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March 12, 2018

**RECEIVED**

MAR 16 2018

Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

**S.C. SUPREME COURT**

Re: Timothy Frady v State, 2015-CP-26-8676

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Horry County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc: Johnny James Esq., Michael Frady, 6355 Doyle Ln., Conway, SC 29526.

THE STATE OF SOUTH CAROLINA

In The Supreme Court

**RECEIVED**

APPEAL FROM HORRY COUNTY

MAR 16 2018

Court of Common Pleas

S.C. SUPREME COURT

Honorable William H Seals, Jr. Circuit Judge

Case No.: 2015-CP-26-08676

Timothy Frady 351671.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Timothy Frady appeals the Honorable William H. Seals Jr's February 15, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on March 12, 2018. A copy of the order on appeal is attached hereto.



James K Falk  
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PO Box 1058  
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March 12, 2018

Johnny James Jr., Esq.  
Office of S.C. Attorney General  
PO Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM Horry COUNTY  
Court of Common Pleas

Honorable William H Seals, Jr., Circuit Judge

RECEIVED

MAR 16 2018

Case No.: 2015-CP-26-8676

S.C. SUPREME COURT

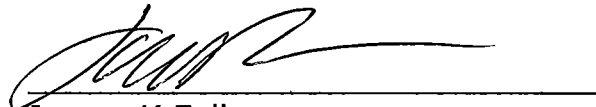
Timothy Frady 351671.....PETITIONER

V.

State of South Carolina.....RESPONDENT

PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Johnny James, Jr. Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this March 12, 2018.



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STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Timothy L. Frady,  
Applicant,

) Case No.: 2015-CP-26-08676

v.

) **ORDER OF DISMISSAL**

State of South Carolina,  
Respondent.

HORRY COUNTY  
2018 FEB 28 PM 12:45  
RENEE N. ELVIS  
CLERK OF COURT  
HORRY COUNTY, SC  
CERTIFIED COPY

This matter comes before the Court by way of an application for post-conviction relief filed by Timothy L. Frady ("Applicant") on December 10, 2015. Respondent made its return on or about December 15, 2016. The Court convened an evidentiary hearing into the matter on Tuesday, November 28, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by James K. Falk, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Melinda A. Knowles, Esq. ("Counsel") testified at the evidentiary hearing. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and pleadings. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant was previously confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the December 2012 term of the Horry County Grand Jury for criminal domestic violence, third or subsequent offense (2012-GS-26-04266). Melinda A. Knowles, Esq. represented Applicant,

and J. Scott Hucks, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On May 12, 2014, Applicant proceeded to trial before the Honorable Edward B. Cottingham and a jury. The jury found Applicant guilty as indicted on May 13, 2014. Judge Cottingham sentenced Applicant to imprisonment for a term of five years, suspended to four years' incarceration and three years' probation.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Tiffany L. Butler, Esq., who raised the following issue:

Whether the trial judge erred by admitting a cell phone and photographs that Appellant allegedly took of Tammi Frady's adult daughter, Appellant's step-daughter, where Frady gave the phone to the solicitor almost two years after Appellant's arrest, the photographs were not relevant to the CDV charge, and even if they were, they should have been excluded under Rule 403, SCRE, the State offered no evidence that the cell phone belonged to Appellant, and there was no evidence presented of when the photographs were taken?

By opinion decided November 4, 2015, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Frady, Op. No. 2015-UP-508 (S.C. Ct. App. filed Nov. 4, 2015). The Remittitur was issued on November 20, 2015.

#### **Present Application.**

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

1. "Insufficient Counsel"
  - a. "She was not prepared for my case."

At the evidentiary hearing, Applicant proceeded forward instead on allegations that trial counsel was ineffective for (1) failing to object to the introduction of Applicant's cell phone records based on relevance and prejudicial effect, and (2) failing to object on the basis of Riley v. California, 134 S.Ct. 2473 (2014).

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

### A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

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

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

### ***1. Failure to Object and Argue Relevance, Prejudicial Effect***

Applicant alleges counsel was ineffective for failing to object and argue against the introduction photographs taken from his personal cell phone.

Immediately prior to trial, Counsel made a motion to exclude photographs of Applicant’s 19-year-old daughter taken from Applicant’s phone by law enforcement. (Tr. 33-34.) Counsel argued the photos were overly prejudicial to Applicant, irrelevant to the charge, and of

questionable authenticity. (Tr. 34.) The State explained the argument leading to criminal domestic violence started due to the victim's discovery of Applicant's phone and the pictures thereon. (Tr. 34-35.) Counsel argued against the authenticity of the photos on the grounds that they were not taken into evidence at the time of the argument; rather, the victim provided Applicant's phone to law enforcement at a later date. (Tr. 35-36.) Law enforcement at that time "dumped that phone," and thereby acquired the photographs. (Tr. 36, ll. 1-2.) Judge Cottingham ruled: "If you have her [the victim's] testimony that the fight erupted over that issue, and that this is his phone, and that you've got another witness to say he got those pictures off the phone I'm going to admit it." (Tr. ll. 9-12.)

During trial, the State elicited testimony from the victim that her argument with Applicant began after Applicant returned home and found the victim looking through the pictures on his cell phone. (Tr. 57-63.) The victim identified the pictures, but the State did not introduce them into evidence at that time. (Tr. 57-58.) Gregory Lent, of the Horry County Police Department, testified that he did not take the cell phone into evidence while responding to the scene because he "was mostly concerned with the injuries that she had incurred. That was my main focus at that time." Tr. 108-09. Lent further explained on cross-examination that there was no mention of photos at the time of the crime. (Tr. 117-18.) Investigator Ginger Pop, of the Fifteenth Circuit Solicitor's Office, testified to receiving a cell phone provided by the victim, who indicated inappropriate pictures were on the phone. (Tr. 132-33.) Counsel objected to the introduction of the cell phone, arguing the phone could not be authenticated, as it was not turned over until "twenty-one months after this alleged incident took place." (Tr. 133, ll. 7-14.) Counsel renewed her earlier objection as the photographs from the phone were separately introduced. (Tr. 137, ll. 1-8).

At the evidentiary hearing, Counsel testified she felt her strongest arguments against the admissibility of the phone were on grounds of authenticity and Rule 403, SCRE. Counsel testified she renewed her objection when the photographs were admitted, focusing on authentication, but was not sure if she renewed her pre-trial motion as it pertained to relevance. Counsel testified she disagreed with the holding of the Court of Appeals and affirmed her belief the issue was properly preserved for appellate review.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. Applicant's allegations, as set forth orally at the outset of the evidentiary hearing, pertains to the photographs of the cell phone—not the cell phone itself. A thorough review of the trial transcript and appellate filings shows that Counsel did properly object to the admissibility of the photographs on the basis of relevance and Rule 403. The first section of the Court of Appeals' opinion found that "the trial court did not err in finding the photographs were relevant[.]" and further found [the trial court properly found the photographs were not overly prejudicial." Frad at 2. The question of the admissibility of the cell phone *itself*, and whether or not Counsel preserved that issue for appeal, is of no consequence to the admissibility of its *contents* and Counsel's arguments thereto.<sup>1</sup> Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

## ***2. Failure to Object on Grounds of Warrantless Cell Phone Search***

Applicant also argues Counsel was ineffective for failing to object to the admission of his cell phone's contents as the result of a unconstitutionally warrantless cell phone search. In an opinion issued June 25, 2014, a little over a month after Applicant's trial, the United States

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<sup>1</sup> Even if Applicant had raised the issue of Counsel's failure to preserve for appellate review the relevance and prejudicial effect of the physical cell phone, as opposed to its contents, this Court cannot conceive of how the admission of a hunk of glass, plastic, and silicon could be unduly prejudicial. It was certainly relevant as the vessel of photographs which led to the argument which resulted in the victim's injuries at the hands of Applicant. The phone plays a central role in the victim's testimony—she was trying to hide it from Applicant.

Supreme Court held that, in conducting a search incident to arrest, law enforcement must generally obtain a warrant before searching information stored or accessible on a cell phone. Riley v. California, -- U.S. ---, 134 S.Ct. 2473 (2014). However, an attorney is not required to be clairvoyant, and cannot be expected in the course of regular competence to anticipate or discover changes in the law not yet come to pass at the time of trial. Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993)(citations omitted).

At the evidentiary hearing, Counsel explained she focused on what she felt were her strongest arguments against the admissibility of the photographs—authenticity and Rule 403. Counsel noted that Riley did not come down until after Applicant's trial, but conceded she should have argued on Fourth Amendment grounds.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. Riley was an open question at the time of trial, and Counsel could not be held to have expected its outcome at the United States Supreme Court. Furthermore, Counsel articulated a valid trial strategy of focusing on what she felt were her most compelling arguments against the admissibility of the photographs. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

*[Conclusion and signature on following page]*

### III. CONCLUSION


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

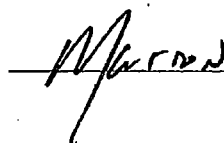
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

#### IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 15 day of Feb

  
WILLIAM H. SEALS, JR.  
Presiding Judge  
Fifteenth Judicial Circuit

  
\_\_\_\_\_, South Carolina

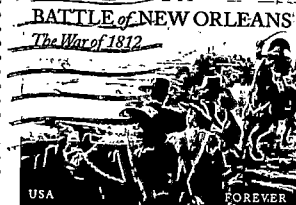
RENEE M. ELLIS  
CLERK OF COURT  
HORRY COUNTY, SC

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