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September 25, 2017

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

RECEIVED
SEP 27 2017
S.C. SUPREME COURT

The Honorable Clerk of Court
Chesterfield County
PO Box 529
Chesterfield, SC 29709

RE: James Tyner, #270696, v. State of South Carolina
2015-CP-13-116

Dear Mr. Shearouse and Ms. Miles:

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

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

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

Yours very truly,

Lance S. Boozer

Enclosures
cc: Johnny E. James, Jr., AAG
Loriene French, OAD
James Tyner, #270696

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

RECEIVED
SEP 27 2017
S.C. SUPREME COURT

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2015-CP-13-116

James Tyner, #270696, ...Petitioner,

v.

State of South Carolina,...Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Roger E. Henderson's Order dated September 5, 2017, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on September 14, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,

Lance S. Boozer
The Boozer Law Firm, LLC
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Tele: 803-608-5543

September 25, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

RECEIVED
SEP 27 2017
S.C. SUPREME COURT

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2015-CP-13-116

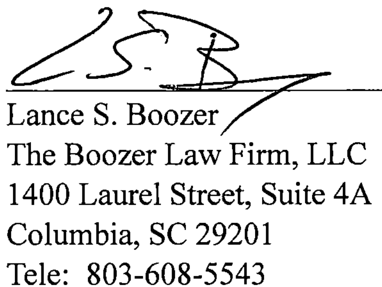
James Tyner, #270696, ...Petitioner,

v.

State of South Carolina,...Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Johnny E. James, Jr., P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 25th day of September, 2017.



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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF CHESTERFIELD)

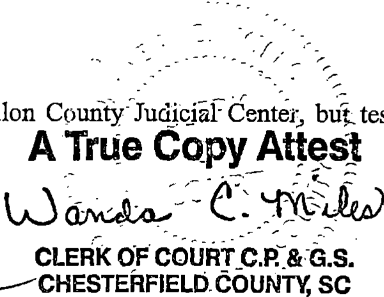
James Curtis Tyner,) Case No.: 2015-CP-13-00116
S.C.D.C. No. 270696,)
)
Applicant,)
) **ORDER OF DISMISSAL**
v.)
)
State of South Carolina,)
)
Respondent.)
)

2017 SEP 12 AM 10: 05
Wanda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief filed by James Curtis Tyner ("Applicant") on March 2, 2015. Respondent made its return on or about January 25, 2017. The Court convened an evidentiary hearing into the matter on July 17, 2017, at the Dillon County Judicial Center in Dillon, South Carolina. Applicant was present at the hearing and represented by Lance S. Boozer, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, M.W. "Trey" Cockrell, III, Esquire ("Counsel"), Applicant's appellate counsel, Carmen V. Ganjehsani, Esquire ("Appellate Counsel"),[1] and Chris Jones, Esquire, of the Fourth Circuit Solicitor's Office, also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Chesterfield County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

[1] Appellate Counsel was not able to be physically present at the Dillon County Judicial Center, but testified by phone by consent of the parties and the Court.



I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. Applicant was indicted at the March 2011 term of the Chesterfield County Grand Jury for assault and battery of a high and aggravated nature (ABHAN) (2011-GS-13-00239), and strong arm robbery (2011-GS-13-00240). M.W. "Trey" Cockrell, Esquire represented Applicant, and Chris Jones, of the Fourth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable Paul M. Burch and a jury. The jury found Applicant guilty as indicted on June 20, 2012. Judge Burch sentenced Applicant to imprisonment for consecutive terms of 15 years for the robbery and 3 years for the ABHAN, to be served in that order.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Carmen V. Canjehsani, Esquire. Appellate Counsel raised two issues to the South Carolina Court of Appeals (verbatim):

> I. Appellant was entitled to a directed verdict on the charge of assault and battery of a high and aggravated nature where the State did not establish that the alleged acts of Appellant caused "great bodily injury to another person" or used "means likely to produce death or great bodily injury" as required by S.C. Code Ann. §16-3-600(B)(1).
>
> II. The Trial Court erred in refusing to quash the jury panel pursuant to Appellant's Batson[2] motion where (1) the State only struck young black jurors; (2) the State struck one female black juror based upon her alleged attitude; and (3) the State struck another female black juror based upon her residence.

Final Brief of Appellant at 4. By opinion decided June 11, 2014, the Court of Appeals affirmed Applicant's convictions. State v. Tyner, Op. No. 2014-UP-222 (S.C. Ct. App. filed June 11, 2014). The Court found evidence existed to show the attack posed a substantial risk of death in

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[2] Batson v. Kentucky, 476 U.S. 79 (1986)

the victim's testimony that "he was choked and could not breathe," along with the victim's wife's testimony as to his injuries. Id. The Court further affirmed the Court's ruling on the Batson motion "because, in the absence of contrary evidence in the record, demeanor is a race-neutral basis for exercising a jury strike." Id. Applicant filed a Petition for Rehearing, which was denied by Order dated August 25, 2014. Finally, Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated January 15, 2015. The Remittitur was issued on February 17, 2015.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
    a. "Failure to properly investigate"
    b. "Counsel failed to investigate Applicant's competency to stand trial."
    c. "Counsel failed to object to indictment."
    d. "Counsel failed to challenge inconsistent witness testimony at trial."
    e. "Counsel failed to object to in-court identification of Applicant during trial."
    f. "Counsel failed to impeach state's witnesses."
    g. "Counsel failed to object to victim's hospital reports."
    h. "Counsel failed to challenge lack of proof Applicant did not commit strong armed robbery."
2. Ineffective Assistance of Appellate Counsel
3. Prosecutorial Misconduct, in that:
    a. "Applicant believes the State committed discovery violations."

At the evidentiary hearing, as to the allegation of ineffective assistance of appellate counsel, Applicant primarily focused on Appellate Counsel's decision to not brief the Court of Appeals on the trial court's refusal to declare a mistrial on the basis of Applicant's injuries sustained the night of June 19, 2012, and concurrent arrest on tangentially related charges.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at

689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

IAC Allegation #1 – Failure to Investigate, Competency to Stand Trial

Applicant alleges Counsel failed to adequately investigate his case, both generally and specifically with respect to his competency to stand trial. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417

(1998)). "In order to find that [an applicant's] trial counsel was ineffective for refusing to request a Blair[3] hearing on [an applicant's] competency to stand trial," the applicant must still satisfy both prongs of Strickland. Matthews v. State, 358 S.C. 456, 459, 596 S.E.2d 49, 50-51 (2004). To show prejudice within the context of counsel's failure to fully investigate an applicant's mental capacity, an applicant must show a reasonable probability that he was either insane at the time the crime was committed or incompetent at the time of trial. Lee v. State, 396 S.C. 314, 320, 721 S.E.2d 442, 445-46 (Ct.App. 2011). "The test for determining whether a criminal defendant is competent to stand trial is whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him." State v. Reed, 332 S.C. 35, 39, 503 S.E.2d 747, 749 (1998) (quoting Dusky v. United States, 362 U.S. 402 (1960)). Counsel may reasonably rely on his or her own perceptions in determining a client's competency to stand trial. Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992).

Applicant was not present for the first day of trial on June 19, 2012, at which time *voir dire* and jury selection occurred. Tr. 9. Counsel moved for a continuance in order to locate and more fully prepare Applicant for trial; the trial court denied the motion as to jury selection but granted Counsel until the following day to find his client and bring him to Court. Id. Applicant was arrested overnight and hauled into Court for the second day of trial on June 20, 2012, at which time Judge Burch admonished him for playing games with the court. Tr. 47-48. The Court granted a short recess for Applicant and Counsel to confer with one another, after which Counsel moved for a mistrial:

> **[COUNSEL:]** Your Honor, after talking with my client I'm going to move for a mistrial. My client obviously just got arrested last night on some other charges,

[3] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981)

> and after speaking with him and what not I don't think he will be in a position, from the events of last night *his condition* and what not, to move forward with this trial.
>
> **MR. JONES:** Your Honor, I don't believe that's enough grounds for a mistrial. The things that happened last night were brought on because of the defendant's actions.
>
> **THE COURT:** Denied.

Tr. 48-49. Counsel again raised the issue of Applicant's fitness for trial after the jury returned its verdict:

> **[COUNSEL:]** My client was not in a position to pursue – excuse me, Your Honor. Renew my motion for a mistrial under the circumstances of my client was not in a position to effectively assist me in representing him. As the Court may or may not be aware Monday evening he was arrested for burglary and criminal domestic violence of a high and aggravated. He was not brought before the Court until Tuesday morning when we just moved forwards with the trial.
>
> He was emotionally, physically frustrated and as such I was not in a position to effectively represent him based on the opportunity to talk with him and prepare for this matter.
>
> **THE COURT:** All right. Based on the history with the prior continuance from last term plus the fact that he was supposed to be here Monday. He'd been where he was supposed to be then you wouldn't be having to step in to try to attempt such a motion as that. The Court certainly is not impressed and I'll have to deny that.

Tr. 180-81.

At the evidentiary hearing, Applicant testified that he was involved in an altercation with his girlfriend the night of June 19, 2012. When law enforcement responded, Applicant testified that he was "busted up with a nightstick," for which he received the treatment of an unspecified number of medical staples in his head. Applicant testified that he could not remember much due to the incident and speculated that he may have suffered a concussion. When pressed on the cause of the altercation, Applicant admitted that his girlfriend held a restraining order against

him at the time, but that he needed time to "work it all out" as she was expected to testify as an alibi witness at trial.

Counsel testified that he believed the case was "triable" given the evidence turned over by the State and his independent drive-by review of the victim's house and visit to the gas station in Society Hill. As to Applicant's competence, Counsel testified that when he finally found Applicant at the detention center, Applicant had a gash in his head and staples. Counsel testified that he gave twenty dollars to his assistant to purchase clothes from a thrift store for Applicant, in order to improve his bloodied appearance. Counsel later contacted Applicant's girlfriend, who reported that Applicant beat her up after she refused to divert from her expected alibi testimony to instead testify that she and Applicant had been in Florida at the time of the crime. Counsel could not remember Applicant having any trouble helping at trial, but testified that Applicant had been intoxicated the night before, was not well-rested, and was not emotionally "in the game." Counsel testified that he made the motion in order to preserve the record.

The Court finds that Applicant has failed to show any deficiency on the part of counsel. Applicant offers no evidence to show what, if anything, additional investigation would have revealed regarding his condition at the time of trial. The extent of Applicant's alleged condition appears to have been well within the scope of Counsel's perception at the time of trial. Applicant introduced no medical report or expert testimony to show that he was not competent at the time of the crime or at the time of trial. Applicant introduced no evidence of any long-term mental condition. To the contrary, the entirety of Applicant's condition was short-term and brought on by his own poor decisions: he was evidently hungover, tired, and battered after making extremely poor decisions on the eve of his own trial. Counsel could not recall Applicant having any trouble helping.

The question at issue in determining the competence of a defendant to stand trial is not whether he was physically suited to provide the best possible assistance to counsel, but whether he could consult at all and basically understood what was happening around him. The Court finds that the records before it show that Applicant was competent at trial—he affirmed his understanding of proceedings when prompted to decide whether he would testify and later gave a perfectly clear reaffirmation of his innocence after the jury returned its verdict. See Tr. 136-37, 186. As to the investigation of anything other than his competency to stand trial, Applicant offered no evidence. Accordingly, Applicant's request for relief based upon his allegations that Counsel failed to investigate is **DENIED**.

IAC Allegation #2 – Failure to Object to Indictment

Applicant alleges counsel was ineffective for failing to object to the indictments against him. Immediately before trial, the State motioned to amend the indictments in order to correct the listed date from December 23, 2010, to December 31, 2010. Tr. 37. Counsel did not object and stated on the record his reasoning for not so objecting: "Our defense would be where [Applicant] was on December 31st." Id. At the evidentiary hearing, Counsel reaffirmed his decision not to object—Applicant had an alibi for December 31st, at least until his fight with the alibi witness.[4] The Court finds that Counsel has articulated a valid strategic reason for not objecting and, as such, his decision not to object cannot be construed as ineffective assistance of counsel. See Smith, 386 S.C. at 567, 689 S.E.2d at 632. Accordingly, Applicant's request for relief based upon this allegation is **DENIED**.

[4] Applicant testified that he and Counsel did not discuss the possibility of an alibi defense, but the Court does not find this testimony credible given Applicant's other testimony that he visited his then-girlfriend, the alibi witness, to "work out" their testimony.

IAC Allegation #3 – Failure to Challenge Inconsistent Witness Testimony at Trial, Impeach

Applicant alleges Counsel was ineffective for failing to adequately confront and impeach the State's witnesses at trial with their inconsistent statements. At trial, Counsel challenged and impeached witness and co-conspirator Adam Quick for claiming to be the getaway driver where witness Bruce Walters had previously claimed the same, for being inebriated at the time of the crime, and for denying his testimony was pursuant to a deal with the State.[5] Tr. 115-120. Counsel introduced Quick's video statement and examined him on it. Tr. 118-120. Counsel similarly challenged and impeached witness and co-conspirator Bruce Walters for testifying pursuant to a plea deal, for being heavily under the influence of both alcohol and illegal narcotics at the time of the crime, and for certain deficiencies in his recollection of how he, Quick, and Applicant acquired the getaway vehicle. Tr. 129-134. In closing statements, Counsel repeatedly emphasized the "gaping holes" in the State's case, including discrepancies between the victim's testimony and the investigative report, the heavy intoxication of the co-conspirators at the time of the crime, the failure to investigate the getaway car's owner, Quick's refusal to admit to his expectation of avoiding jail time, the long period of time between when the crime occurred and when Quick gave his statement to law enforcement, and the absence of physical evidence.

At the evidentiary hearing, Applicant testified the State's witnesses lied, and that he felt Counsel could have done a better job cross-examining them. Applicant was not specific as to how Counsel could have more effectively impeached the witnesses. Counsel testified that he did challenge the witnesses for their inconsistent statements and pointed out that, in a set of facts involving two assailants and a driver, each of the three co-conspirators claimed to be the driver.

[5] As a consequence of the last set of questions here described, counsel for Quick was called to the stand and testified that his understanding was that Quick would get probation for his testimony. Tr. 122.

Counsel recalled the above described impeachment for intoxication and Quick's unwillingness to admit to testifying pursuant to a deal with the State.

The Court finds that Applicant has failed to show any way that Counsel could have more effectively impeached the State's witnesses. The record shows that Counsel clearly and concisely demonstrated the deficiencies in each co-conspirator's testimony, impeached them on the inconsistencies in their stories, and reaffirmed those weaknesses in closing arguments. As such, Applicant has failed to meet his burden of showing either a deficiency on the part of Counsel or any prejudice therefrom. Accordingly, Applicant's request for relief as to these allegations is **DENIED**.

IAC Allegation #4 – Failure to Object to In-Court Identification

Applicant alleges that Counsel was ineffective for failing to object to the in-court identification of him during trial. A first-time, in-court identification is not objectionable under Neil v. Biggers, 409 U.S. 188 (1972), and the remedy for any suggestiveness of or deficiency in an in-court identification is cross-examination and argument. State v. Lewis, 363 S.C. 37, 42-43, 609 S.E.2d 515, 518 (2005) (citations omitted). There was no photo lineup at issue at trial—the co-conspirators merely confirmed that Applicant was a part of the crime and pointed him out in the courtroom. As such, the Court can conceive of no appropriate objection, and Applicant's request for relief as to this allegation is **DENIED**.

IAC Allegation #5 – Failure to Object to Victim's Hospital Reports

Applicant alleges that Counsel was ineffective for failing to object to the introduction of the victim's hospital reports. The victim did not go to the hospital. Tr. 62-63. The victim's refusal to go to the hospital constituted part of Applicant's argument at trial and on appeal that the State could not prove the "great bodily injury" element of ABHAN. Tr. 134-35, 181-82;

Final Brief of Appellant at 9-13. It is traditionally very difficult to object to and successfully exclude evidence that does not exist. Accordingly, Applicant has not met his burden as to either prong of Strickland by this allegation, and his request for relief thereto is **DENIED.**

IAC Allegation #6 – Failure to Challenge Sufficiency of Evidence of Strong Arm Robbery

Applicant alleges Counsel was ineffective for failing to challenge the lack of proof to show he committed strong arm robbery. At trial, Counsel made a general motion for a directed verdict at the close of the State's case and again renewed that motion after the jury returned its verdict, focusing primarily on the ABHAN charge:

> **[COUNSEL:]** Thank you, Your Honor. And I again want to renew my motion for directed verdict on both charges. But mostly and far more importantly on the charge of the assault and battery of a high and aggravated nature. I think the magnitude of the injuries sustained by the victim here, Your Honor, don't rise to the effect of a your – great bodily matter.
>
> **THE COURT:** I don't think – didn't mean to cut the State off. If you have something you want to add.
>
> **MR. JONES:** The State's position is that we certainly presented evidence that the actions were likely to cause the death of the victim. He testified that he thought he was going to die, and due to his present health condition that was a real risk.
>
> **THE COURT:** And age ---
>
> **MR. JONES:** And age.
>
> **THE COURT:** --- difference does come into play. I'll have to deny that motion.

Tr. 181-82. At the evidentiary hearing, Counsel testified he believed the ABHAN issue was the strongest argument available to him, and so focused his efforts thereon.

The Court finds that Counsel articulated a valid strategic decision to focus on the strongest argument available for a directed verdict motion and, therefore, his decision to not more thoroughly argue against the sufficiency of the evidence of strong arm robbery cannot be

deemed ineffective assistance of counsel. See Smith, 386 S.C. at 567, 689 S.E.2d at 632. Furthermore, the testimony of the co-conspirators at trial provided sufficient evidence to convict Applicant of strong-arm robbery. Accordingly, Applicant has failed to meet his burden as to either prong of Strickland by this allegation, and his request for relief thereto is **DENIED**.

B. Ineffective Assistance of Appellate Counsel

Applicant alleges that Appellate Counsel was ineffective in her representation of him on appeal. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "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 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

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

Appellate Counsel testified she briefed the issues raised on appeal because she believed them to be the strongest issues apparent in the record. She specifically noted the issue of Applicant's request for a continuance based on Applicant's arrest immediately prior to trial and the lack of case law on the subject. Appellate Counsel testified to her believe that no appellate court would reverse the trial court's refusal to continue the case where Applicant was contemptuously absent from the first day of trial and the case had already been continued once before. Appellate Counsel reported talking to Applicant around 10 times in the course of the appeal. When presented with additional details regarding Applicant's injuries, Appellate Counsel noted that the details were not apparent on the face of the transcript and that the details did make the issue stronger than her initial conclusion, but ultimately concluded that Applicant would have needed to be "almost non-functioning."

The Court finds that Appellate Counsel articulated valid reasoning for why she prioritized the issues she briefed over the issue proposed by Applicant. The issue of the Court's refusal to continue due to Applicant's injuries prior to trial is not clearly stronger than those briefed on appeal, especially where, as previously noted, Applicant expressed understanding of the proceedings in communicating his decision to not testify and in his reaffirmation of innocence after the return of the jury's verdict. Accordingly, Applicant has failed to meet his burden under Strickland by this allegation, and his request for relief thereto is **DENIED.**

C. Prosecutorial Misconduct & Brady Violation

Finally, Applicant alleges that the State failed to meet its obligations under Brady v. Maryland, 373 U.S. 83 (1963), by failing to turn over fingerprint and footprint (or "shoe print") evidence. "An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was

suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching." Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006) (citing Kyles v. Whitley, 514 U.S. 419 (1995)). "If a Brady violation is found to have occurred, PCR must be granted." Id. (citing Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999)).

At trial, Counsel actually introduced footprint evidence and followed up in closing arguments by criticizing law enforcement's failure to follow-up on those prints. Tr. 77-78, 152, 157. Counsel aggressively pressed Inv. Jordan as to whether there was other evidence not disclosed to the defense. Tr. 88. Inv. Wayne Jordan testified that he did not attempt to take any fingerprint evidence because he felt the other evidence acquired was sufficient, and because the vehicle was not recovered until days after the crime. Tr. 90, 91, 94. When Counsel confronted Inv. Jordan with the footprint evidence provided by the victim's family, Inv. Jordan testified he'd never seen the pictures before. Tr. 92.

At the evidentiary hearing, Applicant testified to his belief that the State did not adequately investigate the case. Counsel testified that he made motions pursuant to Rule 5, SCRCrimP, and Brady. Counsel testified that the State provided materials responsive to those requests and that he reviewed them with Applicant. Chris Jones, who prosecuted the case, testified that all materials were turned over to Counsel on a disc when Counsel was appointed to represent Applicant.

The Court finds that Applicant has failed to demonstrate any of the four elements of a Brady violation. Brady does not establish minimum investigation requirements on the prosecution, but only requires that known exculpatory or impeaching evidence be disclosed to the defendant. Accordingly, Applicant's request for relief as to this allegation is **DENIED**.

III. CONCLUSION

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

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

AND IT IS SO ORDERED this 5th day of September, 2017.

ROGER E. HENDERSON
Presiding Judge
Fourth Judicial Circuit

Chesterfield, South Carolina

2017 SEP 12 AM 10:05
Wanda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

A True Copy Attest
Wanda C. Miles
CLERK OF COURT C.P. & G.S.
CHESTERFIELD COUNTY, SC

CHESTERFIELD COUNTY CLERK OF COURT

200 West Main Street • P. O. Box 529
Chesterfield, South Carolina 29709
Telephone (843) 623-2574

Court of General Sessions
Court of Common Pleas
Register of Deeds

NOTICE OF APPOINTMENT OF COUNSEL:

DATE: March 12, 2015

APPLICANTS NAME: James Curtis Tyner 270696

Lance Boozer OF THE LEXINGTON COUNTY BAR IS HERE BY APPOINTED TO REPRESENT THE ABOVE NAMED APPLICANT IN THE FOLLOWING COMMON PLEAS NON JURY POST CONVICTION RELIEF CASE, CASE NUMBER 2015CP-1300-116 THIS APPOINTMENT IS MADE PURSUANT TO A STANDING ADMINISTRATIVE JUDGE FOR FOURTH JUDICIAL CIRCUIT.

CLERK OF COURT,
CHESTERFIELD COUNTY

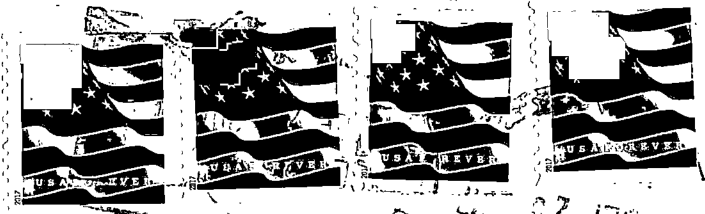
2015 MAR 13 PM 3 37
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

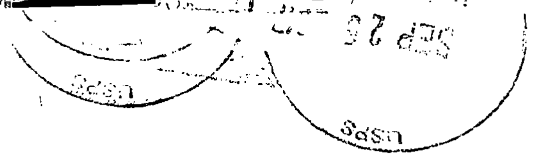
ADDRESS OF APPOINTED ATTORNEY: Lance Boozer
803 Gervais Street Suite 203
Columbia S.C. 29201

ADDRESS OF APPLICANT: James C Tyner 270696
WRCI Ward 2# 67
Rembert SC 29128

CC: ATTORNEY GENERAL'S OFFICE APPLICANT

THE BOOZER LAW FIRM, LLC
1400 Laurel Street, Suite 4A
Columbia, SC 29201





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