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October 31, 2018

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

RE: Richard E. Tedford vs. The State of South Carolina
Case No: 2017-CP-23-6375

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

Rodney Richey

RWR/
Enclosures
cc: DeShawn H. Mitchell, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

HONORABLE LETITIA H. VERDIN

2017-CP-23-6375

RICHARD E. TEDFORD, SCDC# 365731

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Richard E. Tedford appeals the denial of his Post- Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Letitia H. Verdin Circuit Judge on June 20, 2018 and Order issued on October 19, 2018 and filed on October 23, 2018. The Appellant received notice of the judgment on October 28, 2018.

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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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RICHARD E. TEDFORD, SCDC# 365731

APPELLANT,

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RESPONDENT.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on October 31, 2018, addressed to their attorney of record, DeShawn H. Mitchell, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: October 31, 2018

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Richard E. Tedford, 365731 Applicant, v. State of South Carolina, Respondent.	)	2017-CP-23-6375 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed on October 10, 2017 by Richard E. Tedford (Applicant). Respondent made its Return on January 17, 2018. An evidentiary hearing into the matter was convened on June 20, 2018, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by Rodney W. Richey, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Trial Counsel Richard H. Warder, Esquire also testified. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In October of 2014, the Greenville County Grand Jury indicted Applicant for two counts of first-degree burglary (2014-

GS-23-596; 20 14-GS-23- 10427) and two counts of grand larceny (2014-GS-23-597; 20 14-GS-23- 10428). Richard H. Warder, Esquire, represented Applicant. Applicant proceeded to trial on October 13, 2015, before the Honorable Perry H. Gravely and a jury. At the close of the State's case, the trial court granted a directed verdict of not guilty on one count of first-degree burglary, allowing the State to amend the indictment to the lesser included offense of second-degree burglary because there was no evidence the building burglarized was a dwelling. The trial court also granted a directed verdict of not guilty on one count of grand larceny, allowing the State to amend the indictment to the lesser included offense of petit larceny because there was no evidence proving the minimum value of the items stolen. Ultimately, Applicant was found guilty of first-degree burglary (2014-GS-23-10427), second-degree burglary (2014-GS-23-596), grand larceny (20 14-GS-23- 10428), and petit larceny (2014-GS-23-597). (R.p.595-p.596). He was sentenced by the Judge Gravely to twenty-three (23) years' imprisonment for first-degree burglary, twelve (12) years' imprisonment for second-degree burglary, ten (10) years' imprisonment for grand larceny, and thirty (30) days' imprisonment for petit larceny, with all sentence to run concurrently for an aggregate sentence of twenty-three (23) years' imprisonment.

Applicant filed a timely notice of appeal. David Alexander, Esquire of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on May 1, 2017. State v. Tedford, Op. No. 2017-UP-297 (S.C. Ct. App. filed July 19, 2017). The remittitur was returned to the circuit court on August 8, 2017.

FACTUAL HISTORY

Pre-Trial Motions

After the call of the case for trial, Applicant made a pretrial motion to have his two prior burglary convictions treated as one conviction for purposes of the State's attempts to prove the

elements of first-degree burglary pursuant to S.C. Code Ann. § 16-11-311(A)(2). He noted the State was seeking to use the prior burglaries as two separate offenses, which would constitute aggravating factors and would satisfy the elements of first-degree burglary. Applicant argued that because the two burglaries were committed on the same day at houses next door to each other, and because he pled guilty to both pursuant to a single plea bargain, they should be treated as a single offense. (Tr.p.7-p.8). The State responded that the two prior convictions were for burglaries at two separate and distinct houses and therefore should count as two separate and distinct convictions under a plain reading of the statute. (Tr.p.8-p.9). The trial judge ruled that in considering legislative intent and the fact that the legislature chose not to limit the two convictions language in any particular way in the burglary statutes, he was not convinced by Applicant's argument and denied the motion. (Tr.p.9-p.10). Applicant then made a motion for a continuance to seek new counsel before the trial started; however, that motion was also denied. (Tr.p.12). Finally, the trial court granted Applicant's request for a Jackson v. Denno hearing on the admissibility of statements he had made to the police, and a Neil v. Biggers hearings on the identification procedure that led to his identification by several witnesses. (Tr.p.17-p.79).

Trial

After the jury was sworn, the trial court gave brief preliminary instructions and the parties made opening statements (Tr.p.107-p.126), the State presented its case-in-chief, calling the victim from the first burglary, Melody Wilbanks, to the stand. On the morning of August 13, 2013, Wilbanks was home alone with her fifteen-month-old daughter after her husband left for work. Wilbanks was lying in bed when she heard the sound of glass breaking. Wilbanks initially thought maybe a lighting fixture fell, but when she continued hearing noises she went to check. Wilbanks headed into the living room, looked right, and saw a man stepping in the

window sideways, with one leg coming into the house. Wilbanks testified she was unable to identify the man because it was still dark. (Tr.p.137-p.143).

Wilbanks ran to her bedroom and closed and locked the door behind her. Next, she grabbed a pistol her husband kept under the mattress, her glasses, and her phone. She proceeded to lock herself in the bathroom and then got inside the closet. Once in the bathroom, Wilbanks fumbled with the gun, trying to disable the safety. She testified she had never shot a gun before. Wilbanks heard the intruder kick in the bedroom door and then heard what sounded like the man messing with the television and opening drawers. Eventually, the intruder attempted to open the bathroom door where Wilbanks was located. In an effort to let the man know she had a gun, Wilbanks fired the gun in the shower stall. She heard the intruder saying "whoa whoa" or "stop" after the gunshot. Wilbanks testified she then heard the contents of her purse being dumped on the floor. Wilbanks stated she may have also heard a car door slam after she fired the gun; however, the ringing in her ear from the gunshot made it difficult to hear. (Tr.p.144-p.149).

Wilbanks, still in the closet in her bathroom, called the police. She stayed on the phone and in the closet until authorities arrived. During the burglary, Wilbanks's daughter was in a back room and did not cry. After the burglary, Wilbanks noticed missing items including her car keys, a bottle of Claritin, and a pair of sunglasses. She did not notice her car, a 2011 black Scion xB, was also missing until her mother-in-law brought it to her attention after noticing the garage was empty. Wilbanks's car was found later that afternoon behind a medical park in Greer. It was filled with stolen items and had been trashed, causing forty-four hundred dollars in damage. (Tr.p.149-p.152). On cross- examination, Wilbanks testified she owned two keys to her car, one being on her key ring, the other she kept in the ignition in her locked garage. Wilbanks did not recall telling an officer the burglary sounded like he had a black voice. (Tr.p.168-p.174).

Bishop then asked Applicant to leave his residence but Applicant did not respond and instead moved towards the back of the Scion. Bishop quickly went inside the home to grab his gun and told his wife to call the police. Bishop then went back outside and again demanded that Applicant leave and this time Applicant closed the door and hatch and left. Bishop pointed to Applicant when asked to identify the man he saw that morning at his house. (Tr.p.203-p.211).

Next, the State called Natalie Powell to the stand. She encountered Applicant on the morning of August 13, 2013, at her residence in Greer. Powell was home with her son when she heard Applicant ring the doorbell around eight in the morning. Before opening the door, Powell grabbed her gun. Once she opened the door, Applicant was already walking away from the porch. He turned and asked Powell if her parents were home. Powell replied it was her home, and asked Applicant what he wanted. Applicant asked for a "Dirk" or "Derek" and Powell replied by yelling: "Get off my property!" Applicant then walked to black Scion, cussing Powell as he left. (Tr.p.216-p.222).

Powell testified it was the same black Scion all previous witnesses had seen. When Powell backed out to leave for work a little later that morning she hit a trailer tire outside her garage so she drove back in and called her husband. Powell's husband came home and called the police. Powell testified she identified Applicant for Detective Gary Gilstrap one week after the encounter and was one hundred percent sure she identified Applicant. (Tr.p.223-p.229; p.427).

Greenville County Sheriff's Office Officer Joe Seegars was working in August 2013 and responded to the burglary at the Wilbanks' residence. Officer Seegars and two other officers cleared the Wilbanks's residence and noticed there had been a forced break-in. He testified Wilbanks was terrified when he arrived and it took ten minutes to calm her down. After

Next, the State called Gerald Lockhart to the stand. Lockhart explained his residence is located in an isolated area near Greer. He testified he encountered Applicant outside his house on August 13, 2013 around 6:30 in the morning. While looking out his kitchen window, Lockhart noticed a black Scion with all four doors and its trunk open, but did not see a person with the car. Knowing he lived at the end of the road, Lockhart figured someone was lost or something was up. He grabbed his pistol and went out through his basement where he saw Applicant with the car. (Tr.p.175-p.185).

Once outside, Lockhart hid behind his truck and watched as Applicant fumbled around with something in the trunk of the Scion. Lockhart pointed his gun at Applicant and asked him what he was doing. Applicant responded, "Well, I thought it was pretty out here." Lockhart said: "Listen, you need to get out of here and you need to get out of here now." After retrieving the keys from the trunk, Applicant drove away. Lockhart followed Applicant to the main road to make sure he left. Thinking the car was stolen, Lockhart noted the tag number of the Scion and contacted the Sheriff's Department. (Tr.p.185-p.191). Lockhart testified he was close enough to identify Applicant. A week after the encounter, Lockhart met with Detective Gary Gilstrap for the purpose of looking at a photographic lineup. After looking at the lineup, Lockhart chose a photo of Applicant and stated he was one hundred percent sure of the identification. (Tr.p.191-p.194; p.430).

The State then called Terry Bishop, the next person to encounter Applicant on August 13, 2013, to the stand. Bishop returned home from working the nightshift at BMW when he noticed a black Scion sitting in front his house with its side door and hatch open. Bishop testified it was the same black Scion other witnesses had previously seen. Bishop pulled beside the car and asked Applicant if he could help and Applicant replied, "Naw, I'm just out riding around."

collecting the story from Wilbanks, Officer Seegars went around the neighborhood in an effort to find witnesses. Officer Seegars was also dispatched to Bishop's residence where he spoke with Bishop and the Powell residence where he spoke with Powell's husband. (Tr.p.233-p.248).

The black Scion was discovered by Denise Crockett in back of her place of business. Crockett stated she saw the black Scion trying to get out of the mud and decided to call the police; however, she was unable to identify any persons involved. (Tr.p.324-p.326). Greer Police Department Officer Travis Stamey received a call about the black Scion on August 13, 2013 around 2:30 pm. He testified the black Scion was abandoned, stuck in the mud, and located behind a counseling center. Various items were found inside and were processed for evidence. (Tr.p.250-p.257).

The State also called Brian Walker, the victim of the second burglary and his wife Arlene Bruce to testify for the State. (Tr.p.260 & p.302). Walker testified that he and his family had purchased a home in Greer but were still living in their apartment at the time of the break-in. Walker arrived at the new house on August 14, 2003, around 8:30 am and immediately noticed someone had entered the home so he called the police. Walker stated it seemed as if someone had taken a shower in a bathroom and noted some items were missing such as a large box of matches. Those matches were later discovered in the black Scion. (Tr.p.261-p.270). Officer Jeff Hemric was the officer who made the connection between the box of matches found in the black Scion and the matches missing from Walker's residence. (Tr.p.296).

The State introduced testimony from two officers in forensics, Sergeant Dar Shaw and Officer Riley Hope. Both testified to the evidence collected including processing and taking photographs at the Wilbanks residence, the Walker residence, the business where the black Scion was found. (Tr.p.336; p.356; p.369). Chris Gray, the latent print examiner for the Greenville

Department of Public Safety that testified as an expert witness. He said that of the ten latent lifts he was given from investigators, one matched Applicant. (Tr.p.379-p.389).

Investigator Jason Bash testified he received the print match from the latent print examiner and contacted Applicant to come in for questioning; however, Applicant initially a no show. (Tr.p.403-p.408). Bash subsequently made contact with Applicant at his home, where the Applicant lied about his name by giving Bash his brother's name. Bash and Spartanburg law enforcement officers nevertheless arrested Applicant and he eventually admitted to his name at the city jail. (Tr.p.411-p.413).

After presenting its last witness, the State noted there were matters the Court needed to address outside the presence of the jury. There was discussion as to whether the parties would stipulate as to Applicant's two prior convictions for burglary but ultimately agreed the two indictments for those convictions would be admitted as State's Exhibits 58 and 59. (Tr.p.444-p. ; State's Exhibits 58 & 59, prior convictions). The State rested. (Tr.p.456). Applicant then made several motions before the court, the first being that the Walker residence was not a dwelling. The judge agreed and the charge was amended to second-degree burglary. Applicant also moved for directed verdict, however, the judge stated in light of the circumstantial evidence the State has presented the motion must be denied. (Tr.p.457-p.472).

Lastly, Applicant testified in his own defense. (Tr.p.479-p.543) Applicant claimed he and his fiancé were heading to Greer to purchase drugs on the night of August 12, 2013; however, at some point he got out the vehicle and his fiancé left him on Highway 101 because he attempted to prevent her from using drugs while she was driving. Applicant said he then attempted to call a ride and walked for hours before eventually being picked up by a man named "Derek or Dirk." Applicant testified he was picked up in the black Scion at the Walker residence.

Applicant admitted he unlawfully entered the new Walker residence to take a shower and claimed he paid a worker twenty dollars for access. (Tr.p.481-p.486). Applicant claimed he had so much mud present on his clothes that it required a shower. (Tr.p.504).

Applicant admitted to the encounters described by Lockhart and Powell; however, he claimed that "Dirk or Derek" was present during both instances and did not know why the witnesses failed to see him. He claimed he parted ways with "Derek or Dirk" around ten or eleven that morning, meeting his fiancé at a store. Applicant testified he had never visited the Wilbanks residence. (Tr.p.491-p.493).

After Applicant rested, the State called three brief witnesses in reply. (Tr.p.546-p.554). The parties then gave closing arguments and the trial court charged the jury. (Tr.p.554-p.624). Following deliberations, the jury found Applicant guilty of first-degree burglary (2014-GS-23-10427), second-degree burglary (2014-GS-23-596), grand larceny (2014-GS-23-10428), and petit larceny (2014-GS-23-597). (Tr.p.627-p.628). He was sentenced by the Honorable Perry H. Gravely to twenty-three (23) years' imprisonment for first-degree burglary, twelve (12) years' imprisonment for second-degree burglary, ten (10) years' imprisonment for grand larceny, and thirty (30) days' imprisonment for petit larceny, with all sentence to run concurrently for an aggregate sentence of twenty-three (23) years' imprisonment. (Tr.p.641-p.642; Sentencing Sheets).

ALLEGATIONS

1. Ineffective Assistance of Counsel
   a. Attached pages 8-19
2. Ineffective Assistance of Appellate Counsel
   b. Attached pages 19-23

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified Trial Counsel represented him on his charges. He testified the State enhanced his charges because he had prior convictions for burglary. Applicant testified both of his prior burglary convictions happened on the same day so they should have been treated as one when the State tried to enhance his charges. He testified the Court of Appeals affirmed his conviction because the issue was not preserved for appellate review. Applicant testified during pre-trial, Trial Counsel argued to the trial court that his two prior burglaries were to close in time to each other to be treated as multiple convictions for the purpose of enhancement. He testified Trial Counsel however did not argue the appropriate statute under South Carolina law which was SC Code § 17-25-45. Applicant argued Trial Counsel should have objected to the issue with his indictments and that he should have only been convicted of second-degree burglary. He testified proper voir dire questions were not given and that Trial Counsel should have asked the jury panel questions about whether they had been the victims of violent crimes. Applicant testified Trial Counsel should have objected to the State's closing arguments as improper. He testified although he was currently in a clear state of mind because he was taking proper medication, he was on different medication when Trial Counsel represented him which effected his mental health state and that he wanted to explain when he testified at trial. Applicant testified Trial Counsel should have crossed examined the State's witness, Gary Gilstrap, more effectively. He testified Trial Counsel made a directed verdict motion that was denied but that Trial Counsel should have renewed the motion at the close of Applicant's case. Applicant testified Trial Counsel only gave a closing argument on some of his charges and not all.

On cross-examination, Applicant testified Trial Counsel only met with him three times

during the course of his representation. He testified Trial Counsel should have asked more questions during voir dire but at the time he did not have any specific questions he wanted Trial Counsel to ask. Applicant testified his girlfriend who he claimed he had been with prior to the crime did not testify at trial. He testified he was on social security disability which entitled him to a monthly check and that he was bipolar. Applicant testified he told Trial Counsel he had mental health issues.

Trial Counsel's Testimony

Trial Counsel testified he represented Applicant on his charges. He testified he recalled the State introducing Applicant's two prior burglaries into evidence. Trial Counsel testified based on his understanding of the law, Applicant's prior convictions were elements of his current crime and because of this the State could use them to enhance Applicant's charge. He testified in spite of this he argued against the enhancement and believed the issue was properly preserved for appellate review. Trial Counsel testified he believed the voir dire questions asked to the jury panel by the trial judge were sufficient. He testified he thought the motion he argued was successful because he got one of Applicant's charges amended to second-degree burglary. Trial Counsel testified he did not recall his cross-examination of Mr. Gilstrap.

On cross-examination, Trial Counsel testified he had practiced law for forty-three years and the majority of that time had been devoted to criminal law. He testified he was retained to represent Applicant on his charges and that he met with Applicant multiple times during the course of his representation. Trial Counsel testified during his meetings with Applicant he discussed the indictments, elements of the crime, possible punishments, his constitutional rights, and the State's burden of proof. He testified he did not object to the Solicitor's comments during closing arguments because the jury could have inferred from the testimony given at trial that the

scenario offered by the Solicitor may have been true. Trial Counsel testified during the course of his representation Applicant appeared to comprehend everything that they discussed and that Applicant was extremely intelligent. He testified Applicant seemed to understand the charges he was facing and understood the evidence the State was prepared to present against him. Trial Counsel testified none of Applicant's statements or answers to his questions raised any concerns about his mental capacity or lack thereof.

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 hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application 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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 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, 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 hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. **This Court would note that during the hearing Applicant informed the court he was waiving any allegations of ineffective assistance of counsel with respect to appellate counsel.** This Court finds as follows on the following grounds presented by Applicant at the evidentiary hearing:

Ineffective Assistance of Counsel

Failure to Combine Charges

Applicant alleges Trial Counsel was ineffective for failing to get his two prior convictions for burglary to be treated as one for the purpose of enhancement of his charge. Applicant testified the State enhanced his charges because he had prior convictions for burglary. He testified both of his prior burglary convictions happened on the same day so they should have

been treated as one when the State tried to enhance his charges. Trial Counsel testified based on his understanding of the law, Applicant's prior convictions were elements of his current crime and because of this the State could use them to enhance Applicant's charge. He testified in spite of this he argued against the enhancement and believed the issue was properly preserved for appellate review. This court finds Trial Counsel was not ineffective for failing to get Applicant's two prior convictions for burglary to be treated as one for the purpose of enhancement of his charge and Applicant cannot demonstrate sufficient prejudice. A review of the record shows Trail Counsel made a pretrial motion to have Applicant's two prior burglary convictions treated as one conviction for purposes of the State's attempts to prove the elements of first-degree burglary pursuant to S.C. Code Ann. § 16-11-311(A)(2). Applicant noted the State was seeking to use the prior burglaries as two separate offenses, which would constitute aggravating factors and would satisfy the elements of first-degree burglary. Trail Counsel argued that because the two burglaries were committed on the same day at houses next door to each other, and because he pled guilty to both pursuant to a single plea bargain, they should be treated as a single offense. (Tr.p.7-p.8). Ultimately, the trial judge ruled that in considering legislative intent and the fact that the legislature chose not to limit the two convictions language in any particular way in the burglary statutes, he was not convinced by Applicant's argument and denied the motion. (Tr.p.9-p.10). Applicant seems to argue that Trial Counsel was not prepared to argue this motion and his argument should have relied on Section 17-25-50 of the South Carolina Code and its language that, for purposes of our recidivist offender statute, two offenses which are "committed at times so closely connected in point of time" may be considered one offense "notwithstanding under the law they constitute separate and distinct offenses,". A review of Applicant's appellate records reveals the South Carolina Court of Appeals affirmed Applicant's conviction and noted that "a

party may not argue one ground at trial and an alternate ground on appeal". Here, this court finds the trial court properly interpreted "two or more convictions" using the plain and unambiguous meaning of the phrase under S.C. Code Ann. § 16-11-311(B)(2), and would have properly declined to seek out and graft language from the recidivist offender statute (S.C. Code Ann. § 17-25-50) onto that plain and unambiguous meaning. Moreover, this court finds the argument about S.C. Code Ann. § 17-25-50 would not have been successful had it been advanced by Trial Counsel. Furthermore, this court finds while ultimately unsuccessful, Trial Counsel made an appropriate motion and diligently sought to protect Applicant's interest by arguing against the enhancement. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Trial Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Trial Counsel's performance. This Court concludes Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed with prejudice.

Failure to Object to Closing Arguments

Applicant alleged in his application ineffective assistance of counsel for failing to object to a prejudicial remark by the State during closing arguments. In the State's closing arguments the Solicitor stated to the jury regarding Applicant. "And did he also enter that home with the intention of rape? Did he intend to do that only when he saw Ms. Wilbanks come into the room naked?". (Tr.p.575). Applicant argues these remarks by the State inflamed the passions of the jury and prejudiced him in that he was denied a fair trial. This court finds Trial Counsel was not

ineffective for failing to object to the State's remarks during closing arguments. "Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." State v. Mouzon, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995), aff'd, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing Herring v. New York, 422 U.S. 853 (1975)). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609–10, 602 S.E.2d at 744. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. Here, this court finds a reasonable inference could be found from the evidence presented at trial including the testimony at trial from the victim in this case. During trial, the State asked Ms. Wilbanks if she was clothed that morning and she responded she was not. (Tr.p.142). Moreover, this court finds Applicant cannot demonstrate he did not receive a fair trial because of these remarks. Furthermore, Trial Counsel testified he did not object to the Solicitor's comments during closing arguments because the jury could have inferred from the testimony given at trial that the scenario offered by the Solicitor may be true. Therefore, this court finds Trial Counsel was not ineffective

in not objecting to the State's remarks during closing argument. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to Ask Voir Dire Questions

Applicant alleged in his application ineffective assistance of counsel for failing to request additional jury voir dire questions. Applicant argues after the trial judge concluded his initial voir dire, Trial Counsel should have asked additional questions. This Court finds Applicant has failed to meet his burden of proving Trial Counsel was ineffective for failing to request additional jury voir dire questions. Trial Counsel testified credibly he thought the trial judge's voir dire questions were sufficient. Further, Applicant testified Trial Counsel should have asked more questions during voir dire but at the time he did not have any specific questions he wanted Trial Counsel to ask. This court does not believe Applicant would have benefitted from the additional questions. This Court also notes Trial Counsel's performance is measured by a standard of reasonableness based on prevailing professional norms. Requesting the additional voir dire Applicant discussed is not a prevailing professional norm. Therefore, Counsel's failure to request it does not constitute deficiency. Assuming *arguendo* Counsel was deficient, Applicant cannot prove it had any effect on the outcome of his trial. Therefore, Applicant has failed to prove this claim. Furthermore, this court would note during the trial court's voir dire, the trial court inquired of the jury panel if any member of the jury panel knew of any reason whatsoever why they could not give a fair and impartial trial to both the State and the Defendant in the matter. (Tr.p. 92). This question came after the trial judge had already announced to the jury panel that Applicant was there for trial on two charges of burglary first degree and two charges of grand larceny. Therefore, this court finds Trial Counsel was not ineffective for failing to

request additional jury voir dire questions. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to Investigate Applicant's Mental Health

Applicant alleged in his application ineffective assistance of counsel for failing to investigate his mental health for mitigation evidence to possibly obtain a plea bargain. As to this ground, this Court finds that Trial Counsel was not ineffective in failing to investigate Applicant's mental health. Trial Counsel testified during the course of his representation Applicant appeared to comprehend everything that they discussed and that Applicant was extremely intelligent. He testified Applicant seemed to understand the charges he was facing and understood the evidence the State was prepared to present against him. Trial Counsel testified none of Applicant's statements or answers to his questions raised any concerns about his mental capacity or lack thereof. Counsel may reasonably rely on his own perceptions in deciding if a client is competent to stand trial. Jeter v. State, 308 S.C. at 233, 417 S.E.2d at 596 (1992). Because of this, this court finds Trial Counsel was not deficient for investigating Applicant's mental health. Moreover, this court finds Applicant has failed to demonstrate sufficient prejudice. Besides Applicant's testimony which this court does not find credible, Applicant has failed to offer any expert witnesses or medical documents related to his mental health that would demonstrate he suffered from mental health problems. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of

proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

Failure to Properly Cross-examine

Applicant alleges Trial counsel was ineffective for failing to properly cross-exam the State's witness, Investigator Gary Gilstrap, at trial. This Court finds Applicant has failed to meet his burden of proving Trial Counsel was ineffective. This Court finds Trial Counsel's representation was within reasonable professional norms. Here, Trial Counsel asked Investigator Gilstrap during cross-examination about a guy named "Dirk". (Tr.p.442). Ultimately, Investigator Gilstrap testified he could not fully investigate "Dirk" because he did not have a last name to for "Dirk". (Tr.p.442). Additionally, during direct examination Investigator Gilstrap testified Applicant told him he did not know the last name of "Dirk". This court finds Trial Counsel was not deficient in his cross-examination of Investigator Gilstrap as this court believes little or no more information would have been elicited concerning "Dirk" as no one even had a last name for this alleged suspect.

Furthermore, this court finds Applicant cannot demonstrate sufficient prejudice. Applicant argues that Trial Counsel should have questioned the investigator more about "Dirk", another potential suspect in the case. A review of the record shows Applicant ultimately testified at trial and told the jury about this alleged "Dirk". This court finds the jury heard about "Dirk" through Applicant's testimony and had information about another possible suspect. ("The decision as to whether to cross-examine a witness is a tactical one well within the discretion of a defense attorney.... Absent a showing of a single specific instance where cross-examination arguably could have affected the outcome of either the guilt or sentencing phase of the trial, a[n] [applicant] is unable to show prejudice necessary to satisfy the second prong of *Strickland*")

Fugate v. Head, 261 F.3d 1206, 1219 (11th Cir. 2001); ("the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish") Delaware v. Fensterer, 474 U.S. 15, 20 (1985). Therefore, this court finds Trial Counsel was not ineffective in cross-examining Investigator Gary Gilstrap, the State's witness. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to Object to Amendment of Indictment

Applicant alleged in his application ineffective assistance of counsel for failing to object to the amendment of one of his indictments. After the State rested its case, Applicant made several motions before the trial court, the first being that the Walker residence was not a dwelling. The trial judge agreed and the charge was amended to second-degree burglary. Applicant also moved for directed verdict, however, the judge stated in light of the circumstantial evidence the State has presented the motion must be denied. (Tr.p.457-p.472). Applicant alleges that Trial Counsel should have objected to the amendment of the indictment for burglary 1st (2014-GS-23-596) at that time. Here, this court finds Trial Counsel was not ineffective for failing to object to the amendment of the indictment. This Court finds Trial Counsel was not deficient and effectively argued that where the second burglary occurred was not a dwelling. Additionally, this court finds that an objection to the amendment of the indictment form burglary 1st to burglary 2nd would not have been successful as burglary 2nd is a lesser included charge of burglary 1st. Second-degree burglary, is a lesser included offense of first-degree burglary, because it has traditionally been considered a lesser included offense of the greater offense charged. See State v. Wright, 354 S.C. 48, 54, n.2, 579 S.E.2d 538, 541, n.2 (Ct. App. 2003) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); *see also*

State v. Burton, 356 S.C. 259, 264, 589 S.E.2d 6, 8 (2003) (when an offense has traditionally been considered a lesser included offense of the greater offense charged, it will continue to be construed as a lesser included offense). Moreover, this court finds Applicant has failed to demonstrate sufficient prejudice as this court finds had Trial Counsel objected to the amendment of the burglary 1st degree charge and it been dismissed, the State could have re-indicted Applicant for burglary 2nd degree. Therefore, this court finds Trial Counsel was not ineffective for failing to object to the amendment of one of his indictments. Accordingly, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations 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 Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. Reefer to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

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

2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 19 day of Oct., 2018.

LETITIA H. VERDIN
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

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