

**THE BOOZER LAW FIRM, LLC**

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MAR -6 2017

S.C. SUPREME COURT

**Lance S. Boozer, Esq.\***  
\*Also admitted in Florida

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March 2, 2017

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

The Honorable Mary Brown  
Clerk, Berkeley County  
300 California Dr.  
Moncks Corner, SC 29461

**RE: Douglas Thompson, #348634, v. State of South Carolina**  
**2014-CP-08-1602**

Dear Mr. Shearouse and Ms. Brown:

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

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

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

Yours very truly,



Lance S. Boozer

cc: Ruston W. Neely, AAG  
Office of Appellate Defense  
Douglas Thompson, #348634

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MAR -6 2017

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

The Honorable G. Thomas Cooper, Circuit Court Judge

Case No. 2014-CP-08-1602

Douglas Thompson, #348634, .....Petitioner,

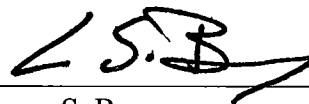
v.

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

**NOTICE OF APPEAL**

The Petitioner appeals the Honorable G. Thomas Cooper's Order dated February 17, 2017, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on March 2, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



Lance S. Boozer  
The Boozer Law Firm, LLC  
1400 Laurel Street, Suite 4A  
Columbia, SC 29201  
Tele: 803-608-5543

March 2, 2017

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

MAR -6 2017

S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

The Honorable G. Thomas Cooper, Circuit Court Judge

Case No. 2014-CP-08-1602

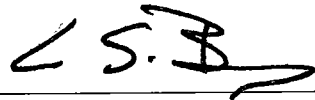
Douglas Thompson, #348634, .....Petitioner,

v.

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

**PROOF OF SERVICE**

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Ruston W. Neely, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 2nd day of March, 2017.



Lance S. Boozer  
The Boozer Law Firm, LLC  
1400 Laurel Street, Suite 4A  
Columbia, SC 29201  
Tele: 803-608-5543

STATE OF SOUTH CAROLINA )  
COUNTY OF BERKELEY )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Douglas Thompson, #348634 )

Case No. 2014-CP-08-1602

v. )

**ORDER OF DISMISSAL**

State of South Carolina, )

Respondent. )  
\_\_\_\_\_ )

CLERK OF COURT  
BERKELEY COUNTY, S.C.

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This Court convened an evidentiary hearing into the matter on December 9, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Lance Boozer, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, David Aylor, Esquire (hereinafter "trial counsel") was present and testified. This Court had the opportunity to listen to the testimony of Applicant and trial counsel. This Court had before it a copy of the trial transcript, the records of the Berkeley County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the appellate records, and the pleadings in this matter. This Court finds as follows:

**I. PROCEDURAL HISTORY**

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Berkeley County Clerk of Court's orders of commitment. The Applicant was indicted by the November 2011 term of the Berkeley County Grand Jury for kidnapping (2011-GS-08-1659), armed robbery (2011-GS-08-1570), and first degree burglary (2011-GS-08-1573). David Aylor, Esquire, represented him. On November 7-11, 2011, the Applicant proceeded to a trial before the Honorable Kristi L. Harrison and a jury. The Applicant was found guilty as indicted. Judge

Harrison sentenced the Applicant to confinement for fifteen (15) years for each charge. These were to be served concurrently.

A notice of appeal was filed and an appeal perfected on the Applicant's behalf. Lanelle Durant, Esquire (hereinafter "appellate counsel"), represented the Applicant on appeal. The Applicant then made a Motion to Relieve Counsel and Proceed Pro Se. The Applicant also filed a Writ of Mandamus regarding the same matter. These were both dismissed with prejudice. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Thompson, Op. No. 2014-UP-136 (S.C. Ct. App. filed April 2, 2014). The Remittitur was issued on April 18, 2014.

## **II. ALLEGATIONS**

Applicant alleged the following grounds in his original application:

1. "Ineffective Counsel"
2. "Prosecute Misconduct"
3. "Violation of 14<sup>th</sup> Amendment"

PCR counsel amended the application to include the following grounds:

1. Counsel failed to file or request a Motion for Severance from co-defendant.
2. Counsel failed to object to indictment and indictment process.
3. Applicant denied his right to self-representation on appeal.
4. Counsel failed to object to witness testimony.
5. Counsel failed to object to amendment of indictments.
6. Ineffective assistance of appellate counsel for failing to brief whether the trial court erred in its ruling admitting cell phones and laptop into evidence at trial.
7. Ineffective assistance of trial counsel for failing to challenge chain of custody of a laptop and cell phones that were admitted into evidence.
8. Counsel failed to introduce bank statements at trial explaining Applicant's possession of money at the time of the alleged crime.
9. Ineffective assistance of appellate counsel for failing to raise the issue that trial court erred in denying Applicant's Motion for Directed Verdict.

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### **III. SUMMARY OF FACTS**

Applicant was convicted for his actions in the armed robbery and burglary of a hispanic household. Multiple victims were held in the house and robbed of money, cell phones, and a laptop at gunpoint by three individuals. Law enforcement was contacted. As a law enforcement officer responded to the scene he drove by three males, one of whom was holding a laptop, less than a quarter of a mile from the incident location. The officer stopped to question the suspects. One suspect ran and was never found. Applicant was the individual holding the laptop, which was later determined to belong to the victims of the burglary. The victims' cell phones were also found on Applicant and his codefendant. One of the defendant's cell phones was left at the scene of the burglary and was given to law enforcement upon arrival at the scene. Law enforcement performed a show-up lineup of the suspects with the victims, who positively identified the suspects as the burglars.

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

This Court reviewed the record in its entirety, listened to the testimony given, and heard the arguments presented at the evidentiary 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 fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

In this post-conviction relief action, Applicant bears the burden to prove the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove counsel's "conduct so undermined the proper functioning of the adversarial process" that the proceedings "cannot be



relied upon as having produced a just result.” Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel’s performance was deficient. Id. Under this first prong, the proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Second, any deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 688.

This Court finds trial counsel properly prepared for and represented Applicant in his trial. He interviewed multiple witnesses. Trial counsel elucidated valid trial strategies and the reasoning behind his decisions. “A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn’t to have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record.” Wood v. Allen, 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Strickland itself recites that there are countless ways to provide effective assistance and even the best lawyers would not defend a particular client in the same way. 466 U.S. at 689.



Applicant's assertions that appellate counsel failed to brief the issues he wanted briefed is without merit. Appellate counsel's decision to focus on some issues to the exclusion of others is presumed to be tactical and Applicant has failed to show that appellate counsel was deficient for doing so. "When counsel focuses on some issues to the exclusion of others, there is a strong presumption of doing so for tactical reasons rather than sheer neglect, Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1,5, 157 L.Ed.2d 1 (2003)."

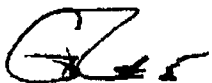
After a thorough review of the record, this Court finds Applicant was adequately and professionally represented by both trial and appellate counsel. This Court finds trial counsel rendered adequate assistance and exercised professional judgment in all his decisions at trial. This Court finds appellate counsel rendered adequate assistance and exercised professional judgment in the decisions on which issues to brief for appeal. This Court dismisses Applicant's application for the reasons set out below:

**A. Ineffective Assistance of Counsel**

This Court finds trial counsel's testimony credible and persuasive. This Court finds Applicant's testimony lacks credibility. This Court finds Applicant has failed to satisfy his burden to prove the alleged deficiencies. This Court also finds that Applicant has failed to prove he was prejudiced by trial or appellate counsel's actions.

1. Counsel failed to file or request a Motion for Severance from co-defendant

Applicant claimed trial counsel should have made a motion to sever the trial between himself and his codefendant. Trial counsel testified there were no grounds on which to base a motion to sever and Applicant never requested he make the motion. Neither Applicant nor his codefendant testified. At the evidentiary hearing, Applicant was unable to name a specific trial right that was compromised by his joint trial or how a joint trial would prevent the jury from



making a reliable judgment. "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." Hughes v. State, 46 S.C. 554, 558-59, 552 S.E.2d 315, 317 (2001) Applicant's only assertion was the jury was biased by his codefendant's record, which implicated his own guilt. His codefendant's record was not introduced at trial and, therefore, did not bias the jury against Applicant.

This Court finds that Applicant has failed to satisfy his burden to prove that trial counsel's failure to make a motion to sever was deficient. Applicant also failed to prove the alleged deficiency of trial counsel compromised a specific trial right or biased the jury. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

2. Counsel failed to object to indictment and indictment process.

Applicant claimed he was direct indicted three days before trial and the indictment wording was changed to allege he committed the act in concert with someone else. "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. State v. Fletcher, 322 S.C. 256, 262, 471 S.E.2d 702, 705 (Ct. App. 1996). Applicant was unable to offer an explanation of how his defense would have changed or how he was prejudiced by the timing of the indictment. Trial counsel testified he didn't remember being surprised by the indictments.

This Court finds that Applicant has failed to satisfy his burden to prove that trial counsel's failure to challenge the indictments was deficient. Applicant also failed to prove the alleged deficiency of trial counsel was prejudicial. Accordingly, Applicant has failed to satisfy

his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

3. Applicant denied his right to self-representation on appeal.

“Appellant clearly does not have a federal constitutional right to proceed *pro se* in this appeal from his criminal conviction. We also find there is no state constitutional provision which confers such a right.” State v. Roberts, 364 S.C. 583, 588, 614 S.E.2d 626, 629 (2005). There is no such right under the Federal or South Carolina constitutions. Therefore, Applicant was not denied any right, as it does not exist. This Court finds this allegation must be dismissed.

4. Counsel failed to object to witness testimony.

Applicant claimed he did not know the female witnesses were going to testify and if he had known he would have plead guilty. Trial counsel testified this was not true and he and Applicant knew of all potential witnesses prior to trial. Trial counsel did make a motion for a Biggers hearing as to the validity of the show-up lineup. The trial judge ruled against Applicant at the Biggers hearing and let the show-up identification into evidence.

This Court finds that Applicant has failed to satisfy his burden to prove that trial counsel was deficient in his questioning or knowledge of potential witnesses. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

5. Counsel failed to object to amendment of indictments.

This Court finds that Applicant has failed to satisfy his burden to prove that trial counsel's choosing not to challenge the indictments was deficient. Applicant also failed to prove the alleged deficiency of trial counsel was prejudicial. Accordingly, Applicant has failed to

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satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

6. Ineffective assistance of appellate counsel for failing to brief whether the trial court erred in its ruling admitting cell phones and laptop into evidence at trial.

“When counsel focuses on some issues to the exclusion of others, there is a strong presumption of doing so for tactical reasons rather than sheer neglect.” Yarborough v. Gentry. Appellate counsel’s choice to focus on issues counsel believed had the best possibility of granting Applicant relief is not deficient. This Court finds that Applicant has failed to satisfy his burden to prove that appellate counsel was deficient. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

7. Ineffective assistance of trial counsel for failing to challenge chain of custody of a laptop and cell phones that were admitted into evidence.

Applicant claims trial counsel should have challenged the chain of custody of the laptop and cell phones at trial.

While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable—the establishment of a strict chain of custody is not required: If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741–42 (2005)

The items in question were non-fungible items with identifiable serial numbers. A strict chain of custody was not required and was properly established by testimony from law enforcement and the owners of the items.

This Court finds that Applicant has failed to satisfy his burden to prove that trial counsel was deficient in failing to challenge the chain of custody of the laptop and cell phones of the victims. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

8. Counsel failed to introduce bank statements at trial explaining Applicant's possession of money at the time of the alleged crime.

Applicant claimed he withdrew the money that was found by law enforcement in his pocket from the bank. Applicant wanted to introduce the bank statement to show that the money in his pocket was not taken in the burglary. Trial counsel testified he did not believe the bank statement was of much evidentiary value. Trial counsel testified that his cross-examination of the victims led to the discovery that the denomination and amount of money the victims' claimed was taken in the burglary was not the same as the amount and denominations found on Applicant. Applicant and his codefendant were found with the victim's laptop and cell phones, which further lessened the value of the bank statement. Trial counsel decided not to introduce the bank statement because he believed the value of last argument was greater than evidence which was redundant. "A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't to have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record." Wood v. Allen, 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Strickland itself recites that there are countless ways to provide effective assistance and even the best lawyers would not defend a particular client in the same way. 466 U.S. at 689.

This Court finds that Applicant has failed to satisfy his burden to that trial counsel was deficient in not introducing the bank statement. This Court finds trial counsel made a reasonable

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strategic decision. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

9. Ineffective assistance of appellate counsel for failing to raise the issue that trial court erred in denying Applicant's Motion for Directed Verdict.

Appellate counsel's choice to focus on issues counsel believed had the best possibility of granting Applicant relief is not deficient. This Court finds that Applicant has failed to satisfy his burden to prove that appellate counsel was deficient. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

#### **B. All Other Allegations**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

#### **V. CONCLUSION**

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

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-




conviction relief. Rule 71.1(g), SCRCF, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 17 day of February, 2017.

  
G. THOMAS COOPER  
Presiding Judge  
9<sup>th</sup> Judicial Circuit

Charleston, South Carolina

STATE OF SOUTH CAROLINA )  
 COUNTY OF BERKELEY )  
 Douglas M. Thompson, )  
 Plaintiff(s), )  
 -vs- )  
 State of South Carolina, )  
 Defendant(s). )

IN THE COURT OF COMMON PLEAS  
 JUDICIAL CIRCUIT  
 CASE NO.: 2014CP0801602  
 APPOINTMENT OF COUNSEL OR GAL  
 (Select one.)

ORDER  
 AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

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

It appears Douglas M. Thompson, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.  
 counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:  
 counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.  
 court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.  
 Other: .

MAILED  
 OCT - 1 AM 10:35  
 CLERK OF COURT  
 BERKELEY COUNTY

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

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

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

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

IT IS SO ORDERED  
 October 1, 2014

Mary P Brown  
 Circuit Judge     Clerk of Court

Plaintiff Attorney:

Lance Boozer	
Attorney At Law	
1331 Park Street	
Columbia, SC 29201	

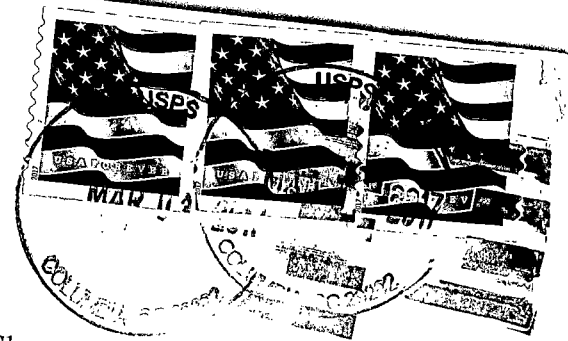
Defendant Attorney:

Ashleigh Rayanna Wilson	
PO Box 11549	
Columbia, SC 29211	

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

**THE BOOZER LAW FIRM, LLC**

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Columbia, SC 29201



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