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April 18, 2018

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

Re: Latrone Butler 303325 v State, 2016-CP-10-4888

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Charleston 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:
Megan Jameson
Latrone Butler 303325.

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable Maite Murphy. Circuit Judge

Case No.: 2016-CP-10-04888

Latrone T. Butler 303325.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Latrone Butler appeals the Honorable Maite Murphy's April 9, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on April 18, 2018. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

April 18, 2018

Megan Harrigan Jameson Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY

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CERTIFICATE 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, Megan Harrigan Jameson. 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 April 18, 2018.

James K Falk
Falk Law Firm
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Charleston, SC 29402

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Latrone T. Butler, #303325, Applicant, v. State of South Carolina, Respondent.	Case No.: 2016-CP-10-4888 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed on September 14, 2016, and amended on June 29, 2017, by LaTrone Butler (Applicant). On June 8, 2017, the State (Respondent) filed its Return and Motion to Dismiss, asking the court to summarily dismiss the application for failure to state a claim upon which post-conviction relief could be granted. On June 13, 2017, the Honorable Deadra L. Jefferson, acting in her capacity as Chief Administrative Judge for Common Pleas for Charleston County, signed a Conditional Order of Dismissal provisionally dismissing the application but allowing Applicant twenty days to provide specific reasons, either factual or legal, as to why the application should not be dismissed; the order was filed on June 14, 2017. Thereafter, on June 29, 2017, Applicant, through counsel James K. Falk, filed a Return to the State's Motion to Dismiss and Amended Application for post-conviction relief. In response, the State filed an Amended Return and requested an evidentiary hearing on the allegations presented in Applicant's amended application. An evidentiary hearing into the matter was convened January 31, 2018, at the Charleston County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. Following the

evidentiary hearing, this Court denied the application. This order follows.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. In June 2012, the Charleston County Grand Jury indicted Applicant for carjacking (2012-GS-10-3303), attempted murder (2012-GS-10-3304), and kidnapping (2012-GS-10-3305). Mary Ford, Esquire, represented Applicant. Assistant Solicitors Jennifer Shealy, Esquire, and Andrew Evans, Esquire, prosecuted the case. On January 15, 2014, Applicant proceeded to a jury trial before the Honorable Roger Young, Sr., circuit court judge, where he was convicted as indicted of all three offenses. Judge Young sentenced Applicant to imprisonment for consecutive terms of imprisonment of twenty years for carjacking, thirty years for attempted murder, and thirty years for kidnapping.

Applicant filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins, Esquire, of the South Carolina Commission on Indigent Defense—Office of Appellate Defense perfected the appeal. Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence on November 25, 2015, in an unpublished opinion State v. Latrone T. Butler, Op. No. 2015-UP-528 (Ct. App. filed November 25, 2015). The remittitur was returned to the circuit court on December 15, 2015.

SUMMARY OF FACTS ADDUCCED AT TRIAL

On December 5, 2011, sixty-seven year old widow Letty Martin (hereinafter "Martin") was living by herself at the Jericho Mobile Home Park in Ravenel, South Carolina. (Tr. pp. 90-91). On that day, Martin taught two line dance classes at the Mt. Pleasant Senior Center, ran

some errands, and returned home. (Tr. pp. 92-93). After parking her vehicle (a 1996 Acura 3.2 TL) in the carport adjacent to her trailer, Martin began to unload her belongings. (Tr. pp. 93, 95-96). After removing the items from her car, Martin noticed a man coming between her carport and her home. (Tr. p. 96). Martin observed his face before turning around to lock her car. (Tr. p. 96) While her back was turned, the man came behind her, grabbed her left arm and put something that he said was a gun against her ribs. (Tr. p. 96). He told her not to scream or fight or he would shoot. (Tr. pp. 96-97). The man then demanded she unlock her car and hand over her car keys, cell phone, and money; Martin complied. (Tr. pp. 97, 99). He also instructed Martin to get into the passenger seat. (Tr. p. 97).

Once Martin was in the passenger seat, the man drove out of Martin's trailer park and on to a main thoroughfare. (Tr. p. 98). Martin was able to glance at the man, although he repeatedly instructed her not to look at him or he would shoot her. (Tr. pp. 99-100). Martin noticed the man was driving the car in the wrong gear and asked him to correct it, which he did. (Tr. p. 101). The man continued to drive around the general area before eventually stopping in a secluded wooded area; by this time it was completely dark. (Tr. pp. 101-104). The man then pulled Martin from the car, placed her near the car's rear, and instructed her to put her purse on the trunk. (Tr. p. 104). The man then placed one hand on Martin's chin and one on her forehead and repeatedly jerked her head in an attempt to snap her neck. (Tr. pp. 104-105). The man's force was so great that it gave Martin whiplash. (Tr. p. 104-105). At some point, Martin passed out and woke up on the ground; the man then lifted Martin up and resumed his attempts to break her neck. (Tr. p. 105). The man eventually stopped and fled in Martin's car with her purse when another car approached. (Tr. pp. 105-106).

Martin walked to the nearest home for help. (Tr. 106). When she arrived, she was greeted by Penny Mizell (hereinafter "Mizell"). (Tr. p. 106). Mizell, a resident of Ravenel, was at home with her husband and sixteen year old son when Martin knocked on her door. (Tr. pp. 107, 153). Mizell answered the door and Martin informed her that she had been carjacked and needed help. (Tr. pp. 106, 153). Martin was very distraught and had visible injuries. (Tr. p. 154). Mizell called 911 and spoke with law enforcement, as well as called Martin's family. (Tr. pp. 107-08, 153-55).

Shortly thereafter, Deputies from the Charleston County Sheriff's Office responded to the Mizell home. (Tr. pp. 108, 155, 156). Responding Deputy Don Kejellman spoke with Martin and received initial information about the carjacking and assault. (Tr. pp. 109, 158-59, 160-61). Martin informed law enforcement that the car had a LoJack security detection device that could possibly be used to locate her car. (Tr. p. 109). Martin also provided law enforcement with a description of the man and her vehicle, resulting in alerts to other law enforcement agencies. (Tr. pp. 159, 165-66). Martin described the man as a black male, age twenty-four to thirty, approximately five feet and eleven inches and one-hundred-and-seventy pounds. (Tr. pp. 162-63). Martin also reviewed her physical injuries with law enforcement. (Tr. pp. 109-112). Emergency Medical Services (EMS) came to the Mizell home and treated Martin. (Tr. p. 111-12).

Two days later, Martin went to the Sheriff's Office to view a photographic lineup. (Tr. p. 112, 169-70). Detective Christina (Chris) Smith (hereinafter "Smith") explained the process to Martin and advised her of her rights, which Martin voluntarily waived. (Tr. pp. 113-16, 192-93). Smith then showed Martin a photo lineup comprised of six individuals matching the description she previously gave law enforcement; the lineup was compiled by another law enforcement

agency with no other involvement in the case. (Tr. p. 113-117, 168-69, 192-93). Based on a tip law enforcement received from Crime Stoppers, Applicant's photograph was included in the six person photo lineup. (Tr. pp. 167-68). Smith had no other involvement in the case beyond showing her the lineup and did not know which person was the suspect when she showed Martin the lineup, which is accordance with office policy. (Tr. pp. 170, 192-95). Martin spent several minutes reviewing the lineup and studying the subject's individual faces before selecting Applicant as the perpetrator, circling his photograph and stating that he looked most like the perpetrator. (Tr. pp. 116-118,170, 193-94). Martin then reviewed her injuries with law enforcement, which were documented by camera. (Tr. p. 119-121, 194).

After Martin identified Applicant as the suspect, law enforcement sent out a BOLO report for Applicant. (Tr. pp. 170-71). Applicant was located the next day, December 8, 2011, at the Hamm Grant Club in Ravenel. (Tr. pp. 171, 199). Martin's vehicle was also found in the parking lot of the club. (Tr. pp. 171, 199). Law enforcement responded to the scene and apprehended Applicant from the club's restroom. (Tr. pp. 171, 199-206). When he was taken into custody, Applicant had the key to Martin's car hidden in his sock. (Tr. p. 206). Law enforcement also took custody of Martin's vehicle, which was towed to the Sheriff's Office evidence compound for processing. (Tr. p. 215). After obtaining a search warrant, Martin's vehicle was searched, photographed, and inventoried. (Tr. p. 215-16). A black wallet containing Applicant's vital records, birth certificate, social security card, paystubs, a South Carolina Beginner's Driving Permit, and South Carolina Identification Card were found in the vehicle. (Tr. p. 231-34). Applicant's beginner's permit listed his height as five feet and eleven inches and one-hundred-and-ninety pounds. (Tr. pp. 232-33). Law enforcement also recovered men's clothing, a towel,

and a remote augmented to look like a makeshift weapon in the vehicle. (Tr. pp. 218-222, 226-230). Law enforcement also took DNA swabs and fingerprint lifts from Martin's vehicle. (Tr. pp. 216-17, 222-226). Law enforcement obtained buccal swabs and fingerprints from Applicant and Martin. (Tr. pp. 171-73, 240-41).

The Charleston County Sheriff's Office sent the fingerprint lifts and known fingerprint samples from Applicant to be tested by a latent print analyst. (Tr. p. 225). Applicant's known prints matched numerous different prints found in Martin's vehicle. (Tr. pp. 247- 250). Additionally, the Charleston County Sheriff's Office sent the DNA swabs from Martin's vehicle and the known DNA samples from Martin and Applicant to the South Carolina Law Enforcement Division (SLED) for testing. (Tr. pp. 175, 234, 269). The SLED analyst who tested the DNA swabs concluded that Applicant's DNA was found on Martin's car and items found within the vehicle. (Tr. pp. 269-278).

Applicant proceeded to a jury trial on January 15, 2014. Applicant moved to suppress Martin's identification of him. (Tr. p. 36-71). The trial court held a hearing pursuant to Neil v. Biggers[1] and heard testimony from Martin, Smith, and Applicant. (Tr. pp. 36-68). Applicant argued that the photographic lineup was unduly suggestive because Applicant's face was more highlighted and located last. (Tr. pp. 68-69). Applicant also argued that Martin only said that Applicant looked most like the perpetrator, not that Applicant was the perpetrator. (Tr. p. 69). Applicant also noted that he has more than seventeen visible tattoos and that Martin's description of her perpetrator did not mention any tattoos. (Tr. pp. 43, 65-67). In reply, the State acknowledged that Applicant's face did appear to be lighter than the other five photographs and

[1] 409 U.S. 188 (1972).

could have grabbed the attention more, but argued that nothing in the lineup was suggestive. (Tr. p. 70). The State also noted that Martin examined all the photographs in the lineup closely before selecting Applicant as most closely resembling the perpetrator and noted the long duration Martin had to observe her perpetrator. (Tr. pp. 70-71). The trial court denied Applicant's motion:

> Well, I find there is nothing suggestive at all about the process, much less unduly suggestive. It's a textbook procedure outlined. Went over the questions with her with a disinterested person, someone who is not involved in the investigation at all so she wouldn't have any way of tipping Martin of looking at any particular one of the photos. And as far as the argument that his picture has more of a highlight or a glare, I mean, I just don't see it. All of these gentlemen have a little bit of a glare to their picture. I mean, it's a flash, is what we're talking about, and I don't see where that draws any attention to the defendant's picture over any of the others such that it would make it an unduly suggestive process.

(Tr. pp. 71-72).

During the trial, Martin's out-of-court identification of Applicant was admitted, and Martin made an in-court identification of Applicant. (Tr. pp. 114-18). Martin also testified she had seen Applicant earlier on the day of the attack knocking on her neighbor's door. (Tr. p. 133). Martin also testified that she had given a black man around Applicant's age a ride to work at Harvest Moon Grill (the same restaurant that Applicant worked) earlier in the year but could not recall if it was Applicant. (Tr. pp. 135-36).

Following the State's case, Applicant moved for a directed verdict, arguing the State did not present sufficient evidence that Applicant had attempted to kill Martin and that there was no physical evidence tying him to the attack. (Tr. pp. 280-281). The trial court denied Applicant's motion. (Tr. pp. 281-82). Applicant called one witness in his defense, an investigator with the Charleston County Public Defender's Office, who testified regarding Applicant's numerous

tattoos. (Tr. pp. 285-290). Applicant then renewed his motion for a directed verdict, which was again denied by the trial court. (Tr. p. 291).

Applicant requested jury instructions on the lesser included offenses. (Tr. p. 291). At a charging conference on the record the following morning, the trial court noted that Applicant had requested jury instructions on assault and battery of a high and aggravated nature and assault and battery in the first, second, and third degrees. (Tr. p. 295). The court asked Applicant to elucidate why he was entitled to those lesser included offenses and the following exchange occurred:

> MS. FORD: I think the evidence is Ms. Martin testified the man's hands were around her mouth and her forehead and everything.
>
> THE COURT: And the jerking –
>
> MS. FORD: Yes, but I think it's possible the jury comes to the interpretation that the man does not intend to actually kill her, but, rather, trying to get her to –
>
> THE COURT: A chiropractic adjust or what? I mean, we don't understand it. The only evidence we have is he not only put his hand over her forehead and chin but he was jerking her head to the side. You can't just say one thing. There's no evidence other than that.
>
> MS. FORD: I just think the jury could come to the conclusion that there was not an intent to kill, Your Honor.
>
> THE COURT: How?
>
> MS. FORD: Just because the circumstances she was in a very stressful situation, obviously. She doesn't remember all of the details and everything that was occurring. She passed out, and so I just think–
>
> THE COURT: And then he resumed the exact same attack. That is uncontroverted evidence. Now, they can believe it or not, but it is uncontroverted that that is what happened. He took his hands, put it over her head and her chin, and snapped her neck to the side till

> [sic] he passed out. All right [sic]? And then he did it again when she came out. So if you were to say his intent was not to kill her but to cause her to just pass out, well, he accomplished that, so to do it again makes no sense. If you want to say, well, all he wanted to do was cause her to pass out so that he could rob her and take her stuff, he had the opportunity to do that. I'm just trying to think, how is there any view of the evidence that we have that he had anything other than the intent to kill her?
>
> MS. FORD: She passed out but then she came to so the man did it again and got her to pass out again. It didn't work the first time. That's why he had to do it again.
>
> THE COURT: And what?
>
> MS. FORD: I understand that's the only evidence about what happened that evening. We just think the jury could come to the conclusion there was not a specific intent to kill, so in that case, an ABHAN charge and assault and battery first charge and the others would be appropriate, Your Honor. Just cause of the various assaults there is great bodily injury, moderate bodily injury.
>
> THE COURT: You would be entitled to those charges if there was some way to construe the evidence as fitting all those elements without intent to kill, but there is no way to view this evidence, as I see it, other than with an intent to kill, because he did it until she passed out and then he started to do it again and then another car came along. A car came along and spooked him and he dropped her and ran off. I don't know how you construe that as other than an intent to kill, and I've thought about it.

(Tr. pp. 295-98). The court then asked the State to respond, to which the prosecutor replied that there was nothing in the record warranting the inclusion of the lesser included offenses. (Tr. p. 298). The Court agreed, stating: "I just don't see how you can have the uncontroverted evidence that we have and not view that evidence as not having an intent to kill, and that's the only way you get the lesser included. I agree, they are lesser includeds but the facts have to support them, and there is no way to view the uncontroverted evidence as whoever did it. She says it was him,

had the intent to kill her at that time. So I'm not going to allow lesser included. It's is straight up attempted murder, kidnapping, carjacking." (Tr. p. 298). Applicant also requested a specific jury instruction on the identification procedure, which the trial court charged over the State's objection. (Tr. p. 299-301).

The jury convicted Applicant as indicted of attempted murder, kidnapping, and carjacking. (Tr. p. 342). The State informed the court that Applicant was eligible for life without parole pursuant to S.C. Code Ann. § 17-25-45 based on his prior record and requested that the court impose a lengthy term of imprisonment with consecutive sentences. (Tr. p. 348). After listening to mitigation from Applicant's counsel, the trial court sentenced Applicant to twenty years imprisonment for carjacking, thirty years imprisonment for attempted murder, and thirty years imprisonment for kidnapping, with all sentences to be served consecutively. (Tr. p. 349-52)

ALLEGATIONS RAISED

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

1. "Alleged victim claimed she struggled/fought with attacker."
2. "My clothing were tested for DNA, in which victim was excluded."
3. "Martin stated attacker had no tattoos; nor facial hair; nor hair description; victim stated I look most like the attacker Booking Photo."

On June 8, 2017, the State filed its Return and Motion to Dismiss, asking the Court to summarily dismiss the application for failure to state a claim upon which post-conviction relief could be granted. On June 13, 2017, the Honorable Deadra L. Jefferson, acting in her capacity as Chief Administrative Judge for Common Pleas for Charleston County, signed a Conditional Order of Dismissal provisionally dismissing the application but allowing Applicant twenty days

to provide specific reasons, either factual or legal, as to why the application should not be dismissed; the order was filed on June 14, 2017.

Thereafter, on June 29, 2017, Applicant, through counsel James K. Falk, filed a Return to the State's Motion to Dismiss and Amended Application for post-conviction relief.[2] In this amended application, Applicant sets forth the following grounds for post-conviction relief:

1. Trial counsel failed to obtain or consult with an expert DNA witness.
2. Trial counsel failed to seek suppression or redaction of the 911 recording (State's Ex. No. 104)
3. Trial counsel failed to object to prejudicial hearsay testimony uttered by the State's witnesses, Penny Mizell (Record on Appeal p. 153 lines 16-17; p. 154 lines 19-24).
4. Trial failed to object when State's witness Chris Smith testimony bolstered Martin's identification testimony. (Record on Appeal p. 193 lines 9-25).
5. Trial counsel failed to move to challenge the sufficient of the indictment and move to quash the indictments.

At the start of the evidentiary hearing, Applicant expressly withdrew amended allegation #2 (Trial counsel failed to seek suppression or redaction of the 911 recording), citing a lack of merit. Applicant proceeded forward on the remaining four allegations as set forth in his amended application.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant called his trial counsel, Mary Ford (counsel), to testify. Counsel testified she was appointed to represent Applicant in her capacity as a Charleston

[2] Applicant also filed his own pro se amended application alleging various grounds of ineffective assistance of trial and appellate counsel. However, as Applicant is represented by counsel, this Court does not consider these *pro se* filings to be part of the record of this case. See Rule 11, SCRCP, requiring every pleading, motion, or other paper of a party represented by counsel to be signed by at least one attorney of record who is an active member of the South Carolina Bar. If a pleading, motion or other paper is not signed, "it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." Rule 11 SCRCP. Furthermore, the South Carolina Supreme Court has stated counsel cannot serve as a mere conduit for *pro se* documents in an effort to avoid the prohibition against hybrid representation, but must use their professional judgment in reviewing the documents and shall only submit those arguments that are relevant and have been edited by counsel. Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002).

County Assistant Public Defender and is still employed at the Charleston County Public Defender's Office. Counsel testified she was appointed to represent Applicant shortly after his arrest and was his only attorney. She testified she met with Applicant for the first time on January 9, 2012, and met with Applicant a total of twenty-four times prior to his trial. Counsel testified the allegations presented by the State were that a black male approached Martin, an older woman who lived by herself, outside of her trailer, stole her vehicle and forced her to drive around with him around for a period of time before removing her from the car and attempting to snap her neck before eventually fleeing with the vehicle. She testified Applicant was apprehended at a nearby club fifty-five hours later and when arrested, had the key to Martin's car inside his shoe. Additionally, counsel testified Applicant's DNA, fingerprints, and various personal identification documents were found inside Martin's vehicle that was parked outside the club. She testified none of Martin's DNA was found on Applicant, but acknowledged he was arrested more than two days following the event and that none of victim's injuries resulted in a loss of blood.

She testified she reviewed the elements of the offenses and the State's evidence with Applicant prior to trial. She testified the State did not make any favorable offers to Applicant prior to trial and discussed with Applicant that he would likely receive a significant sentence if he pled guilty without any negotiations or recommendations, and therefore, both she and Applicant were preparing the case for trial early during her representation. She testified Applicant was eligible for a life without parole sentence based on his prior convictions and discussed this with Applicant. She testified the State did not serve Applicant with notice of intent

to seek life without parole, but that she would not have handled the case differently if the State had served notice.

Counsel testified she did not consult with a DNA expert because Applicant was already conclusively linked to Martin's vehicle by his fingerprints, various identifying documents found in the vehicle, and his possession of the vehicle's key in his shoe at the time of his arrest, so the DNA was not dispositive in linking him to the vehicle. Moreover, she testified the DNA found in Martin's vehicle did not establish that Applicant was the perpetrator who had carjacked and assaulted Martin, but merely showed he was in possession of the car some fifty-five hours following the attack, which coincided with her defense strategy that while Applicant was in possession of the stolen vehicle, he was not the person who committed these violent acts against Martin. She testified she has handled cases with DNA issues multiple times in her career and did not think it was necessary to consult with a DNA expert to prepare for her cross-examination of the State's DNA expert.

Counsel testified she moved to suppress Martin's identification of Applicant and the trial court held a pre-trial motions hearing pursuant to Neil v. Biggers. She testified she argued the photographic lineup was unduly suggestive because Applicant's photograph was last and was more highlighted than the other five photographs. She also testified she argued Martin's identification of Applicant was not sufficiently reliable because Martin only said Applicant looked most like the perpetrator, not that she was certain he was the perpetrator. She testified the trial court denied her motion to suppress and that she again moved to exclude the identification when the State sought to admit it during trial. She testified this issue was raised on Applicant's appeal.

When questioned about why she did not object to hearsay testimony provided by Mizell, counsel testified she did not think the testimony was objectionable. Counsel elaborated that Mizell's testimony that Martin told her she had been carjacked and asked her to call law enforcement and her sister was not objectionable hearsay because the statement was an excited utterance or present sense impression. (See Tr. P. 153 lns. 16-17). Moreover, she testified this testimony was not relevant to her case theory that someone else had attacked Martin, not Applicant, and therefore, it was not prejudicial. When questioned about Mizell's testimony describing how Martin said she was attacked, counsel again testified she did not think this testimony was objectionable hearsay as it was an excited utterance or present sense impression, as well as irrelevant to her defense strategy that someone else had attacked Martin and Applicant had received her stolen car sometime after. (See Tr. P. 154 lns. 19-24). Counsel acknowledged the State likely called Mizell as a witness to corroborate Martin's account that she had been attacked and to set the scene following the attack. However, she testified neither of these instances related to the identity of Applicant, and therefore, were irrelevant and not prejudicial.

When questioned about the testimony of Smith, the law enforcement officer who conducted the photograph lineup with Martin, counsel testified she was a "blind" witness who had no involvement in the case other than to conduct the identification with Martin. She testified this was a common procedure in law enforcement to avoid or limit any suggestibility from law enforcement during the identification procedures. Counsel testified she did not object to. Smith's testimony where she described Martin "studying the photographs" because she did not think this testimony was bolstering, or intended to bolster Martin's testimony or identification of Applicant, but rather, an observation of what the witness observed during the identification

procedure. (See Tr. P. 193 lns. 9-25). She testified that in hindsight, she can see an argument could have been made that the testimony was bolstering. Counsel testified she attacked this testimony on during cross-examination when she highlighted that the identification procedure was not recorded, that Martin did not indicate her confidence in her selection to a percentage value, and the witness did not write a report.

Counsel testified she believes Applicant was properly indicted and did not have any valid basis for challenging the sufficiency of the indictments. She testified she would have moved to quash the indictments if she saw any legitimate ground on which to attack their validity.

Counsel testified she called an investigator with the public defender's office as a defense witness to testify about Applicant's numerous tattoos. She testified she also moved pictures of Applicant's tattoos into evidence through this witness. She testified this was part of her trial strategy of establishing that although Martin had been attacked, Applicant was not the perpetrator, citing Martin's lack of any indication of tattoos on her attacker.

Counsel testified she was not surprised Applicant received lengthy consecutive sentences because the State informed the trial court that Applicant should have been served with notice of its intent to seek life without parole based on his prior convictions and it was an error that he had not been properly noticed. She elaborated that the State asked for a lengthy sentence based on the severity of the crime and that Applicant's prior record had made him eligible for a life without parole sentence. However, she clarified that the jury never heard about Applicant's prior record and this information was not presented to the court until after the jury had been excused following its verdict.

Applicant testified he told counsel he had received Martin's stolen car from someone and that he was not the attacker. He acknowledged he never told counsel who he received the car from or anything else that would have assisted counsel in investigating this defense. He testified he wanted counsel to bring up discrepancies between his height and the reported height of the attacker. He testified counsel discussed the possibility of the State serving him with notice of intent to seek life without parole based on his prior record. He testified he thinks he was convicted because of his prior record and background. He testified the jury heard "a piece" of his prior record.

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 at the post-conviction relief hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

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." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all

significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action in regards to his allegations of ineffective assistance of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant.

Allegation: trial counsel was ineffective for failing retain a DNA expert

Applicant asserts trial counsel was ineffective for failing to retain a DNA expert, either for consultation or to testify on his behalf at trial to rebut the State's evidence. This Court finds Applicant has failed to establish his requisite burden of proof as to this allegation, which must be denied and dismissed with prejudice.

Initially, this Court finds Applicant has failed to establish any deficiency of trial counsel, whom this Court finds performed effectively and in accordance with the professional standards

required. Trial counsel testified she had prior experience handling DNA cases and did not believe it was necessary to retain an expert for consultation or testimony in Applicant's case. She elaborated Applicant was already conclusively linked to Martin's vehicle by his fingerprints, various identifying documents found in the vehicle, and his possession of the vehicle's key in his shoe at the time of his arrest, and therefore, his DNA was not dispositive in linking him to the vehicle. She also testified a DNA expert would not have assisted with her defense theory that Applicant had received Martin's stolen vehicle from someone else and he was not the person who attacked and carjacked Martin. This Court finds counsel was not deficient in her decision not to retain a DNA expert.

Moreover, this Court finds Applicant cannot establish any prejudice because he failed to present testimony from a DNA expert at the evidentiary hearing. See Reeves v. State, 415 S.C. 366, 378, 782 S.E.2d 747, 753 (Ct. App. 2015) (finding Reeves established he was prejudiced by trial counsel's failure to present a medical expert to rebut the State's expert witness where he presented evidence of prejudice through the testimony of a medical expert at the PCR hearing); Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 776–77 (2008) ("First, Lorenzen failed to present evidence that would show a reasonable probability that, but for counsel's failure to call expert witnesses, the result of his trial would have been different. Aside from his testimony and his trial counsel's testimony, Lorenzen did not offer any other witnesses to testify on his behalf at the PCR hearing. Therefore, it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense."); Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) ("[B]ecause Dempsey failed to have an expert on child sexual abuse testify at the PCR hearing, we hold that any finding of prejudice is merely speculative."); see also Porter

v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR."). Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation: trial counsel was ineffective for failing to object to testimony of Penny Mizell

Applicant asserts trial counsel was ineffective for failing to object to two portions of Mizell's testimony. The specific portions of testimony that Applicant alleges amount to prejudicial hearsay are as follows:

> And she said she had been carjacked and would I please call the police for her, and then after I did that, she asked me to call her sister.

(Tr. P. 153 lns. 16-17).

> She said she was getting into her car. Somebody approached her from behind, put something in her ribs. She thought it was a gun. Forced her into the car, kept screaming at her not to look at him and choked her out. You know, this was daytime. When she got to my house it was at night, so it had been a few hours, I'm guessing.

(Tr. P. 154 lns. 19-24).

Applicant asserts these statements by Mizell are impermissible hearsay and counsel was deficient for failing to object to these portions of testimony. Moreover, he argues these statements prejudiced him because they bolstered Martin's testimony that she was attacked and carjacked.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "Hearsay is not admissible" unless an exception applies, or "as provided by . . . other rules . . . or by statute." Rule 802, SCRE. "An excited utterance is a 'statement relating to a startling event or condition made while the declarant was under the stress of excitement caused

by the event or condition' and may be admitted at trial as an exception to the hearsay rule." State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999) (quoting Rule 803(2), SCRE). "The rationale underlying the excited utterance exception is that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." Id. Additionally, "Rule 803(1), SCRE, provides for the 'present sense impression' exception, which allows for the admission of 'a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.'" State v. Parvin, 413 S.C. 497, 503, 777 S.E.2d 1, 4 (Ct. App. 2015) (quoting Rule 803(1), SCRE).

This Court finds this allegation is without merit and must be denied and dismissed with prejudice. When questioned about why she did not object to either portion of the testimony, trial counsel testified she believed both instances were not objectionable, as the testimony was about statements made by Martin immediately after she was violently carjacked and attacked, and therefore, were excited utterances and present sense impressions. This Court agrees and finds neither portion of Mizell's testimony was objectionable, as the testimony was admissible as excited utterances and present sense impressions.

Moreover, this Court finds Applicant cannot establish any requisite prejudice for counsel's alleged deficiency. Counsel testified neither statement was prejudicial based on her defense strategy, which was not to deny that Martin had been attacked or carjacked, but to establish that Applicant was not the perpetrator. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation: trial counsel was ineffective for failing to object to testimony of Chris Smith

Applicant asserts trial counsel was ineffective for failing to object to the testimony of Chris Smith, the law enforcement officer who showed Martin the photographic lineup because this testimony impermissibly bolstered Martin's testimony. The specific testimony is in question is as follows:

> Q. When showing this to Ms. Martin, could you describe to the jury what level of care she seemed to be giving the photographs? How did she appear when she was looking at them?
>
> A. She studied the photographs, making sure that each -- you can see as just her and other folks that have seen photo lineups, they look at each individual picture to see if they can pick out whoever is in that photo.
>
> Q. And while Ms. Martin was there -- I'll get to that in just a second. So how did she indicate to you that she, in fact, identified someone?
>
> A. She pointed to the picture that she thought was the person that had carjacked her.
>
> Q. Okay. And it's showing you on your screen there, State's Exhibit 15?
>
> A. Yes.

(Tr. P. 193 lns. 9-25).

Counsel testified she did not object to Smith's testimony because she did not think it amounted to bolstering but was related to the witness' personal observation of the identification procedure. She testified that in hindsight, she can see an argument could have been made that the testimony was bolstering. Counsel also testified she believes she sufficiently attacked the identification procedures and Smith's observations on cross-examination.

"Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct.App.2006), rev'd in part on other grounds, 380 S.C. 499, 671 S.E.2d 606 (2009). "Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain 'the assessment of witness credibility . . . within the exclusive province of the jury.'" State v. Taylor, 404 S.C. 506, 514–15, 745 S.E.2d 124, 128 (Ct. App. 2013) (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012).

This Court finds counsel was not deficient for failing to object to Smith's testimony, as Smith's testimony pertained to her personal observations. Moreover, this Court finds Applicant cannot establish the requisite prejudice necessary for relief in light of the substantial amount of evidence establishing his guilt. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation: trial counsel was ineffective for failing to challenge the indictments

Applicant asserts trial counsel was ineffective for failing to challenge the indictments. Counsel testified Applicant was properly indicted and did not have any valid basis for challenging the sufficiency of the indictments, but if she believed there was a defect with any indictment, she would have properly moved to quash it. This Court has reviewed the indictments in conjunction with the record as a whole and finds this allegation is without merit. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this 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 is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record 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 post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and

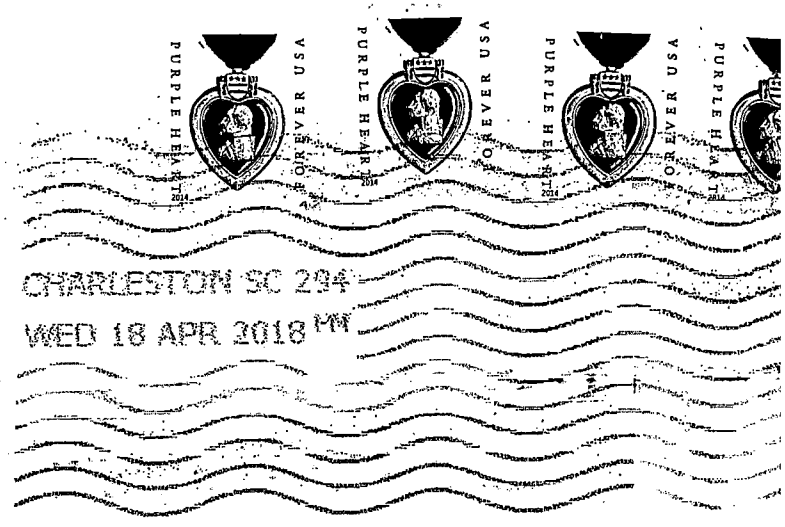
2. Applicant LaTrone Butler shall remain in the custody of the State.

AND IT IS SO ORDERED this 9 day of April, 2018.

Maite Murphy

MAITE MURPHY
Presiding Judge
Ninth Judicial Circuit

St. George, South Carolina



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