cause existed at the Schmerber hearing.
    - d. Appellate counsel failed to raise the issue of the trial judge's denial of trial counsel's request for certain investigative expenses.
  3. Brady/Rule 5/Kyles v. Whitley violation.
  4. Prosecutorial misconduct.

At the hearing, Applicant proceeding solely on the allegations of ineffective assistance of counsel based on the following:

1. Failure to properly challenge the issue of probable cause at the April 23, 2007 Schmerber hearing, which led to the State obtaining a blood sample from Defendant.
2. Failure to raise and preserve the issue of suppressing DNA evidence after it was revealed that the SLED DNA lab had contaminated samples related to the case.
3. Failure to argue and obtain a ruling on the admissibility of Defendant's prior record for the purposes of impeachment.
4. Failure to properly raise, renew, and preserve the issue of the conflict of interest between himself and Defendant with regard to the issue of compensation from SCCID.
5. Failure to investigate and interview potential exculpatory witnesses.
6. Failure to properly investigate co-defendant Lorenzo Hicks's prior mental health history.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly.<sup>3</sup>

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

### Summary of the Testimony

Alfonzo Howard, the Applicant, testified he was represented by James A. Brown Jr. The Applicant testified he met with counsel on several occasions and recalls reviewing discovery with counsel. He testified that they discussed possible defenses and that he gave counsel potential witnesses to investigate. The Applicant testified it was his decision to proceed to trial.

He testified counsel did not investigate and challenge the State's probable cause at the Schmerber hearing. He testified that ultimately his blood was taken and the DNA found was used against him at trial. The Applicant also testified counsel did not thoroughly investigate his case. He testified he gave counsel a few witnesses to investigate and counsel did not speak to the witness. He testified that the witnesses were incarcerated and that these witnesses had written letters to counsel.

The Applicant testified he discussed the right to testify with counsel and was advised against it because of his prior criminal record. The Applicant testified it would have been helpful for him to testify. The Applicant testified further the trial judge and counsel spoke sharply with

<sup>3</sup> During the evidentiary hearing, it was put on the record that the Applicant's attorney filed a motion to halt prosecution a month before trial was scheduled. Judge Buckner handled the matter and concluded the payment issue would be addressed after trial. Judge Buckner also handled a scheduling matter, but knew nothing about the merits of the case. The Applicant agreed to waive any conflicts that may arise with Judge Buckner hearing his PCR case.

one another at trial. He testified counsel took the case personally and had to call his own lawyer. He testified counsel's inability to obtain payment for his representation affected his performance and the outcome of his trial.

James A. Brown, Jr., Esquire, was present and testified he was appointed to represent the Applicant at trial. Counsel testified he met with the Applicant many times prior to trial. He testified he filed multiple Brady and Rule 5 motions on the Applicant's behalf. Counsel testified he reviewed discovery and possible defenses with the Applicant. He testified they also discussed the elements of the charges and the Applicant's version of the facts.

Counsel testified it was the Applicant's decision to proceed to trial. Counsel testified further his defense and focus at trial was that another person was involved. He testified he argued third party guilt in his opening and closing, but the trial court refused to charge the jury on third party guilt. Counsel testified further he did not have a name for the guilty third party, but relied on the unknown DNA profile found on the evidence which did not match the Applicant.

#5  
R.B.  
Counsel testified he received funds to hire an investigator. He testified as a part of his investigation he received all reports from law enforcement, obtained a deposition from a civil suit, and investigated all witnesses. Counsel also testified he reviewed the file of Anthony Dore, Esquire, the Applicant's previous attorney. He testified he knew of the inmates who had information about the co-defendant recanting his statement against the Applicant. He testified he had a copy of the letter from one of the inmates and tried to track him down through his attorney, Donald Colongeli. He testified he was also aware of 5 letters purported to be from the co-defendant exculpating the Applicant. Counsel testified 4 of the letters were found by the State's handwriting expert to have been written by the Applicant. Counsel testified that the 5<sup>th</sup> letter had not been examined by a handwriting expert, but he was able to question the jail counselor who

notarized the letter for the co-defendant. Counsel testified he requested a handwriting expert to review the letters analyzed by the State's expert and his request was denied.

Counsel testified he had a discussion with the Applicant about testifying at trial and his potential for impeachment with his prior record. He testified he knew what the Applicant's testimony would have been had he taken the stand and he did not want to pursue that version of facts at trial because it was not a good defense. Counsel testified he knew about the Applicant's prior convictions before trial because the Applicant was given notice that the State would seek life without parole. Counsel testified he reviewed the record and thought the convictions would have been admissible for purposes of impeachment. Counsel testified he did not make a pretrial motion to determine the admissibility of the Applicant's prior record. He testified that is not a standard motion and he is sure his priors would have been admissible.

#6  
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Counsel testified he represented to the Court during a pre-trial hearing that he could not go forward because of a conflict between his compensation issues and his obligations to the Applicant. Counsel testified he had a short discussion with the trial court about being paid for his representation of the Applicant and was told the issue would be handled after trial. Counsel testified the Court told him to go forward representing the Applicant or be incarcerated. He testified that ultimately he was paid the \$3,500 statutory cap for his representation. Counsel testified he spent 291.7 hours on the Applicant's case and should have been compensated much more. Counsel testified further he appealed the order limiting payment to \$3,500. He testified the Supreme Court affirmed the lower court and concluded it was a takings issue.

Counsel testified he was served with the State's Schmerber motion and a hearing was held on April 23, 2007. Counsel testified that at the time the hearing was held he had not reviewed all discovery. He testified that at the hearing, he offered a contrary statement to the

Court from the co-defendant stating that the Applicant did not commit the crime. He testified he argued the State had to specifically identify which items needed testing for unknown substances and why the item was probative. Counsel also testified he argued the co-defendant's statement was not sufficient to establish probable cause and the testing of the unknown sample from the car did not prove anything and only showed the Applicant had access to his father's car. Counsel testified he did not know at the Schmerber hearing that some of the samples were contaminated and could not have presented an argument to the Court during the hearing about the contamination for purposes of showing the State's probable cause.

Counsel testified he had not spoken to any witnesses before the hearing or investigated the co-defendant's credibility before the Schmerber hearing. He testified that in hindsight investigating the co-defendant's credibility may have helped because he later learned he had substantial mental health issues. Counsel testified at trial he was able to argue to the jury the co-defendant was coerced by the police into testifying against the Applicant at trial.

#7  
PMB  
Counsel testified he later received an amended SLED report that was prepared prior to the Schmerber hearing, but was not given to him until after. Counsel testified that after the contamination was discovered there was a problem with the fingernail scrapings tested by SLED. Counsel testified he made multiple attempts to keep the contaminated DNA evidence from being presented to the jury. Counsel testified when he became aware of the contamination and amended DNA report he was given funds to hire a DNA expert who testified at trial about the contamination issue.

Counsel testified that at trial he was able to challenge the co-defendant's competency multiple times. He testified he filed a motion to determine if the co-defendant was competent to testify and a hearing was held. Counsel testified at the hearing the co-defendant was found

competent. Counsel testified further he was able to put before the jury the co-defendant's mental evaluation and question Dr. Smith who completed the evaluation.

Counsel testified had he had more time to prepare for trial he would have been more thorough. Counsel testified further issues with the handwriting and contamination of DNA came up about a month before trial. Counsel testified that at trial, he raised the issue that he was not given the information about the contamination prior to the Schmerber hearing.

Angela McCall-Tanner, Esquire, was also present and testifying. She testified she was the solicitor assigned to prosecute the Applicant's case. She testified the basis of the State's case against the Applicant was mostly circumstantial evidence, the co-defendant's statement, and a DNA match. Counsel testified she received multiple Brady/Rule 5 requests from trial counsel which were very thorough and specific. Counsel testified she provided trial counsel with statements, reports, photos, videos, DNA reports, the blood drawn form, and the Applicant's NCIC report.

#8  
PJB  
Counsel testified she filed a standard Schmerber motion along with a 2 page affidavit from the officer along with the original SLED report. She testified the officer was present at the hearing. She testified the officer's affidavit discussed how the Applicant was caught, the Applicant's vehicle being parked next to the victim's vehicle, the victim's testimony, where the Applicant's wallet and BB gun were found, the Applicant being soaking wet at the time of arrest, and a store video showing the Applicant purchasing pantyhose. Counsel testified Judge King did not make a finding of probable cause solely based on the co-defendant's statement and the co-defendant's credibility was never discussed during the Schmerber hearing.

Counsel testified she learned by phone of the contamination by SLED in October 2008. She testified that at the time there was no procedure in place at SLED on how to notify parties

when there is lab contamination. She testified the same day or day after she was informed of the contamination by SLED, she sent a letter to the Applicant and the co-defendant's attorney about the contamination and called the attorneys. Counsel testified she was not aware of the contamination before the Schmerber hearing which was held in April 2007. She testified she received an updated report that was issued by SLED in July 2008.

### **Ineffective Assistance of Counsel**

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

For the 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, 117-118, 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).

This Court finds credible the testimony of both trial counsel and the solicitor. This Court finds that counsel met with the Applicant numerous times prior to trial and fully investigated the Applicant's case. This Court finds that counsel filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the received discovery with the Applicant. This Court finds that

counsel discussed with the Applicant the elements of the charges against him and what the State was required to prove. This Court finds that counsel discussed the Applicant's version of the facts and possible defenses with the Applicant.

***Failure to properly challenge the issue of probable cause at the Schmerber hearing***

This Court finds the Applicant failed to carry his burden of proving counsel failed to properly challenge the issue of probable cause at the April 23, 2007 Schmerber hearing. To determine whether probable cause exists to permit the acquisition of evidence by bodily intrusion the following elements must be shown: (1) probable cause to believe the suspect had committed the crime, (2) a clear indication that relevant material evidence will be found, and (3) the method used to secure the evidence is safe and reliable. State v. Sanders, 388 S.C. 292, 696 S.E.2d 592 (2009).

This Court finds trial counsel adequately challenged the State's probable cause at the Schmerber hearing. The record reflects counsel made several arguments to the Court during the hearing to challenge the State's evidence of probable cause. First, counsel argued that at least one item the State wanted to test- the Ford Tempo, had already been related to the Applicant. (Schmerber 4). Second, counsel argued several of the items had unknown samples and the State had not shown which items they needed to compare the Applicant's DNA against. Lastly, counsel argued against the comparison of the Applicant's sample with that of a cigarette butt containing an unknown male sample because there was no information about the cigarette butt in any of the discovery or police reports. (Schmerber 5-6).

This Court finds counsel did not need to present evidence of the Applicant's co-defendant- Lorenzo Hicks' mental health history to adequately challenge the credibility of Hicks's statement to police implicating the Applicant which was considered by the Court during

the Schmerber hearing. When the Court indicated Hicks' statement helped establish probable cause, trial counsel tried to refute Hicks' testimony by presenting a statement signed by Hicks recanting his prior statement implicating the Applicant. (Schmerber 9-10).

This Court also finds counsel was adequately prepared for the hearing and had a sufficient understanding of the facts of the case to challenge the State's probable cause. The record reflects counsel stated during the hearing that in preparation he had spoken with the detective in the evidence room. (Schmerber 7).

This Court finds further the Applicant has failed to carry his burden of proving that prejudice resulted from counsel's alleged failure to properly challenge the issue of probable cause. This Court concludes there was sufficient evidence presented by the State to establish probable cause aside from the testimony of the Applicant's co-defendant. The "Affidavit" submitted by the State in support of the Schmerber Motion (Applicant's Exhibit 5) indicates the Court was apprised of all the facts of the case including how both Howard and Hicks were developed as suspects after a car chase and a foot chase. The record indicates the Court considered more than Hicks's statement to support a finding of probable cause. The Court stated "[i]t seems to me the State has identified three specific areas that do seem relevant to me and give them need to know what the defendant's DNA is in this case. It further appears that from the statement made by the defendant, there is probable cause to believe the defendant could be involved in this crime." (Schmerber 10-11). This Court finds it is unlikely that further evidence submitted by counsel about the co-defendant's mental health would have resulted in a different outcome at the Schmerber hearing. For these reasons, this Court finds this allegation is without merit and the Applicant failed to carry his burden of proving counsel provided ineffective assistance.

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P-2B

*Failure to raise and preserve the issue of suppressing DNA evidence after it was revealed that the DNA samples were contaminated*

This Court finds the Applicant has failed to carry his burden of proving counsel failed to raise and preserve the issue of suppressing DNA evidence after it was revealed that the SLED DNA lab had contaminated samples related to the case. This Court finds counsel sufficiently challenged the admissibility of the DNA evidence at every opportunity given. The record reflects counsel made the following motions to prevent the DNA evidence from being admitted at trial: (1) motion to exclude unreliable DNA evidence which was denied after an in-camera hearing in which counsel was allowed to present the testimony of the defense DNA expert (T. 68), (2) motion to have the case dismissed for destruction of exculpatory evidence made after counsel became aware that a napkin used during testing and contaminated samples had been destroyed (T. 247), (3) motion to exclude any information about the DNA that was linked to a blood standard from the Applicant since State based probable cause at the Schmerber hearing on contaminated DNA (T. 793), and a (4) motion to exclude the DNA evidence because the State failed to disclose the info it had at the time about contamination (T. 800).

#12  
PAB This Court also finds that while counsel was not able to get the DNA evidence suppressed after numerous attempts, he was able to call into question the DNA testing results because of the lab contamination. Counsel was able to cross-examine the State's DNA expert about the contamination and present the testimony of a DNA expert for the defense. The record also reflects the issue was properly preserved (T. 741) and addressed on appeal. For these reasons, this Court finds this allegation is without merit and the Applicant failed to carry his burden of proving counsel's provided ineffective assistance of counsel.

***Failure to argue and obtain a ruling on the admissibility of Defendant's prior record for the purposes of impeachment.***

This Court finds the Applicant has failed to carry his burden of proving counsel should have argued and obtained a ruling on the admissibility of the Defendant's prior record for purposes of impeachment. This Court finds counsel adequately investigated and reviewed the Applicant's prior convictions prior to trial. Counsel provided credible testimony that he reviewed the prior record, received an LWOP notice from the State, and felt the prior record would be admissible to impeach the Applicant. This Court finds the Applicant has presented no evidence to show the Applicant's prior convictions would have been excluded from use for impeachment purposes had counsel obtained a ruling from the Court on the matter. This Court also finds the Applicant was not prejudiced by counsel's failure to obtain a ruling on the admissibility of his prior convictions because the Applicant was advised of his right to testify by the Court and chose not to take the stand. The Applicant presented no evidence that obtaining such a ruling would have caused him to exercise his right to testify. This Court finds this allegation is without merit and the Applicant has failed to carry his burden of proving counsel was ineffective.

#13  
AMB

***Failure by counsel to properly raise, renew, and preserve the issue of the conflict of interest between himself and Defendant with regard to the issue of compensation from SCCID***

This Court finds the Applicant has failed to carry his burden of proving counsel's inability to obtain full payment for his representation prior to trial affected his ability to effectively represent the Applicant. This Court also finds this issue was properly preserved and litigated in the appellate court post-trial.

This Court also finds the Applicant has failed to carry his burden of proving counsel's inability to obtain full payment affected the outcome of his trial. Even if a defendant shows the performance of counsel were unreasonable, the defendant must show that they actually had an

adverse effect on the defense. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067 (1984). It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Id. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. Id.

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PMB  
This Court finds counsel's behavior while trying to obtain payment for his representation of the Applicant in no way affected the outcome of the Applicant's trial. This Court finds the Applicant has failed to present any evidence that counsel's behavior affected the jury verdict or the Court's ruling on issues argued at trial. All discussions with the Court with regard to obtaining payment for representation or experts took place outside of the presence of the jury. The record also reflects the trial court was more than patient with the counsel when he raised issues with regard to his compensation. Counsel's inability to obtain payment for his extensive representation of the Applicant prior to trial in no way resulted in ineffective assistance of counsel. Counsel's effective representation of the Applicant at trial is further reflected by counsel's testimony that he spent 291.7 hours working on the Applicant's case. This Court finds this allegation is without merit and the Applicant has failed to prove counsel was ineffective.

***Failure to investigate and interview potential exculpatory witnesses***

This Court finds the Applicant has failed to carry his burden of proving counsel failed to investigate and interview potential exculpatory witnesses. Without a doubt, “[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.” Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (citing Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986)). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

#15  
PMB

The Applicant alleges counsel should have investigated and interviewed several inmates who had written letters to counsel about the co-defendant recanting his story in which he implicated the Applicant. This Court finds counsel conducted an adequate investigation of these witnesses. Counsel gave credible testimony that he had copies of letters written from several inmates indicating the co-defendant had changed his statement and he attempted to track down at least one of the inmates through his attorney. This Court finds the Applicant has failed to present any evidence of what further investigation of these potential witnesses would have uncovered or that further investigation would have led to a different result. This Court declines to speculate on what the incarcerated witnesses’ testimony would have been since the Applicant failed to produce their testimony or otherwise offer the testimony in accordance with the rules of evidence. This Court finds this allegation is without merit and the Applicant has failed to carry his burden of proving counsel was ineffective.

***Failure to properly investigate co-defendant Lorenzo Hicks’s prior mental health history***

This Court finds trial counsel adequately investigated and challenged the prior mental health history of the Applicant’s co-defendant Lorenzo Hicks. Counsel made several motions

during trial to preclude Hicks from testifying because of his mental health history. Counsel made a motion to exclude the testimony of Lorenzo Hicks on the basis that the Applicant and Hicks at one point were both represented by attorney Gene Hood. (T. 121). Counsel made a motion for a hearing to determine if Hicks was competent to testify during which counsel elicited testimony from Dr. Smith who administered the evaluation of Hicks. Counsel made a motion for funds for an expert to assist with Hicks's competency issues. Counsel requested a continuance to hire a psychiatric expert (T. 640). Lastly, counsel made a motion to strike testimony of Hicks because Hicks was incompetent (T. 1055).

This Court finds even though Hicks was found competent to testify, trial counsel successfully elicited testimony about Hicks's mental health history to challenge the credibility of his statement implicating the Applicant. During trial, the Court granted counsel leeway to cross-examine the applicant about his mental health issues and hallucinations. Counsel was able to inquire about whether Hicks was taken to jail or the mental hospital by police after being accused of a theft. (T. 500). Counsel was also able to elicit testimony from Hicks that he was schizophrenic, saw unicorns, flashes of color, demons, and heard voices. This Court finds trial counsel investigated Hicks's mental health history. This Court also finds the Applicant has failed to show what would have been uncovered had counsel investigated the matter further. This Court finds this allegation is without merit and the Applicant failed to carry his burden of proving trial counsel was ineffective.

Accordingly, this Court finds the Applicant 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 their representation of the Applicant.

#16  
PWS

*Applicant was not prejudiced by any failures of his counsel*

The Court finds that, even if Applicant's counsel was ineffective, the Applicant has failed to prove the second prong of the Strickland test- that trial counsel's failures would not have changed the outcome of the trial. See Cherry v. State, 300 S.C. at 17-18, S.E.2d at 625. The State presented several witnesses and evidentiary exhibits that would have led to a conviction even without the evidence that the Applicant has challenged though post conviction relief.

The State was able to account for the Applicant's actions in the moments preceding the attack on the Davidsons (T. 601), for the events that transpired during the attack (T.311-384, 568), for the capture of the Applicant after fleeing from law enforcement (T. 416-435), and for numerous pieces of evidence tying the Applicant to these crimes (T. 559, 693, 704-709).

#17 The State produced evidence of the Applicant and his co-defendant purchasing the stockings that they would later use as masks when attacking the Davidsons. An employee from the Food Lion on Lady's Island, where the purchase took place, identified both a video of the defendants as well as an electronic sales record of the stockings being purchased (T. 601). In the parking lot where the Davidsons were attacked, the State also found the Applicant's vehicle with the seats prone, which concealed the Applicant's presence in the car (T. 423).

The Davidsons' narrative about the attack further corroborates the State's evidence. The Davidsons described the Applicant's vehicle from which they were ambushed (T. 310). The Davidsons stated that they were made to drive through an ATM to withdraw cash, which is confirmed by video footage from the Bank that services the ATM (T. 568). The Davidsons testified that they were eventually made to drive out to the Beaufort High School football stadium; this is where Mrs. Davidson was able to identify her assailants' clothing and masks (T. 383). Outside the football stadium, police first encountered two black males matching the

description of the Applicant and his co-defendant after the attack (T. 288). Law enforcement officers testified that they gave chase to these suspects, who were using the Davidsons' vehicle to flee (T. 289). Officers giving chase testified that these suspects temporarily evaded police by hiding in nearby woods (T. 292). Being isolated on Lady Island, these men would have faced the choice of either crossing water or utilizing a bridge back to the mainland (T. 428, 571). As such, officers stated that they alerted personnel at nearby bridges to watch for two men attempting to leave Lady's Island (T. 423). A state-employed bridge operator testified that he observed two black males attempting to cross the Woods Bridge leaving Lady Island (T. 417). Simultaneously, law enforcement was searching the island for signs of the Davidsons' assailants (T. 689). While no one was found hiding on the island, members of law enforcement testified that they did find the Applicant's shirt, wallet, social security card, and photo identification (T. 693, 707). They further testified that the discarded clothing was wet, indicating that the Applicant and his co-defendant had attempted to swim away from the island prior to walking over the Woods Bridge (T. 429).

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Members of law enforcement testified that they came upon the Applicant and his co-defendant after they had crossed the bridge (T. 428, 433-436). Officers were alerted to the Applicant's presence by the bridge personnel, but Officer O'Neill and Chief Clancy of the Beaufort Police Department, who were investigating the area where the Davidsons had been originally attacked, also observed the Applicant and his co-defendant on foot (T. 424, 435). The officers apprehending the Applicant testified that he was shirtless and that the remainder of his clothing was wet, sandy, and smelled of the river (T. 436, 557); he was arrested while attempting to hide on a hotel balcony (T. 559). The applicant's co-defendant was found with Mrs. Davidson's driver's license, Mr. Davidson's watch, and the Davidsons' hotel room key (T. 452).

The applicant has argued that the Davidsons have mistaken his identity for that of his co-defendant. The Davidsons stated that one of their assailants had a knife while the other carried a pistol (T. 311). While the Davidsons did not differentiate significantly between their assailants' appearances – both were black males with dark clothing – Mrs. Davidson testified that the man with the gun was the one giving orders, controlling the carjacking, and initiating sexual acts with her (T. 376, 381-383). The State has contended that the Applicant was the attacker in possession of the gun. The Applicant's co-defendant was found carrying a knife (T. 452). A BB pistol was found near the Applicant's clothing and identification underneath the bridge (T. 707). This allows for the reasonable inference from the evidence that the Applicant was the "gun guy" described by the Davidsons (T. 311).

The State also presented DNA evidence that implicated the Applicant's involvement with these crimes, and the Applicant's co-defendant confessed and testified against him. The Applicant has claimed that these two pieces of evidence are flawed and would not have been admitted had he had the effective assistance of counsel. Even if that claim had merit, a reasonable jury could still have convicted the Applicant based on the totality of the other evidence and testimony. There are two video recordings – one showing the Applicant purchasing stockings to use as masks and one corroborating the Davidsons' narrative about being forced to withdraw money from an ATM (T. 568, 606). There is an electronic record of the Applicant and his co-defendant purchasing the stocking masks (T. 606). After Mr. Davidson was able to call for emergency personnel, a subject matching the Applicant's description was seen fleeing the crime scene at the football stadium; this moment was also recorded by a law enforcement car-mounted camera (T. 292). Later, the Applicant was chased and apprehended while attempting to hide on a hotel balcony (T. 435). His clothes were wet and sandy, and several forms of the Applicant's

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identification were found on Lady's Island where law enforcement was searching for the Davidsons' assailants (T. 707). A gun was found near the Applicant's belongings while a knife was found on the person of his co-defendant (T. 452, 709). These pieces of evidence standing alone would have allowed a reasonable jury to find the Applicant guilty.

This Court finds that the Applicant has failed to prove the second prong of the Strickland test. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052. Based on the amount of evidence and testimony indicating the Applicant's guilt, this Court finds that there is not a reasonable probability that but for the Applicant's counsel's errors, if any, the outcome of the trial would have been altered. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### All Other Allegations

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As to any and all allegations that were raised in the application at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore they are hereby denied and dismissed.

**CONCLUSION**

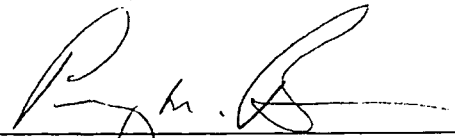
Based on all the forgoing evidence and testimony, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

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

**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 14 day of September, 20 16

  
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Perry M. Buckner  
Presiding Judge  
14th Judicial Circuit

Walterboro, South Carolina.