VOLUME THREE OF THREE

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Honorable Deadra Jefferson, Circuit Court Judge

ANTHONY DOMINIQUE WILDER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001697

APPENDIX

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

INDEX

Green also said she made a mistake when she told the police that the "other four guys" all wore "black pants." R. 68, ll. 2-10. In addition, Green said the mask did not cover appellant's whole face, and that was how she identify him. She maintained "You can see the mask doesn't cover the whole entire eyes. It's not beady-eye mask holes. If they're big holes you can see the eyes, the color of their skin through the eyes and around the mouth." When questioned about how she could identify appellant from across the street through a mask, Green responded: "When he was across the street when I looked out of my window, he didn't have the mask hooked on. The hat was rolled up like a Marvin Gay." R. 71, l. 6 – 77, l. 25. Green testified after she was beaten, a man about 6'4 and skinny tied her up with duct tape. R. 78, l. 8 – 80, l. 19.

Jamie Williams was helping his friend, decedent Sterling Spann, who was a "rapper," and Williams remembered the two men were trying to raise money "to get a new keyboard." R. 87, l. 8 – 88, l. 19 Williams also recalled that Green telephoned him that afternoon and told him to come over and get the ten dollars that Green owed him for the crack cocaine. R. 89, l. 16 – 90, l. 20.

Sterling Spann then drove appellant over to Green's house. Williams saw that Green's front door was "cracked," which was unusual. However before Williams could get to the door Williams claimed someone opened it quickly and "put a gun in my face." R. 90, ll. 2 – 9. Williams saw another man behind the man who put a gun in his face. Williams identified co-defendant Gadsden as the man who pointed the gun in his face. R. 93, l. 17 – 95, l. 7.

Williams said he could not identify the man behind Gadsden. Williams also remembered that Gadsden hit him in the head with the gun and shot him four times.

Williams said Gadsden told a "taller man" to chase after him as Williams tried to escape. R. 103 , l. 11 – 106, l. 19. However, Williams was able to run down the street to the nearby fire station for safety despite having been shot by Gadsden. R. 96, l. 7 – 106, l. 7.

Green's neighbor Leroy Daniel testified he heard the shots fired that afternoon. Daniel said he saw two men pulling another man [Spann] out of the car. Spann was shot and killed on the spot. Daniel said he saw the men jump into a Jeep and drive away. R. 137, ll. 2 – 25.

Charleston Police Officer Scott Jackson said he quickly informed dispatch of the nature of the suspect vehicle -- a white Jeep. R. 196, l. 1 – 200 l. 24. Charleston Police Officer Elijah Simpson testified he also immediately spotted the Jeep while he was on patrol following the BOLO. Simpson confirmed that this was the suspect vehicle and he pulled in behind it. Simpson turned on his blue light and siren. R. 206, l. 13 - 207. 25.

Simpson said he chased the Jeep for about three or four minutes down on I-26 while he observed several objects being thrown out of the window during the high speed chase. The objects included masks and gloves. Simpson said that the driver lost control of the Jeep and that it turned over. R 207. 2 – 219. 3. Appellant and the other two co-defendants were taken out of the Jeep, and arrested.

Since Spann was shot and killed, Williams was shot and lived, and Patricia Ann Green was beaten with a gun and bled, the DNA evidence became important as it pertained to victim's blood getting on the suspects. The judge would at appellant's request, later charge the jury that mere presence at the scene of the crime was insufficient to establish guilt. He also instructed the jury that prior knowledge a crime was going to be committed was insufficient to establish guilt. R. 822, l. 11- 824, l. 5.

Charleston County crime scene investigator Brent Roy testified that he took both appellant's and decedent Spann's clothing from the hospital where they both were taken after the shooting, and after the Jeep turned over. Roy said the "usual approach" was "if an item has blood or it is wet in any way, the item is put into a bag, plastic bag, and sealed, initially placed into a paper bag and then sealed again. . .." R. 325, l. 6 – 326, l. 16.

Defense counsel strongly questioned the manner in which the appellant's and the decedent's clothing was gathered in this case since it raised a great chance the evidence became contaminated.

Detective Heide Drake testified she collected Spann's clothes. Drake admitted she could not remember whether the clothes were in "a container or not" but she maintained while in a "paper bag" that she folded the "bag over," and gave them to Detective Roy. R. 411, l. 14 – 412, l. 13.

To further add to the confusion Detective Donald Stanley, who picked up the ski mask and gloves that were allegedly thrown out of the Jeep window testified that he was not aware of how appellant's or the co-defendant's clothes were collected. Stanley acknowledged on cross-examination that a law enforcement form indicated their clothes were *taken when they were booked into the jail.* R. 506, ll. 8 – 19.

SLED Agent Patty Ruff made cuttings of the clothes for DNA analysis. R. 536, l. 11 – 537, l. 15. When the solicitor went to introduce the blue jeans which were alleged worn by appellant the day of the incident, defense counsel objected and the objection was sustained. The judge then sent the jury to its room. R. 548, ll. 5 – 22.

Defense counsel Lofton then argued that Investigator Roy was directed to go three different hospitals after the shootings. While appellant was at Trident Hospital Drake had

testified the medical staff removed appellant's clothes and put them in a brown bag. They were not sealed. Drake subsequently turned the bag over to investigator Roy. Trident Hospital also had the decedent Spann's clothes. Spann's clothes were also put in a brown bag. Counsel noted that Spann bled profusely and there was a very strong chance the DNA evidence in this case was contaminated because of the way it was handled. R. 549, l. 1 – 559, l. 17. Defense counsel argued the evidence was not sufficiently reliable to be admitted until Rule 702, SCRE. R. 559, l. 3 – 565, l. 4.

Defense counsel continued to argue with the trial court that this evidence was not sufficiently reliable to be admissible. He argued that appellant's own DNA was not even found on pants that allegedly were his own pants. R. 565, ll. 5 – 10.

The judge said he did not see any evidence Spann and appellant's clothes were intermingled and he therefore ruled that the DNA evidence was not contaminated. He overruled counsel's objection and ruled appellant's pants, State's Exhibit 98, would be admitted into evidence. Defense counsel repeated his objection when the evidence was admitted. R. 565, l. 9 – 572, l. 20.

SLED DNA analyst Lily Gallman later admitted that appellant's DNA was not found on his jeans but that co-defendant's Smith's DNA was found on the pants that allegedly were taken from appellant on the night of the shooting. R. 614, l. 8 – 615, l. 3. Gallman said that decedent Spann's DNA was also found on those pants. R. 598, l. 25 – 599, l. 11.

Defense counsel renewed his motion regarding the contamination of the evidence and chain of custody problems at the close of the state's case. Both motions were again denied. R. 714, ll. 5 – 19.

Discussion

In State v. Ramsey, 345 S.C. 607, 615 550 S.E.2d 294, 298 (2001) our Supreme Court held that if evidence was so tainted that it is totally unreliable it should be excluded. The Court in Ramsey also held that pursuant to Rule 702, SCRE that in order for evidence of this type to be admissible, the trial judge must find the scientific evidence will assist the trier of fact, that the expert witness is qualified, and that the underlying science is reliable. The court said where it challenges to the expert testimony being unreliable pursuant to Rule 702, SCRE the appellant court reviews the admission of such testimony under an abuse of discretion standard. Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998).

Here, appellant directly challenged the admissibility of the evidence because the handling of the evidence and the chain of custody made the evidence totally unreliable given the strong likelihood the evidence was contaminated.[1] DNA evidence is so highly prejudicial it almost guarantees a conviction if it is opined to be a "match," and appellant submits that calls upon the court to have a heightened sense that the evidence is reliable.

Further, our Supreme Court has held such sloppy handling of evidence in other lesser contexts requires its exclusion. See State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007) (drug evidence was not admissible given the chain of custody was not complete).

Further in State v. Cribb, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992) the Supreme Court reversed the trial court's admission of blood-alcohol evidence when the identity of the person who drew the blood sample or transported to the hospital laboratory was not clear.

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[1] Appellant was not arguing that properly gathered and analyzed DNA evidence was not reliable given the State v.Council, 335 S.C. 1, 515 S.E.2d 508 (1999) factors. See, State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

Moreover, in Raino v. Goodyear Tire and Rubber Company, 309 S.C. 255, 258, 422 S.E.2d 98, 1000 (1992), the Court affirmed the trial court's suppression of blood alcohol evidence since that was proper where the identity of any party handling the blood was unknown regardless of the fact the analyzing laboratory was in close proximity to the trauma where the sample was drawn.

Here, defense counsel correctly argued the evidence should be excluded under Rule 702, SCRE, because the evidence was not scientifically reliable. He pointed out the strange fact that appellant's DNA was not even found on his own pants but that co-defendant's Smith DNA was found on pants that allegedly belonged to him.

Appellant submits to the extent State v. Ramsey can be read that this a purely "weight" matter, and not an admissibly question under Rule 702, SCRE given the reasoning of Oregon v. Lyons, 124 Or.App. 598, 863 S.E.2d 1302 (1993),[2] that case should be revisited. There is not any rational reason appellant can think of to treat sloppily gathered DNA blood evidence any differently from blood alcohol or drug evidence where the chain cannot be completed or the chance of contamination of that evidence appears substantial. Appellant should be granted a new trial since the decedent's DNA -- a match -- was said to be found on his pants where the evidence showed a very strong chance of contamination and therefore that this critical evidence guaranteeing his conviction was totally unreliable.

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[2] Further, Oregon v. Lyons was an early attack on DNA evidence with the arguments being that it was too complex for the jury, that scientists and laboratories had a vested interest in it being found reliable, and that its probative value was outweighed by its unduly prejudicial effect. This case involves the gathering of appellant's (allegedly) and the decedent's bloody clothing in such manner that it presented an intolerable risk of contamination given the extraordinary power of evidence of a DNA match.

CONCLUSION

By reason foregoing argument, appellant's conviction should be reversed, and his case remanded to the Charleston County Court of General Sessions Court for a new trial.

Respectfully submitted,

Robert M. Dudek
Acting Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of January, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 19, 2010

Robert M. Dudek
Acting Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
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Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY D. WILDER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Anthony Mabry, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 19th day of January, 2009.

Robert M. Dudek
Acting Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of January, 2010.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 1, 2019 .

2011 WL 11735039
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of South Carolina.

The STATE, Respondent,
v.
Anthony D. WILDER, Appellant.

No.
2011
–
UP
–
385

Heard April 6, 2011.

Decided Aug. 9, 2011.

Appeal From Charleston County; J. Derham Cole, Circuit Court Judge.

Attorneys and Law Firms

Chief Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John McIntosh, Assistant Deputy General Attorney Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

Opinion

PER CURIAM.

*1 Anthony D. Wilder was convicted of murder, assault and battery with intent to kill (ABWCK), two counts of kidnapping, and first-degree burglary and sentenced to life imprisonment. Wilder appeals, arguing the trial court erred in allowing the admission of DNA evidence collected from his pants. Specifically, Wilder contends the chain of custody and sloppy handling of his pants created a strong chance the DNA evidence was contaminated, and therefore, totally unreliable. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. As to whether the trial court erred in admitting the DNA evidence developed from Wilder's pants: *State v. Ramsey,* 345 S.C. 607, 615, 550 S.E.2d 294, 298 (2001) (finding conflicting theories of how evidence was collected and the potential for contamination related did not render DNA evidence so tainted it was totally unreliable).

2. Assuming the trial court erred in admitting the DNA evidence developed from Wilder's pants: *State v. Pagan,* 369 S.C. 201, 212–13, 631 S.E.2d 262, 267–68 (2006) (finding error in admitting evidence of defendant's failure to stop for a blue light was harmless because defendant was not prejudiced and other competent evidence established defendant's guilt beyond a reasonable doubt).

AFFIRMED.

WILLIAMS, GEATHERS, and LOCKEMY, JJ., concur.

All Citations

Not Reported in S.E.2d, 2011 WL 11735039

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FORM 5

2013-CP-10-5655

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
County of Charleston)

Anthony D. Wilder #328282)
Full name and prison number (if any) of Applicant)
)
v.)
)
State of South Carolina)
)
)
)

FILED
2013 SEP 25 PM 2:54
JULIE J. ARMSTRONG
CLERK OF COURT
BY

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS – READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional Institution

2. Name and location of Court which imposed sentence General Sessions, Charleston County

3. Name(s) of co-defendant(s) (if any) Leo Gadsden and Keiv Smith

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2008GS1002383 Murder, 2008GS1002384 Kidnapping, 2008GS100-

(b) 2385 Burglary 1st Degree, 2008GS1002386 ARW/K/Assault and Battery

(c) with Intent to Kill, and 2008GS1002390 Kidnapping

5. The date upon which sentence was imposed and the terms of the sentence:

(a) May 9, 2008 Two Life Sentences Consecutive, Thirty years concurrent,

(b) Twenty years Consecutive

(c)

6. Check whether a finding of guilty was made:

(a) after a plea of guilty

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. The South Carolina Court of Appeals

ii. The Supreme Court of South Carolina

iii.

(b) the result in each such Court to which you appealed:

i. South Carolina Court of Appeals, Affirmed Conviction

ii. Supreme Court of South Carolina, writ of certiorari denied

iii.

(c) the date of each such result:

i. Heard April 16, 2011 - Filed August 9, 2011 Court of Appeals

ii. March 20, 2013 Supreme Court

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Unpublished Opinion No. 2011-UP-385

ii. denied writ of certiorari

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) N/A

(c)

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Counsel

(b) Prosecutor Misconduct

(c)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See attached

(b) See attached

(c)

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? Yes

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Direct Appeal

ii. Petition for Rehearing

iii. Writ of Certiorari

iv.

(b) the name and location of the Court in which each was filed:

i. The South Carolina Court of Appeals; Columbia, S.C.

ii. "

iii. The Supreme Court of South Carolina; Columbia, S.C.

iv. _____

(c) the disposition thereof:

i. Direct Appeal, Affirmed Conviction

ii. Petition for Rehearing, Denied

iii. Writ of Certiorari, Denied

iv. _____

(d) the date of each such disposition:

i. Appeal Heard April 6, 2011 - Filed August 9, 2011

ii. Petition for Rehearing denied November 17, 2011

iii. Writ of Certiorari denied March 20, 2013

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. Appeal Unpublished Opinion No. 2011-UP-385

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N

ii. _____

iii. A

(b) the proceedings in which each ground was raised:

i. N

ii. _____

iii. A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Applicant first time presenting ground

(b)

(c)

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? No

(b) your trial, if any? Yes

(c) your sentencing? Yes, same as trial

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Lionel S. Lofton and V. Lynn Lofton
225 Seven Farms Dr., Suite 109 Charleston, S.C. 29492

ii. [redacted] Robert M. Dudek
P.O. Box 11589, Columbia, S.C. 29211-1589

iii.

(b) the proceedings at which each such attorney represented you:

i. General Sessions (Trial) Lofton & Lofton

ii. Court of Appeals (Appeal) Robert M. Dudek

iii.

19. State clearly the relief you seek in filing this application:

Conviction reversed, case remanded for New trial, and any other relief that I am entitled

20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/2003

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of McCormick)

I, Anthony D. Wilder, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Anthony D. Wilder

SWORN to and subscribed before me this 20 day of September, 2013.

J. Frank Cuss, Sr.
Notary Public

My Commission Expires: 12-16-2015

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Anthony D. Wilder, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Anthony D. Wilder
Applicant

SWORN or affirmed to and subscribed before me this 20 day of September, 2013.

Notary Public

My Commission Expires: 12-16-2019

Continued from question 11.

(a) Trial counsel was ineffective for not objecting to hearsay testimony.

Applicant asserts trial counsel was ineffective for failing to object to hearsay testimony that was prejudicial to Applicant.

Deputy Scott Jackson, a state's witness, testified he was flagged down by a citizen who said a vehicle was seen fleeing the area. And that he put that description over the air which was a 'jeep like vehicle'. II pg. 293, LN 17 - 294, LN 2. Here trial counsel failed to object to this hearsay testimony. Further on direct examination, Deputy Jackson testified the description he put over the radio was a 'small white jeep vehicle'. II pg. 298, LN 22-24. Here trial counsel failed to object again.

For trial counsel's failure to object to this hearsay testimony was prejudicial to applicant.

Deputy Jackson testified the description given was from a witness, whom did not testify at trial and subject to cross-examination. This out-of-court statement is what Deputy used to prove the suppose truthfulness of his description given from witness to take action in the matter of stopping a possible suspect vehicle. This hearsay testimony was inadmissible and prejudicial to applicant. This description that Deputy testify to that he put over radio was given to him from an out-of-court statement from declarant. An out-of-court statement that was used as information to search for and stop a 'small white jeep', with the supposedly suspects, as seen leaving the area.

This was a element to connect applicant to the crime, to say that he was there then and present during its commission.

This held importance to the state's case, and applicant was biased by its assertion before the jury. Had trial counsel objected to this biased impermissible hearsay testimony it would have instilled reasonable doubt within the jurors mind and tend a verdict of not guilty.

Trial Counsel failure to object to this hearsay testimony was highly prejudicial to Applicant.

(b) Solicitor constituted prosecutor misconduct when he allowed a state witness to commit perjury in trial testimony.
Solicitor permitted a state witness to commit perjury was prosecutorial misconduct which was prejudicial to Applicant.

Deputy Scott Jackson, a state witness on direct examination, testified that while he was sitting at the Lincolnville Public Safety Building, a fireman came and told him they had some gunshot victims. That is when Deputy went to the truck bay and saw a victim on the ground with gunshot wounds, which Deputy radioed into headquarters and was then inform of another victim at a residence around the corner, 200 West Stall Street. As he was approaching the residence he was flagged down by a citizen who said a vehicle was seen fleeing the area. And that he put that description over the air which was a 'jeep like vehicle'. TT pg 292, LN 8 - 294, LN 2. When the Solicitor stopped the C.D. that was played for the jury with the audio tracks of the radio transmissions for that day he questioned:

Q. 250. And it said on there 250, small white jeep vehicle. You gave that description?

A. Yes, Sir. TT pg 298, LN 22-24.

Here the Solicitor permits the Deputy to perjure in his testimony of the said description given of the vehicle, put over radio transmissions, from a witness. A witness whom did not testify at trial, identified by Deputy Jackson, on cross-examination by Mr. Brown, the neighbor that gave him the description to put over the radio was a Harold Corley. Tpg 299, LN 9-17. In Harold Corley's written statement, the description he dictated to Deputy Jackson was a 'Light Colored jeep like vehicle'. Exhibit* 1. Here it shows the falseness and fabrication of Deputy Jackson's trial testimony, of the said description given, versus the witness Harold Corley actual description explained to Deputy Jackson. In Harold Corley's statement the description given is contrary to Deputy's description. The descriptive words 'small' nor 'white' is used in Harold Corley's statement anywhere, therefore showing the falseness and fabrication of Deputy's trial testimony of description. Solicitor constituted prosecutor misconduct in permitting and failing to correct this perjured trial testimony that was prejudicial to Applicant.

The Solicitor who reviewed all evidence collected by investigators, and crime scene officers in the course of their investigation, including statements given by witnesses, Knew of the actual description given. The Solicitor failed in making any attempt to correct Deputy's testimony.

This was prejudicial to applicant because the said description, 'small white jeep', which was supposedly given by witness Corley and put over radio as vehicle seen leaving the area was false and fabricated. Had Solicitor corrected testimony, it would have also contradicted other testifying witnesses testimony. Allowing Deputy to testify before the jury with his fabricated description, which was similar to vehicle

applicant was arrested in, put in the jurors mind that applicant could have been or was there then and present, contributed to the presentation of evidence was very prejudicial to applicant. Prosecutor's failure to correct testimony constituted misconduct on his behalf before the court and jury. In his misconduct denied Applicant due process of law in violation of the fourteenth Amendment. Had prosecutor brought forth the truth of the matter, this would contribute to the jurors likelihood of returning a verdict of not guilty.

For prosecutors misconduct this was prejudicial error and very harmful to applicant

Exhibit #1

PAGE 1 OF 1

CHARLESTON COUNTY SHERIFF'S OFFICE

OCA # 2006-018852-B DATE 8/31/06

STATEMENT OF HAROLD CORLEY

ADDRESS [redacted] PHONE # [redacted]

EMPLOYMENT: DISABLE PHONE # [redacted]

RACE: B SEX: M DATE OF BIRTH: [redacted]

I HEARD 4 TO 5 SHOTS RING OUT IN AN AUTOMATIC FASHION THEN THERE WAS A PAUSE LIKE 3 TO 5 SECONDS AND ANOTHER 4 TO 5 SHOTS RANG OUT. I WAS IN THE GARAGE AND I WENT TO THE CAMERAS BUT DIDN'T SEE ANYTHING. [SO I WENT TO THE FRONT DOOR AND LOOKED OUT. I LOOKED TO MY LEFT AND SAW TWO BLACK MALES RUNNING ACROSS THE INTERSECTION OF W. FRONT AND W. STALL FROM the DIRECTION OFF 200 W. STALL AND DOWN THE DEAD END OF W. Fra A FEW SECONDS LATER A LIGHT COLORED JEEP LIKE VEHICLE CAME FROM the DEAD END TO the STOP SIGN AT W. STALL AND W. FRONT AND TURN LEFT TOWARD LINCOLN AVE. THEY WERE DRIVING SLOW TAKING THEIR SWEET TIME. THEY TURNED RIGHT ON LINCOLN AVE. I SAW All THE FIREFIGHTERS STANDING OVER SOMETHING. I SAW CHIEF RUN OVER THIS WAY My neighbor JOHN SAID THERE WAS SOMEONE LAYING IN THE YARD. I SAW the COP IN THE UNMARKED CAR COME BY AND I told him ABOUT THE JEEP-LIKE Vehicle.]

*Q: DID YOU SEE ANYTHING ON THE HEADS OR IN THE HANDS OF THE RUNNING MALES?

A: NO

*Q: DID YOU DICTATE THIS STATEMENT TO DEPUTY JACKSON?

A: YES

I HAVE READ (HAD READ TO ME) THE FOREGOING STATEMENT WHICH HAS BEEN FREELY AND VOLUNTARILY MADE BY ME AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

WITNESSES: X Harold Corley

Harold Corley

I HAVE RECEIVED A COPY OF THE ABOVE STATEMENT

SPA-Sheriff's Other/Statement Form

Exhibit #1

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Anthony Wilder, #328282, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS 2013-CP-10-5655 **RETURN**

The Respondent, making its Return to the application for post-conviction relief (PCR) filed September 25, 2013 would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the March 2008 term of the Charleston County Grand Jury for murder (2008-GS-10-2383), burglary-first degree (2008-GS-10-2385), assault and battery with intent to kill (ABWIK) (2008-GS-10-2386), and two counts of kidnapping (2008-GS-10-2384, -2390). The Applicant was represented by Lionel Lofton Esquire, and V. Lynn Lofton, Esquire.

On May 5, 2008, the Applicant pled guilty as indicted. The Applicant was sentenced by the Honorable J. Derham Cole to confinement for a period of life for murder and burglary, twenty years for ABWIK, and thirty years for kidnapping[1].

[1] The sentence for kidnapping indictment #2008-GS-10-2390 was suspended because the Applicant was also convicted of murder for the same victim.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Robert Dudek, Esquire, of the Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Wilder, No. 2011-UP-385 (S.C. Ct. App. August 9, 2011). The Applicant filed a Petition for Rehearing which was denied on November 17, 2011. The Applicant petitioned for Writ of Certiorari to the South Carolina Supreme Court. The South Carolina Supreme Court denied the Petition for Writ of Certiorari on March 20, 2013. The Remittitur was issued April 9, 2013.

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the Applicant's appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective assistance of counsel.
    a. Counsel did not object to hearsay testimony.
2. Prosecutorial misconduct.
    a. Allowed a State witness to commit perjury in trial testimony.

III.

In this application, the Applicant alleges ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). The Respondent submits the Applicant has not carried his burden of proving actual prosecutorial misconduct, therefore, this allegation should be summarily dismissed.

V.

Each and every allegation contained within the application not herein before either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held on the issue of ineffective assistance of counsel and that the remaining allegation be dismissed with prejudice.

[Signature on the following page.]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
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Telephone: (803) 734-3737

Feb. 19, 2014.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
	)	2013-CP-10-5655
	)	
ANTHONY WILDER, #328282	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the ~~**Amended**~~ **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James Falk, Esquire
3 Broad Street, Ste 450
Charleston, SC 29401

DATED this 19th day of February, 2014

Anne K Henley

Anne Henley, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA — COURT OF COMMON PLEAS

COUNTY OF CHARLESTON — NINTH JUDICIAL CIRCUIT

2013-CP-10-5655

ANTHONY WILDER,

APPLICANT,

VS.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

TRANSCRIPT OF RECORD

DECEMBER 15, 2015
CHARLESTON, SC

B E F O R E:

HONORABLE DEADRA JEFFERSON

A P P E A R A N C E S:

J. RUTLEDGE JOHNSON, ESQUIRE
Attorney for the State

NAKI RICHARDSON-BAX, ESQUIRE
Attorney for the Applicant

* *

Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

I N D E X

NO EXHIBITS INTRODUCED

(The following proceedings were held December 15, 2016, Charleston County, South Carolina, at 3:05 p.m.)

THE COURT: All right. This is Anthony Wilder versus the State of South Carolina, 2013-CP-10-5655. It's before the Court on an application for post-conviction relief. The applicant was indicted on indictment 2008-GS-10-2383, burglary in the first degree, 2008-GS-10-2385, assault and battery with intent to kill, 2008-GS-10-2386, and two counts of kidnapping, 2000-GS-10-2384 and 2390. He was represented by Lionel Lofton and V. Lynn Lofton.

On May 5th he pled guilty as indicted. He was sentenced by Judge Cole to life for murder and burglary, 20 years for assault and battery with intent to kill and 30 years for kidnapping and that was suspended, of course, because under the -- whenever you are convicted of murder you can't sentence on the maximum on the kidnapping as well where you receive a life sentence. He filed a timely notice of appeal. Mr. Dudeck of appellate defense represented him and that was affirmed at State v. Wilder in an unpublished opinion 2011 385 by the Court of Appeals. The rehearing was denied

November 17th, 2011. He applied for a writ and that was denied on March 20th of 2013 with the remittitur being issued on April 9th of 2013.

He alleges ineffective assistance of counsel, counsel did not object to hearsay testimony and prosecutorial misconduct that allowed a state witness to commit perjury. Are we ready to proceed, Ms. Bax?

MS. BAX: Yes, Your Honor.

THE COURT: And is the State ready to proceed, Mr. Johnson?

MR. JOHNSON: Yes, Your Honor.

THE COURT: You may proceed, ma'am.

MS. BAX: Thank you, Your Honor. We call Anthony Wilder.

ANTHONY WILDER

who, after being first duly sworn, testified as follows:

THE COURT: State your full name for the record.

THE APPLICANT: Anthony Tarelle Wilder.

THE COURT: Spell Tarelle for us, please?

THE APPLICANT: T-A-R-E-L-L-E.

THE COURT: Thank you, sir. You may

take your seat. Ms. Bax, you may proceed with questioning your client when you are ready.

MS. BAX: Thank you, Your Honor.

THE COURT: You're welcome.

DIRECT EXAMINATION

BY MS. BAX:

Q. Mr. Wilder, how old are you?

A. Thirty-nine.

Q. You are here today for a post-conviction relief?

A. Yes, ma'am.

Q. Do you understand what the post-conviction relief is?

A. Yes, ma'am.

Q. And do you understand that the only relief in post-conviction relief is to have your conviction vacated; is that correct? Or have a new trial?

A. Yes, ma'am.

Q. You do understand that you cannot have a -- your sentence reduced or anything of that sort? We have discussed that; is that correct?

A. Yes, ma'am.

Q. And do you remember when you were charged with these offenses?

A. Yes, ma'am.

Q. What were the charges that you were charged with?

A. Burglary of the third degree, two separate counts of kidnapping, assault and battery with intent to kill, and attempted armed robbery, possession of firearm.

Q. How did Mr. Lofton come to represent you?

A. Well, Mr. Lofton told me he didn't have a defense for my case.

Q. I am sorry. Let me rephrase. How did it come about that Mr. Lofton became your attorney?

A. Family and friends.

Q. He was not your first attorney in this matter, was he?

A. No, ma'am.

Q. Was he your second or third attorney?

A. He was like my third, I believe.

Q. And so you had received discovery about the charges in this matter?

A. From Mr. Lofton, yes, I did.

Q. So your discovery came from him?

A. Yes, ma'am.

Q. How many times do you remember speaking

with him about your case before trial?

A. About two or three times.

Q. And you were incarcerated from the time that you were arrested until the trial?

A. Yes, ma'am.

Q. And you had an opportunity to go over your discovery with him?

A. Somewhat.

Q. Would you explain what you mean by that?

A. Well, he didn't actually go over my discovery. We just like, you know what I'm saying, talk about this piece of the case because he just was talking about not having a defense for the case.

THE COURT: I'm sorry, please repeat that answer.

THE APPLICANT: We didn't really go over the motion because he was stuck on saying that he did not have a defense for the case.

BY MS. BAX:

Q. Did you have an opportunity to ask him about what the possible defenses would have been?

A. I mean, yes, got the same answer.

Q. During that time was there ever

discussion about whether you had been offered a plea or --

MR. JOHNSON: Objection, Your Honor. Any reference to an offer I would say is not proper for this venue. It was not alleged. I have not prepared for that.

THE COURT: Ms. Bax.

MS. BAX: Your Honor, I will rephrase. I'll withdraw the question.

BY MS. BAX:

Q. Did you speak to Mr. Lofton about any evidence of possible investigation to helping your defense?

A. Can you say that one more time.

Q. Did you speak to him about any investigation that might help in your defense?

A. Well, he told me about an in court identification of me I asked him about. I asked him how was it possible. He told me that it was just they didn't do it, you know.

Q. You said in court identification?

A. Yes, ma'am.

Q. So you are talking -- are you saying this happened during trial?

A. No, this was before trial that I spoke

to him about it.

Q. I need to clarify, please. Are you saying that he talked to you about a possible in court identification?

A. No, he told me somebody was going to identify me.

Q. Was there information in your discovery?

A. No, ma'am.

Q. To your knowledge how did he know about a possible identification?

A. I can't recall.

THE COURT: Sir, I need you to speak up for us so the court reporter can hear you.

THE APPLICANT: I can't really remember how, you know, that he got that information. I believe he met with solicitor or someone.

BY MS. BAX:

Q. Let's go to your application for post-conviction relief. You allege that your counsel was ineffective for failure to object to hearsay testimony.

A. Yes, ma'am.

Q. So would you explain what hearsay testimony that you are referring to?

A. I was talking about the hearsay testimony of Deputy Jackson.

MR. JOHNSON: What page is that?

THE APPLICANT: Trial transcript page 293 line 17 to page 294 line 2, trial page 298.

MR. JOHNSON: Thank you, sir.

THE COURT: Proceed, Mr. Wilder.

THE APPLICANT: He testified he was flagged down by a citizen who states I saw a vehicle in the area and that he put that description out over the air which was a Jeep-like vehicle. Trial counsel didn't object to the hearsay testimony. Deputy Jackson testified about his description he was given from the witness who did not testify at trial. Now all of a sudden on cross-examination the description Deputy Jackson testifies that he put over the radio was given from a statement, out-of-court statement from the declarant and this out-of-court statement was what the deputy used to support his description from a witness to take action and stop possible suspect vehicle.

BY MS. BAX:

Q. Now, the witness that you were

referring to, is that Mr. Corley?

A. Yes, ma'am.

Q. And he didn't testify at the trial at all?

A. No, ma'am.

Q. Do you remember if any other statements of his came in at the trial?

A. Yes.

Q. Did trial counsel object at that time?

A. No, he did not.

Q. You also alleged that the solicitor constituted prosecutorial misconduct regarding perjured testimony. Can you explain that, please?

A. In opening statements he presented evidence that on the 31st of August 2007 Deputy Jackson got a description from one of the neighbors that said he saw a white Jeep-like vehicle leaving the area. That's page 98 line 18 to 20 and Deputy Jackson on direct examination testified that he was flagged down by a citizen who said it was in the area and he put that description over the air.

Now, when we look at Mr. Corley's statement the description that he gave Deputy Jackson was a small and white vehicle. That's where it showed the solicitor constituted

prosecutorial misconduct in his opening statement and he allowed Deputy Jackson to perjure himself in his trial testimony about the said description given of the vehicle. In Harry Corley's statement as compared to Deputy Jackson's trial testimony it showed the fabrication of Deputy Jackson's trial testimony. He used the words small and white to describe the vehicle.

MR. JOHNSON: Your Honor, I can't understand what he is saying. I do apologize. Maybe he is speaking too quickly.

THE COURT: If you could slow down for us, please, and I need to correct the record as well. State's return is inaccurate. This was a trial May 5 through 9, 2008 before Judge Cole where the Defendant was found guilty of the offenses along with his co-defendant Keive Milik Smith and Leo Gadsden. Sir, I need you to speak slower so that we can hear what you are saying.

THE APPLICANT: So start over?

THE COURT: No, I don't need you to start over. I heard what you said. I need you to slow down for the court reporter or Mr. Johnson so they can hear what you said. You need to start where you left off.

THE APPLICANT: All right. So in an out-of-court statement as compared to Deputy Jackson's trial testimony it showed the fabrication of Deputy Jackson trial testimony when he used descriptive words such as small and white to describe the vehicle.

THE COURT: Sir, we have already heard that. You were talking about prosecutorial misconduct. I'm confused.

THE APPLICANT: Yes. That's what I am saying, solicitor constituted prosecutorial misconduct and failed to correct the perjured trial testimony.

MS. BAX: I think -- was that the end of your answer?

MR. JOHNSON: Thank you. We appreciate it.

BY MS. BAX:

Q. Mr. Wilder, you also allege that your trial counsel was ineffective for not objecting to admittance of some evidence?

A. Yes, ma'am.

Q. Can you explain to the Court what you are referring to?

A. Trial counsel --

MR. JOHNSON: Your Honor, I may have to object at this point. I am looking through my application and I do not see that issue raised.

THE COURT: What issue?

MR. JOHNSON: If I can confer with counsel for just a moment.

(Off-the-record conference.)

MS. BAX: Begging the Court's indulgence.

(Attorney confers with client.)

MS. BAX: Your Honor, for the record, my understanding is the application that we are looking at is the one that was filed September 20th of 2013. My understanding was that there was an amended PCR application that was filed, but I actually do not have a copy of that or -- I am asking my client to be able to submit that.

THE COURT: I am sorry. Say that one more time again. Are you talking about the September 25, 2013, application he filed?

MS. BAX: Yes, Your Honor.

THE COURT: What's the issue now?

MS. BAX: And my understanding was there was one that was filed that was amended and filed afterwards that --

THE COURT: When was that and who amended it?

MS. BAX: That would have been Mr. Falk, his original appointed counsel. Your Honor, I don't know if that was actually done or not. That was my understanding. I know there were additional issues that they spoke about.

THE COURT: I have an amendment right here that was April 24th, 2014 by Mr. Falk. Let's see here. It says ineffective assistance, failed to object to prejudicial hearsay, solicitor committed prosecutorial misconduct, perjured testimony, trial counsel was ineffective by not calling attention to discrepancy between the testimony of one witness and the written statement of another. Ineffective assistance of appellate counsel in that did not raise the issue of whether the trial court was correct in admitting certain physical evidence over timely objection of counsel. That's it.

MR. JOHNSON: I'm not sure I have that, Your Honor, but obviously we have some type of computer document.

THE COURT: Could the clerk please print a copy of that for Mr. Johnson or are those

not scanned?

THE CLERK: Possibly.

MS. BAX: Your Honor --

THE COURT: Bear with me just one moment. I need to tell my secretary something while you all are looking for that. Is it on line?

THE CLERK: I'm not showing it on this, but I can try it.

THE COURT: My clerk says she thinks it is. If you could find that and please print that for Mr. Johnson. He just needs the amended application.

(Brief pause.)

THE COURT: Ms. Bax, you may continue.

BY MS. BAX:

Q. Mr. Wilder, your trial counsel, you allege that he was ineffective for not objecting to certain evidence that had been admitted?

A. Yes, ma'am.

Q. And what evidence in particular are you referring to?

A. A mask marked State's Exhibit No. 113 and a glove marked State's Exhibit No. 114.

THE COURT: I don't see that in his application. Is that in the original application

or the amended application?

(Off-the-record conference.)

MS. BAX: Your Honor, I understand from the amended application that refers to appellate counsel, we are asking that the Court -- we be able to talk about this evidence that was submitted underlying because that goes into an issue that appellate counsel that had to do with --

THE COURT: Yeah, but I need him to confine it to appellate counsel, not trial court. I'm not going to go back and rehash all of that. If he objected to it that's a foregone issue. The issue is whether appellate counsel did something with it.

So I just need you to direct his questions to what appellate counsel did in that regard because I'm not going to go through every piece of evidence that's in this voluminous record because the evidence he's talking about his lawyer objected to it. He is saying that appellate counsel was ineffective for raising it. So I need him to confine his testimony to that. Because there's not an issue with Mr. Lofton. He says Mr. Lofton objected to it. That appellate counsel, that's 2B, ineffective assistance of appellate

counsel in that did not raise the issue of whether the trial court was correct in admitting certain physical evidence over the timely objection of trial counsel.

MS. BAX: That's correct, Your Honor. Let me rephrase.

BY MS. BAX:

Q. As part of -- after you were -- after there had been a conviction you had an appeal done; is that correct?

A. Yes, ma'am.

Q. And the issue raised on appeal dealt with what specific evidence?

A. One issue dealt with the pants and the other issue dealt with the -- I misunderstood the question.

Q. The evidence that was referred to in your appeal?

A. Right.

Q. That had to do with inadmissibility of some evidence that came in during the trial; is that correct?

A. Yes, ma'am.

Q. And what was that evidence?

A. The evidence on appeal that the

appellate counsel raised, that's what you are asking me?

Q. Yes.

A. The pants.

Q. What was it specifically about your pants that was the issue?

A. The Defendant's pants was contaminated and intermingled with the deceased clothing.

Q. And at trial your counsel had made an objection, is that correct, regarding that as to how it was preserved for appeal?

A. Yes, ma'am.

Q. You are alleging that the appellate counsel was ineffective. How so?

A. Because he failed to raise an issue that was properly preserved for appeal.

Q. What was that?

A. Which was objection made to a mask marked State's Exhibit 104, pair of pants marked State's Exhibit No. 105 and another pair of gloves marked State's Exhibit No. 106 because the collection officers did not identify this evidence and the trial judge overruled the objection.

Q. And what page are you referring to in the transcript?

A. Trial transcript page 528 to 529 and page 531 and 532.

Q. And you are alleging that appellate counsel was deficient for not bringing that issue up on appeal as well?

A. Yes, ma'am.

Q. And how further was appellate counsel deficient?

A. The argument that he raised, that was the pants, because he was arguing the same thing the trial counsel argued. He argued that -- the inference was reliability under Rule 702, and Rule 702 does not deal with reliability. It deals with the testimony of expert.

Q. And is it your contention that he should have argued under a different rule?

A. Yes, ma'am.

MR. JOHNSON: Your Honor, I'm going to go ahead and object to this line of questioning. Looking at the unpublished opinion from the court of appeals, this issue has already been raised and ruled upon. Therefore, it is not appropriate for this venue.

THE COURT: Ms. Bax, would you like to respond?

MS. BAX: Your Honor, begging the Court's indulgence.

(Attorney confers with client.)

MS. BAX: Your Honor, my response is that we weren't actually -- I will -- let me rephrase my question so my client can explain better.

THE COURT: Just for clarity and for time sake, the rule that he referred to in evidence does deal with reliability and it is applicable and I have read the transcript. And I think you might want to cut to the chase on that issue. The pants have already been dealt with in the appeal and it's dispositive. And they have already ruled there was no basis under the case law regarding the DNA that was developed from his pants. And then also they have determined that any error would have been harmless even if it were, even if it should not have been admitted.

MS. BAX: Thank you, Your Honor.

THE COURT: You're welcome.

BY MS. BAX:

Q. Mr. Wilder, I would like to refer you back to you're alleging that counsel was ineffective for not objecting to hearsay testimony

as to Mr. Corley. Was it your testimony that Mr. Corley's statement came into the record?

A. My testimony? I didn't testify.

Q. Earlier. Did you intimate to the Court that Mr. Corley's statement had been presented to the jury during your trial?

A. No. It wasn't presented to the jury. It just would have been read from the statement.

Q. So it was read in front of the jury?

THE COURT: Now you have me confused. I need to know what statement you are referring to. I need to know what page in the transcript you are referring to because I don't see that in either of the applications.

MS. BAX: That goes back to his first application referring to --

THE COURT: Hearsay testimony. He already talked about that. So that's why I am confused. He has already talked about that in great detail at the beginning of his testimony about the officer presenting the testimony, about the description of the vehicle.

MS. BAX: Right. I was talking about Mr. Corley's testimony itself.

THE APPLICANT: He did not testify.

BY MS. BAX:

Q. Was that information relayed to the jury?

A. Yes, description of the vehicle.

Q. Is that also an indication where -- I will withdraw that question, Your Honor. Mr. Wilder, is there anything else that you would like the Court to be aware of or ask the Court to consider regarding ineffective counsel by Mr. Lofton?

A. Yes. You just told me I couldn't speak upon it.

THE COURT: You need to ask him specific questions. I am not going to have him reading verbatim what he has already presented. There need to be directed questions. We know the standard for post-conviction relief. You need to ask him those questions that are germane. He did not represent himself and so you need to direct him where he needs to go in order to satisfy the elements of what he has asserted.

BY MS. BAX:

Q. Were you prepared for trial in this matter? Did you prepare for trial?

A. He said we didn't have a defense.

There was nothing to prepare. I gave him some motions and he couldn't file them. I filed them by myself pro se.

Q. What happened with those motions?

A. I don't know.

Q. Did you ever have any discussion with him about any pretrial motions or argument that would be made in preparation for when the trial started?

A. No, ma'am.

Q. Did you all ever discuss the possibility of a motion to sever?

A. No, ma'am.

MR. JOHNSON: Objection.

THE COURT: That's not in the application.

BY MS. BAX:

Q. During the trial --

MR. JOHNSON: May I have a ruling on that, Your Honor?

THE COURT: Sustained. And I don't know that he would have prevailed on it anyway based on the record. I don't think there would have been any basis for a severance motion. He could have made it, but the purpose of -- the

burden is not whether he failed to make it. It has to be resulting prejudice which means in order to meet his burden of proof he would have to prove there is some likelihood that he would have prevailed on this motion. And based on this record it is unlikely that the Court would have granted the severance under the facts as they are in this record. And he needs to be specific about what pro se motions he claimed he filed so that I can know from looking at the record whether any of them were pursued or whether they were actually ruled upon. Although actually technically he couldn't file any pro se motions. He had a lawyer.

BY MS. BAX:

Q. Can you identify what pro se motions that you did make?

A. Motion to dismiss charges and motion to suppress the evidence.

Q. Did you have a discussion about the motion to suppress with Mr. Lofton?

A. No, ma'am.

MS. BAX: Your Honor, I have no further questions for Mr. Wilder at this time.

MR. JOHNSON: I have none for the Applicant, Your Honor.

THE COURT: Does the Applicant have any further witnesses?

MS. BAX: Yes, Your Honor. We would like to call Lionel Lofton, please.

THE COURT: Mr. Lofton, if you would come to the stand and be sworn.

LIONEL LOFTON

who, after being first duly sworn, testified as follows:

THE CLERK: Please state your first and last name and spell your last name.

THE WITNESS: Lionel Lofton, L-O-F-T-O-N.

THE COURT: Mr. Lofton, if you could pull that microphone just a little closer to you. Perfect. Ms. Bax, you may proceed.

DIRECT EXAMINATION

BY MS. BAX:

Q. Good afternoon, Mr. Lofton.

A. How are you?

Q. Good. How long have you been practicing law?

A. A long time, since 1971.

Q. And what was -- what's the primary practice that you have for your law firm?

A. It's changed over the years. Used to be totally criminal work. And now we are primarily medical malpractice. But I did a lot of criminal work back in the day so to speak.

Q. Had a lot of trial experience?

A. Tried a lot of cases. I was a federal prosecutor for 12 years.

Q. You were retained on this case by Mr. Wilder and/or his family?

A. Yes, ma'am.

Q. Do you remember whether you were his first attorney in this matter?

A. You know, it's been a long time. Until you raised that issue today I quite frankly did not remember. I still do not remember whether there was other people involved prior.

Q. Do you remember if you were the first attorney that received discovery on this matter?

A. I can't answer that either; I don't know.

Q. But Mr. Wilder was incarcerated the entire time that you were representing him?

A. As best as I recall, that's correct.

Q. Do you remember -- have you had an opportunity to go over the discovery with Mr.

Wilder while he was incarcerated?

A. I'm sure I did. I mean I go over discovery with all clients. I can't tell you --

THE COURT: Let me interrupt you one second. Ma'am, could you please go pull Mr. Wilder's criminal files if they are not in storage? You may continue your answer. I apologize for interrupting you.

THE WITNESS: I can't tell you how many times I met with him, but I can tell you that either myself or my daughter who was practicing with me at the time would have gone over the discovery with him once or more than once.

BY MS. BAX:

Q. My next question was if it wasn't you, if you had an investigator or anyone else in your office that might have met with Mr. Wilder?

A. My daughter was practicing with me at that time so she would have met with him if I wasn't there.

Q. And do you remember the charges that he was facing in this case?

A. You know, I remember them having heard again, today, yeah. They were substantial.

Q. Do you remember what the defense theory

of this case was?

A. Well, there were a couple of things that if you go back and look at the transcript. Of course we challenged the DNA which was the main issue on appeal. The chain of custody on the clothing, we thought that the chain was contaminated. We also during the course of the trial or prior to trial we learned that one of the shell casings I believe that had been recovered or something, there was a gun that was used subsequent to Mr. Wilder being incarcerated that they claim was also involved in this particular crime. So we thought we had some issues for the jury and we raised all of those at trial.

Q. So you had a discussion with him regarding those possible avenues as a defense?

A. Yes, of course. You got to remember the big problem with this case was that he and the other two Defendants were arrested in a car fleeing the scene and that was during the course of their fleeing the scene of course they were throwing evidence out the window, mask and things of that nature. Those were pretty substantial obstacles to try to overcome.

Q. And in reference to that there was some

of the evidence that was found, there was evidence collected from the side of the road, correct?

A. Correct.

Q. From inside the car?

A. I don't specifically recall anything being taken out of the car, but could have been. I'm not going to say that there wasn't.

Q. Do you remember there being an issue about the chain of custody regarding the evidence that was taken off the side of the road?

A. I can tell you I remember there was chain of custody issues in the trial. Specifically what items I can't tell you.

Q. In your experience with a case like this would issues such as chain of custody be something that you would emphasize or spend a lot of time about?

A. Well, if you go back and look at the transcript, and I only perused it for a limited amount of time, but obviously from the standpoint of the clothing Mr. Wilder was allegedly wearing at the time of the crime, and the subsequent DNA analysis that was done, that was a large portion of our defense because we thought there was an issue as whether or not there was a proper chain on the

actual seizure of his clothing, the possibility of contamination wherein the clothing was commingled or mixed with the alleged victim and most significantly the pair of pants that they claimed were Mr. Wilder's did not even have his DNA on it.

So we raised all of those issues. There was a lot of discussion in court concerning those issues. So, yeah, the chain of custody, the contamination, those were really the two main legal issues I think we had during the trial.

Q. When we talk about chain of custody, one of the pieces of evidence that was found was the mask and the glove off the side of the road. Can you -- would I be wrong if I rephrase that that's where it was found?

A. I'm not going to tell you that you are wrong, but I am not going to tell you you are right either. I specifically don't remember. All I can tell you is that there were a number of items seized from the side of the road that the alleged Defendants were throwing from the car as they were fleeing the scene and police were in hot pursuant.

MR. JOHNSON: Your Honor, I will object to this line of questioning. There's nothing in the application that's saying ineffective for

failing to challenge the chain of custody.

MS. BAX: Your Honor, I was just laying the ground work which the defense had to deal with.

THE COURT: I'm going to give you a little latitude. You may proceed.

BY MS. BAX:

Q. Were there any other issues regarding -- aside from the evidence that you felt were something that could be brought up in Mr. Wilder's defense? I know we talked about chain of custody and evidence. We talked about DNA. Was there anything else that you had felt was a particular issue to raise during your defense of Mr. Wilder?

A. One of the other issues that we raised and argued strenuously during the course of the trial was the identification because the victim that identified Mr. Wilder, the State introduced certain photographs that looking at the photographs to where she said she identified him from her location in her house there were trees in the way, sort of like the My Cousin Vinny movie. How did you see that through the bushes? So we did challenge her identification. We also raised the issue of if I recall that Mr. Wilder's photograph or picture had been on television, it had been in

the newspaper and so there was a great deal of cross-examination of her and the reliability of her identification of him being outside the residence prior to the attack.

Q. Did you become aware before trial that they were going to make an in-court identification to Mr. Wilder?

A. I can't tell you yes, but I must have had that information. I'm guessing that in one of my conversations with Nathan Williams who was the prosecutor that he told me that there was going to be or attempt to be an in-court identification. I can't say that unequivocally, but that -- I'm guessing that's what happened.

Q. And you didn't object to that in-court identification?

MR. JOHNSON: Objection, Your Honor. This is not in the application.

THE COURT: Would you like to respond?

MS. BAX: Your Honor, this all has to do with his defense of Mr. Wilder trying to figure out what the strategy and defense was at the time.

MR. JOHNSON: To reply, Your Honor, she is going into specific instances of his defense that were not in the application. The State has no

notice of that. The only thing she is alleging is failure to object to prejudicial hearsay testimony and not calling attention to discrepancies between testimony of one witness and the written statement of another.

THE COURT: I will give her a little latitude. He said things within the strategy and I am going to let her develop that line of questioning. Then if you need additional time to prepare for cross I will give you that. You may proceed.

THE WITNESS: Let me answer your question. I don't know that I did that, okay? Maybe I did, maybe I didn't. All I know is that we certainly challenged her identification during the trial. Maybe I didn't learn of it until that point in time. Maybe I didn't know there was going to be an in-court identification. Maybe all Mr. Williams told me was that he was going to attempt an in-court identification and I don't have any independent recollection of that. All I know is having looked at the transcript we raised the issue from the standpoint of challenging the identification.

BY MS. BAX:

Q. Now, as the DNA results become an issue did you ever feel at any time that that might have been something that could have been explored, at least the contamination part of it with an expert witness or --

MR. JOHNSON: I object to that, Your Honor. She is getting into whether or not he was ineffective for failing to secure an expert witness. That's a specific allegation that the State objects to.

THE COURT: Ms. Bax, I have read the transcript and I am at a loss as to how an expert would have aided.

MS. BAX: That was not my question.

THE COURT: So let's ask the question. Because what his strategy was, you don't really need an expert to establish contamination. I think with the proliferation of DNA and TV shows and the average person understands that concept. So I don't know that it would have necessarily helped. So five-year old DNA, they watch CSI, they probably know more about technology and everything else. You may ask the question, Ms. Bax.

BY MS. BAX:

Q. Was that ever something that was

considered?

A. I did not consider consulting an expert, no, ma'am.

MS. BAX: Beg the Court's indulgence.

THE COURT: Yes, ma'am.

BY MS. BAX:

Q. Mr. Lofton, let me go back to Mr. Wilder's allegation regarding the solicitor's conduct during the trial regarding the statement of Mr. Corley as indicated by Detective Jackson. Do you know what I am referring to?

A. No, ma'am.

Q. Were you aware that the Applicant is saying that the solicitor constituted prosecutorial misconduct by allowing a witness to perjure himself in court?

A. I will be honest with you. Since it didn't pertain to me I didn't read that part of his application. I figured Mr. Williams could take care of himself.

Q. My question was I guess did you not -- the description and the statement that was given by Mr. Corley, did you have any information that could contradict that statement?

THE COURT: You need to ask the

question directly, one of which is your client's contention he didn't object. So we need to know why he didn't object and if there was -- he felt there was any basis to object. And I'm sorry, I know how it is to struggle with questions when you are practicing. Sometimes it's just a lot more clear for me because I don't have the stress on me that you have on you. I hope you don't mind. You may proceed.

BY MS. BAX:

Q. The question is there was a statement that was given by Mr. Corley, correct, about the description of the vehicle?

A. I don't specifically remember that, but all I can tell you is in the issue that I looked at because the issue that he raised in his application was that I didn't object to the testimony that he contended was hearsay when the officer put out the identification of the vehicle over the radio. The reason I didn't object to that is because the officer did it exactly the way you are supposed to do it. Testified he had a conversation. As a result of that conversation what did you do? As a result of the conversation I did this. This is what I said. So it wasn't hearsay.

Q. So there was nothing else that you felt like you could have done regarding that statement during trial?

A. No, ma'am. And I never thought Mr. Williams was participating in prosecutorial misconduct either.

Q. And as to the testimony of Deputy Jackson, do you remember whether it was a small white Jeep vehicle, was that what was testified to as far as you remember? It was accurate?

A. I can't tell you whether I remember it was accurate or not. I remember he testified that he put out a description and that's all I can tell you I remember.

Q. Did you ever consider calling Mr. Corley as a witness?

A. No, ma'am.

MS. BAX: Your Honor, begging the Court's indulgence.

THE COURT: Take your time.

(Attorney confers with client.)

MS. BAX: Your Honor, I have no further questions.

THE COURT: You may proceed.

MR. JOHNSON: Your Honor, I have no

questions for Mr. Lofton.

THE COURT: Any objection to Mr. Lofton being excused?

MR. JOHNSON: No.

MS. BAX: No, Your Honor.

THE COURT: Mr. Lofton, you are excused. Anything further from the Applicant?

MS. BAX: No, Your Honor.

THE COURT: Applicant rests?

MS. BAX: Yes, Your Honor.

THE COURT: Any testimony from the State?

MR. JOHNSON: No, Your Honor, but we would have a motion for a directed verdict at this point.

THE COURT: I think we have heard the merits. We might as well proceed with the disposal on that basis. Is there any closing argument, Ms. Bax?

MR. JOHNSON: May I have one moment, Your Honor?

THE COURT: Certainly.

(Off-the-record conference.)

MR. JOHNSON: State rests, Your Honor. We ask Mr. Williams be allowed to exit the

courtroom.

THE COURT: What was Mr. Williams going to testify to?

MR. JOHNSON: Prosecutorial misconduct.

THE COURT: About the --

MR. JOHNSON: We subpoenaed him because he was in the application.

THE COURT: About the -- okay. Any objection to the witness being excused, Ms. Bax?

MS. BAX: No, Your Honor.

THE COURT: Did you have any desire to call him as a witness?

MS. BAX: No, Your Honor.

THE COURT: Mr. Williams, you are excused. All right. Any closing argument?

MS. BAX: Briefly, Your Honor.

THE COURT: Give me one second, Ms. Bax. I want to look at something right quick. Bear with me.

(Brief pause.)

Ms. Bax, you may proceed with your closing argument.

MS. BAX: Your Honor, Mr. Wilder was facing some serious charges in this case. He is alleging ineffective assistance of Mr. Lofton who

we will all recognize is a very experienced trial attorney. But in this matter Mr. Wilder is concerned that there was certain things that counsel did not do that would have resulted in a different result for him, those being dealing with some of the chain of custody issues, the DNA that was sent in, particularly with the problems with being able to authenticate where his DNA came from in the matter.

Counsel also has admitted and agreed that there was some testimony given by some witnesses that may have caused problems for Mr. Wilder. We understand that Mr. Lofton is saying that it was his strategy that the defense had made a decision to go certain ways, he had discussed that with Mr. Wilder. Mr. Wilder is alleging that there weren't discussions that he had, he feels counsel was ineffective for not objecting to that testimony and that he was biased by it.

He also feels that there were instances where evidence should have been handled differently. We just ask the Court to consider those in this matter. That's all, Your Honor.

THE COURT: Would you like to respond?

MR. JOHNSON: Briefly, Your Honor. May

it please the Court.

THE COURT: Yes, sir.

MR. JOHNSON: First of all, the State's position is that Mr. Lofton provided excellent representation of Mr. Wilder, especially when it comes to his specific allegations about failing to object to prejudicial hearsay testimony. As Mr. Lofton testified, it was Officer Jackson's statement about Mr. Corley describing the vehicle. In State v. Kirby 325 S.C. 390, a court of appeals case from 1996, as Mr. Lofton testified, when a statement is given by a law enforcement officer which shows the subsequent action he takes, it is not a hearsay statement. And so even if he says a white Jeep, takes a description, puts it out over the air, that subsequent action therefore is not hearsay. Therefore, Mr. Lofton had no basis to object because it was not hearsay.

Second, as to the prosecutorial misconduct, what Mr. Wilder is claiming is that during opening statements the prosecutor Mr. Williams references a white Jeep-like vehicle and then on page 293 or 294 Officer Jackson states that it's a Jeep-like vehicle. As Your Honor knows, prosecutors have wide latitude in opening

statements. It is not evidence. All the evidence comes from the witnesses, therefore, there's no prosecutorial misconduct in this case.

As far as chain of custody issue is concerned, counsel extensively argued that that was the appellate issue and therefore is not proper for PCR. And as I have read yesterday, Your Honor, in the Strickland vs. Washington concerning judicial scrutiny, counsel's performance must be highly differential and a fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight to reconstruct circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time.

Further, it states when a Defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

The State's position is there has been no ineffective assistance of counsel, therefore, there could be no resulting prejudice. We ask you to deny this application.

THE COURT: Now, I'm going to deal with some things preliminarily, one of which there has been mention of him having had several lawyers before Mr. Lofton. I had his file pulled because I wanted to look at it and see so we could have clarity on that issue.

It appears that he was originally represented by the public defender's office, but his co-defendants were likewise. So conflict counsel was appointed and that was Ms. Dudgeon. Amanda K. She then was substituted by Mr. William Runion. And Mr. Runion was substituted by Mr. Lofton.

In addition, Mr. Wilder has an extensive and lengthy criminal history with this court and in 2002 he was represented by Jackson Seth Whipper of the bar and then in 2003 was represented by Edward Brown. So they are also in the file as having represented him on separate charges that are unrelated to this case.

The other thing that is of note that I think should be documented for the record, as a result of this conviction the State of South Carolina nolle prosed or dismissed multiple counts that were still pending against Mr. Wilder that

were true billed, that being 2005-GS-10-4406 which was possession with the intent to distribute cocaine within proximity of a school. 2005-GS-10-4405, an indictment for trafficking in cocaine. 2006-GS-10-1116, failure to stop for a blue light. 2006-GS-10-1115, possession with intent to distribute cocaine base within proximity of a school. 2006-GS-10-1114, possession with the intent to distribute cocaine base. 2008-GS-10-2394, attempted armed robbery. 2008-GS-2392, possession of a firearm during the commission of a violent crime. 2008-2391, unlawful possession of a firearm. All these cases were nolle prosed after his conviction.

Now, the other thing is that he has made reference to several motions he filed pro se and that was the original reason I had the file pulled. He filed August 2nd of 2007 a motion for discovery and disclosure of evidence pursuant to Rule 5 which was a nullity because he was represented by counsel and each of his counsel had already filed a Brady on Rule 5 motions which are in the file and documented. On February -- I can only assume the State responded to those motions.

On February 19th, 2008, he filed a

motion to dismiss, which basically alleges that his cases had not been indicted in a timely manner. That would not have been a basis for a dismissal so he would not have prevailed on that motion and certainly Mr. Lofton would not have filed such a motion. So again he was represented by counsel so the Court had no obligation to acknowledge these motions.

So I would assume they sat in the file. They were not disposed of because the Court would have no obligation to dispose of them.

He also filed a motion to suppress all evidence and dismiss charges. Based again on the case not being indicted, the cases not being indicted, that his stop was racially motivated, that the dispatch notes don't indicate why the -- basically there was no probable cause for stop. Raising certain issues about the forensic scientist at SLED, the firearms department, the gloves, the mask, and other items that basically deal and citing several federal rules which are not applicable in state court. Which in a nutshell, all of those are factual issues that his attorney pursued during his case and they would not have formed the basis for a motion to dismiss and he

would not have prevailed on that.

He also filed a motion for hearing on May 7th of 2008 asking that his pro se motions be heard. Of course, the Court had no obligation to acknowledge that and didn't. And again raising the same issues about proper police procedure would have not been the basis for a dismissal.

He then filed a motion on December 22nd of 2011 asking for transcripts of a preliminary hearing which arise out of these charges and he directed it to the clerk of courts. After so many years those records would not have been available and it should not have been directed to the clerk, it should have been directed to the Magistrate who had the prelim. So those records would not have probably been in existence unless they were asked for at the time of the hearing.

Again, he filed that motion twice, one dated December 14th, 2011, one dated September 29th, 2011. On May 6th of 2013 asked for the indictment, the grand jury report and the chief administrative judge order for convening the grand jury on June 13th of 2005. And that he asked for this previously and had not had a response and rightfully so they would not have responded to him

because one, he acknowledges he had already received his indictment so they did not have any duty to send him additional copies as he indicated he already had those.

Well, apparently they had sent them to him based on the content of this letter. He asked for the grand jury report and they had no obligation to provide him with that as grand jury proceedings are secret and the report would have been made orally to the court and he would have needed -- it is unlikely that a court reporter would have been present so there would have been no report to him or there would have a court reporter present. Either way he would have needed to request the transcript from the court reporter, and '13 and this happened in '8, those records probably didn't exist anymore because they are only required to keep them for five years.

So that disposes of all of the motions -- or documents for the record all of the motions that he indicated he filed in a pro se capacity that are in his file.

He raised a Biggers issue. Basically based on the overwhelming breadth of this record, even if he had a Biggers hearing it is unlikely he

would have prevailed on it, and even if it was error for Mr. Lofton to have not requested one, it would have been harmless error. Given the overwhelming evidence in this record it would be harmless error and since the standard is only a preponderance of the evidence, it is unlikely that the Court would have suppressed the identification that is contained in the record. So again it would have been harmless error for Mr. Lofton to have not requested a Biggers hearing. While not couched in these exact terms, that's basically what has been testified to.

As regard to the statement made by the officer, under South Carolina case law that is not hearsay. An officer is entitled to testify as to statements that were reported to them to explain why a particular course of action has been initiated, that being a BOLO or be on the look out. And there are many reasons for that. One is that it is not offered for its truth which is the seminal in hearsay, the other is that because in most instances when things are reported to the police it is through the 911 system and it is considered an excited utterance under the stress of an event, therefore, it has inherent voracity. So

they would not have had to call the witness and it is not hearsay because it's not offered for its truth. It's only offered for the officer to explain why they went, why they pursued a particular course of action.

There is -- Mr. Johnson cited the case law that is applicable to this portion of the testimony. There is absolutely no evidence in this record of prosecutorial misconduct. Perjury is not -- an inconsistent statement is not perjury. It just means you get to argue the differences in those facts and is it necessary you get to impeach the witness. That's not perjury. People testify inconsistently all the time. Sometimes people remember things differently at the time of the event than they do at time trial. That's not perjury. That's just inconsistent testimony and that's a factual issue that could have been argued and was argued by his counsel.

And that's not perjured testimony. It would not amount to any level of prosecutorial misconduct. The issue regarding any pants and DNA has been disposed on direct appeal. And Mr. Lofton preserved the issue of DNA contamination. He said basically under the facts and circumstances of this

case I really did have very little to work with. He had very little in terms of developing a defense it is clear from the record. But he did work with what he had. The theory was to challenge the DNA, say the chain was contaminated, to deal with the shell casing or casings that were at the scene. And then the chain issues and he argued those. He argued those very zealously on behalf of his client, but he is correct. What is overwhelming in this regard, most troubling is that he could not overcome the fact that they were arrested within such close proximity of the alleged incident and they were discarding the fruits of this event from the vehicle. That in and of itself with nothing else being offered in the record is enough to have convicted him.

A jury -- reasonable jury could have found beyond a reasonable doubt that he was guilty of the crimes just on that evidence alone without anything else. The police were in hot pursuit when these items were discarded. The other issue he raised was not obtaining an expert and I am at a loss as to what an expert would have added. He had the State's expert that he effectively cross-examined and dealt with the contamination

issue. And most critically, most important that he had to argue that his client's DNA was not on those pants. He argued that. That was a factual issue that the jury could consider, and had the ability to consider. He did argue the identification strenuously, as well as, I am using his term, not mine, that there were trees obscuring her view. That's a typical tactical way to impeach the credibility of witnesses again even without -- even if there was a Biggers hearing, even if he did not request one, it is harmless error because ID based on the record would have come. He would have then pursued exactly the line questioning he did, which is how could you see this person, are you sure you didn't see him on TV before and that that colored her identification of the Defendant as the person who had perpetrated this incident.

So while he did not technically have a Biggers hearing, it is unlikely that that witness's testimony would have been excluded on that basis and he did what any lawyer would have done, which is try to impeach the credibility or the recollection of that person consistent with the elements that a Court would instruct on ID of a witness.

Again, as I have already indicated, there's no evidence of perjury and there would have been no basis for Mr. Lofton to have objected regarding that. If anything, it would have heightened the jury's attention to that issue. As it was testified to, the officer said BOLO, this that and the other, and to have strenuously objected to it I think in terms of strategy probably would not have enured to Mr. Wilder's benefit.

So based on what has been presented to the Court there's no basis for -- he has failed to meet his burden of proof regarding the application and it is denied. The State is directed to provide the Court with a proposed order within 20 days of today and provide Ms. Bax a copy of that order so that she can weigh in on anything that she would like to have added for the Court to consider that. Thank you all very much.

(These proceedings were concluded at 4:26 p.m., December 15, 2015, Charleston County, South Carolina.)

CERTIFICATE OF REPORTER

I, Ruth C. Weese, Registered Diplomate Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 18th day of September, 2016 at Charleston, Charleston County, South Carolina.

Ruth C. Weese

Ruth C. Weese
Registered Diplomate
Reporter

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Anthony Wilder, #328282, Applicant, v. State of South Carolina, Respondent.	2013-CP-10-5655 **ORDER OF DISMISSAL**

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Sharnaisha Naki Richardson-Bax, Esquire
Respondent's Attorney:	J. Rutledge Johnson, Esquire
Trial Counsel:	V. Lynn Lofton, Esquire Lionel S. Lofton, Esquire Nathan S. Williams, Esquire
Date of Hearing:	December 15, 2015
Court Reporter:	Ruth Weese

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed September 25, 2013. The Respondent made its Return on February 19, 2014 and filed on February 21, 2014. A Notice of Amendment to the Applicant's PCR Application was filed on April 24, 2014. An evidentiary hearing into the matter was convened on December 15, 2015, at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Sharnaisha Naki Richardson-Bax, Esquire. J. Rutledge Johnson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

At the hearing, Applicant testified on his behalf. Lionel Lofton, Esquire, also testified. This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the

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South Carolina Department of Corrections, Applicant's PCR Application, the State's Return, the trial transcript and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the March 2008 term of the Charleston County Grand Jury for Murder (2008-GS-10-2383),[1] Burglary-First degree (2008-GS-10-2385),[2] Assault and Battery with Intent to Kill (ABWIK) (2008-GS-10-2386),[3] and two counts of Kidnapping (2008-GS-10-2384, -2390).[4] The Applicant was represented by Lionel S. Lofton, Esquire, and V. Lynn Lofton, Esquire.

On May 5-9, 2008, the Applicant proceeded to trial and was found guilty as indicted. The Applicant was sentenced by the Honorable J. Derham Cole to confinement for a period of life for Murder and Burglary, twenty (20) years for ABWIK, and thirty (30) years for kidnapping.[5]

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Robert M. Dudek, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Wilder, No. 2011-UP-385 (S.C. Ct. App.

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[1] Murder is a violent, most serious felony punishable by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty (30) years. See S.C. CODE ANN. §§ 16-3-10, -20 (2003), 16-1-60 (2003), 17-25-45 (2003). Life imprisonment means until death of the offender without the possibility of parole. See S.C. CODE ANN. § 16-3-20 (2003).

[2] "Burglary in the first degree is a [violent, most serious] felony punishable by life imprisonment. For purposes of this section, "life" means until death. The court, in its discretion, may sentence the defendant to a term of not less than fifteen [(15)] years." S.C. CODE ANN. § 16-11-311 (2005); S.C. CODE ANN. § 16-1-60 (2005); S.C. CODE ANN. § 17-25-45 (2005).

[3] "The crime of assault and battery with intent to kill shall be a [most serious, violent] felony in this State and any person convicted of such crime shall be punished by imprisonment not to exceed twenty [(20)] years." S.C. CODE ANN. § 16-3-620 (2007); S.C. CODE ANN. § 17-25-45 (2007); S.C. CODE ANN. § 16-1-60 (2007).

[4] Kidnapping is a violent, most serious felony punishable by thirty (30) years' imprisonment. See S.C. CODE ANN. § 16-3-910 (2012); S.C. CODE ANN. § 16-1-60 (2012); S.C. CODE ANN. § 17-25-45 (2012).

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August 9, 2011). The Applicant filed a Petition for Rehearing, which was denied on November 17, 2011. The Applicant petitioned for Writ of Certiorari to the South Carolina Supreme Court. The South Carolina Supreme Court denied the Petition on March 20, 2013. The Remittitur was issued April 9, 2013.

ALLEGATIONS

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

1. Ineffective assistance of counsel.
   a. Counsel did not object to hearsay testimony.
2. Prosecutorial misconduct.
   a. Allowed a State witness to commit perjury in trial testimony.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified Counsel was hired because he was a family friend and was the third attorney on this case. Applicant stated he received discovery from Counsel and met with him two (2) to three (3) times prior to his trial. Applicant claimed Counsel did not have a defense for his case, but had an opportunity to ask about possible defenses. Applicant stated that a witness would identify him in court; however, this is not in the discovery. Applicant claimed Counsel did not object to hearsay testimony on pages 293 through 294 in his trial transcript, when a law enforcement officer announced a vehicle description from a third-party witness.

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[5] The sentence for kidnapping indictment 2008-GS-10-2390 was suspended because the Applicant was also convicted of murder for the same victim.

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Applicant also claimed that the Assistant Solicitor offered perjured testimony in his opening statement. Applicant claimed the Assistant Solicitor then allowed Officer Jackson to perjure himself during direct examination.

Applicant then claimed Appellate Counsel was ineffective for failing to raise the issue of whether the trial court was correct in admitting evidence over a timely objection of his trial counsel. However, the State objected to this issue, as this was the exact issue raised on appeal. This Court sustained the objection.

Counsel testified that he has been practicing law since 1971 and was a federal prosecutor for twelve (12) years prior to entering private practice. He further testified that he now practices solely in the area of medical malpractice. Counsel stated Applicant was in jail during the entire pendency of trial. Counsel testified he reviewed the discovery with Applicant, as these were substantial charges. Counsel then testified his theory of the case was to challenge the chain of custody regarding the collection, potential comingling and testing of any DNA samples found in evidence and the Applicant's clothing. Counsel stated he discussed defenses with Applicant; however, this case was difficult to defend, as Applicant was caught in a car fleeing the scene in a "hot pursuit" and observed discarding evidence from the car during the ensuing chase. This evidence was collected from the side of the road in proximity of the Applicant's car right after his vehicle crashed. He further testified from an evidentiary standpoint these were "substantial hurdles to overcome."

Counsel articulated that the main legal issue was the chain of custody of Applicant's clothing and a possibility of contamination with the Victim's blood. He further testified that another legal issue he pursued vigorously was the issue of the identification of Applicant, which was raised and argued strenuously by Counsel at trial. Counsel stated that because the DNA results were

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contaminated, he did not consider consulting an expert. Counsel stated he did not object to the alleged hearsay testimony claimed by Applicant because it was a statement of a witness as indicated by Officer Jackson. This statement was used to show what Officer Jackson did in response to the statement and was not being offered for its truth and therefore was not hearsay. Counsel then stated Assistant Solicitor Williams did not participate in prosecutorial misconduct.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court has also read the trial transcript and the appellate records, all of which assists the Court in judging their credibility.

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

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, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. Courts presume that counsel rendered adequate assistance and made all significant decisions

in the exercise of reasonable professional judgment. Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. See Id. at 117–18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). 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." Id. at 117–18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court also has read the trial transcript and appellate records, all of which assists the Court in judging the witnesses' credibility. This Court finds that Applicant's testimony regarding Counsel's ineffectiveness is not credible, while also finding Counsel's testimony is persuasive and very credible.

This Court finds Counsel's representation of Applicant in this case well above the professional norms. Counsel fully investigated this case and assisted Applicant in his defense. Counsel vigorously objected to the introduction of the DNA evidence based on defects in the chain of custody of this evidence and cross-examined the State's witnesses, specifically concerning the possible contamination of DNA on the defendant's clothes (Tr. 668: 7-25; 669-681; 682: 1-8; 734: 8-25; 735-736). Counsel also strenuously objected to the introduction of the identification of the

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Applicant as the perpetrator and cross-examined the State's witnesses concerning the identification of Applicant (Tr. 168: 6-25; 169-175; 176: 1-11). Further, Counsel had no legal basis to object to the statement by Officer Jackson, as this statement was not offered for the truth of the matter asserted; rather, the statement was offered to show subsequent action by law enforcement (Tr. 293: 20-25; 294: 1-2). Therefore, this Court finds the Applicant has failed to meet his burden of proving Counsel's performance was deficient or that he was prejudiced thereby. Accordingly, this allegation is denied.

Prosecutorial misconduct

Applicant contends that the assistant solicitor offered perjured testimony and that a witness gave an inconsistent statement to his opening argument. Because it was simply an inconsistent statement, Counsel had ample opportunity to cross-examine that witness, which he did. This Court finds absolutely no evidence of prosecutorial misconduct or wrongdoing in this case. Therefore, this allegation is also denied.

Overwhelming Evidence of Guilt

This Court further finds overwhelming evidence of Applicant's guilt in this case. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994). See also Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991).

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In Ford, trial counsel failed to request an alibi instruction and his representation was found deficient as a result. However, the evidence of the applicant's guilt in Ford was overwhelming and the South Carolina Supreme Court held that the Applicant failed to prove the second prong of Strickland, which requires that an Applicant show prejudice by the deficient representation.

Even assuming *arguendo* Counsel performed deficiently, Applicant can prove no resulting prejudice. Counsel challenged the DNA evidence, the identification of Applicant, the chain of custody, and the shell casings. Additionally, Applicant was identified at the crime scene, was observed discarding the fruits of the crime while in flight, and subsequently arrested at the scene of the vehicle crash after a hot pursuit very close in time and proximity to the crime scene. Based on the entirety of the trial transcript, there is overwhelming evidence of Applicant's guilt in this case.

CONCLUSION

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

This Court 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, 454, 409 S.E.2d 395, 396 (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

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appellate review, PCR counsel must serve and file a Notice of Appeal on the 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!

Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

May 5, 2016
Charleston, South Carolina

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

ANTHONY WILDER, #328282,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

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

S. Naki Richardson-Bax, Esquire
The Bax Law Firm, PA
69 Robert Smalls Pkwy Ste 3C
Beaufort, SC 29906-4274

This 12th day of May, 2016.

J. RUTLEDGE JOHNSON
ATTORNEY FOR RESPONDENT

SWORN to before me this 12th day of May, 2016.

Notary Public for South Carolina.
My Commission Expires: 12/16/2024

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Anthony Wilder, #328282, Applicant, v. State of South Carolina, Respondent.	Case No.: 2013-CP-10-5655 **AMENDED[1]** **ORDER OF DISMISSAL**

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Sharnaisha Naki Richardson-Bax, Esquire
Respondent's Attorney:	J. Rutledge Johnson, Esquire
Trial Counsel:	V. Lynn Lofton, Esquire Lionel S. Lofton, Esquire Nathan S. Williams, Esquire
Appellate Counsel:	Robert M. Dudek, Esquire
Date of Hearing:	December 15, 2015
Court Reporter:	Ruth Weese

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed September 25, 2013. The Respondent made its Return on February 19, 2014 and filed on February 21, 2014. A Notice of Amendment to the Applicant's PCR Application was filed on April 24, 2014. An evidentiary hearing into the matter was convened on December 15, 2015, at the Charleston County Courthouse. The Applicant was present at the hearing and represented by

[1] Pursuant to the Defendant's Motion to Alter/Amend Judgment filed on May 26, 2016 and received on June 10, 2016 this order is amended to reflect the Applicant's allegations made in his Notice of Amendment to his Post-Conviction Relief Application. Counsel submitted copies of letters to the Court dated January 6, 2016 and January 14, 2016 that were sent to the State which addressed the issues raised by her client after the hearing. This Motion is disposed of without the necessity of a hearing and decided on the record and written motion. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401–402, 444 S.E.2d 534, 536 (Ct. App. 1994). The State was given the opportunity to respond to the Motion and declined. This Court finds that all of the issues that were raised during the hearing have now been addressed and those raised afterwards are waived as untimely.

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Sharnaisha Naki Richardson-Bax, Esquire. J. Rutledge Johnson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

At the hearing, Applicant testified on his behalf. Lionel Lofton, Esquire, also testified. This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, Applicant's PCR Application, the State's Return, the trial transcript and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the March 2008 term of the Charleston County Grand Jury for Murder (2008-GS-10-2383),[2] Burglary-First degree (2008-GS-10-2385),[3] Assault and Battery with Intent to Kill (ABWIK) (2008-GS-10-2386),[4] and two counts of Kidnapping (2008-GS-10-2384, -2390).[5] The Applicant was represented by Lionel S. Lofton, Esquire, and V. Lynn Lofton, Esquire.

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[2] Murder is a violent, most serious felony punishable by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty (30) years. See S.C. CODE ANN. §§ 16–3–10, –20 (2003), 16–1–60 (2003), 17–25–45 (2003). Life imprisonment means until death of the offender without the possibility of parole. See S.C. CODE ANN. §§ 16–3–20 (2003).

[3] "Burglary in the first degree is a [violent, most serious] felony punishable by life imprisonment. For purposes of this section, "life" means until death. The court, in its discretion, may sentence the defendant to a term of not less than fifteen [(15)] years." S.C. CODE ANN. § 16–11–311 (2005); S.C. CODE ANN. § 16–1–60 (2005); S.C. CODE ANN. § 17–25–45 (2005).

[4] "The crime of assault and battery with intent to kill shall be a [most serious, violent] felony in this State and any person convicted of such crime shall be punished by imprisonment not to exceed twenty [(20)] years." S.C. CODE ANN. § 16–3–620 (2007); S.C. CODE ANN. § 17–25–45 (2007); S.C. CODE ANN. § 16–1–60 (2007).

[5] Kidnapping is a violent, most serious felony punishable by thirty (30) years' imprisonment. See S.C. CODE ANN. § 16–3–910 (2012); S.C. CODE ANN. § 16–1–60 (2012); S.C. CODE ANN. § 17–25–45 (2012).

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On May 5-9, 2008, the Applicant proceeded to trial and was found guilty as indicted. The Applicant was sentenced by the Honorable J. Derham Cole to confinement for a period of life for Murder and Burglary, twenty (20) years for ABWIK, and thirty (30) years for kidnapping.[6]

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Robert M. Dudek, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Wilder, No. 2011-UP-385 (S.C. Ct. App. August 9, 2011). The Applicant filed a Petition for Rehearing, which was denied on November 17, 2011. The Applicant petitioned for Writ of Certiorari to the South Carolina Supreme Court. The South Carolina Supreme Court denied the Petition on March 20, 2013. The Remittitur was issued April 9, 2013.

ALLEGATIONS

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

1. Ineffective assistance of Counsel.
   a. Counsel did not object to hearsay testimony.
   b. Counsel did not call attention to discrepancies between the testimony of one witness and the written statement of another witness.
2. Prosecutorial misconduct.
   a. Allowed a State witness to commit perjury in trial testimony.
3. Ineffective assistant of Appellate Counsel
   a. Counsel did not raise the issue of whether the trial court was correct in admitting certain physical evidence over the timely objection of trial counsel.

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[6] The sentence for kidnapping indictment 2008-GS-10-2390 was suspended because the Applicant was also convicted of murder for the same victim.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified Counsel was hired because he was a family friend and was the third attorney on this case. Applicant stated he received discovery from Counsel and met with him two (2) to three (3) times prior to his trial. Applicant claimed Counsel did not have a defense for his case, but had an opportunity to ask about possible defenses. Applicant stated that a witness would identify him in court; however, this is not in the discovery. Applicant claimed Counsel did not object to hearsay testimony on pages 293 through 294 in his trial transcript, when a law enforcement officer announced a vehicle description from a third-party witness.

Applicant also claimed that the Assistant Solicitor offered perjured testimony in his opening statement. Applicant claimed the Assistant Solicitor then allowed Officer Jackson to perjure himself during direct examination.

Applicant then claimed Appellate Counsel was ineffective for failing to raise the issue of whether the trial court was correct in admitting evidence over a timely objection of his trial counsel. However, the State objected to this issue, as this was the exact issue raised on appeal. This Court sustained the objection.

Counsel testified that he has been practicing law since 1971 and was a federal prosecutor for twelve (12) years prior to entering private practice. He further testified that he now practices solely in the area of medical malpractice. Counsel stated Applicant was in jail during the entire pendency of trial. Counsel testified he reviewed the discovery with Applicant, as these were substantial charges. Counsel then testified his theory of the case was to challenge the chain of custody regarding the collection, potential comingling and testing of any DNA samples found on evidence and the Applicant's clothing. Counsel stated he discussed defenses with Applicant; however, this case was difficult to defend, as Applicant was caught in a car fleeing the scene in a "hot pursuit" and observed

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discarding evidence from of the car during the ensuing chase. This evidence was collected from the side of the road in proximity of the Applicant's car right after his vehicle crashed. He further testified from an evidentiary standpoint these were "substantial hurdles to overcome."

Counsel articulated that the main legal issue was the chain of custody of Applicant's clothing and a possibility of contamination with the Victim's blood. He further testified that another legal he pursued vigorously was the issue of the identification of Applicant, which was raised and argued strenuously by Counsel at trial. Counsel stated that because the DNA results were contaminated, he did not consider consulting an expert. Counsel stated he did not object to the alleged hearsay testimony claimed by Applicant because it was a statement of a witness as indicated by Officer Jackson. This statement was used to show what Officer Jackson did in response to the statement and was not being offered for its truth and therefore was not hearsay. Counsel then stated Assistant Solicitor Williams did not participate in prosecutorial misconduct.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court has also read the trial transcript and the appellate records, all of which assists the Court in judging their credibility.

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

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

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adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. See Id. at 117–18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "'reasonableness under prevailing professional norms.'" Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). 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.'" Id. at 117–18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court also has read the trial transcript and appellate records, all of which assists the Court in judging the witnesses' credibility. This Court finds that Applicant's testimony regarding Counsel's ineffectiveness is not credible, while also finding Counsel's testimony is persuasive and

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very credible.

This Court finds Counsel's representation of Applicant in this case well above the professional norms. Counsel fully investigated this case and assisted Applicant in his defense. Counsel vigorously objected to the introduction of the DNA evidence based on defects in the chain of custody of this evidence and cross-examined the State's witnesses, specifically concerning the possible contamination of DNA on the defendant's clothes (Tr. 668: 7-25; 669-681; 682: 1-8; 734: 8-25; 735-736). Counsel also strenuously objected to the introduction of the identification of the Applicant as the perpetrator and cross-examined the State's witnesses concerning the identification of Applicant (Tr. 168: 6-25; 169-175; 176: 1-11). Further, Counsel had no legal basis to object to the statement by Officer Jackson, as this statement was not offered for the truth of the matter asserted; rather, the statement was offered to show subsequent action by law enforcement (Tr. 293: 20-25; 294: 1-2). Therefore, this Court finds the Applicant has failed to meet his burden of proving Counsel's performance was deficient or that he was prejudiced thereby. Accordingly, these allegations are denied.

Prosecutorial misconduct

Applicant contends that the assistant solicitor offered perjured testimony and that a witness gave an inconsistent statement to his opening argument. Because it was simply an inconsistent statement, Counsel had ample opportunity to cross-examine that witness, which he did. This Court finds absolutely no evidence of prosecutorial misconduct or wrongdoing in this case. Therefore, this allegation is also denied.

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Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 749, 103 S. Ct. 3308, 3311 (1983). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . ." Jones, 463 U.S. at 754, 103 S. Ct. at 3314. The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift v. State, 302 S.C. at 537, 397 S.E.2d at 525; Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005); Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Furthermore, "[t]he *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal." Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993). "Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel." Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993).

Here, Applicant contends Appellate Counsel did not raise the issue of whether the trial court was correct in admitting certain physical evidence over the timely objection of trial counsel. The issue of whether the trial court erred in admitting the DNA evidence developed from Wilder's pants was raised and addressed by the Court of Appeals. The Court of Appeals held that "conflicting

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theories of how evidence was collected and the potential for contamination related did not render DNA evidence so tainted it was totally unreliable." State v. Wilder, No. 2011-UP-385 (S.C. Ct. App. Aug. 9, 2011). Furthermore, the Court of Appeals found that even if the trial court erred in admitting the DNA evidence it was harmless because the Applicant was not prejudiced and other competent evidence established Applicant's guilt beyond a reasonable doubt. Id.

Thus, this Court finds the Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby. Accordingly, this allegation is denied.

Overwhelming Evidence of Guilt

This Court further finds overwhelming evidence of Applicant's guilt in this case. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (S.C. 1991). In Ford, trial counsel failed to request an alibi instruction and his representation was found deficient as a result. However, the evidence of the applicant's guilt in Ford was overwhelming and the South Carolina Supreme Court held that the Applicant failed to prove the second prong of Strickland, which requires that an Applicant show prejudice by the deficient representation.

Even assuming *arguendo* Counsel performed deficiently, Applicant can prove no resulting prejudice. Counsel challenged the DNA evidence, the identification of Applicant, the chain of custody, and the shell casings. Additionally, Applicant was identified at the crime scene, was observed discarding the fruits of the crime while in flight, and subsequently arrested at the scene of the vehicle crash after a hot pursuit very close in time and proximity to the crime scene. Based on the entirety of the trial transcript, there is overwhelming evidence of Applicant's guilt in this case.

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CONCLUSION

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

This Court 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 the 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!

Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

July 26, 2016
Charleston, South Carolina

10/8/10

NSW20060902297

WITNESSES

Charleston County Sheriff

AGENCY CASE NUMBER

2006018852B

ARREST WARRANT NUMBER

K179702

DATE OF ARREST

2006-08-31

ACTION OF GRAND JURY

TRUE BILL

Eddie Cochran

Foreperson of Grand Jury

Date: MAR 03 2008

VERDICT

Guilty

Rena L. Brown 5/9/08

Foreperson of Petit Jury *Date:*

INDICT

DOCKET NO. **2008GS1002383**

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

March Term 2008

THE STATE 06-5099(a), V

vs.

ANTHONY DOMINIQUE WILDER
DOB: [redacted]
B/M

Indictment for

Murder

FILED
2008 MAR -5 PM 2:08
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on March 3, 2008 the Grand Jurors of Charleston County present upon their oath:

Murder

That in Charleston County on or about August 31, 2006, with malice aforethought, ANTHONY DOMINIQUE WILDER, alone or while acting with others, did kill and murder Sterling Spann by shooting him, and that Sterling Spann did die in Charleston County as a proximate result thereof on August 31, 2006; in violation of Section 16-3-10 of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

NATHAN WILLIAMS
ASSISTANT SOLICITOR

NSW20060902297

WITNESSES

GUY STANLEY
Charleston County Sheriff

AGENCY CASE NUMBER

2006018852B

ARREST WARRANT NUMBER

K179765

DATE OF ARREST

2006-09-05

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: MAR 03 2008

VERDICT

Guilty

Rena L. Brown 5/9/08
Foreperson of Petit Jury Date:

INDICT

DOCKET NO. 2008GS1002390

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

March Term 2008

THE STATE 06-D08(03)

vs.

ANTHONY DOMINIQUE WILDER
DOB: [redacted]
B/M

Indictment for:

Kidnapping

FILED
2008 MAR -5 PM 2:08
JULIE J. ARMSTRONG
CLERK OF COURT
BY

1105

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on March 3, 2008 the Grand Jurors of Charleston County present upon their oath:

Kidnapping

That in CharlestonCounty, South Carolina, on or about August 31, 2006, the Defendant, ANTHONY DOMINIQUE WILDER, alone or while acting with others, unlawfully did seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, Sterling Spann , without authority of law; all in violation of Section 16-3-910 of the Code of Laws of South Carolina, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Nathan Williams

NATHAN WILLIAMS
ASSISTANT SOLICITOR

NSW20060902297

WITNESSES

Charleston County Sheriff

AGENCY CASE NUMBER

2006018852B

ARREST WARRANT NUMBER

K179703

DATE OF ARREST

2006-08-31

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: MAR 03 2008

VERDICT

Guilty

Rena L. Brown 5/9/08

Foreperson of Petit Jury Date

INDICT

DOCKET NO. 2008GS1002384

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

March Term 2008

THE STATE

vs. 06-5399025

ANTHONY DOMINIQUE WILDER

DOB: [redacted]

B/M

Indictment for

Kidnapping

FILED

2008 MAR -5 PM 2:08

JULIE J. ARMSTRONG

CLERK OF COURT

BY

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on March 3, 2008 the Grand Jurors of Charleston County present upon their oath:

Kidnapping

That in CharlestonCounty, South Carolina, on or about August 31, 2006, the Defendant, ANTHONY DOMINIQUE WILDER, alone or while acting with others, unlawfully did seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, Patricia Green, without authority of law; all in violation of Section 16-3-910 of the Code of Laws of South Carolina, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Nathan Williams

NATHAN WILLIAMS
ASSISTANT SOLICITOR

NSW20060902297

WITNESSES

GUY STANLEY
Charleston County Sheriff

AGENCY CASE NUMBER

2006018852B

ARREST WARRANT NUMBER

K179764

DATE OF ARREST

2006-09-05

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: MAR 03 2008

VERDICT

Guilty

Rena L. Brown 5/9/08
Foreperson of Petit Jury *Date:*

INDICT

DOCKET NO. 2008GS1002386

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

March Term 2008

THE STATE

06-[illegible]

vs.

ANTHONY DOMINIQUE WILDER
DOB: [redacted]
B/M

Indictment for

Assault and Battery With Intent to Kill

FILED
2008 MAR -5 PM 2:08
JULIE J. ARMSTRONG
CLERK OF COURT
BY

1109

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on March 3, 2008 the Grand Jurors of Charleston County present upon their oath:

Assault and Battery With Intent to Kill

That in Charleston County, South Carolina, on or about August 31, 2006, ANTHONY DOMINIQUE WILDER, alone or while acting with others, with malice aforethought, did commit an unlawful act of a violent nature upon, Jamie Williams, to wit: shooting him, in violation of the Common Law of South Carolina and Section 16-03-620 of the Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Nathan Williams

NATHAN WILLIAMS
ASSISTANT SOLICITOR

NSW20060902297

WITNESSES

GUY STANLEY
Charleston County Sheriff

AGENCY CASE NUMBER

2006018852B

ARREST WARRANT NUMBER

K179763

DATE OF ARREST

2006-09-05

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: MAR 03 2008

VERDICT

Guilty

Rena L. Brown 5/9/08
Foreperson of Petit Jury Date:

INDICT

DOCKET NO. 2008GS1002385

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

March Term 2008

THE STATE

vs.

ANTHONY DOMINIQUE WILDER
DOB: [redacted]
B/M

Indictment for

Burglary First Degree

FILED
2008 MAR -5 PM 2:08
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on March 3, 2008 the Grand Jurors of Charleston County present upon their oath:

Burglary First Degree

That in Charleston County, South Carolina, on or about August 31, 2006, the Defendant ANTHONY DOMINIQUE WILDER, alone or while acting with others, did enter the dwelling of Patricia Green, located at [redacted] W. Stall Rd, without consent and with the intent to commit a crime therein. While armed with a firearm; in violation of Section 16-11-311 of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Nathan Williams

NATHAN WILLIAMS
ASSISTANT SOLICITOR