VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

GABRIEL JON RIOS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001549

APPENDIX

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PAGES 501 – 570

INDEX

THE FOLLOWING EXHIBIT IS ON FILE WITH THIS COURT:
Applicant's Exhibit 1 (CD of 911 call)

ISSUE (C)

WAS COUNSEL INEFFECTIVE FOR FAILING TO IMPEACH THE STATE'S STAR WITNESS THAT CONTRADICTED HER TRIAL TESTIMONY IN REGARDS TO THE IDENTITY OF THE PERPETRATOR?

FACTS

Petitioner submits he was denied the effective assistance of counsel during trial when counsel allowed Gail Holt to identify Petitioner as the perpetrator when she had told 911 that she did not know who the perpetrator was and as a result of this deficiency Petitioner was denied his right to cross-examination that is guaranteed by the Sixth Amendment.

During trial Gail Holt testified that getting ready to take the dog out and it had been day light for some time, and she heard glass break, Tr.p.107, L.20-23. She said she had thought something had broken and fallen, so she started down the hall to check and that's when she encountered a man, who she identified as Petitioner, Tr.p.107, L.25-p.108, L.11.

This identification testimony was crucial for the State and trial counsel should have impeach her in regards to this damaging testimony.

IN support of this contention Petitioner submits exhibit (A), and (B) attached hereto. Exhibit (A) is the Forensic Report where Deputy Welch had responded to a home invasion where a **unknown** suspect had forced entry into the victim's home. Exhibit (B) is Deputy Welch's Narrative Report, where Deputy Welch states that he responded to the victim's home and spoke to Phillip (Gail Holt's husband) and Phillip told Deputy Welch he received a call from his wife Gail that an **unknown** suspect broke into the residence and

tied her up.

Counsel's failure to impeach Gail Holt's direct identification of Petitioner as the perpetrator in the eyes of the jury was very damaging to Petitioner and had a substantial and injurious affect on the jury in reaching their verdict against Petitioner.

DISCUSSION

The test formulated in STrickland v. Washington, 466 U.S. 668 , the Court identified two components to any ineffective assistance of counsel claim: (1) deficient performance and (2) prejudice . IN the instant case counsel's performance fell below and objective standard of reasonableness when counsel failed to impeach a star witness for the State. The prejudice incurred is easily seen because Petitioner was denied the right to adequately confront the witness against him that denied him a fair trial.

In Bruton v. United States, 391 U.S. 123 (1968), the U.S. Supreme Court clearly established the general right to confront one's accusers, and the right to adequately cross-examination of witnesses against him.

In Pointer v. Texas, 380 U.S. 400, the U.S. Supreme Court had confirmed "that the right of cross-examination [is] included in the right of an accused in a criminal trial to confront the witnesses against him" secured by the Sixth Amendment, Id at 404; [a] major reason underlying the constitutional confrontation rule is to give the defendant charged with a crime an opportunity to cross-examine the witness against him. Id 406-07.

Prior inconsistent statements may be found from [any] number of sources and they may be written or oral. Sources for prior inconsistent statements include, (1) statements made to a friend or

or acquaintance, State v. Galloway, 263 S.C. 585, 211 S.E.2d 885 (1975); or (2) statements made to an investigator. See Varnadore v. Nationwide Mut.Ins., 289 S.C. 155, 345 S.E.2d 711 (1986); also see State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct.App.1991) (law enforcement investigator).

The South Carolina Supreme Court recently reversed a murder conviction in PCR because of trial counsel's failure to impeach a key witness with prior inconsistent statements. Rutland v. State, 415 S.C. 570, 785 S.E.2d 350 (2016). In Rutland, trial counsel failed to cross-examine the State's star witness with prior inconsistent statements. Id at 573-74, 785 S.E.2d at 351. The Court held trial counsel was ineffective and the defendant was prejudiced because of the failure to impeach the witness with the prior statements. Id at 577-78, 785 S.E.2d at 353-54. The S.C. Supreme Court stated in Rutland that "had trial counsel discredited [the witness's] testimony by raising the prior inconsistent statements on cross-examination, [the witness's] credibility would have suffered." Id.

The Court noted that the solicitor in Rutland relied heavily on the key witness in closing argument. Id at 578, 785 S.E.2d at 354 ("Any question as to whether petitioner was prejudiced may be be answered by looking to the solicitor's reliance on Kestner's trial testimony.").

The solicitor in Petitioner's case repeatedly relied on Holt's testimony during closing argument. Based on Gail Holt's testimony, the solicitor argued that:

> You have **Mrs. Holt's** testimony and identifcation. **She** told you **she knew it was him.**, Tr.p.320, L.17-18

She knew him. She had been around him at the business. He had been inside her home. She had plenty of opportunities to see him.
Tr.p.320, L.21-24.

She knew his voice. She knew his accent. She knew his face. She immediately saw him when she came face-to-face. There is no doubt in her mind whatsoever. She got up there and she told you that she did not hesitate one bit.

Tr.p.320, L.25-p.321, L.3.

She knew him as Gabe and all she's ever testified to is Gabe.
Gabe is Gabriel Rios. That's the man she knew. That's the man she knew worked for her husband. That's the man who attacked her. That's the man who did this.
Tr.p.321, L.5-10

She made a solid identification, ladies and gentlemen, and it's up to you to believe that. But I would submit to you that her identification is pretty darn solid.
Tr.p.321, L.19-21.

Mrs. Holt told you that she's absolutely sure
Tr.p.321, L.25.

If you believe the defense's story, you either believe one, that Mrs. Holt is just flat out lying, or two, that she is dead wrong. If you believe their side, that's what you're basically saying to Mrs. Holt.
Can you look at her and say you're lying?
Can you look at her and say you're dead wrong?
Tr.p.323, L.6-11

Ask yourselves who are you going to believe Mrs. Holt or his people?
Tr.p.323, L.18-19

As is seen in the instant case the solicitor here just as in Rutland, supra heavily relied on the State's star witness's testimony in closing argument. The same factors the Court used to find prejudice in Rutland exist in Petitioner's case. This Court should reverse and grant a new trial and allow the jury to asses

Gail Holt's impaired credibility with the knowledge that she initially told her husband and 911 that she did not know who the perpetrator was. Id.

CONCLUSION

WHEREFORE, based on the aforegoing statement of issues presented and citations of authorities relied on Applicant respectfully prays this Honorable Court will find that counsel rendered ineffective assistance of counsel and as a result the Applicant was denied a fair trial.

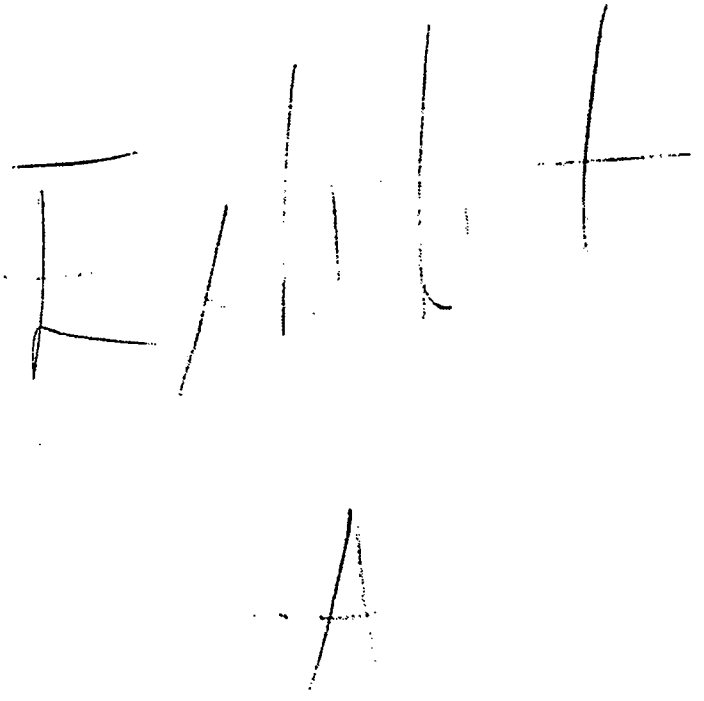
THEREFORE, Applicant respectfully asks this Court to grant a new trial.

Respectfully Submitted,

/s/_____

Gabriel J. Rios

Applicant,



09/13/10 Spillman Data Systems, Inc. 723
10:06 Deputy Supplemental Report Page: 4

Forensic Report
Spartanburg County Sheriff's Office

Case No: 2010080848
Offense Type: Home Invasion
Victim: Holt, Gail
Location: 639 Perrin Dr.
Patrol Ofc: Welch, D.
Forensic Ofc: Howard, B.
Date/Time: 08/14/10 9:32 AM

I responded to the above address at the request of Deputy Welch, D. in regards to a home invasion. Inv. Williams, L. was also on seen when I arrived. Some unknown suspect forced entry into the victim's home by breaking out a door panel in the carport door leading into the kitchen of the home. I photographed the incident scene along with the damage to the home and several objects the suspect had left behind or had moved. There was a window pane broken out of the door in the carport leading to the kitchen. There was glass in the kitchen floor with a small piece of purple tape (item 1.) mixed in with it. In the living room on an end-table between two chairs was a ball of purple tape (item 2) the victim stated the suspect used to tie her up. Down the hall leading to the master bedroom was a black gun case (item 14), a triangular shaped piece of broken glass (item 3), and a brown rock (item 4). In the office bedroom, the first bedroom on the left down the hall the suspect had attempted to take a large water container filled with coins. In that same room there was a brown gun case (item 15) that the suspect moved and opened. In the master bedroom at the end of the hall there were several items scattered about and drawer from a large jewelry (item 13) box pulled out and on the floor. On the dresser in the master bedroom was a roll of purple tape (item 5) that appeared to match the same tape used to tie up the victim. In the master bedroom on the floor was the victim's wallet (item 10) and check book (item 9) she stated the suspect took out of her purse and removed money from. Touch DNA samples were taken from the lid of a small jewelry box on the dresser (item 6) and the handles of the large jewelry box (item 8) both in the master bedroom. A touch DNA sample was taken from the handle/locks (item 7) of the black gun case in the hallway. Mr. Phillip Holt gave a buccal swab (item 11), as well as Mrs. Gail Holt (item 12). The entry and exit points, along with various items were processed for latent prints. Two partial latent prints (A,B) were removed from the glass door in the carport leading to the kitchen. One partial latent print (C) was removed from a ball canister lying in the floor of the master bedroom. All the above items were collected as evidence and taken to the Sheriff's Office for processing. See property sheet for further details. The items were secured in the evidence room in the Crime Lab at the Sheriff's Office till they could be processed. Item #'s 1, 2, 3, 5, 9, 10, 13, 14, and 15 were processed at the Sheriff's Office for latent prints. A DNA swab was taken from the edges of item 3 the triangular piece of glass collected at the incident location. A hair (item 17) was found in the balled up piece of tape that was used to tie up the victim. The hair sample was collected and placed into evidence. A partial latent print was removed from the triangular piece of glass item 3 that Mrs. Holt stated the suspect confronted her with. Inv. Shaffer took elimination prints from Mr. and

Narrative

Narrative

I RESPONDED TO 639 PERRIN DR IN REF TO A HOME INVASION. UPON ARRIVAL PHILLIP STATES HE LEFT THE RESIDENCE AT APPROX 0630 THIS MORNING. HE RECIEVED A CALL FROM HIS WIFE GAIL THAT AN UNKNOWN SUSPECT BROKE INTO THE RESIDENCE AND TIED HER UP. PHILLIP RECIEVED THE CALL FROM GAIL AT APPROX 0809 HRS THIS DAY. PHILLIP INTURN WENT HOME AND CALLED 911 WHILE STILL ENROUTE. OFFICERS ARRIVED AT APPROX 0836 HRS. GAIL STAES SHE WAS IN BED WHEN SHE HEARD GLASS BREAKING. GAIL GOT UP TO INVESTIGATE AND WAS MET IN THE HALLWAY BY A BLACK MALE GAIL DESCRIBED AS A MIDDLE AGED MALE WITH A BALL CAP ON. HE ASKED HER WHERE THE SAFE WAS AND CONTINUED ASKING ABOUT MONEY. THE SUSPECT ORIGINALLY CONFRONTED GAIL IN THE HALLWAY WITH A LARGE PIECE OF GLASS. THE SUSPECT TOOK HER BACK TO THE BEDROOM WHERE HE BOUND HER HANDS WITH BLUE TAPE. SUSPECT TOOK A SMITH AND WESSON .357 HANDGUN WHICH WAS ON THE BEDPOST AND CONTINUED TO DEMAND MONEY, THE SAFE COMBINATION, AND THE LOCATION OF HER PURSE. SUSPECT RETRIEVED HER PURSE AND TOOK HER CELLPHONE UNKNOWN MAKE, $220 IN CASH FROM HER PURSE ALONG WITH THE KEYS TO THE BELOW LISTED VEHICLE. SUSPECT THREATENED TO KILL HER IF SHE GOT UP. GAIL HEARD THE SUSPECT LEAVE AND WAITED SEVERAL MINUTES BEFORE LEAVING THE BEDROOM WHERE SHE WAS ABLE TO UNDO THE TAPE AND CALL HER HUSBAND. ID OFFICER HOWARD ARRIVED ON SCENE, INV L. WILLIAMS ARRIVED ON SCENE. VEHICLE TAKEN WAS A 2001 LEXUS 300RX WHITE IN COLOR BLACK LEATHER INTERIOR, TAG #EHD844, VIN # JTJGF10U610101547. THIS VEHICLE WAS ENTERED NCIC WITH NIC# V094787186.

Signature

Officer	Welch D
Badge/ID #	3491
Date	08/14/2010
Signature	

2016 WL 1239869
Only the Westlaw citation is currently available.

Supreme Court of South Carolina.

Fred R. **RUTLAND**, Petitioner,

v.

STATE of South Carolina, Respondent.

Appellate Case No. 2014–000381.

|

No. 27614.

|

Submitted Jan. 15, 2016.

|

Decided March 30, 2016.

Synopsis

Background: Defendant filed post-conviction relief action, following his conviction for murder, possession of a firearm during the commission of a violent crime, and pointing a firearm. The Circuit Court, Lexington County, L. Casey Manning, Post–Conviction Relief Judge, denied relief. Defendant sought certiorari review.

[Holding:] The Supreme Court, Pleicones, C.J., held that defendant was prejudiced by trial counsel's deficient performance.

Reversed.

West Headnotes (7)

[1] **Criminal Law**

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[2] **Criminal Law**

In a post-conviction relief proceeding, the burden is on the applicant to prove the allegations in his application.

Cases that cite this headnote

[3] **Criminal Law**

Factual findings of the post-conviction relief court will be upheld if there is any evidence of probative value to support them; however, the findings of a post-conviction relief court will not be upheld if no probative evidence supports those findings.

Cases that cite this headnote

[4] **Criminal Law**

In order to prove trial counsel was ineffective, the post-conviction relief applicant must show: (1) counsel's performance was deficient, and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[5] **Criminal Law**

Regarding the deficiency prong of a claim for ineffective assistance of trial counsel, the proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[6] **Criminal Law**

Regarding the prejudice prong of a claim for ineffective assistance of trial counsel, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[7] **Criminal Law**

Trial counsel's deficient performance in failing to cross-examine State's witness regarding prior inconsistent statements that victim was armed prejudiced defendant in murder trial, and thus, amounted to ineffective assistance; credibility of witness, who was only independent witness to events, would have suffered if confronted with prior statements that supported defendant's claim of self-defense, solicitor relied on and emphasized witness's testimony during closing arguments, and jury asked question about whose fingerprints were on gun that defendant claimed victim used and solicitor suggested could have been planted, indicating jury focused on whether victim was armed. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

ON WRIT OF CERTIORARI.
Appeal from Lexington County; L. Casey Manning, Post-Conviction Relief Judge.

Attorneys and Law Firms

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Patrick Lowell Schmeckpeper, both of Columbia, for Respondent.

Opinion

CHIEF JUSTICE PLEICONES.

*1 Petitioner was convicted of murder, possession of a firearm during the commission of a violent crime, and pointing a firearm. He was sentenced to life imprisonment without parole. This Court affirmed petitioner's convictions and sentences on direct appeal. *State v. Rutland*, Op. No. 95-MO-263 (S.C. Sup.Ct. filed Aug. 25, 1995).

Petitioner filed a post-conviction relief ("PCR") action, [1] and sought certiorari to review the PCR judge's order denying relief. We granted the petition for a writ of certiorari on two issues: (1) whether the PCR judge erred in finding trial counsel was not ineffective by failing to cross-examine the State's "key" witness regarding prior inconsistent statements; [2] and (2) whether the PCR judge erred in finding trial counsel was not ineffective by failing to preserve for appellate review the trial judge's refusal to charge the jury on the defense of others. Because we find the PCR judge erred as to the first issue, we reverse the PCR judge's decision. [3]

FACTS

Petitioner was romantically involved with the victim's estranged wife, Sally Peele ("Peele"), and both contend the victim was abusive and violent. On the morning of the victim's death, an altercation occurred at the Peele residence between petitioner, Peele, and the victim. Later that day, Peele and petitioner drove to Bow Wow Boutique ("Boutique"), a pet grooming business, to inquire about purchasing a vehicle from employee Kimberly Kestner ("Kestner"). The victim subsequently arrived at the Boutique, where he was shot and killed by petitioner. The only individuals in the Boutique at the time of the shooting, in addition to petitioner and the victim, were Peele and Kestner.

Prior to trial, Kestner gave a written and signed statement to law enforcement to the effect that the victim was armed when he was shot inside the Boutique. In the signed statement, Kestner attested, "[The victim] came in. He reached behind him and pulled a gun. I heard two shots and [the victim] fell." Kestner gave a similar statement to a newspaper reporter, who later wrote a published article quoting Kestner as stating, "[the victim] said nothing. He pulled his gun out and was fixing to shoot, ... It scared me to death. I couldn't understand why he was doing this."

At trial, Kestner testified she had a good view of the victim as he walked into the Boutique,[4] and the only thing she saw in the victim's hands was a pack of cigarettes, which he placed on the counter as soon as he walked in. Kestner testified that as the victim entered the Boutique, petitioner put his pack of cigarettes in his mouth and reached behind his back, at which point the victim also reached behind his back. Kestner testified she then heard two gunshots, and that she never saw the victim possess a gun, or utter a word during the quick exchange. Kestner testified that after the victim was shot, she witnessed petitioner holding a handgun, and saw a second handgun lying on the floor.[5]

*2 On cross-examination, trial counsel failed to question Kestner as to her prior inconsistent statements made to law enforcement and to the newspaper reporter.

Peele testified the victim entered the Boutique, drew his 9mm handgun, chambered a round,[6] and pointed the handgun at Peele. Peele stated the victim had a "strange" look in his eyes she had seen before.[7] Peele described that as she started moving toward the victim, she heard petitioner beg him, "Please don't," repeatedly. Peele testified that, in shock, she turned to look at petitioner, who was holding a .25 caliber handgun pointed towards the floor. Peele testified that when the victim saw petitioner's handgun, he shifted his aim to petitioner, at which point Peele saw the victim pull the trigger of the 9mm handgun. Peele testified that at that moment, she heard gunshots, and the victim collapsed.

Petitioner's testimony largely corroborated Peele's version of events. However, petitioner added he had concealed the .25 caliber handgun and carried it into the Boutique due to threats made earlier that day by the victim to "blow [petitioner's] shit away, fuck [petitioner's] world up." Petitioner explained that as he saw the victim quickly approaching the front door of the Boutique, he tried to avoid a confrontation by exiting through the back of the building, but when petitioner could not find an escape route, he removed the .25 caliber handgun from his belt. Petitioner recalled that when he then encountered the victim, the victim reached behind his back, pulled out a handgun, cocked it, and aimed it at Peele from less than one foot away. Petitioner testified the victim appeared "wild," and was unresponsive to petitioner's verbal attempts to calm him down.

Petitioner stated the victim then aimed the 9mm handgun at petitioner and pulled the trigger. Petitioner explained seeing the victim pull the trigger prompted him to shoot the victim once, which did not faze the victim, and as petitioner saw the victim continue to pull the trigger, petitioner shot the victim three more times. Petitioner described that in the moment, he believed he himself had been shot.

At the PCR hearing, petitioner argued, *inter alia,* trial counsel was ineffective for failing to cross-examine Kestner as to her prior inconsistent statements that the victim was armed at the time of the shooting.

Trial counsel agreed Kestner's testimony at trial was important as she was the only disinterested, objective witness to the shooting. Trial counsel testified he was aware of Kestner's prior inconsistent statements, and acknowledged they could have been used to impeach her trial testimony, but explained he was unable to locate the newspaper article prior to trial, and admitted his failure to use the police report was due to his "oversight." Trial counsel further acknowledged that whether the victim was armed was an important issue at trial, and agreed the statement given under oath to law enforcement could have been used not only to impeach Kestner, but also could have been entered into evidence if she had denied giving it.

*3 The solicitor testified he was aware of Kestner's prior inconsistent statements, and agreed her trial testimony was essential as she was the only independent witness, and any inconsistencies in her statements could have negatively affected her credibility.

Although Kestner did not testify at the PCR hearing, petitioner produced the signed police statement wherein Kestner stated the victim was armed at the time of the shooting. Petitioner also produced affidavits by several individuals swearing that after the incident, Kestner stated to them the victim was armed when he was shot.

In his order denying relief, the PCR judge determined trial counsel was deficient for failing to impeach Kestner with her prior inconsistent statements; however, the PCR judge further found petitioner failed to prove he was prejudiced by trial counsel's deficient performance. We granted petitioner's petition for a writ of certiorari to review the PCR judge's decision.

ISSUE

Did the PCR judge err in finding trial counsel was not ineffective by failing to cross-examine the State's "key" witness as to her prior inconsistent statements?

LAW/ANALYSIS

The PCR judge found that although trial counsel was deficient in failing to cross-examine Kestner as to her prior inconsistent statements, petitioner failed to meet his burden of proving trial counsel's deficiencies were prejudicial. We disagree.

[1] [2] [3] A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 669, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citation omitted). This Court will uphold factual findings of the PCR court if there is any evidence of probative value to support them. *Webb v. State*, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984) (citation omitted). However, this Court will not uphold the findings of a PCR court if no probative evidence supports those findings. *Holland v. State*, 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996) (citing *Cartrette v. State*, 323S.C. 15, 323 S.C. 15, 448 S.E.2d 553 (1994)).

[4] In order to prove trial counsel was ineffective, the PCR applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Ard*, 372 S.C. at 331, 642 S.E.2d at 596 (citing *Strickland*, 466 U.S. at 687; *Rhodes v. State*, 349 S.C. 25, 30–31, 561 S.E.2d 606, 609 (2002)).

[5] [6] Regarding the deficiency prong, the proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases. *McHam v. State*, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013) (quoting *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985)). Regarding the prejudice prong, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (citing *Strickland*, 466 U.S. at 694). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694.

*4 [7] In denying petitioner's PCR application, the PCR judge relied on petitioner's failure to present Kestner as a witness at the PCR hearing and to produce extrinsic evidence as to her prior inconsistent statements.

We agree with the PCR judge's finding that there is substantial evidence trial counsel was deficient for failing to cross-examine Kestner as to her prior inconsistent statements. *See Strickland*, 466 U.S. at 688; Webb, 281 S.C. at 238, 314 S.E.2d at 839. However, we find the PCR judge's ruling as to the prejudice prong is not supported by the evidence in the record. *See Holland*, 322 S.C. at 113, 470 S.E.2d at 379 (stating the Court will not uphold findings of a PCR court if no probative evidence supports those findings). Principally, the PCR judge was incorrect in finding petitioner failed to produce extrinsic evidence of Kestner's statements at the PCR hearing. To the contrary, petitioner produced both the written copy of Kestner's statement to law enforcement, as well as affidavits from individuals attesting to have heard Kestner state the victim was armed at the time of the shooting. Accordingly, there is no evidence of probative value supporting the PCR judge's ruling that petitioner failed to present extrinsic evidence of Kestner's prior inconsistent statements. *See Holland*, 322 S.C. at 113, 470 S.E.2d at 379; *Webb*, 281 S.C. at 238, 314 S.E.2d at 839.

Further, had trial counsel discredited Kestner's testimony by raising the prior inconsistent statements on cross-examination, Kestner's credibility at trial would have suffered. Notably, petitioner admitted to shooting the victim, but maintained his actions were in self-defense; both petitioner and Peele testified at trial that the victim entered the Boutique and immediately brandished his 9mm handgun; and the only other witness to the shooting—and the only disinterested, objective witness—was Kestner. As a result, we find there is a reasonable probability the outcome of the trial would have been different had trial counsel impeached Kestner, as her prior inconsistent statements demonstrate all three witnesses to the incident attested at some juncture the victim was armed at the time of the shooting. *See Strickland*, 466 U.S. at 694; *see also, e.g., Thomas v. State*, 308 S.C. 123, 124, 417 S.E.2d 531, 532 (1992) (finding trial counsel's performance was deficient and prejudicial in failing to call as witnesses medical personnel who were the only individuals that could cast doubt on the victim's identification of the petitioner). Moreover, had Kestner denied making the

statements during cross-examination, trial counsel could have introduced as evidence the police report or the newspaper article, which we find also would have damaged Kestner's credibility as to her version of events leading up to the shooting. *See* Rule 613(b), SCRE.

Any question as to whether petitioner was prejudiced may be answered by looking to the solicitor's reliance on Kestner's trial testimony, and the questions posed by the jury upon deliberation. During closing arguments, the solicitor emphasized Kestner was the only "independent witness," and relied upon her testimony to argue the victim was never armed, stating, "[The victim] never ever pulled that weapon. [Kestner] didn't see it.... Kim Kestner independent witness. Kim Kestner never ever saw [victim] with [a gun] ever." The solicitor further insinuated the victim never possessed the 9mm handgun, suggesting it could have been planted at the scene of the shooting. We find the solicitor's reliance on Kestner's uncontroverted trial testimony highlights trial counsel's deficient performance, and supports a finding the deficient performance undermines confidence in the outcome of the trial. *See Strickland,* 466 U.S. at 694 (establishing the prejudice prong is satisfied when there is a reasonable probability that but for counsel's errors, the result of the trial would have been different, which requires a probability sufficient to undermine confidence in the outcome of the trial).

*5 Additionally, it is clear the jury was focusing on whether the victim was armed. Out of several questions asked by the jury, one of the initial questions was whose fingerprints were on the 9mm handgun. We find this inquiry indicates the jury was considering the State's argument the victim was never armed, and was focusing "critical attention" on the sequence of events surrounding the shooting, which was undoubtedly impacted by Kestner's trial testimony, and would have been impacted by trial counsel's impeachment of those statements. *See State v. Blassingame,* 271 S.C. 44, 46–47, 244 S.E.2d 528, 530 (1978) (finding when a jury submits a question to the court following a jury charge, it is reasonable to assume the jury is focusing "critical attention" on the specific question asked). Moreover, although the jury was re-charged on the elements of murder, manslaughter, mutual combat, and self-defense at its request at least twice, the jury foreperson indicated she was unsure the jury could reach a unanimous verdict on any indictment except one. [8]

The trial judge informed the foreperson he did not want to keep the jury from their families, but instructed the jury that it was important for them to work together to agree on a verdict, and asked that they continue to deliberate. Although the jury had been deliberating over six hours at that point, the jury returned a verdict on all indictments ten minutes later. Our finding that trial counsel's deficient performance undermines confidence in the outcome of petitioner's trial is supported by the jury's struggle to reach a unanimous verdict on all indictments in this case. *See Strickland,* 466 U.S. at 694.

CONCLUSION

For the reasons given above, we reverse the PCR judge's order denying petitioner PCR relief.

BEATTY, KITTREDGE and HEARN, JJ., concur. FEW, J., not participating.

All Citations

--- S.E.2d ----, 2016 WL 1239869

Footnotes

1 The State consented to petitioner filing his PCR application after the statute of limitations had run. *See* S.C.Code Ann. § 17–27–45(A) (2014).

2 Prior inconsistent statements are admissible pursuant to Rule 613, SCRE.

3 We decline to address petitioner's second argument as our holding on the first issue is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.,* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues on appeal when the disposition of a prior issue is dispositive (citation omitted)).

4 The State presented testimony by Robin Hunt that the encounter at the Boutique was prearranged by Peele; however, that testimony was recanted in 1997 in a sworn affidavit.

5 The 9mm handgun was recovered on the floor four to five feet from the victim with one bullet in the chamber and a full magazine. Peele later testified she moved the 9mm after the shooting in order to roll the victim over and administer CPR with petitioner's assistance.

6 Specifically, Peele's testimony was, "He come through the front door fairly quick; stopped in front of the gate; put his hands behind him; pulled that nine out; shhh, shhh; loaded."

7 Peele had previously testified as to the victim's demeanor when he was angry and abusive, **stating**, "I've seen him angry plenty of times. You can see it in his—you can see it in his eyes when he was angry."

8 The foreperson did not disclose on which indictment she believed the jury could reach a unanimous verdict.

End of Document

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS OF THE SEVENTH JUDICIAL CIRCUIT
Gabriel Jon Rios, S.C.D.C. No. 344751, Applicant, v. State of South Carolina, Respondent.	2015-CP-42-2541 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 3, 2015. Respondent made its Return on February 11, 2016. An evidentiary hearing was held on January 30, 2017, at the Spartanburg County Courthouse. Applicant was present and represented by Susannah C. Ross, Esquire. Assistant Attorney General Caitlin B. Hastings represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel Matthew Shealy, Esquire, also testified. Additionally, Applicant's daughter testified at the evidentiary hearing. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, Applicant's records from the South Carolina Department of Corrections, the 911 tape, AT&T phone records, and the pleadings. The Court finds as follows:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the November 2010 term of the Spartanburg County Grand Jury for burglary—1st degree (2010-

GS-42-6830), armed robbery and possession of a weapon during the commission of a violent crime (2010-GS-42-6831, counts one and two), grand larceny, value $10,000 or more (2010-GS-42-6832),[1] kidnapping (2010-GS-42-6833), and assault and battery, first degree (2010-GS-42-6834). Matthew Shealy, Esquire, represented Applicant. On February 26, 2013, Applicant proceeded to trial before the Honorable R. Lawton McIntosh and a jury. The jury found Applicant guilty as indicted. Judge McIntosh sentenced Applicant to imprisonment to concurrent terms of 40 years for burglary, 30 years for armed robbery and kidnapping, and ten years for assault and battery, and a consecutive term of five years for possession of a weapon.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on February 1, 2015. State v. Rios, Op. No. 2015-UP-135 (S.C. Ct. App. filed March 11, 2015). The remittitur was returned on April 10, 2015.

ALLEGATIONS

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

1. Ineffective Assistance of trial counsel in that:
    a. "prior and during trial [in violation] of his rights pursuant to the Sixth an Fourteenth Amendment to the United States Constitution, as well as Article I section 14 of the South Carolina Constitution"
    b. Counsel "failed to object to Solicitor shifting the burden" during his closing argument
    c. Counsel "failed applicant by conceding his guilt" in his closing argument
    d. Counsel failed to adequately advise Applicant
    e. Counsel failed to adequately investigate
    f. Counsel failed to admit the 911 tape and AT&T phone records at trial

[1] The State elected to proceed on the armed robbery charge and dismissed the grand larceny charge before trial.

g. Counsel failed to advise Applicant that he should testify at trial
h. Failure to impeach
i. Failure to put forth an alibi defense

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. As a matter of general impression, this Court finds Counsel's testimony to be credible and Applicant's testimony to be neither credible nor legally relevant. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

Summary of the Testimony

Applicant testified that he met with Counsel approximately three times. Applicant testified that the solicitor's closing argument included burden-shifting statements because the solicitor said Applicant had no proof that he was innocent but was merely telling a story. Tr. p. 323. Applicant testified that he believes Counsel failed to object to this statement but should have. Applicant further testified that Counsel failed him by making statements that conceded his guilt during his closing argument. Specifically, Applicant testified that the statements regarding the use of painter's tape to bind the victim conceded Applicant's guilt. Tr. p. 305. Applicant testified that Counsel did review the Rule 5 discovery materials with him; however, Applicant testified that Counsel never reviewed the 911 tape with him nor did he admit it into evidence. Applicant testified that he believes the 911 tape shows his innocence because the victim did not identify him during the call even though she claimed to recognize him right away because he used to work for her husband. Applicant additionally testified that he believes Counsel was

ineffective for failing to admit into evidence the 911 tape and the AT&T phone records of Ester Boyd because he claims that he made about eight phone calls to his wife from Ester Boyd's home phone during the time of the crime. Applicant testified that if Counsel had admitted the tape and phone records into evidence, it would have established an alibi defense for Applicant. Applicant testified that he believes Counsel was ineffective for failing to use this evidence to establish an alibi defense. Applicant further alleged that Counsel was ineffective for failing to advise Applicant that he should testify at his trial. Applicant stated that if he had testified during the trial he would have talked about how there was no DNA evidence that matched him except for the thumbprint on the broken glass. Applicant testified that this thumbprint could have been from previous visits to the victim's home since he used to work for her husband. Applicant further testified that he would have argued to the jury that this lack of DNA evidence at the scene showed that he could not be in two places at once since he alleges he was at Ester Boyd's home calling his wife. Applicant admitted that Counsel explained to him that it was his decision as to whether he would testify at trial. Applicant testified that Counsel advised him against him testifying but agreed that Counsel explained it was ultimately his decision.

Applicant's daughter also testified at the PCR hearing. She testified that she remembered speaking with her father on the phone the morning of the incident. She testified that she believed she spoke with him around 7:02 A.M.

Counsel testified that he has been practicing law for a little over nine years, the majority being criminal law. Counsel testified that, at the time of Applicant's trial, he had previously handled other trials with similar charges. Counsel testified he became involved with Applicant's case about four months before trial—other attorneys within his office had handled different stages of Applicant's case. During these four months, Counsel testified he met with Applicant

four times and also spoke with various members of his family. Counsel testified he reviewed all discovery with Applicant. He also discussed with Applicant the elements of the charges and possible defenses to those charges and advised Applicant concerning his right to testify. Counsel investigated the leads that Applicant provided to him, including a possible alibi defense. However, Counsel testified that there were problems with this defense, specifically, Applicant was only able to establish a possible partial alibi.

Counsel testified Applicant's alleged timeline that he was calling his wife from Ester Boyd's home still allowed time for him to be at the scene of the crime. Counsel testified that he conducted a drive test run of Applicant's chain of events on the day of the incident. He stated that test run showed that Applicant could only establish a partial alibi, at best. Additionally, Applicant was unable to provide Counsel with any alibi witnesses that saw him during the time of the crime. However, Counsel still attempted to have the trial judge charge the jury with a partial alibi instruction, which the trial judge ultimately refused to do. Tr. p. 288.

Counsel further testified that he did not attempt to admit the 911 tape into evidence because the call was made by the victim's husband. Counsel said he felt the tape bared greater risks than potential benefits, and he felt he introduced the beneficial information of the 911 tape through other evidence. Counsel also testified that he did not attempt to introduce the phone records because they don't indicate who was making the call only that a call was made.

Counsel also testified regarding the comments in his closing argument referring to the use of painter's tape during the crime. Counsel testified the theme of his closing argument was that the State wanted the jury convict Applicant merely on inference. He explained that he used the specific example of painter's tape as an illustration of reasonable doubt. Counsel testified that someone who was trying to bind another person would not use painter's tape because it's easily

broken. He testified that Applicant knew the consistency of painter's tape from his construction work and would, therefore, know not to use it for that purpose. Tr. pp. 305-06.

Counsel testified that he remembered making a couple motions in limine, a motion to suppress the in-court identification and the alleged rock that was used to break the window, and motions for a directed verdict and a new trial. Counsel also testified that he objected to the trial judge's refusal to charge a partial alibi instruction and to the introduction of the piece of glass bearing the thumbprint. Tr. pp. 16, 24, 46, 198, 254, 288, 371. Additionally, Counsel testified that he maybe should have objected to the solicitor's remarks during his closing statement but also testified that if he had noticed something troublesome at the time, he would have objected.

Ineffective Assistance of Trial Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at

690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Failure to Object to Solicitor's Alleged Burden-Shifting Statements

Applicant alleged that Counsel was ineffective for failing to object to the alleged burden-shifting statements made by the solicitor during his closing argument. This Court finds Applicant has failed to show that Counsel's failure to object to these statements resulted in a deficiency that prejudiced the outcome of his trial. Counsel is an experienced criminal defense attorney who has handled many cases similar to Applicant's. Counsel testified that if at the time of the trial, the solicitor's statements appeared troubling to Applicant's case, he would have objected. Counsel admits in hindsight he possibly should have objected to those statements. However, this Court finds that Counsel's performance was still within the range of reasonable competence required for criminal cases. Further, this Court finds Applicant has failed to show any resulting prejudice. Therefore, this Court finds Applicant has failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Alleged Concession of Applicant's Guilt

Applicant alleged Counsel was ineffective for allegedly making statements that conceded

his guilt during his closing statement. This Court finds Applicant has failed to show that Counsel's statements were deficient or resulted in any prejudice. Counsel testified the theme of his closing argument was that the State wanted to the jury convict Applicant merely on inference. He explained that he used the specific example of painter's tape as an illustration of reasonable doubt. Counsel testified that someone who was trying to bind another person would not use painter's tape because it's easily broken. He testified that Applicant knew the consistency of painter's tape from his construction work and would, therefore, know not to use it for that purpose. Tr. pp. 305-06. This Court finds Counsel's statements during his closing argument were part of Counsel's strategy and within the range or reasonableness for criminal representation. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not effective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Further, this Court finds Applicant did not suffer any prejudice from these statements. Therefore, this Court finds Applicant has failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Failure to Adequately Investigate

Applicant alleged at the evidentiary hearing that Counsel failed to conduct a proper investigation. This Court finds Applicant has failed to show that Counsel was deficient or that he was prejudiced by any alleged deficiency. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and

making an independent investigation of the facts and circumstances of the case. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

Here, Counsel testified that he conducted a test run and explored the possibility of an alibi defense. Counsel also testified he spoke with Applicant's family members. Additionally, the testimony reflects that Counsel reviewed all the evidence in the case, discussed possible defenses with Applicant, and pursued leads that Applicant provided. Specifically, Counsel pursued a possible alibi defense. Such an investigation was reasonable under the circumstances. See Edwards, 392 S.C. at 457, 710 S.E.2d at 65 (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)). This Court finds Counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation. Accordingly, Applicant has failed to show Counsel was deficient in investigating or developing a defense.

Likewise, Applicant has failed to demonstrate any prejudice resulting from Counsel's alleged failure to investigate. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))). This Court can only speculate as to what additional investigation could have been done and what evidence that investigation would have uncovered. Applicant testified on his own behalf but presented no other witnesses and produced no evidence of what Counsel might have uncovered had he conducted any additional investigation. Therefore,

Applicant has failed to demonstrate any alleged deficiency prejudiced him. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Accordingly, this Court finds Applicant has failed to satisfy either prong of the Strickland analysis. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to Admit 911 Tape and AT&T Phone Records into Evidence

Applicant alleged that Counsel was ineffective for failing to introduce the 911 tape and Ms. Ester Boyd's AT&T phone records into evidence. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not effective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Counsel explained that although Applicant was not identified by the victim during the 911 call, he didn't feel this was especially helpful since it was the victim's husband who made the call. Further, Counsel testified that he felt that introducing the 911 tape posed more risks than benefits, and he felt he could introduce the helpful information from the tape through other evidence. Counsel also stated that he did not believe that Ms. Boyd's phone records would be especially helpful either because it is unclear from the records who placed a call. They only indicate that a call was made. This Court finds Counsel's decision to leave the 911 tape and phone records out of evidence to be part of a trial strategy that falls within the scope of reasonable criminal representation. Further, Applicant has failed to

show that this alleged deficiency prejudiced him. Accordingly, this Court finds Applicant failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Failure to Advise Applicant to Testify

Applicant alleged that Counsel was ineffective for failing to advise him to testify at trial. Both Applicant and Counsel's testimony reflect that Counsel advised Applicant of his right to testify at trial. While Counsel advised Applicant against testifying, he made it clear that the ultimate decision was Applicant's to make. Applicant admitted that he understood it was his decision and ultimately decided to follow Counsel's advice not to testify. Further, the trial court thoroughly advised Applicant of his right to testify, and Applicant told the trial judge that it was his personal decision to exercise his Fifth Amendment right. Tr. pp. 255-58. This Court finds that Applicant has failed to show Counsel's conduct in advising him not to testify was unreasonable under prevailing professional norms. Counsel testified he did not believe it was in Applicant's best interest to testify. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Therefore, Applicant has failed to satisfy his burden of proving deficiency as to this allegation. Further, this Court finds Applicant has failed to show there is a reasonable probability that but for Counsel's advice not to testify, he would not have been convicted. Accordingly, this Court finds Applicant has failed to show any deficiency in Counsel's performance or resulting prejudice. Therefore, this allegation is denied and dismissed with prejudice.

Failure to Put Forth an Alibi Defense

Applicant alleged that Counsel was ineffective for failing to put forth an alibi defense

before the trial court. Counsel's testimony at the PCR hearing and the trial transcript reflect that Counsel did attempt to put forth the defense of a partial alibi through his opening and closing arguments and requesting a jury instruction. Tr. pp. 102-04, 290-92, 303-14. However, the trial judge ultimately decided to exclude such an instruction. Tr. pp. 290-92. Further, Counsel made a motion for a new trial based on the denial of this charge. Tr. p. 371. Accordingly, this Court finds Counsel did attempt to put forth an alibi defense, and Applicant has failed to show Counsel acted deficiently. Moreover, this Court finds Applicant has failed to show that this alleged deficiency resulted in prejudice to Applicant. This Court also notes that the issue of the trial judge's refusal to charge the jury with a partial alibi instruction was directly addressed on appeal, and has been ruled on by the South Carolina Court of Appeals. State v. Rios, Op. No. 2015-UP-135 (S.C. Ct. App. filed March 11, 2015). Therefore, this Court denies and dismisses this allegation with prejudice.

All Other Allegations

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

CONCLUSION

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

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 21 day of March, 2017.

EDWARD W. MILLER
Presiding Judge
Seventh Judicial Circuit

Aiken, South Carolina

2017 MAR 27 PM 1:03
R. HOPE BLACKLEY

530

Spartanburg County

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M. Hope Blackley
Clerk of Court

March 28, 2017

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Gabriel Jon Rios #344257
Applicant

VS

Steel
Respondent

IN THE COURT OF COMMON PLEAS

7TH JUDICIAL CIRCUIT

CASE# 2016CP4202541

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Order Dismissed
In this action dated 3-21, 2017 on 3-28-17

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Ashley Harwell
Alicia Oliver
Gabriel Rios

3-28-17
(Date)

(Signature)

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE GABRIEL JON RIOS, APPLICANT, VS. STATE OF SOUTH CAROLINA, RESPONDENT.	IN THE COURT OF COMMON PLEAS CASE NO. 2015-CP-42-2541 MOTION TO ALTER OR AMEND THE JUDGMENT

COMES NOW the Applicant and hereby moves pursuant to Rule 59(e), SCRCP, to alter or amend the judgment of this Court filed on March 27, 2017. The Applicant takes issue with the findings of fact and conclusions of law set fourth resulting in the denial of post-conviction relief in his case. He argues each allegation set fourth amounted to undue prejudice. He further argues that if each allegation did not amount to ineffective assistance of counsel standing alone, the cumulative effect of counsel's performance was deficient and prejudiced him to the degree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 386 S.E.2d 624, 625 (1989)

The Order of Dismissal addresses the Applicant's argument of ineffective assistance of trial counsel for failure to admit a tape of the 911 call and certain AT & T phone records into evidence on page ten. It states that the decision was strategic because trial counsel testified that the 911 call was not particularly helpful because the victim's husband, Phil Holt, made the call and it posed more risks than benefits. The Applicant testified that counsel had not made him aware of the 911 tape prior to his trial and argued

that trial counsel was ineffective for failing to effectively impeach Gail Holt by using the 911 call.

In trial, Ms. Holt testified that she immediately recognized the man robbing her as "Gabe" who worked for her husband and so she had met Gabe several times. (Trial transcript p. 108) She testified that during the robbery she knew his name but a guardian angel or something told her not to say his name to his face but address him instead as sir. (Trial transcript p. 111) Without objection, the State bolstered Ms. Holt's identification in closing by arguing that Ms. Holt knew Gabe, knew his voice, knew his accent, knew his face, and immediately identified him as the robber. (Trial transcript p. 320) The recording of the 911 call shows she did not recognize or name the Applicant. While it is mostly Mr. Holt's voice on the recording, you can hear him question Ms. Holt and her responses, none of which name Gabe or demonstrate any recognition of who attacked her. While trial counsel did present evidence of the first responding officer who testified that Ms. Holt did not name or say she knew the suspect to him, his failure to use the primary evidence of the 911 call substantially weakened the case. During deliberations, the jury asked to review Ms. Holt's and Officer Welch's trial testimony. (Trial testimony p. 351)

The 911 tape significantly strengthens the Applicant's case and stands in strong contrast to Ms. Holt's sworn testimony and the Solicitor's argument to the jury. The fact that the jury asked to review her testimony suggests that the credibility of Ms. Holt's identification was a close issue. Failure to use the 911 recording as impeachment amounted to ineffective assistance of counsel and likely effected the outcome of the case. The prejudice of counsel's failure to use the evidence was compounded by counsel's

failure to object during the State's closing when the assistant solicitor argued that Ms. Holt's identification was stronger because she immediately recognized her attacker as her husband's employee, Gabe. The State then argues without objection that the Applicant presented no witnesses to account for his whereabouts and finally asks the jury whether they can "look at Ms. Holt and say, 'you're lying'." (Trial transcript p. 323)

In addition to any allegation relating to AT&T phone records, the Applicant argued that counsel was ineffective for failing to authenticate or enter into evidence the T-Mobile phone records showed two calls were made on the date of the burglary at 7:16 AM and 7:22 AM to Sonia Rios, the defendant's wife. Sonia Rios testified as an alibi witness. The T-Mobile records are important because they show the calls made to Sonia Rios came from phone number 864-582-2858. Estar Byrd testified 864-582-2858 was her land line at her home which she allowed Mr. Rios to use from time to time. While she could not recall if he used her land line the morning of the incident, the records provided strong evidence that he had. (Trial transcript p. 268-9) Furthermore, while Ms. Rios testified she was unsure of the time when she spoke to her husband the morning of the robbery, the records would clearly indicate the time the calls were made. Trial counsel was allowed to use the records to refresh Sonia Rios recollection but did not enter them into evidence after the State objected to their authenticity. (Trial transcript p. 274) The State argued in closing without objection that no one said they were with him that morning or could account for his whereabouts. He argued that one of the Applicant's alibi witnesses was unsure when calls were made from her phone and the other was his biased wife with a false information to police conviction. (Trial transcript p. 322-3) The T-Mobile phone records showed that two calls were made between Ms. Byrd's home

telephone line and Ms. Rios cell phone that morning which would have clarified and substantiated the Applicant's alibi. They also showed that the argument made by the State in closing was likely untrue. The failure to enter the T-Mobile records into evidence effected the outcome of the case. The order fails to address these arguments.

Trial counsel admitted that he probably should have objected to the above comments made in the State's closing. He was ineffective for failing to do so. Not only were burden shifting comments made, the argument went beyond reasonable inferences of what the Solicitor knew to be the facts, and in fact contradicted the records the Solicitor knew to exist. The solicitor must confine his arguments to the evidence in the record and its reasonable inferences. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). The 911 call recording and T-mobile records would have shown the Solicitor's comments in closing were not reasonable inferences but misstatements of the facts which so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990). See also Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). The order fails to address this argument.

The allegation that counsel was ineffective for advising the Applicant not to testify at trial is addressed on page eleven of the Order of Dismissal. While the Applicant did testify at the PCR hearing that counsel and the Court advised him that the decision whether to testify was ultimately his, he alleged that his decision not to testify was based on trial counsel's advice that he would be impeached by the State on his prior record without determining whether his prior criminal charges would be impeachable under Rule 609 of the South Carolina Rules of Evidence. Furthermore, trial counsel failed to

request a finding from the trial judge whether his prior record was impeachable. Therefore, his decision whether to testify was not knowingly made.

For the foregoing reasons, the Applicant requests this Court to alter or amend its Order of Dismissal.

Respectfully submitted,

Susannah Ross
Attorney for the Applicant
333 E. Coffee Street,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina
This 6 day of April, 2017.

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF SPARTANBURG	)	**CASE NUMBER 2015-CP-42-2541**
	)	
GABRIEL JON RIOS, APPELLANT,	)	
	)	
VS.	)	**AFFIDAVIT OF SERVICE BY MAIL**
	)	
THE STATE OF SOUTH CAROLINA, RESPONDANT.	)	

1. I am the attorney for the Applicant in the above-captioned matter.

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

3. I have this day served a copy of the **Motion to Alter or Amend** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Office of Attorney General Alan Wilson
P.O. Box 11549
Columbia, SC 29211

Attorney for Defendant

Greenville, South Carolina
This 6 day of April, 2017.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

2017 APR 13 PM 12:08
TL HODGE CLERK

Gabriel J. Rios) C/A No.2015-CP-42-2541
Applicant,)
-vs-) **MOTION FOR RECONSIDERATION**
State of South Carolina) **PURSUANT TO RULE 59(e), SCRCP**
Respondent,)
)

Introduction

PLEASE TAKE NOTICE, that the above captioned Applicant by and through attorney of record, pursuant to applicable case and statutory law, hereby moves this Honorable Court to reconsider the judgment entered in the above captioned case on March 21, 2017. The Order was received via U.S. Mail April 3, 2017, see attached envelope). Therefore this request for reconsideration is timely made.

IN support of this request the Applicant will show unto this Court the following:

(1). This matter comes before this Court by way of an application for post conviction relief filed June 3, 2015. An evidentiary hearing was convened on January 30, 2017 at the Spartanburg County Courthouse. Subsequently thereafter this Court issued an Order of dismissal on March 21, 2017, filed March 27, 2017 and received April 3, 2017.

(2). The Order issued by this Court has overlooked a critical issue in it's order. The order omits any reference to the issue

of counsel rendering ineffective assistance in failing to impeach State's witness' Gail Holt and her husband Phillip Holt during trial.

(3). Applicant presented this issue by way of an amended PCR application and testified to such during the hearing, and further in support Applicant submitted (2) exhibits with the amendment and are part of the record.

(4). The exhibits contain sufficient evidentiary support and should be addressed by this Court. Specifically, during trial Gail Holt was allowed to identify Applicant as the perpetrator, when the police reports and 911 call reveal that Gail Holt actually stated an "unknown" suspect forced entry and further reveal Phillip Holt told Deputy Welch he also received a call from his wife Gail Holt who said that an "unknown" suspect broke into their house. This was critical information for impeachment purposes.

(5). Impeaching these witnesses was critical. The prejudice incurred is easily seen by the solicitor's strong reliance on Gail Holt's testimony during closing summation. See Tr.p.320, L.17-18; p.320, l.21-24; p.320, l.25-p.321, l.3; p.321, l.5-10; p.321, l.19-21; p.321, l.25; p.323, l.6-11; p.323, l.18-19. This was found extremely prejudicial in Rutland v. State, 415 S.C. 570, 785 S.E.2d 350 (2016). The Court noted that in Rutland the solicitor relied heavily on the key witness in closing argument. Id at 578, 785 S.E.2d at 354). The same is true in the instant case and the analysis from Rutland should apply as well.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests this Court to alter/amend and/or reconsider the judgment entered in this case.

Respectfully Submitted,

/s/ Gabriel J. Rios

Gabriel J. Rios

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

C/A No.2015-CP-42-2541

Gabriel J. Rios -- Applicant,

-vs-

State of South Carolina -- Respondent,

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served a true and correct copy of the parties who appear below. By placing the enclosed Rule 59(e), SCRCP motion in properly addressed, first-class postage affixed envelopes and placed in the U.S. Mail this 10th day of April 2017.

Those Served:

SpartanBurg County Clerk
M.Hope Blackley
P.O. Box 3483
Spartanburg, SC. 29304-3483

Law Clerk for
The Hon. Edward W. Miller
P.O. Box 3483
Spartanburg, SC. 29304-3483

Assistant Attorney General
Caitlin B. Hastings
P.O. Box 11549
Columbia, SC. 29211

Respectfully Submitted,

/s/ Gabriel Rios

Gabriel J. Rios

Sworn to and Subscribed Before Me

this 10th day of April 2017

Nancy C Murchant
NOTARY PUBLIC

MY COMM. EXPIRES 1-23-2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Gabriel Jon Rios, #344751,	)	2015-CP-42-2541
	)	
Applicant,	)	
	)	
v.	)	**RETURN TO APPLICANT'S MOTION TO ALTER OR AMEND THE JUDGMENT**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of Applicant's Motion to Alter or Amend the Judgment[1] in which Applicant asks the Court to reconsider its Order dismissing his Application for post-conviction relief (PCR). Respondent (the State) would submit the following:

I.

Respondent submits that the Order of Dismissal of the Honorable Edward W. Miller, dated March 21, 2017, contains the findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003), and Rule 52(a) SCRCP. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). However, Respondent concedes Applicant's claim of ineffective assistance of counsel for failing to impeach was not addressed in the Order of Dismissal. Therefore, the motion should be granted by amending the Order of Dismissal to address this claim and denied on every other ground.

II.

Applicant's *pro se* motion states that the Order issued in this case omits any reference to the issue of trial counsel failing to impeach the State's witnesses Gail Holt and her husband,

[1] Counsel for Applicant served this motion on Respondent April 6, 2017. Shortly thereafter, on April 14, 2017, Respondent received a *Pro Se* "Motion for Reconsideration Pursuant to Rule 59 (e), SCRCP." Respondent responds herein to both motions.

Phillip Holt. Respondent agrees. Respondent submits that Applicant's motion be granted to amend the Order of Dismissal to address Applicant's allegation that trial counsel failed to impeach the State's witnesses.

III.

Respondent submits the remainder of Applicant's Motion to Reconsider should be denied. Applicant is not requesting either an alteration or amendment to the final order. Rather, Applicant is asking the Court to reverse its decision. Such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e) motion is to preserve issues raised to, but not ruled upon by, the trial court).

IV.

WHEREFORE, having made its Return to Applicant's motion to reconsider, the State requests that the relief requested in the Motion be granted in part and denied in part.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

BY: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

April 17th, 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
	)	2015-CP-42-2541
GABRIEL JON RIOS, #344751,	)	
	)	
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 **Return to Applicant's Motion to Alter or Amend the Judgment** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ms. Susannah C. Ross, Esquire
Ross & Enderlin, PA
330 East Coffee St.
Greenville, SC 29601

DATED this 17th day of April, 2017.

Ashley Haworth, Paralegal
For Respondent

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS OF THE SEVENTH JUDICIAL CIRCUIT
Gabriel Jon Rios, S.C.D.C. No. 344751, Applicant, v. State of South Carolina, Respondent.	2015-CP-42-2541 **AMENDED** **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 3, 2015. Respondent made its Return on February 11, 2016. An evidentiary hearing was held on January 30, 2017, at the Spartanburg County Courthouse. Applicant was present and represented by Susannah C. Ross, Esquire. Assistant Attorney General Caitlin B. Hastings represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel Matthew Shealy, Esquire, also testified. Additionally, Applicant's daughter testified at the evidentiary hearing. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, Applicant's records from the South Carolina Department of Corrections, the 911 tape, AT&T phone records, and the pleadings. The Court finds as follows:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the November 2010 term of the Spartanburg County Grand Jury for burglary—1st degree (2010-

GS-42-6830), armed robbery and possession of a weapon during the commission of a violent crime (2010-GS-42-6831, counts one and two), grand larceny, value $10,000 or more (2010-GS-42-6832),[1] kidnapping (2010-GS-42-6833), and assault and battery, first degree (2010-GS-42-6834). Matthew Shealy, Esquire, represented Applicant. On February 26, 2013, Applicant proceeded to trial before the Honorable R. Lawton McIntosh and a jury. The jury found Applicant guilty as indicted. Judge McIntosh sentenced Applicant to imprisonment to concurrent terms of 40 years for burglary, 30 years for armed robbery and kidnapping, and ten years for assault and battery, and a consecutive term of five years for possession of a weapon.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on February 1, 2015. State v. Rios, Op. No. 2015-UP-135 (S.C. Ct. App. filed March 11, 2015). The remittitur was returned on April 10, 2015.

ALLEGATIONS

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

1. Ineffective Assistance of trial counsel in that:
   a. "prior and during trial [in violation] of his rights pursuant to the Sixth an Fourteenth Amendment to the United States Constitution, as well as Article I section 14 of the South Carolina Constitution"
   b. Counsel "failed to object to Solicitor shifting the burden" during his closing argument
   c. Counsel "failed applicant by conceding his guilt" in his closing argument
   d. Counsel failed to adequately advise Applicant
   e. Counsel failed to adequately investigate
   f. Counsel failed to admit the 911 tape and AT&T phone records at trial

[1] The State elected to proceed on the armed robbery charge and dismissed the grand larceny charge before trial.

g. Counsel failed to advise Applicant that he should testify at trial
h. Failure to impeach
i. Failure to put forth an alibi defense

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. As a matter of general impression, this Court finds Counsel's testimony to be credible and Applicant's testimony to be neither credible nor legally relevant. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

Summary of the Testimony

Applicant testified that he met with Counsel approximately three times. Applicant testified that the solicitor's closing argument included burden-shifting statements because the solicitor said Applicant had no proof that he was innocent but was merely telling a story. Tr. p. 323. Applicant testified that he believes Counsel failed to object to this statement but should have. Applicant further testified that Counsel failed him by making statements that conceded his guilt during his closing argument. Specifically, Applicant testified that the statements regarding the use of painter's tape to bind the victim conceded Applicant's guilt. Tr. p. 305. Applicant testified that Counsel did review the Rule 5 discovery materials with him; however, Applicant testified that Counsel never reviewed the 911 tape with him nor did he admit it into evidence. Applicant testified that he believes the 911 tape shows his innocence because the victim did not identify him during the call even though she claimed to recognize him right away because he used to work for her husband. Applicant additionally testified that he believes Counsel was

ineffective for failing to admit into evidence the 911 tape and the AT&T phone records of Ester Boyd because he claims that he made about eight phone calls to his wife from Ester Boyd's home phone during the time of the crime. Applicant testified that if Counsel had admitted the tape and phone records into evidence, it would have established an alibi defense for Applicant. Applicant testified that he believes Counsel was ineffective for failing to use this evidence to establish an alibi defense. Applicant further alleged that Counsel was ineffective for failing to advise Applicant that he should testify at his trial. Applicant stated that if he had testified during the trial he would have talked about how there was no DNA evidence that matched him except for the thumbprint on the broken glass. Applicant testified that this thumbprint could have been from previous visits to the victim's home since he used to work for her husband. Applicant further testified that he would have argued to the jury that this lack of DNA evidence at the scene showed that he could not be in two places at once since he alleges he was at Ester Boyd's home calling his wife. Applicant admitted that Counsel explained to him that it was his decision as to whether he would testify at trial. Applicant testified that Counsel advised him against him testifying but agreed that Counsel explained it was ultimately his decision.

Applicant's daughter also testified at the PCR hearing. She testified that she remembered speaking with her father on the phone the morning of the incident. She testified that she believed she spoke with him around 7:02 A.M.

Counsel testified that he has been practicing law for a little over nine years, the majority being criminal law. Counsel testified that, at the time of Applicant's trial, he had previously handled other trials with similar charges. Counsel testified he became involved with Applicant's case about four months before trial—other attorneys within his office had handled different stages of Applicant's case. During these four months, Counsel testified he met with Applicant

four times and also spoke with various members of his family. Counsel testified he reviewed all discovery with Applicant. He also discussed with Applicant the elements of the charges and possible defenses to those charges and advised Applicant concerning his right to testify. Counsel investigated the leads that Applicant provided to him, including a possible alibi defense. However, Counsel testified that there were problems with this defense, specifically, Applicant was only able to establish a possible partial alibi.

Counsel testified Applicant's alleged timeline that he was calling his wife from Ester Boyd's home still allowed time for him to be at the scene of the crime. Counsel testified that he conducted a drive test run of Applicant's chain of events on the day of the incident. He stated that test run showed that Applicant could only establish a partial alibi, at best. Additionally, Applicant was unable to provide Counsel with any alibi witnesses that saw him during the time of the crime. However, Counsel still attempted to have the trial judge charge the jury with a partial alibi instruction, which the trial judge ultimately refused to do. Tr. p. 288.

Counsel further testified that he did not attempt to admit the 911 tape into evidence because the call was made by the victim's husband. Counsel said he felt the tape bared greater risks than potential benefits, and he felt he introduced the beneficial information of the 911 tape through other evidence. Counsel also testified that he did not attempt to introduce the phone records because they don't indicate who was making the call only that a call was made.

Counsel also testified regarding the comments in his closing argument referring to the use of painter's tape during the crime. Counsel testified the theme of his closing argument was that the State wanted the jury convict Applicant merely on inference. He explained that he used the specific example of painter's tape as an illustration of reasonable doubt. Counsel testified that someone who was trying to bind another person would not use painter's tape because it's easily

broken. He testified that Applicant knew the consistency of painter's tape from his construction work and would, therefore, know not to use it for that purpose. Tr. pp. 305-06.

Counsel testified that he remembered making a couple motions in limine, a motion to suppress the in-court identification and the alleged rock that was used to break the window, and motions for a directed verdict and a new trial. Counsel also testified that he objected to the trial judge's refusal to charge a partial alibi instruction and to the introduction of the piece of glass bearing the thumbprint. Tr. pp. 16, 24, 46, 198, 254, 288, 371. Additionally, Counsel testified that he maybe should have objected to the solicitor's remarks during his closing statement but also testified that if he had noticed something troublesome at the time, he would have objected.

Ineffective Assistance of Trial Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S.

690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Failure to Object to Solicitor's Alleged Burden-Shifting Statements

Applicant alleged that Counsel was ineffective for failing to object to the alleged burden-shifting statements made by the solicitor during his closing argument. This Court finds Applicant has failed to show that Counsel's failure to object to these statements resulted in a deficiency that prejudiced the outcome of his trial. Counsel is an experienced criminal defense attorney who has handled many cases similar to Applicant's. Counsel testified that if at the time of the trial, the solicitor's statements appeared troubling to Applicant's case, he would have objected. Counsel admits in hindsight he possibly should have objected to those statements. However, this Court finds that Counsel's performance was still within the range of reasonable competence required for criminal cases. Further, this Court finds Applicant has failed to show any resulting prejudice. Therefore, this Court finds Applicant has failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Alleged Concession of Applicant's Guilt

Applicant alleged Counsel was ineffective for allegedly making statements that conceded

his guilt during his closing statement. This Court finds Applicant has failed to show that Counsel's statements were deficient or resulted in any prejudice. Counsel testified the theme of his closing argument was that the State wanted to the jury convict Applicant merely on inference. He explained that he used the specific example of painter's tape as an illustration of reasonable doubt. Counsel testified that someone who was trying to bind another person would not use painter's tape because it's easily broken. He testified that Applicant knew the consistency of painter's tape from his construction work and would, therefore, know not to use it for that purpose. Tr. pp. 305-06. This Court finds Counsel's statements during his closing argument were part of Counsel's strategy and within the range or reasonableness for criminal representation. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not effective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Further, this Court finds Applicant did not suffer any prejudice from these statements. Therefore, this Court finds Applicant has failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Failure to Adequately Investigate

Applicant alleged at the evidentiary hearing that Counsel failed to conduct a proper investigation. This Court finds Applicant has failed to show that Counsel was deficient or that he was prejudiced by any alleged deficiency. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and

making an independent investigation of the facts and circumstances of the case. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

Here, Counsel testified that he conducted a test run and explored the possibility of an alibi defense. Counsel also testified he spoke with Applicant's family members. Additionally, the testimony reflects that Counsel reviewed all the evidence in the case, discussed possible defenses with Applicant, and pursued leads that Applicant provided. Specifically, Counsel pursued a possible alibi defense. Such an investigation was reasonable under the circumstances. See Edwards, 392 S.C. at 457, 710 S.E.2d at 65 (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)). This Court finds Counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation. Accordingly, Applicant has failed to show Counsel was deficient in investigating or developing a defense.

Likewise, Applicant has failed to demonstrate any prejudice resulting from Counsel's alleged failure to investigate. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))). This Court can only speculate as to what additional investigation could have been done and what evidence that investigation would have uncovered. Applicant testified on his own behalf but presented no other witnesses and produced no evidence of what Counsel might have uncovered had he conducted any additional investigation. Therefore,

Applicant has failed to demonstrate any alleged deficiency prejudiced him. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Accordingly, this Court finds Applicant has failed to satisfy either prong of the Strickland analysis. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to Admit 911 Tape and AT&T Phone Records into Evidence

Applicant alleged that Counsel was ineffective for failing to introduce the 911 tape and Ms. Ester Boyd's AT&T phone records into evidence. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not effective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Counsel explained that although Applicant was not identified by the victim during the 911 call, he didn't feel this was especially helpful since it was the victim's husband who made the call. Further, Counsel testified that he felt that introducing the 911 tape posed more risks than benefits, and he felt he could introduce the helpful information from the tape through other evidence. Counsel also stated that he did not believe that Ms. Boyd's phone records would be especially helpful either because it is unclear from the records who placed a call. They only indicate that a call was made. This Court finds Counsel's decision to leave the 911 tape and phone records out of evidence to be part of a trial strategy that falls within the scope of reasonable criminal representation. Further, Applicant has failed

show that this alleged deficiency prejudiced him. Accordingly, this Court finds Applicant failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Failure to Advise Applicant to Testify

Applicant alleged that Counsel was ineffective for failing to advise him to testify at trial. Both Applicant and Counsel's testimony reflect that Counsel advised Applicant of his right to testify at trial. While Counsel advised Applicant against testifying, he made it clear that the ultimate decision was Applicant's to make. Applicant admitted that he understood it was his decision and ultimately decided to follow Counsel's advice not to testify. Further, the trial court thoroughly advised Applicant of his right to testify, and Applicant told the trial judge that it was his personal decision to exercise his Fifth Amendment right. Tr. pp. 255-58. This Court finds that Applicant has failed to show Counsel's conduct in advising him not to testify was unreasonable under prevailing professional norms. Counsel testified he did not believe it was in Applicant's best interest to testify. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Therefore, Applicant has failed to satisfy his burden of proving deficiency as to this allegation. Further, this Court finds Applicant has failed to show there is a reasonable probability that but for Counsel's advice not to testify, he would not have been convicted. Accordingly, this Court finds Applicant has failed to show any deficiency in Counsel's performance or resulting prejudice. Therefore, this allegation is denied and dismissed with prejudice.

Failure to impeach

Applicant alleged that Counsel was ineffective for failing to impeach the state

witnesses, specifically, the victims: Gail Holt (Mrs. Holt) and Phillip Holt (Mr. Holt). Applicant testified that he believes the 911 tape shows his innocence because the victim did not identify him during the call even though she claimed to recognize him right away because he used to work for her husband. Counsel testified that he did not attempt to use the 911 tape to impeach Mrs. Holt, because the call was made by the victim's husband. Counsel said he felt the tape bared greater risks than potential benefits, and he felt he introduced the beneficial information of the 911 tape through other evidence.

The record shows that the victim, Mrs. Holt, testified at trial that she recognized the home intruder. Tr. 108; ll. 4-5. Mrs. Holt also testified she knew his name to be Gabe. Tr. 108, l. 11. She knew Applicant because he worked for her husband and she had met him several times at her husband's shop and at her home. Tr. 108, ll. 12-21. She recognized Applicant immediately and also recognized his voice. Tr. 108, l. 22 – p. 109, l. 4. Mrs. Holt came face-to-face with Applicant during the incident. Tr. 109, ll. 17-20. She testified that she did not call him by name, but rather, "sir," to let him know he was in control. Tr. 111, ll. 3-6. After the incident, Mrs. Holt called her husband, who then called 911. Tr. 114, ll. 15-16. *After* Mrs. Holt testified that the police arrived shortly after her husband, the State asked her if she gave them a description of who did this, to which Mrs. Holt responded, "yes, I told them who." Tr. 131, ll. 2-6. Mrs. Holt further testified that Investigator Williams presented her with a lineup of pictures and from those pictures she made an identification of Applicant with absolute certainty. Tr. 131, l. 11 – p. 133, l. 12 . Additionally, she testified that the home invader's name was Gabe and pointed him out in the courtroom. Tr. 134, ll. 1-14.

Based on the record and the testimony presented to this Court, Counsel was not ineffective for failing to impeach witness Gail Holt. Applicant has failed to meet his burden of

proving any deficiency on the part of Counsel for failing to impeach Mrs. Holt using the 911 tape. Counsel's strategic decision not to impeach Mrs. Holt using the 911 recording was reasonable in light of the circumstances. Even assuming *arguendo* that Counsel's decision not to use the 911 recording to impeach Mrs. Holt was unreasonable, Applicant fails to demonstrate any prejudice. Not only did Mrs. Holt testify that she recognized the intruder because he worked for her husband and had met him several times, she also picked him out of a photo lineup shortly after the incident without anyone else's influence and identified him in open court. Additionally, it was Mr. Holt who called the police to his house after receiving a frantic call from his wife. Although no identity was given during the 911 call, this Court fails to see how the recording would impeach the testimony of Mrs. Holt to the extent it would affect the outcome of Applicant's trial.

Applicant also contends that Counsel was ineffective in failing to impeach Mr. Holt for the same reasons. This Court finds no testimony in the record that would warrant impeachment on the basis that no identity was given during the 911 call. Mr. Holt was not present in the house during the incident. He received a call from his wife immediately after, who was hysterical. Tr. 149, ll. 3-5. He called the police on his drive to his home, suggested the police get there quickly, hung up and called his wife back. Tr. 149, ll. 19-23. Mr. Holt never testified that his wife had identified her assailant at any time prior to the photo lineup provided by investigators. Therefore, Counsel could not have impeached him using the 911 recording that contained no identification – because the identification was made after the police arrived to the scene.

Because Applicant has failed to prove any deficiency on the part of Counsel, and prejudice flowing therefrom, this Court denies and dismisses this allegation with prejudice.

Failure to Put Forth an Alibi Defense

Applicant alleged that Counsel was ineffective for failing to put forth an alibi defense before the trial court. Counsel's testimony at the PCR hearing and the trial transcript reflect that Counsel did attempt to put forth the defense of a partial alibi through his opening and closing arguments and requesting a jury instruction. Tr. pp. 102-04, 290-92, 303-14. However, the trial judge ultimately decided to exclude such an instruction. Tr. pp. 290-92. Further, Counsel made a motion for a new trial based on the denial of this charge. Tr. p. 371. Accordingly, this Court finds Counsel did attempt to put forth an alibi defense, and Applicant has failed to show Counsel acted deficiently. Moreover, this Court finds Applicant has failed to show that this alleged deficiency resulted in prejudice to Applicant. This Court also notes that the issue of the trial judge's refusal to charge the jury with a partial alibi instruction was directly addressed on appeal, and has been ruled on by the South Carolina Court of Appeals. State v. Rios, Op. No. 2015-UP-135 (S.C. Ct. App. filed March 11, 2015). Therefore, this Court denies and dismisses this allegation with prejudice.

All Other Allegations

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

CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application.

Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 21 day of June, 2017.

EDWARD W. MILLER
Presiding Judge
Seventh Judicial Circuit

Greenville, South Carolina

CLERK OF COURT
SPARTANBURG COUNTY
2017 JUN 29 AM 10:16
M. HOPE BLACKLEY

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP4203862

Michael Anthony Rogers, #348110 [Applicant]	State of South Carolina, [Respondent]
PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

Applicant filed an application for post-conviction relief (PCR). An order dismissing the Applicant's PCR case was entered into on March 29, 2017. The Applicant moved to alter or amend the Order of Dismissal pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. After considering the Applicant's motion, the requested relief is hereby DENIED.

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

CLERK OF COURT SPARTANBURG COUNTY 2017 JUN 29 AM 10:16 M. HOPE BLACKLEY

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional

taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	2130 Judge Code	6/8/2017 Date

For Clerk of Court Office Use Only

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

Susannah C. Ross	Valerie Garcia Giovanoli Caitlin B. Hastings
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CLERK OF COURT
SPARTANBURG COUNTY
2017 JUN 29 AM 10 16
M. HOPE BLACKLEY

WITNESSES

Spartanburg County Sheriff's Office

ARREST WARRANT NUMBER

M424613- Count One

M424611- Count Two

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date: NOV 2 4 2010

VERDICT

Guilty 2/25/13

Foreperson of Petit Jury
Date: FEB. 28, 2013

DOCKET NO. 6831

The State of South Carolina

County of Spartanburg

Trey Gowdy, *Solicitor*

COURT OF GENERAL SESSIONS

NOV 2 7 2010

TERM

THE STATE
vs.

Gabriel Jon Rios

Indictment for

ARMED ROBBERY AND POSSESSION OF WEAPON DURING COMMISSION OF A VIOLENT CRIME

SC Code: 16-11-330 (A); 16-23-490
CDR Code: 139: 549
Class FEL/A: FEL/F

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 DEC -2 PM 1:54
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on NOV 24 2010, the Grand Jurors of Spartanburg County present upon their oath:

COUNT ONE---ARMED ROBBERY

That Gabriel Jon Rios did in Spartanburg County on or about August 14, 2010, while armed with a deadly weapon, being a handgun and a broken piece of glass, did feloniously take from the person or presence of Gail Holt, by means of force, violence, and/or intimidation, goods or monies, such goods or monies being described as follows: a 2001 Lexus vehicle, a handgun, and US currency, with intent to deprive the owner permanently of such property, in violation of §16-11-330 (A), *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

COUNT TWO---POSSESSION OF WEAPON DURING COMMISSION OF A VIOLENT CRIME

That Gabriel Jon Rios did in Spartanburg County on or about August 14, 2010, possess or visibly display a handgun and a broken piece of glass during the commission of a violent crime, to-wit: ARMED ROBBERY, in violation of Code §16-23-490, *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.

ASSISTANT SOLICITOR

WITNESSESS

1. SENTENCE MADE ☒
2. Spartanburg County Sheriff's Office ☒
3. CARD FILLED ☒
4. [illegible] ☒
5. CHECKED WARRANT ☒
6. CHECKED SIGNATURE ☒
7. ASSESSMENT AND [illegible] CARD MADE ☒
TRAFFIC VIOLATIONS COPY ☒

ARREST WARRANT NUMBER

M424612

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury NOV 24 2010
Date:

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO: [illegible] 6837

The State of South Carolina

County of Spartanburg

Trey Gowdy, *Solicitor*

COURT OF GENERAL SESSIONS

NOV 2[illegible] 2010

TERM

THE STATE
vs.

Gabriel Jon Rios

Indictment for

GRAND LARCENY

SC Code: 16-13-30 (B)
CDR Code: 3421
Class FEL-E

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 DEC -2 PM 1:55
M. HOPE BLACKLEY

Nolle prossed - Defendant convicted on other charges related to this crime -
2/28/13
Timi Poulos
Asst. Solicitor

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 MAR -1 AM 10:50
M. HOPE BLACKLEY

563

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on NOV 22 2010 the Grand Jurors of Spartanburg County present upon their oath:

GRAND LARCENY

That Gabriel Jon Rios, did in Spartanburg County on or about August 14, 2010, feloniously take and carry away the goods of Gail Holt, valued at more than Ten Thousand Dollars, described as follows: a .357 Smith & Wesson handgun, US currency, and a 2001 Lexus vehicle, with the intent to deprive the owner permanently of such property, all in violation of Section 16-13-30 (B), *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.

ASSISTANT SOLICITOR

WITNESSES

Spartanburg County Sheriff's Office

- [x] PRESENCE MADE
- [x] REPORT ENDED
- [x] CARD FILED
- [x] [illegible]
- [x] SIGNED WARRANTS
- [x] [illegible] SIGNATURES
- [ ] ASSESSMENT AND FINGERPRINT CARD MADE
- [x] [illegible] COPY

ARREST WARRANT NUMBER

M424615

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date: NOV 24 2010

VERDICT

Guilty 2/26/13

Foreperson of Petit Jury
Date: Feb. 28, 2013

DOCKET NO. 10GS 6833

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 2 2010

TERM

THE STATE
vs.

Gabriel Jon Rios

Indictment for

KIDNAPPING

SC Code: 16-03-910
CDR Code: 0095
Class FEL-A

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 DEC -2 PM 1:55
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on NOV 24 2010, the Grand Jurors of Spartanburg County present upon their oath:

KIDNAPPING

The Defendant, Gabriel Jon Rios, did in Spartanburg County, on or about August 14, 2010, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, Gail Holt, without authority of law, all in violation of Section 16-3-910, 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.

ASSISTANT SOLICITOR

WITNESSES

Spartanburg County Sheriff's Office

DOCKET NO. 10GS 42 6834

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 24 2010

TERM

ARREST WARRANT NUMBER

Direct Indictment (M424614)

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date: NOV 24 2010

VERDICT

Guilty 2/28/13

Foreperson of Petit Jury
Date: FEB. 28, 2013

THE STATE
vs.

Gabriel Jon Rios

Indictment for
ASSAULT AND BATTERY
FIRST DEGREE

SC Code: 16-3-600
CDR Code: 3412
Class FEL-E

CLERK OF COURT
SPARTANBURG COUNTY

2010 DEC -2 PM 1:55

M. HOPE BLACKLEY

567

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on NOV 24 2010 the Grand Jurors of Spartanburg County present upon their oath:

ASSAULT AND BATTERY FIRST DEGREE

That Gabriel Jon Rios did in Spartanburg County on or about August 14, 2010 commit an act causing an unlawful injury to Gail Holt, and the act:

(1) involved nonconsensual touching of the private parts of an adult with lewd and lascivious intent, or

(2) occurred during the commission of a robbery, burglary, kidnapping, or theft, or

(3) involves an offer or attempt to injure another person with the present ability to do so, and the act is accomplished by means likely to produce death or great bodily injury, or occurred during the commission of a robbery, burglary, kidnapping, or theft,

all in violation of § 16-3-600, *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.

ASSISTANT SOLICITOR

WITNESSES

1. SEE [illegible] MADE
2. REPORT ENDED
Spartanburg County Sheriff's Office
CARD FILED
4. INDEXED
5. CHECKED WARRANTS
6. CHECKED SIGNATURE
7. ASSESSMENT AND FINE CARD MADE
8. TRAFFIC VIOLATION COPY

ARREST WARRANT NUMBER

M424610

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date: NOV 24 2010

VERDICT

Guilty 2/28/13

Foreperson of Petit Jury
Date: FEB. 28, 2013

DOCKET NO. 10-GS-42-6830

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 24 2010

TERM

THE STATE
vs.

Gabriel Jon Rios

Indictment for

BURGLARY FIRST DEGREE (DWELLING)

SC Code: 16-11-0311
CDR Code: 0079
Class: FEL/EXM (V)

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 DEC -2 PM 1:54
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on NOV 24 2010, the Grand Jurors of Spartanburg County present upon their oath:

BURGLARY FIRST DEGREE (DWELLING)

That the Defendant, Gabriel Jon Rios, did in Spartanburg County on or about August 14, 2010 willfully and intentionally enter a dwelling belonging to Gail Holt located at [redacted] without consent and with intent to commit a crime therein, and either in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:

(1) was armed with a deadly weapon, and/or

(2) caused physical injury to any person who was not a participant in the crime, and/or

(3) used or threatened the use of a dangerous instrument, and/or

(4) displayed what was or appeared to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm, and/or

(5) entered the dwelling during the nighttime, and/or

(6) committed the crime while possessing a prior record of two or more convictions for burglary or housebreaking or a combination of both,

all in violation of Section 16-11-0311 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.

Assistant Solicitor