

# The Law Office of Tristan M. Shaffer

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Litigation • Injury Law • Criminal Defense

November 22, 2016

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

**RECEIVED**

NOV 28 2016

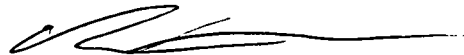
S.C. SUPREME COURT

Re: Timothy Lemacks v. State 2014-CP-15-0163

Dear Mr. Shearouse,

Please find the enclosed Notice of Appeal, Certificate of Service, and Order of Dismissal in the above referenced case.

Sincerely,



Tristan M. Shaffer

CC:  
Ruston Neely  
Colleton County Clerk of Court

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM COLLETON COUNTY  
Court of Common Pleas

Edgar Dickson, Circuit Court Judge

Case No. 2014-CP-15-0163

Timothy Lemacks # 345057,

Petitioner,

v.

The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the Order of the Honorable Edgar Dickson dismissing his post-conviction relief action filed on December 21, 2015. Petitioner received this Order on October 24, 2016.

November 22, 2016



Tristan M. Shaffer (SC Bar 77565)  
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tristan@shafferlawsc.com  
Attorney for Petitioner

Other Counsel of Record:  
Ruston Neely  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, South Carolina 29211  
Attorney for Respondent

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S.C. SUPREME COURT

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APPEAL FROM COLLETON COUNTY  
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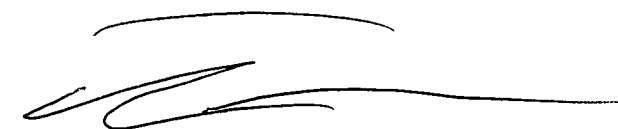
The State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The State of South Carolina by mailing a copy to the Attorney General's Office at P.O. Box 11549, SC 29211 on the date listed below.

November 22, 2016



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Other Counsel of Record:  
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Attorney for Respondent

STATE OF SOUTH CAROLINA )  
 COUNTY OF COLLETON )  
 )  
 )  
 Timothy A. Lemacks, #345057, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

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IN THE COURT OF COMMON PLEAS  
 FOURTEENTH JUDICIAL CIRCUIT

2014-CP-15-0163

**ORDER OF DISMISSAL**

PATRICIA C. GRANT  
 COLLETON COUNTY  
 COMMON PLEAS  
 2015 DEC 21 AM 9:48

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 25, 2014. Respondent made its Return on August 20, 2014. An evidentiary hearing into the matter was convened on October 27, 2014, at the Beaufort County Courthouse. Tristan M. Shaffer, Esquire represented the Applicant. Ashleigh Wilson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, Applicant testified on his own behalf. David Matthews, Esquire also testified. This Court had before it a copy of the records of the Colleton County Clerk of Court, records from the South Carolina Department of Corrections, and the trial transcript.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Colleton County Clerk of Court. The Applicant was indicted at the January 2011 term of the Colleton County Grand Jury for criminal sexual conduct with a minor- first degree. The Applicant was represented by David Matthews, Esquire.

The Applicant proceeded to trial and was convicted. On March 2, 2011, the Applicant was sentenced by the Honorable D. Craig Brown to confinement for a period of twenty-five (25) years.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Lanelle Durant, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Lemacks, No. 2013-UP-363 (S.C. Ct. App. October 2, 2013). The Remittitur was issued on October 18, 2013.

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

1. Police never tested me for DNA.
2. No DNA or visual evidence present during the use of rape kit.
3. Rushed to trial, David Mathews put in for a speedy trial without my knowledge.

At the PCR hearing, Applicant, through counsel, verbally amended his application to include claims of ineffective assistance of counsel.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

**Ineffective Assistance of Counsel**

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP).

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court had a copy of the Clerk's records and has read the trial transcript, all of which assists the Court in judging the witnesses' credibility.

The Court finds that Applicant was not deprived of effective assistance of counsel. Overall, defense counsel's decisions and conduct were appropriate under the circumstances and did not fall below professional norms of reasonableness. Although there was some testimony during the trial that

defense counsel should have objected to for hearsay, the Court finds that the evidence against Applicant was overwhelming and the lack of proper objections would not have changed the outcome of the trial. Therefore, this application for post-conviction relief is denied.

#### CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

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

**AND IT IS SO ORDERED!**



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Edgar W. Dickson  
Presiding Circuit Court Judge  
Fourteenth Judicial Circuit

December 15, 2015

Orangeburg, South Carolina

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

\_\_\_\_\_  
TIMOTHY ALLEN LEMACKS, #345057,

Applicant,

v.

STATE OF SOUTH CAROLINA,


Respondent.

\_\_\_\_\_  
**CERTIFICATE OF SERVICE**  
\_\_\_\_\_

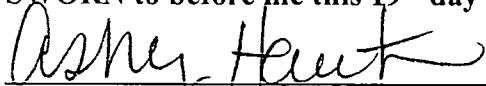
The undersigned hereby certifies that a true copy of the **Order of Dismissal** (2014-CP-15-0163) has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Mr. Tristan Michael Shaffer  
Shaffer Law Firm  
225 Columbia Ave.  
Chapin, SC 29026**

This 19<sup>th</sup> day of October, 2016.

  
\_\_\_\_\_  
Ruston W. Neely  
Attorney for Respondent

SWORN to before me this 19<sup>th</sup> day of October, 2016.

  
\_\_\_\_\_  
Notary Public for South Carolina.  
My Commission Expires: 3-18-2023

Law Office of Tristan M. Shaffer  
225 Columbia Ave.  
Chapin, SC 29036

The Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

