

Law Office of Leah B. Moody, LLC

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April 15, 2015

The Honorable Daniel E. Shearouse  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29221

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S.C. Supreme Court

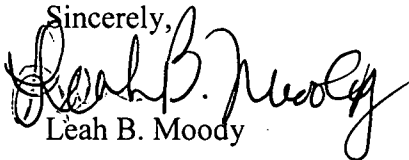
RE: John Mack v. State of South Carolina  
Case No.: 2013-CP-42-2063

Dear Mr. Shearouse:

The Spartanburg County Court of Common Pleas appointed my office to represent John Mack in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal, Proof of Service, and one (1) copy of the Order of Dismissal in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance with this matter.

Sincerely,

  
Leah B. Moody

LBM/scm  
Enclosure

cc John Willie Mack  
Suzanne White, Esquire  
Sharon Graham, SCCID  
Hope Blackley, Clerk of Court, Spartanburg County

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Deadra L. Jefferson, Presiding in Spartanburg County

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Case No.: 2013-CP-42-2063

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John Willie Mack, ..... Appellant,

v.

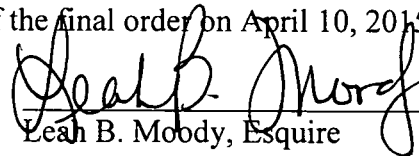
State of South Carolina, ..... Respondent.

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NOTICE OF APPEAL

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John Mack appeals the order of the Honorable Deadra L. Jefferson, dated April 6, 2015. Appellant received written notice of entry of the final order on April 10, 2015.



Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
235 E. Main Street, Suite 115  
Post Office Box 1015  
Rock Hill, South Carolina 29731

Other Counsel of record:  
Suzanne White, SC Attorney General's Office  
Rembert C. Dennis Building  
Post Office Box 11549  
Columbia, South Carolina 29211-1549  
(803) 734-3970

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S.C. Supreme Court

**IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

**APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas**

**Deadra L. Jefferson, Presiding in Spartanburg County**

**Case No. 2013-CP-42-2063**

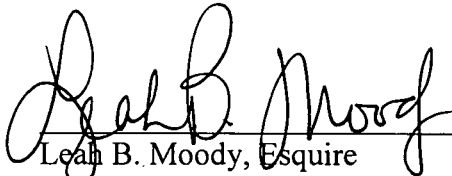
**John Willie Mack, ..... Appellant,**

**v.**

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

**PROOF OF SERVICE**

I certify that I have served the Notice of Appeal on Suzanne White by depositing a copy of it in the United States Mail, postage prepaid, on 4/17, 2015 addressed to its attorney of record, Suzanne White, Post Office Box 11549, Columbia, South Carolina, 29211-1549.

  
Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
235 E. Main Street, Suite 115  
Post Office Box 1015  
Rock Hill, South Carolina 29731

April 15, 2015

cc John Willie Mack  
Suzanne White, Esquire  
Hope Blackley, Clerk of Court, Spartanburg County  
Sharon A. Graham, SCCID

STATE OF SOUTH CAROLINA )  
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 COUNTY OF SPARTANBURG )  
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 John Willie Mack, #257219, )  
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 Applicant, )  
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 v. )  
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 State of South Carolina, )  
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 Respondent. )  
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IN THE COURT OF COMMON PLEAS  
 SEVENTH JUDICIAL CIRCUIT

2013-CP-42-2063

**ORDER OF DISMISSAL**

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Leah B. Moody, Esquire
Respondent's Attorney:	Suzanne H. White, Esquire
Trial Counsel:	J. Roger Poole, Esquire
Schmerber Motion Counsel:	William McPherson, Esquire
Date of Hearing:	January 14, 2015
Court Reporter:	Pamela E. Green

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed May 6, 2013. The Respondent made its Return on or about March 18, 2014. An evidentiary hearing into the matter was convened on January 14, 2015, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Leah B. Moody, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. J. Roger Poole, Esquire, (Counsel) also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, and the trial transcript.

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## PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the June 2006 term of the Spartanburg County Grand Jury for Burglary–First Degree<sup>1</sup> (2006–GS–42–1167) and Grand Larceny<sup>2</sup> (2006–GS–42–1166). On September 12, 2008, the State moved to compel the Applicant to produce a DNA sample, pursuant to Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966) before the Honorable Clifton J. Newman. At the Applicant's Schmerber hearing, he was represented by William McPherson, Esquire. At trial, the Applicant was represented by J. Roger Poole, Esquire (Counsel). On February 22, 2011, the Applicant proceeded to trial and was convicted of the charges by a jury. On February 23, 2011, the Honorable J. Derham Cole sentenced the Applicant, pursuant to S.C. CODE ANN. § 17–25–45(A) (2005), to life imprisonment without possibility of parole (LWOP) for Burglary–First Degree and a concurrent term of five (5) years' imprisonment for Grand Larceny.

The Applicant's Counsel filed a timely notice of appeal and brief on the Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal. State v. Mack, Op. No. 2013–UP–161 (filed April 17, 2013), *available at* 2013 WL 8507869.<sup>3</sup> The Remittitur was returned on May 7, 2013.

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

<sup>2</sup> Grand Larceny is a felony punishable by a fine in the court's discretion or "ten [(10)] years [in prison] if the value of the personalty is five thousand dollars [(\$5,000.00)] or more." S.C. CODE ANN. § 16–13–30(B)(1) (2005).

<sup>3</sup> A review of the subsequent history of the Applicant's appeal reveals that the Applicant did not petition for certiorari and review of the Court of Appeals' affirmance to the South Carolina Supreme Court. In his Application for Forensic DNA Testing, filed with the Spartanburg County General Sessions Court on September 27, 2012, the Applicant asserts that he awaits results of SLED's DNA test from his trial, pending the resolution of his ongoing

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## ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
  - i. Counsel failed to object to the amendment of the indictment,
  - ii. Counsel failed to object to the admission of DNA evidence when the State failed to produce tangible items or pictures of items swabbed,
  - iii. Counsel failed to object to Applicant's prior criminal history being presented to the jury,
  - iv. Counsel failed to thoroughly and properly examine a crucial prosecution witness to address her perjury,
  - v. Counsel failed to file a motion for a speedy trial,
2. Trial court error, in that;
  - i. The trial judge improperly stated that only one aggravating circumstance had to be proven,
3. Misconduct of Solicitor's office and law enforcement with regards to DNA evidence,
  - i. Brady violation because the State did not turn over the blood evidence.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. § 17-27-80 (2003).

appeals in the appellate courts. The Applicant challenges the DNA evidence as grounds for his collateral attack before this Court.

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**Motion for Continuance**

At the commencement of his PCR hearing, the Applicant requested a continuance of his evidentiary hearing pending the outcome of his Application for Forensic DNA Testing, filed with the Spartanburg County General Sessions Court on September 27, 2012. The Applicant alleged that the State told him they found his DNA in the CODIS system, but had yet to produce the results during the pendency of his PCR action. The Applicant also indicated that he believed his prior attorney William McPherson, Esquire, who argued his Schmerber motion and who currently lives in Texas, should be present for his evidentiary hearing.

The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record. Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) (citing Bridwell v. Bridwell, 279 S.C. 111, 112, 302 S.E.2d 856, 858 (1983)). See Hudson v. Blanton, 282 S.C. 70, 74, 316 S.E.2d 432, 434 (Ct. App. 1984) (noting that in order to justify a continuance, a moving party must show the absence of some material evidence and due diligence on his part to obtain such evidence). Cf. Beasley v. Kerr-McGee Chem. Corp., 273 S.C. 523, 532, 257 S.E.2d 726, 730 (1979) (finding a movant failed to show due diligence to justify a continuance when he had eight months from filing of the complaint until trial to prepare). The bald assertion that the Applicant or his counsel were not ready to go forward and the Applicant was unprepared is not a sound basis for granting a motion for continuance. See State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51-52 (1996); Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2001) (“[T]he denial of a motion for a continuance on the ground that [a party] has not had time to prepare is rarely disturbed on appeal.”).

The Applicant claims that the DNA introduced at trial has bearing on his claim of

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ineffective assistance of counsel and that the results of the DNA testing could rise to the level of after discovered evidence. The Applicant's DNA was found on a light switch, bookshelf, and entertainment center in the house that the Applicant allegedly burglarized. The Applicant explained that after his trial, he requested SLED re-test the evidence containing his DNA. The Applicant requests that the actual, physical items in the home where the burglary took place be re-tested, not the original DNA swabs. He further explained that Judge J. Derham Cole heard argument on his motion, but had not yet issued a final order in connection with his request.

This Court finds that the Applicant filed his Application for Forensic DNA Testing almost two (2) years ago and has since obtained counsel to represent him in his PCR matter. Further, the DNA issue dates back to the Applicant's trial in February 2011, over three (3) years before the instant PCR hearing. As of the hearing date, the Applicant and his attorney have not resolved the issue. Thus, the Applicant has failed to show good cause to continue this matter in the hopes of obtaining purportedly beneficial evidence and testimony. Further, as elaborated below, the test results of the physical items in the home have no bearing on the Applicant's burden of proving trial Counsel was ineffective. He further argues that counsel for his Schmerber motion William McPherson, Esquire, should be present for his evidentiary hearing. Mr. McPherson currently lives in Texas. However, the Applicant cannot show that Mr. McPherson would provide any relevant testimony supporting his grounds for relief. Additionally, the Applicant does not allege with any particularity that Mr. McPherson was deficient in his representation of the Applicant in the Schmerber motion. Therefore, the Applicant's motion for a continuance is denied. However, the Applicant is not prejudiced in any manner by the present action proceeding. Any findings by this Court regarding his PCR application will not preclude the applicant from pursuing additional relief available to him as a result of any additional

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findings regarding prevailing on any pending motion to retest the DNA.<sup>4</sup>

The Court allowed the Applicant the opportunity to state all relevant grounds regarding this issue on the record. Thereafter, the Court proceeded with the Applicant's evidentiary hearing.

### Summary of Testimony

The Applicant testified that he was currently incarcerated at the South Carolina Department of Corrections Lee County Correctional Institute on charges of Burglary—First Degree and Grand Larceny. The Applicant testified that four (4) attorneys represented him, including various attorneys in the Seventh Circuit Public Defender's Office. The Applicant elaborated that James Cheek, Esquire, represented him on his bond hearing; William McPherson, Esquire represented him on his Schmerber motion; J. Roger Poole, Esquire (Counsel) represented him at trial; and LaNelle Cantey DuRant, Esquire was his appellate counsel. The Applicant testified that he waited five (5) years to go to trial.

The Applicant alleged that Counsel failed to object to the amendment of the indictment. However, he admitted that Counsel made a motion before Judge Cole to "squash it" for inaccurately reflecting the dates of offense between September 1, 2004 and September 6, 2005, but the judge denied his motion. The Solicitor made a motion to amend the indictment, which the trial court granted, but the Applicant believed that Counsel should have objected to or moved to quash the amended indictment.

The Applicant testified that he received a copy of the arrest warrant dated February 2006, indicating that the Applicant's DNA was matched to blood found at the crime scene based on a CODIS hit. The Applicant testified that he believes the physical and tangible items needed to be tested or introduced at trial, included the light switch, bookshelf, and entertainment center.

<sup>4</sup> Rule 29, SCRCrimP and S.C. Code Ann. § 17-28-100 (1976).

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The Applicant testified that the State introduced only the swabs with blood taken from the items, not any pictures of the items or the items themselves. The Applicant also testified that he believed there should have been an independent investigation of the swabs and DNA. The Applicant alleges the Solicitor's Office and law enforcement committed prosecutorial misconduct amounting to a Rule 5, SCRCrimP violation for failure to provide the Applicant the swabs themselves, the pictures of the items swabbed, the items themselves, and the items' locations in the home. The Applicant testified that law enforcement discovered a large amount of blood on the light switch, bookshelf, and entertainment center, but that the Solicitor's Rule 5 disclosure contained only the police report and never turned over the swabs or items. The Applicant claimed that if Counsel received additional evidence, he did not bring it to the Applicant's attention. The Applicant testified that he never received SLED's swabs and said that the swabs were not "his blood." However, he admitted that he saw the SLED DNA report. The Applicant testified that the defense's theory was that the perpetrator was "not me" and that he maintained his innocence. The Applicant alleged that the DNA evidence would conclusively prove that the burglar was "not me." He opined that obtaining an independent test of the items would discover new information and new facts undermining his conviction and supporting a motion for a new trial. As background for the Applicant's Grand Larceny charge, he stated that the victim and law enforcement discovered items such as jewelry and a laptop missing from the residence.

Prior to trial, the Applicant asked the State for the actual items, which request the State did not oblige. The Applicant testified that Counsel told him that they did not need the items at that point. The Applicant stated that law enforcement needed his DNA sample for comparison. The Applicant further testified that Counsel failed to request the items at the time of the trial.

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Applicant further alleged that he wanted Counsel to object to the swabs coming into evidence, but during trial, Counsel said "you need to be quiet."

The Applicant testified that Counsel failed to object to the Solicitor publishing his prior record to the jury because the Applicant was unaware that he was also trying to combat his prior convictions at trial. However, he admitted that the court gave the jury a limiting instruction. The Applicant further testified that Counsel failed to effectively cross-examine the victim, LaRhonda Moss, as to her observations of blood in her home. The Applicant testified that he believes that her testimony contradicts the police report, which indicates that the police initially observed the blood, and that she perjured herself. The Applicant testified that Counsel failed to file a motion for a speedy trial. The Applicant then testified that the trial judge improperly stated to the jury that his charge was only one (1) of the elements the Assistant Solicitor was required to prove at trial. Finally, the Applicant claimed a violation of his constitutional due process rights.

Counsel testified that he inherited the case in 2009, two (2) years prior to trial, from two (2) prior attorneys, Karen Quinby, Esquire, and William McPherson, Esquire from the Public Defender's Office. Counsel testified that he received a copy of the prior attorney's notes, files, and all work product; however, he did not speak with the attorneys because they moved out of state. Counsel testified that he met with the Applicant numerous times at the detention center to discuss his charges, defenses, and the case in general. Counsel testified that he shared all discovery materials with the Applicant, including the SLED and police reports.

Counsel testified that originally he was hoping to work out a plea arrangement because the Applicant had been served with a notice that the State intended to seek a sentence of life imprisonment without possibility of parole. Counsel testified that the Applicant had several cases pending at one time and that he was attempting to work the entire case out. Counsel testified that

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James Cheek, Esquire, then became involved and assisted him in plea negotiations. Counsel testified that the State extended three (3) offers for twenty (20) years; fifteen (15) years; and then a final offer for a plea to the Applicant's current charges in exchange for dismissal of the remaining charges and ten (10) years, respectively, all of which the Applicant rejected. Counsel testified the Applicant insisted on going to trial.

Counsel testified that the Applicant provided him some vague names of potential alibi witnesses, but Counsel was unable to locate any of the witnesses. He testified that because of the lapse in time between the date of offense in 2005 and his preparation for trial beginning in 2009, the Applicant provided only vague names and recollections and no contact information. Ultimately, the Applicant and Counsel had no idea what any potential witnesses might say.

Counsel testified that he was aware of the blood evidence on the scene and that the DNA was the Applicant's biggest issue and hurdle because the DNA at the scene matched the Applicant on the CODIS system. The State moved to confirm the CODIS match by compelling the Applicant to produce an additional DNA sample in 2008. Counsel testified that McPherson, the Applicant's prior attorney, objected to the State obtaining a Buccal swab from the Applicant; however, Judge Clifton Newman ordered the Applicant to provide a sample. When the SLED report came back a match, Counsel shared the report with the Applicant, even though he did not see the swabs or the items themselves. Counsel characterized the report as a typical SLED report including DNA analysis of each item.

Counsel testified that he reviewed the discovery, including the SLED and police reports, and the whole case several times with the Applicant. Counsel testified that he spoke with the Applicant a great deal about the DNA issue and discussed "probabilities." Counsel testified that he advised the Applicant that he could try to challenge how the Applicant's blood was left in the

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residence when cross-examining the SLED witness, but Counsel had no evidence that the testing was improper. Counsel elaborated that the two, usual SLED scientists and experts, Rhonda Fields or Manuel John Ortuno could testify as to their results, which consisted mainly of statistics and numerical information. Counsel explained that he could discern no basis to challenge such scientific evidence and that his only strategy to ameliorate the SLED analysis was to question the experts: "you don't know how the blood got there." Counsel considered the argument that he could question the experts about the five (5) day span of time, which was five (5) years ago to try to undermine the results before the jury. Counsel characterized his frustration: "I'm not smart enough, and I don't know who is, to take on DNA evidence." However, Counsel did explain what the DNA experts' testimony would be about to the Applicant.

Counsel explained to the Applicant that it would be highly uncommon to bring actual items with blood on them to enter into the record as evidence at trial. He testified that exposing the jury to those items would be a biohazard, but that the Applicant still wanted the State to produce them. Counsel obliged and asked the Solicitor whether the items were still in custody, but because it was "so late in the game," the actual items with the DNA on them probably no longer existed.

Counsel also testified that the Applicant never wanted to discuss calling an expert witness because the Applicant always wanted to discuss other issues. Counsel was wary of presenting an expert or having an independent test completed because Counsel was concerned that it could hurt the Applicant if the results were likely the same and the State's evidence was "double" by another confirmation of the Applicant's guilt. Counsel opined that that strategy is a "risk" and that he could not recall whether he discussed that strategy with the Applicant. Counsel testified

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that he did have an investigator with his office work with him on the case, but he did not ask the investigator to go view the residence where the burglary occurred and that Counsel personally did not go to the apartment to look at the light switch or other items. Counsel also testified that Officer Burgess misplaced the photos of the scene and blood, which Counsel believed worked in the Applicant's favor.

Counsel testified that the victim, Ms. Moss, had moved to Canada and the State requested to allow her to testify via SKYPE, which Counsel objected to. Counsel testified that he believed the Applicant was holding out hope that the victim would not appear for the trial; however, she came from Canada and testified at trial.

Counsel testified that he moved to quash the Burglary indictment because of the scrivener's error: the dates reflected a time frame of over one (1) year spanning 2005-2006. Counsel's argument was that the date of offense included in the indictment was too broad, but the court denied his motion. Counsel testified that the State then moved to amend the indictment, which motion was granted. Counsel explained that he had preserved error for appellate review by arguing his motion to quash the indictment. He further explained that in objecting to the State's motion to amend the indictment, he could not in good conscience object to the date range because he had no good faith argument that he and the Applicant were taken by "surprise." Rather, Counsel testified, he and the Applicant were aware of the error and the accurate date range—based on the argument he utilized during his motion to quash—and were ultimately prepared to defend the charges. Thus, Counsel explained, based on the procedural circumstances, he could not articulate any prejudice inuring to the Applicant.

Counsel testified that the Applicant was generally disposed not to testify on his behalf at trial. Counsel opined that the Applicant's prior record was "probably the compelling reason

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However, Counsel further testified that the Applicant's decision whether to testify or not was "his decision, I left it up to him."

Counsel acknowledged that the case was old and he shared the Applicant's sentiment that he wanted it tried, but testified that he did not file a motion for speedy trial because he was in constant contact with the Assistant Solicitor, Barry Barnette, to set up a mutually agreeable trial date. Additionally, the Applicant's case languished on the docket because of the period of time the parties had to await SLED results following the Schmerber motion in 2008. Further, Counsel testified that the first time the Applicant's trial was set on the trial docket; he experienced a death in the family the night before and could not go forward at that time. Counsel offered that the victim's move to Canada presented logistics issues as well.

Counsel further opined that he could discern no basis to cross-examine, impeach, or question the victim about possible perjured statements. To the contrary, Counsel stated, the victim's demeanor was good and firm. Counsel testified that based on the police report narrative, dated February 28, 2006, which posed questions to the victim about the blood evidence, he understood that the victim did not know the Applicant. Counsel stated that at one point, there was some confusion about whether the Applicant claimed the victim knew him, but the Applicant finally said that he did not know the victim. Counsel clarified that the officer in charge of the crime scene investigation discovered the blood.

### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. This Court found the testimony of Counsel to be more credible than the testimony of Applicant as to all allegations raised in the application and at the hearing.

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In a PCR action, “the burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983)). Where the Applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See id. The 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).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. See id. at 117–18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117–18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State

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325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

The Applicant alleges he received ineffective assistance of counsel. This Court finds the testimony of Counsel to be more credible than the testimony of Applicant as to all allegations. This Court finds Counsel is a criminal practitioner who has experience in the trial of serious offenses. This Court finds Counsel provided credible testimony during the Applicant's evidentiary hearing. Counsel conferred with the Applicant and discussed the pending charges, the elements of the charges and what the State was required to prove, the Applicant's version of the facts, the penalty ranges associated with the charged offenses, and the Applicant's defenses he could present at trial. The record also reflects that Counsel fully argued all motions on the Applicant's behalf and zealously advocate on his client's behalf.

In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. This Court finds that the Applicant has failed to meet his burden of proof as to this claim.

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, 294, 484 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778-79 (1992). Courts must be wary of second

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guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)). See Stokes, 308 S.C. at 548, 419 S.E.2d at 778–79 (finding counsel's decision not to call witnesses reasonable where their testimony would have been of no value to the case and witnesses were not credible); Abney v. State, 408 S.C. 41, 51, 757 S.E.2d 544, 549 (Ct. App. 2014) (“While trial counsel should consult with his client, the final decision on strategy belongs to counsel.”); Moore v. State, 399 S.C. 641, 723 S.E.2d 871, 873 (2012) (citing Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551 (2004) (“Attorneys have a duty to consult with their clients regarding ‘important decisions,’ including questions of overarching ‘defense strategy.’ . . . This does not require counsel to obtain the defendant’s consent on every strategic decision, but certain decisions regarding the waiver of basic trial rights [to plead guilty, waive a jury, testify on his own behalf, or take an appeal] cannot be made for the defendant by surrogate”).

Regarding the Applicant’s claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that the Applicant’s attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 5, 239 S.E.2d 750, 752 (1977); Strickland, 466 U.S. at 687–88, 104 S. Ct. 2052, 2064–65; Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687–88, 104 S. Ct. at 2064–65, Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985), *rev’d on other grounds*, Turner v. Murray, 106 S. Ct. 1683 (1986); Marzullo v. Maryland, 561 F.2d 140, 143 (4th Cir. 1977)). This Court further finds Counsel adequately conferred with the Applicant and provided thorough representation. This Court finds that Counsel’s representation did not fall

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below an objective standard of reasonableness.

### **Failure to Object to Indictment**

The Applicant summarily argues that Counsel was ineffective for failing to challenge the sufficiency of the indictments. This Court finds that an indictment is purely a notice document:

Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

S.C. CODE ANN. § 17-19-20 (2012). “The primary purpose of an indictment is to put the defendant on notice of what he is called upon to answer, by apprising him of the elements of the offense, and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted.” State v. Smalls, 364 S.C. 343, 346-47, 613 S.E.2d 754, 756 (2005). The court

should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

State v. Gentry, 363 S.C. 93, 102-03, 610 S.E.2d 494, 500 (2005) (citing State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003)). “In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances.” Id. (citing State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981)). Whether the indictment could be more definite or certain is irrelevant.” Id. (citing State v. Knuckles, 354 S.C. 626, 583 S.E.2d 51 (2003)). See also State v. Tumbleston, 376 S.C. 90, 97-98, 654 S.E.2d 849, 853 (2007) (citing Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005)) (noting

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that all of the surrounding circumstances must be weighed to make an accurate determination of whether the defendant was prejudiced by a lack of notice and an insufficient indictment).

Further, “[w]here time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred.” State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991). “In such a case, however, the indictment must show the offense was committed prior to the finding of the indictment.” Id. (citing State v. Gregory, 191 S.C. 212, 4 S.E.2d 1 (1939)).

In a post-conviction relief action, an Applicant challenging the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. CODE ANN. § 17-19-90 (2003) (“Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards.”).

The Applicant was fully aware of the charges he was facing and suffered no surprise or prejudice by the court amending the Burglary indictment to reflect the correct dates of the offense.<sup>5</sup> Based on Counsel’s credible procedural synopsis and a review of the record, Counsel properly moved to quash the indictment, which motion was denied (Tr. 6:2-9:2). The court questioned the Solicitor about the nature of his motion to amend and deduced that the indictments contained a scrivener’s error (7:15-8:2). In his motion to quash, Counsel argued that the period of time contained in the Burglary indictment September 1, 2005 through September 6, 2006, was overly broad and vague (Tr. 6:11-24). However, Counsel was required to argue that the Burglary indictment was insufficient based on the Grand Larceny indictment. Counsel

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accordingly argued that the Grand Larceny indictment, in contrast to the Burglary indictment, contained the time frame of September 1, 2005 through September 6, 2005 (Tr. 6:25–7:2). Implicit in Counsel’s argument was the assumption—which was confirmed based on the discovery in the Applicant’s case—that both the Burglary and Grand Larceny occurred at or around the same time.<sup>6</sup> Counsel stated on the record that the defense had prepared its case on the offenses occurring during September 2005 (Tr. 7:9–14). The Court then granted the State’s motion to amend and the indictment was corrected to reflect the accurate time frame. Based on his ethical obligations as an officer of the court, Counsel could not propound a diametrically opposed argument, while utilizing his prior argument in order to challenge the amendment. Ultimately, Counsel properly challenged the indictments in accordance with the statutes and case law expounded above and preserved error for appellate review (Tr. 8:3–24).

This Court finds Counsel’s testimony credible that he and the Applicant were aware of the applicable time period based on the discovery turned over by the State and their trial preparations and thus suffered no surprise or prejudice sufficient to invalidate the indictment. This Court finds that after the amendment, the Burglary indictment sufficiently described the offense in order to provide the Applicant notice of the charged offenses. Therefore, this Court finds that the indictments are sufficient on their face, but for the scrivener’s error. Accordingly, this Court finds that Counsel was not ineffective in arguing his motion to quash. Similarly, this Court finds that counsel was not ineffective for failing to challenge the amendment of the indictments. The Applicant’s assignment of error is without merit.

<sup>5</sup> This Court notes that the sentencing sheet on the Applicant’s Burglary–First Degree conviction contains the incorrect date of offense. However, the Applicant does not challenge this error on collateral review before the Court. This Court can discern no prejudice, as the error was clearly a scrivener’s error.

<sup>6</sup> Although the Applicant was facing numerous different charges at the time he went to trial on the instant Burglary and Grand Larceny offenses, neither Counsel nor the Applicant raised the possibility that the indictments were insufficient for failing to accurately describe concurrent crimes. The Solicitor thereafter clarified any misunderstanding that the offenses did not occur at the same time (Tr. 7:24–8:1).

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Failure to Object to Admission of DNA Evidence

The Applicant alleges that Counsel was ineffective for failing to object to the admission of the DNA evidence based on his inability to enter the bloody items from the scene of the crime and the swabs themselves, or both. This Court finds that Counsel was not ineffective for failing to object to the admission of evidence regarding the blood swabs and DNA testing. This Court finds Counsel's testimony credible that he felt admission of the items themselves was highly unusual and a biohazard and that, based on the length of time between the offenses and the trial, the actual items and the blood on the items likely no longer existed. This Court further finds credible Counsel's strategy not to obtain an independent expert because of the risks of confirming the State's DNA match. This Court also finds that Counsel was not ineffective for failing to object to or attack the DNA testing methodology, the chain of custody, or the qualifications of the SLED experts. Counsel had no good faith or legal basis on which to challenge the testing. Based on this Court's review of the record, there is no indication that the DNA evidence was not properly preserved (Tr. 62-65; 89-90). Moreover, this Court finds that Counsel adequately cross-examined the SLED expert within the normal range of competency, especially considering his constraints regarding the uncontradicted certainty of the DNA results (Tr. 107:14-109:8).

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 477 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at

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693, 104 S. Ct. at 2067. Where counsel articulates a valid strategic reason for his action or inaction, based on an objective standard of reasonableness, counsel's performance should not be found ineffective. See 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, 308 S.C. at 548, 419 S.E.2d at 779.

This Court further finds that Counsel was not ineffective for failing to obtain a dueling DNA expert or investigate the defense of invalidating the DNA evidence. "[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." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), *overruled on other grounds*, Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 2535 (2003).

Our Courts have repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 603 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). The Applicant's mere speculation as to what a witness

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testimony would have been by itself cannot satisfy the Applicant's burden of showing prejudice. Id. (citing Glover, 318 S.C. at 498–99, 458 S.E.2d at 540). See Edwards, 392 S.C. at 457, 710 S.E.2d at 65 (“So long as a defendant’s attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient.”); Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006) (citing Strickland, 466 U.S. at 691, 104 S. Ct. at 2066) (“Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”).

The Applicant has failed to provide this Court with any actual evidence tending to prove his assertions at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). Ultimately, the Applicant has failed to produce the putative witnesses and present their purportedly beneficial testimony at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). The Applicant failed to produce any evidence or testimony to support his claim that an independent expert or that any additional investigation into the swabs themselves or the items from which blood was collected would have affected the outcome of his trial. The Applicant asserts that a re-testing of the actual items themselves, pursuant to his Application for Forensic DNA Testing, filed September 27, 2012, will show that his DNA does not match the blood found on the scene. However, the Applicant has failed to articulate any scientific or logical basis supporting his contention that a third testing of the evidence will reveal that the DNA is a match.

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The Solicitor already confirmed the CODIS match by obtaining an independent test by virtue of Judge Newman's Order for DNA Testing, filed January 23, 2008. This Court finds most compelling the SLED analyst's expert testimony that the probability of selecting a random, unrelated individual having the same DNA found at the scene matching the Applicant's profile was approximately one in 1.3 quadrillion individuals (Tr. 106:7-107:7). Based on the certainty of the scientific evidence presented at trial, this Court finds that the Applicant could not be prejudiced by Counsel's failure to offer putatively exculpatory physical evidence. The test results of the physical items in the home have no bearing on the Applicant's burden of proving trial Counsel was ineffective. Thus, this Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to further investigate the DNA evidence, subpoena potential witnesses, or obtain the swabs or items for admission at trial.

**Failure to Object to Publication of Criminal History and Trial Court Error**

This Court finds that Counsel had no basis to object to the State's publication of the Applicant's criminal history in order to satisfy the elements of Burglary-First Degree and the trial court instructed the jury on the current, prevailing, and accurate law applicable to the particular facts of the case (Tr. 146:19-150:9). The State published the Applicant's prior Burglary convictions in the form of a stipulation to the jury: Burglary-First Degree (Indictment Number 89-GS-42-2367), Burglary-Second Degree (Indictment Number 99-GS-42-0698), and Burglary-Third Degree (Indictment Number 88-GS-42-1248) (Tr. 116:1-18). The jury heard no further recitation of the Applicant's criminal record.<sup>7</sup>

<sup>7</sup> The Applicant's criminal history includes three (3) charges for Burglary-Third Degree in 1999, Burglary-Second Degree, Violent in 1999, Burglary-Second Degree, Violent in 1999; however, the Applicant was not convicted of those Burglaries. The Applicant had a 1987 Criminal Domestic Violence, a 1988 Petit Larceny, a 1989 Petit Larceny, a 1994 Criminal Domestic Violence and Resisting Arrest, a 1995 Conspiracy to Distribute Cocaine, and a 1999 Grand Larceny. The Applicant's record also included a 1989 Burglary-First Degree, a 1999 Burglary-Second Degree, and a 1988 Burglary-Third Degree.

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“A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both.” S.C. CODE ANN. § 16-11-311(A)(2) (2005). The two prior convictions were an element of the crime for which Appellant was charged and the State was required to prove the two prior convictions in order to prove the element of the crime. See State v. Hamilton, 327 S.C. 440, 443, 486 S.E.2d 512, 513 (Ct. App. 1997). Moreover, the court instructed the jury that in considering the elements of Burglary-First Degree, they were precluded from considering possible penalty or punishment (Tr. 145:21-146). Ultimately, the Court charged the current, correct, and prevailing law applicable to the finite facts of the case and Counsel had no duty to object to the instruction. See State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (citing Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004); State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001); State v. Adkins, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct. App. 2003)) (“[T]he trial court is required to charge only the current and correct law of South Carolina. . . . The law to be charged must be determined from the evidence presented at trial. . . . The substance of the law is what must be charged to the jury, not any particular verbiage.”). Furthermore, the Applicant was not prejudiced because the court included the appropriate limiting instruction, charging the jury that it could consider the Applicant’s prior Burglary conviction only for the limited purpose of finding one element of the offense beyond a reasonable doubt (Tr. 149:2-150:9). The court specifically instructed the jury that they could not consider the charge for any other purpose, including for the purpose of proving the Applicant committed the prior Burglary, for the purpose of establishing the Applicant’s bad character.

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for the purpose of concluding that the Applicant acted in accordance with prior bad conduct (Tr. 149:8–150:2).

**Ineffective Examination of Witness**

This Court finds that the Applicant has failed to meet his burden of proof of establishing that Counsel was ineffective in his cross-examination of the victim. The Applicant presented no testimony to support his claim that the victim committed perjury on the stand, particularly since the victim’s testimony that she did not know the Applicant was consistent with Applicant’s assertion that he did not know the victim. Further, the Applicant alleged that the victim perjured herself and Counsel’s cross-examination was damaging to the Applicant’s case. 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, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778–79 (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 ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)).

The Applicant did not proffer any questions counsel allegedly failed to ask and did not present any testimony showing the witness’ answers at trial would have been different. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). This Court finds credible Counsel’s testimony that the Applicant’s demeanor was good and firm. Further, the Applicant’s assertion that the victim perjured herself by lying about who discovered the blood is without merit. The

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transcript reveals that the victim's testimony that the responding officer found the blood—which he pointed out to the victim to discover—on her bedroom wall by the light switch, on the bookcase, and on the entertainment center is uncontradicted (Tr. 52:25–53:11). Therefore, Counsel need not have further questioned the victim on this subject. Upon review of the record, this Court finds no deficiencies in Counsel's cross-examination and can discern no information germane to impeaching the victim's credibility, proving her perjury, or regarding her non-existent relationship with the Applicant. Further, Counsel followed the directives of his client—who asserted that he did not steal jewelry from the victim—and cross-examined the victim about the items she alleged were stolen (Tr. 54:11–58:13). Accordingly, the Applicant has not proven that a different approach to cross-examination would have been beneficial to the defense.

#### **Failure to File Motion for Speedy Trial**

The Applicant asserts that Counsel was ineffective because the Applicant sat in jail for five (5) years before his case was called to trial and Counsel never filed a speedy trial motion on his behalf. "The right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." Beavers v. Haubert, 198 U.S. 77, 87, 25 S.Ct. 573, 49 L.Ed. 950 (1905). "A speedy trial does not mean an immediate one; it does not imply undue haste, for the [S]tate, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay." Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966). The court should balance factors including "the length of the delay, the reason for it, the defendant's assertion of his right to a speedy trial, and any prejudice he suffered." State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 482 (2012). The speedy trial clock does not begin to run "[u]ntil there is some delay which is presumptively prejudicial." Barker v. Wingo,

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407 U.S. 514, 530, 92 S.Ct. 2128, 2182 (1972). See State v. Edwards, 374 S.C. 543, 571, 649 S.E.2d 112, 126 (Ct. App. 2007) (applying abuse of discretion standard to speedy trial claim).

Finally, this Court finds that the Applicant failed to meet his burden of proof of establishing he suffered any prejudice relating to Counsel's failure to file a motion for speedy trial. This Court finds credible Counsel's testimony that a speedy trial motion would not have been applicable in the Applicant's case because he and the Assistant Solicitor were in constant contact seeking to agree upon a mutually agreeable trial date. This Court can discern no evidence that the Applicant's case languished at the behest of the Solicitor and to the ignorance of Counsel. See Langford, 400 S.C. at 440–41, 735 S.E.2d at 481. Furthermore, the Applicant could not be prejudiced by Counsel's failure to move for a speedy trial—the remedy associated with a speedy trial motion is to set the case for trial on a trial docket. Counsel credibly testified that the Applicant's case was, in fact, set on a trial docket, but due to various innocuous scheduling conflicts on behalf of both the Solicitor and Counsel—including transporting the victim from Canada and a death in Counsel's family on the eve of trial—the Applicant's case was continued from term to term. Therefore, this claim is denied and dismissed.

### **Prosecutorial Misconduct and Brady Violation**

"A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (citing Kyles v. Whitley, 514 U.S. 419, 432–42, 115 S.Ct. 1555, 1565–69, 131 L.Ed.2d 279, 490, 505–10 (1995); Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196 (1963); Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to impeachment

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evidence as well as exculpatory evidence. Id. (citing United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985)). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 388–89, 434 S.E.2d 266, 267–68 (1993). “Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Id.

This court finds that the Applicant’s Brady rights were not violated. The Applicant failed to prove that the Solicitor’s office or law enforcement suppressed any evidence. This Court finds that the Applicant failed to prove any misconduct on behalf of either the Solicitor’s office or law enforcement. This Court finds the testimony of Counsel credible that the State turned over all discovery materials which he reviewed with the Applicant. Therefore, this claim is denied and dismissed.

#### All Other Allegations

As to any and all allegations that the Applicant raised in the application and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant abandoned such allegations, which are denied and dismissed.

#### CONCLUSION

This Court finds in regards to the allegations of ineffective assistance of counsel, Applicant’s testimony as a whole was not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel’s conduct does not fall below the objective standard of reasonableness. This Court finds that the Applicant failed to meet his burden of proof to support

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his claims. Therefore, they are denied and dismissed.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test specifically that Counsel failed to render reasonably effective assistance under prevailing professional norms. See Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in her representation of the Applicant. The Applicant failed to show that Counsel's performance was deficient. Therefore, this Court need not address whether the Applicant was prejudiced by Counsel's representation. See id. The Applicant's complaints concerning Counsel's performance are without merit and are denied and dismissed.

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

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 454, 409 S.E.2d 395, 396 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. The Applicant's attention is directed to South Carolina Appellate Court Rule 24 for appropriate procedures for appeal.

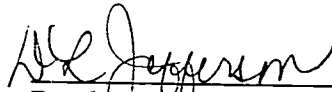
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**IT IS THEREFORE ORDERED:**

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

**AND IT IS SO ORDERED** this 6<sup>th</sup> day of April, 2015.



Deadra L. Jefferson  
Presiding Judge  
Seventh Judicial Circuit

Charleston, South Carolina  
At Chambers

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Supreme Court of South Carolina  
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