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December 11, 2018

The South Carolina Supreme Court  
Clerk, Daniel Shearouse  
P.O. Box 11330  
Columbia, SC 29211

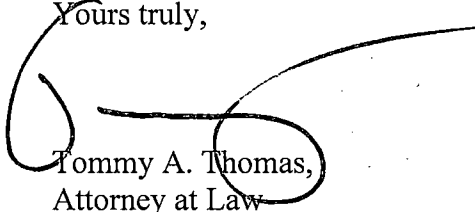
RE: Mario Tynes #340936 v. State of South Carolina  
Case No.: 2014-CP-26-01211

Dear Sir or Madam:

Enclosed please find for filing an original and a copy of a Notice of Appeal and Certificate of Service regarding the above referenced matter.

Kindly return the clocked copies to me in the enclosed envelope. Please feel free to contact me should you have any questions.

Yours truly,

  
Tommy A. Thomas,  
Attorney at Law

TAT/jem  
cc: Johnny James, Esq.  
Mario Tynes #340936  
Appellate Defense

RECEIVED  
DEC 14 2018  
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM HORRY COUNTY  
Court of Common Pleas  
Post Conviction Relief

J. Cordell Maddox, Jr., Circuit Court Judge

Case No.: 2014-CP-26-01211

RECEIVED  
DEC 14 2018  
S.C. SUPREME COURT

Mario Tynes #340936,..... Petitioner,

vs.

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

NOTICE OF APPEAL

Mario Tynes #340936 appeals the Order of the Honorable J. Cordell Maddox, Jr., dated July 7, 2017 and filed on July 13, 2017. On August 4, 2017 a timely Notice of Motion and Motion to Alter or Amend the Judgment was filed. The Honorable J. Cordell Maddox, Jr. signed an Order to alter/Amend Order of Dismissal on November 2, 2018. This Order was filed on November 7, 2018. Appellant received written notice of entry of this order on November 12, 2018.



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Other Counsel of Record:  
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Attorney for Respondent

Irmo, South Carolina  
December 11, 2018

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM HORRY COUNTY  
Court of Common Pleas  
Post Conviction Relief

J. Cordell Maddox, Jr., Circuit Court Judge

Case No.: 2014-CP-26-01211

Mario Tynes #340936,..... Petitioner,

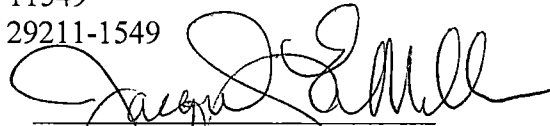
vs.

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

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Applicant hereby certify that I placed in the United States Mail, a copy of a Notice of Appeal with postage prepaid and the return address clearly shown on said envelope to Johnny James Esq. of the Attorney General's Office, at:

Johnny James, Esq.  
Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211-1549



Jacquelyn E. Miller  
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Irmo, SC  
December 11, 2018

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 Mario Tynes, #340936, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2014-CP-26-1211

**ORDER OF DISMISSAL**

FILED  
 HORRY COUNTY  
 2017 JUL 13 PM 4:48  
 RENEE N. ELVIS  
 CLERK OF COURT  
 HORRY COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 28, 2014. Respondent made a Return on July 11, 2014. The Court convened an evidentiary hearing into the matter on August 11, 2016, at the Horry County Courthouse. Applicant was present at the hearing and represented by Tommy A. Thomas, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, William H. Monckton, VI, Esquire, also testified. Applicant's mother, Tracey Tynes, also testified. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the pleadings, and the return. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In January 2008, the Horry County Grand Jury indicted Applicant for first degree burglary (2008-GS-26-207), armed robbery (2008-GS-26-208), possession with intent to distribute marijuana (2008-GS-26-206),

and unlawful carrying of a pistol (2008-GS-26-205). William H. Monickton, VI, Esquire, ("Counsel") represented Applicant. On May 17, 2010, Applicant proceeded to trial before the Honorable Larry B. Hyman and a jury. The jury found Applicant guilty as indicted. Judge Hyman sentenced Applicant to imprisonment for concurrent terms of 18 years for first degree burglary, 10 years for armed robbery, five years for possession with intent to distribute marijuana, and one year for unlawful carrying of a pistol.

Applicant filed a timely notice of appeal. Tommy A. Thomas, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on in a published opinion on April 3, 2013. State v. Tynes, 402 S.C. 211, 740 S.E.2d 512 (Ct. App. 2013). The remittitur was returned to the circuit court on April 22, 2013.

## **II. ALLEGATIONS**

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

### **1. "Ineffective Assistance of Counsel"**

At the evidentiary hearing, Applicant proceeded on only the below allegations of ineffective assistance of trial counsel.

## **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

### **A. Evidence Adduced at Trial**

Applicant's convictions arose from the burglary and armed robbery of a drug dealer at Coastal Carolina University. On October 13, 2007, the Horry County Police Department was advised to be on the lookout for a white older-model, four-door Ford Crown Victoria without hubcaps. Dan Gause testified he placed a 911 call stating that he saw a vehicle occupied by five black males who were wearing all black clothing and waving guns. (Tr. at 203-18). He admitted that he did not actually see them waving guns, but he could tell they were concealing something and knew something was going on. (Tr. at 211-13). He stated he did not lie, but that he saw them concealing something and he assumed it was a gun. (Tr. at 214). Officer Justin Cole was off-duty security on the night of the incident and saw a vehicle matching the description. (Tr. at 219-25). Cole stopped the vehicle, observed marijuana in the vehicle, directed the occupants to step out of the vehicle, and then observed a magazine clip in the backseat. (Tr. at 226). Thereafter, he conducted a search. (Tr. at 226). The video of the stop was played for the jury. (Tr. at 227-28). After an in-camera motion to suppress, the Court ruled that there was probable cause to search and a lawful search incident to arrest. (Tr. at 275, lines 9-11). The vehicle was pulled over approximately two miles from the apartment complex where the vehicle was first seen. (Tr. at 298). A handgun and magazine were obtained from the search of the vehicle. (Tr. at 306; 309). Approximately 500 grams of marijuana was obtained from the vehicle. (Tr. at 799). Applicant was identified as one of the occupants in the vehicle. (Tr. at 223).

Craig Collins testified he knew Applicant from college and that he used to buy marijuana from Applicant. (Tr. at 400). Collins told Applicant he had started buy from the victim, and Applicant and Eric Brown asked Collins to purchase small quantities of marijuana for them from Sean Barrett. (Tr. at 403). Collins testified Applicant showed him a pistol once and always

bragged about him and Brown being “gangsters.” (Tr. at 405). Collins also testified Applicant asked him if Barrett would “fold over” if he saw something like this gun. (Tr. at 406). Collins testified he and Applicant discussed purchasing a large quantity of marijuana from Barrett. (Tr. at 406). Justin Tresslar testified he thought he was facilitating a purchase of marijuana from Barrett for Collins because Collins and Barrett were not acquainted. (Tr. at 490-93). Tresslar testified Barrett had approximately four or five pounds of marijuana at the time. (Tr. at 507). Tresslar was supposed to go in and get the marijuana from Barrett and bring it back out because he was the only person who Barrett would have allowed into the apartment. (Tr. at 490). Tresslar testified we went into the apartment, met Barrett and went to his bedroom with him, and while Barrett was counting the money, the door was kicked in, he heard people running upstairs, saying “where is the cash or where is the stash” (Tr. at 497). Tresslar testified he saw two black men go into Barrett’s room; one of them had a gun and pistol-whipped Barrett on top of the head multiple times. (Tr. at 497).

Barrett testified he was selling drugs in October 2007. At the time of the incident, he did not know Applicant, Brown, Lackey, or Readon. (Tr. at 540). Counsel testified to the in-court identification of Applicant by Barrett. (Tr. at 619). The Court ruled that the question be stricken as non-responsive and gave a curative instruction. Counsel also moved for a mistrial, which was denied. (Tr. at 630-40).

Katie Coy, an expert DNA analyst, testified that Barrett’s DNA was identified on the gun and that Applicant could not be excluded from the DNA mixture obtained from the gun, but admitted Applicant was not a “match.” (Tr. at 770-85). Counsel objected to the testimony of Katie Coy regarding the DNA analysis linking Applicant to the weapon. (Tr. at 735). He

objected on the basis her testimony would be that Barrett was the major contributor and that Applicant could not be excluded as a possible minor contributor to the mixture. (Tr. at 736). The trial judge ruled that the witness could testify that she could not match him but she could not exclude him. (Tr. at 748). Coy testified she was able to exclude Ricky Johnson, Eric Brown, Michael Lackey, and Joshua Readon, but was not able to exclude Applicant from the mixture. (Tr. at 778, line 24-p. 779, line 3). Coy testified she conclusively found Barrett's DNA on the gun. (Tr. at 781). Coy confirmed on cross-examination that she could not "use a 'match statement'" for Applicant. (Tr. at 782, lines 22-25).

Brown testified Applicant hit Barrett with the pistol and grabbed the money. (Tr. at 881). Brown testified Applicant and Readon had guns. (Tr. at 887). He testified the gun Applicant had was silver and black and Readon's was black and gray. (Tr. at 887).

Joshua Readon testified he lived in Atlanta in October of 2007 and that he visited Applicant at Coastal Carolina University at Applicant's request to watch Applicant's game and to get some "cush." (Tr. at 961). Applicant was living with Brown and Ricky Johnson at the time. (Tr. at 963). Readon testified Applicant, Johnson, and Collins were talking about robbing someone to get the weed. (Tr. at 963). Readon testified they took Ricky's vehicle—a white Crown Vic. (Tr. at 965). Readon testified Brown and Applicant went upstairs and Readon and Lackey were on the main floor of the apartment and he had no knowledge of what happened upstairs. (Tr. at 968). Readon testified he had a gun and he found out Applicant also had a gun after the incident. (Tr. at 967).

Ricky Johnson also testified. He testified he saw Applicant with a weapon that night. (Tr. at 1003). Johnson testified he drove that night and Applicant, Brown, Readon, and Lackey were

passengers in his car. (Tr. at 1002). Johnson testified when they arrived at Barrett's apartment, he stayed in the car and everyone else got out. (Tr. at 1004). When they came back, one of them remarked that Applicant hit someone with a gun. (Tr. at 1005). Johnson testified he knew they had marijuana because the odor was so strong he could smell it from the front seat. (Tr. at 1005). Johnson testified he knew a robbery was going to take place when they arrived at the apartment. (Tr. at 1008).

### **B. Summary of PCR Testimony**

Applicant's mother testified concerning the sequestration. She testified that during the trial one of Applicant's family members expressed concern that Officer Graham, who was under a sequestration order and standing outside of the courtroom, might be able to hear testimony from where he was standing. Applicant testified that someone also brought to Counsel's attention that Graham was right outside of the courtroom. Applicant testified Graham could hear Officer Cole's testimony.

Applicant's mother testified Applicant did not want to plead guilty because he believed the charges were false. Applicant testified it was his decision to go to trial because he wanted to prove his innocence. Applicant testified he was offered a ten year and a twelve year plea and he rejected them both because he did not want to admit guilt. He testified he did not know what an Alford plea was. He testified it was explained to him the day that Readon pleaded guilty. When questioned whether he understood an Alford plea operates the same as a guilty plea, he stated he did not. Applicant testified he thought Readon was allowed to plead because he was going to testify at trial. Applicant testified he did not know what Readon was going to testify to. Applicant testified he had no opportunity to talk to Counsel after Readon pleaded. Applicant

testified that had he known ten days before trial he would have pleaded guilty, and had he known what Readon would say in the courtroom he would have pleaded guilty. Applicant testified Counsel only talked to him about this right before trial.

Applicant testified he did receive his discovery material in the mail. He testified he only met with Counsel twice and that he only met with him the night before trial regarding trial preparation. Applicant testified Counsel did not review discovery with him. He testified he would have wanted Counsel to object to the 911 call. Applicant testified he thought Counsel should have asked the DNA analyst why he his DNA could not be excluded. He agreed the analyst testified he was not a scientific match. Applicant testified he was not satisfied with Counsel's questioning of the DNA analyst. Applicant testified that in a written statement, Officer Cole stated he saw a magazine clip and because Applicant knew this was not illegal, he told Counsel to look into it. Applicant testified Counsel's failure to suppress evidence was hurtful.

Applicant asked rhetorically during his testimony how it could be burglary if the victims were letting people buy drugs. He testified he knew he and his co-defendants did not burglarize the victim. Applicant testified he was confused about the elements of burglary first because there was no forced entry and they never had any evidence of forced entry, so he knew it was basically a drug deal gone bad situation. Applicant testified Counsel told him if he did not testify, Counsel would have last argument. Applicant said this was good because he did not want to testify. Applicant affirmed at the evidentiary hearing he did not want to testify at trial.

Counsel was retained shortly after Applicant's arrest. Counsel testified Applicant was offered a ten year plea deal but he rejected the offer because he did not want to plead guilty.

Counsel testified that all co-defendants were to be tried together, and at the last minute they decided to accept a plea offer and would implicate Applicant at trial. Counsel testified he asked the trial judge for leniency at sentencing. Counsel testified his trial preparation included reviewing discovery, which he also reviewed with Applicant, reviewing witness statements and interviewing witnesses and co-defendants. He said he met extensively with Applicant. He could not recall how many times exactly, but testified it was at least a dozen, and they also communicated through phone calls and emails. Counsel has been practicing criminal law for 23 of his 24 years as a practicing attorney. He testified he had represented defendants with the same charges as Applicant many times before representing Applicant. Counsel discussed Applicant's charges with him as well as possible punishments. Counsel testified he was not authorized to negotiate plea deals on Applicant's behalf. Counsel testified Applicant never provided an actual version of the facts but was consistent with the general facts and did not wish to plead. Counsel testified he had sufficient time to prepare for trial. Counsel stated he normally practices at the Horry Courthouse and that it would be extremely difficult to hear what was going on outside.

Counsel testified his theory at trial was that Applicant and his co-defendant were not there when the armed robbery happened but were picked up by the other co-defendants later. Counsel testified Applicant did not provide an alibi witness. The trial judge went on record with the plea offer before trial. The State offered to drop the burglary charge if Applicant would plead to armed robbery and possession with intent to distribute marijuana for a negotiated sentence of twelve years. Applicant rejected the offer. Counsel testified the Court encouraged Applicant and his co-defendants to think about accepting the plea offer. The following day, Readon decided to plead guilty and agreed to testify against Applicant. Once Readon decided to plead, Counsel

knew there would be multiple co-defendants testifying against Applicant. Counsel told Applicant there was no way he was *not* going to get convicted. He stated they discussed both plea offers, and that on the day of trial, he brought all of Applicant's family in and strongly encouraged him to accept. Counsel said Applicant did not want to plead guilty because he did not want to admit guilt. Readon pleaded guilty under Alford. Counsel testified that Applicant gave no indication he wanted to plead under Alford, and that if he had, Counsel would have acted upon it immediately.

### **C. Ineffective Assistance of Trial Counsel**

In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment.” *Id.* (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

*Failure to sufficiently challenge violation of sequestration order*

Applicant alleges trial counsel was ineffective for failing to ensure that Officer Graham was properly sequestered during Officer Cole's testimony. This Court finds Applicant has failed to show deficiency or prejudice with respect to this allegation.

A circuit court may order the sequestration of any witness by order or by motion of a party. Rule 615, SCRE. The decision to sequester a witness is within the sound discretion of the circuit court. State v. Simmons, 384 S.C. 145, 173, 682 S.E.2d 19, 33–34 (Ct. App. 2009). The purpose of the exclusion rule is to prevent the possibility that one witness will shape his testimony to match another witness's testimony. State v. Huckabee, 388 S.C. 232, 241, 694 S.E.2d 781, 785 (Ct. App. 2010). If a witness violates the order, he may be disciplined by the court. *Id.* The question of whether to exclude testimony by the offending witness depends upon the particular circumstances and “lies within the sound discretion of the trial court.” *Id.* (quoting United States v. Leggett, 326 F.2d 613, 613–14 (4th Cir.1964)).

First, as the Court of Appeals opined, “The trial court never made any order as to where the witnesses were to wait before they were called; thus, there was no violation of any sequestration order.” Tynes, 402 S.C. at 218, 740S.E.2d at 518. Counsel brought the issue to the trial judge's attention, and the trial judge noted there was nothing to indicate that Officer Graham

heard the other officer's testimony. (Tr. at 472, line 17-p. 275, line 3). Additionally, as the trial judge pointed out, there was no actual violation of the sequestration order because the judge gave no order regarding a specific location for sequestered witnesses to wait. (Tr. at 275, lines 3-4). Therefore, because no actual violation occurred, Counsel was not deficient for not pursuing the objection further.

Moreover, Applicant presented no evidence at the evidentiary hearing that Graham was able to hear Cole testify, and therefore, has failed to demonstrate there is a reasonable probability that but for the alleged deficiency, the testimony would have been excluded and the result of trial would have been different. Applicant testified Graham could hear Cole's testimony, but he did not observe this first-hand. Applicant's mother testified one of her family members expressed concern that Graham was standing outside of the courtroom and might be able to hear the testimony. However, this Court finds her testimony is not persuasive given she also did not observe this first-hand. Further, Counsel testified he regularly appears in the Horry County Courthouse, and it is extremely difficult to hear anything from where Graham was standing. Based on this testimony, Applicant has failed to present evidence Graham actually overheard any testimony, or that it affected Graham's testimony. Accordingly, this Court finds Applicant has not met his burden of proving deficiency or prejudice, and relief on this ground is denied.

***Failure to advise Applicant he could enter an Alford plea***

This Court finds Applicant has failed to demonstrate either deficiency or prejudice with respect to this allegation. First, Applicant has demonstrated no deficiency. The State offered to drop the burglary first charge if Applicant would plead to armed robbery and possession with intent to distribute marijuana for a negotiated sentence of twelve years. Counsel testified the trial

judge went on record with the plea offer. (Tr. at 14-19). Applicant rejected the offer. (Tr. at 19). The trial judge encouraged Applicant and his co-defendants to think about taking the plea offer. (Tr. at 19-25). The following day, Readon decided to plead guilty under Alford and agreed to testify against Applicant. Once Readon decided to plead, Counsel knew multiple co-defendants would be testifying against Applicant, and Counsel told Applicant there was a high probability he would be convicted if he went to trial. Counsel, along with Applicant's family, encouraged Applicant to accept the plea offer.

This Court finds Applicant's testimony that Counsel did not explain before trial the concept of an Alford plea to be not credible. Counsel was not authorized to negotiate plea deals on Applicant's behalf. Counsel credibly testified that he explained Alford to Applicant and that if Applicant had given him any indication that he wished to plead guilty under Alford, Counsel would have pursued that immediately. Applicant was consistent in that he did not wish to plead guilty. Once Counsel understood Applicant's co-defendants' testimony would implicate Applicant, he strongly encouraged Applicant to plead guilty, enlisting the help of his family. Applicant still chose to reject the offer and proceed to trial. Applicant has failed to prove Counsel was deficient.

Applicant has failed to demonstrate that but for Counsel's alleged failure to explain an Alford plea to him, he would have chosen to plead no-contest instead of proceeding to trial. Applicant testified it was his decision to go to trial so he could prove his innocence. He also testified he was offered a ten-year and a twelve-year plea, both of which he rejected. Applicant's mother also testified Applicant did not want to plead guilty because he believed the charges were false. Counsel testified Applicant was offered a ten-year plea deal but he rejected the offer

because he did not want to plead. This Court finds Applicant has presented no evidence he would have chosen to plead no-contest rather than proceed to trial. Notably, Applicant does not profess his innocence; rather, he contends, on the one hand, he was never involved and was his co-picked up later and, on the other, that his conduct did not constitute burglary because he and the others were permitted inside the house to buy drugs. Accordingly, this Court finds Applicant has failed to prove prejudice with respect to this allegation.

*Failure to properly consult with Applicant*

Applicant contends Counsel did not properly consult with him prior to trial. This Court finds Applicant has failed to prove either deficiency or prejudice with respect to this allegation. See Moody v. Polk, 408 F.3d 141, 148 (4th Cir. 2005) (“[T]here is no established ‘minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel.’” (citing United States v. Olson, 846 F.2d 1103 (7th Cir. 1988))). The Court finds Counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation. Counsel reviewed discovery with Applicant and discussed the elements of the charge and trial strategy. Counsel’s trial preparation included reviewing discovery with Applicant, reviewing witness statements and interviewing witnesses and co-defendants. Further, he met extensively with Applicant. Counsel has extensive criminal experience and had represented many defendants on the same or similar charges prior to representing Applicant. Counsel testified he had sufficient time to prepare for trial. Applicant testified Counsel only talked to him about Readon’s testimony immediately before trial. However, Readon intended to proceed to trial until the day he entered his plea. Therefore,

Counsel had no reason to think Readon would testify against him. Applicant has failed to satisfy his burden of proving deficiency with respect to this allegation.

In addition, Applicant has failed to present any evidence that but for the alleged lack of consultation, there is a reasonable probability the outcome would have been different. Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (“Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial.”). See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (no deficiency where “it would have been futile for Attorney to have made such arguments”). Therefore, Applicant has failed to satisfy his burden of proving prejudice. Accordingly, this allegation is denied and dismissed.

***Failure to suppress evidence obtained from vehicle search***

This Court finds Applicant has failed to satisfy his burden with respect to this allegation. Counsel did challenge the search and seizure of the evidence resulting from the traffic stop, and the Court of Appeals ruled on that issue and affirmed the trial judge’s refusal to suppress the evidence. The Court held the following regarding the search of the vehicle:

“[I]f there is probable cause to search a vehicle, a warrant is not necessary so long as the search is based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained.” State v. Weaver, 374 S.C. 313, 320, 649 S.E.2d 479, 482 (2007). Officer Cole testified that he stopped the car because it matched a description of a vehicle involved in possible criminal activity in the vicinity where he was working at the time, and [Applicant] does not challenge the propriety of the traffic stop. Officer Graham testified that after he arrived at the scene and the occupants were ordered from the car, he spotted marijuana in plain view on the front floorboard of the vehicle, and as the trial court found, videotape evidence played outside the jury's presence corroborated Graham's testimony. In addition, Officer Cole testified that once the occupants were outside the car, he saw a magazine clip in plain view on the back seat. The officers' observation of the magazine clip, when considered with the report of suspicious activity and videotape evidence, was sufficient to establish exigent

circumstances to justify searching the vehicle. See State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct.App.1995) (upholding a warrantless search of a vehicle in which police agents observed a handgun on the floor before arresting the occupants and stating the standard for a warrantless search as “a justifiable determination, based on the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved”)[.]

State v. Tynes, 402 S.C. 211, 217–18, 740 S.E.2d 512, 515 (Ct. App. 2013). Therefore, the issue was clearly preserved and affirmed on the merits on appeal. Applicant has failed to demonstrate what, if anything, Counsel could have done differently to obtain a different outcome. Accordingly, Applicant has failed to prove deficiency.

Furthermore, Applicant has failed to demonstrate there is a reasonable probability that the result of the proceeding would have been different. The trial judge denied the motion to suppress and the Court of Appeals affirmed. Applicant has made no showing that there is a reasonable probability the trial judge would have suppressed the evidence had some other argument been made, nor has he shown what that argument could have been. Applicant has failed to satisfy his burden of proving prejudice. Accordingly, this allegation is denied.

*Advice not to testify*

Applicant presented testimony in a cursory fashion concerning Counsel’s advice not to testify. Out of an abundance of caution, this Court addresses the merits of this allegation. Applicant has failed to show deficiency or prejudice with respect to this allegation. Applicant testified Counsel told him that if he did not testify, Counsel would have last argument. Applicant stated he responded to Counsel that was good because he did not want to testify. Applicant again confirmed at the PCR hearing, he did not want to testify at trial. Applicant has failed to show that Counsel actually discouraged him from testifying so that he could have last argument. Further,

the trial judge fully advised Applicant of his right to testify at trial. Applicant chose not to testify and still affirms he did not wish to testify. In addition, Applicant presented no evidence at the evidentiary hearing concerning what his testimony would have been. Accordingly, he has also failed to show prejudice with respect to this allegation, and it is denied and dismissed.

***Failure to ask DNA analyst why Applicant's DNA could not be excluded***

Applicant testified he thought Counsel should have asked the DNA analyst why he his DNA could not be excluded. This Court finds this allegation is entirely without merit. Counsel objected to the testimony of Katie Coy regarding the DNA analysis linking Applicant to the weapon. (Tr. at 735). He objected on the basis her testimony would be that Barrett was the major contributor and that Applicant could not be excluded as a possible minor contributor to the mixture. (Tr. at 736). The basis of Counsel's objection was that the DNA analyst should not be permitted to testify that Applicant was a possible contributor to the mixture. (Tr. at 735-48). The trial judge ruled that the witness could testify that she could not match him but she could not exclude him. (Tr. at 748). Applicant agreed the analyst testified he was not a scientific match. Applicant testified that he was not satisfied with Counsel's questioning of the DNA analyst.

This Court finds Counsel's questioning of the DNA analyst was based on sound, valid trial strategy, and that in his cross-examination, he pointed out that she was unable to conclude that Applicant's DNA was an actual match of the DNA found on the weapon. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))).

Accordingly, Counsel was not deficient for failing to ask Coy why Applicant could not be excluded.

Likewise, Applicant was not prejudiced by this alleged deficiency. One of the issues raised and addressed in Applicant's appeal was whether the trial judge erred in permitting Coy to testify that Applicant could not be excluded as a minor contributor to the DNA found on the gun used in the crime. Tynes, 402 S.C. at 215, 740 S.E.2d at 514-15. The court found no error in the trial court's admission of the evidence. Id. at 221, 740 S.E.2d at 517. The court also stated as follows:

Coy never said [Applicant] was a possible contributor. Moreover, when [Applicant] cross-examined her, *she acknowledged that he was not developed as a scientific match for the DNA that she tested*. Accordingly, we hold the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice and find no error in the trial court's admission of this evidence.

Id. For the same reasons articulated by the Court of Appeals, this Court finds Applicant has failed to demonstrate that but for the alleged error, there is a reasonable probability the outcome would have been different. To the contrary, Counsel's question was beneficial rather than harmful to Applicant because it highlighted the fact that he *was not* a match. If Counsel had asked the DNA analyst why she could not exclude Applicant, her testimony would have been exactly that which Counsel sought to exclude. Accordingly, this Court finds Applicant has failed to demonstrate prejudice with respect to this allegation. Therefore, this allegation is denied and dismissed.

#### IV. CONCLUSION

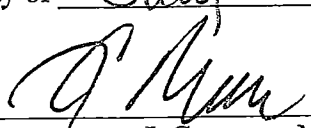
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

#### IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 7<sup>th</sup> day of July, 2017.

  
\_\_\_\_\_  
THE HONORABLE J. CORDELL MADDOX, JR.  
Presiding Judge  
Fifteenth Judicial Circuit

Anderson, South Carolina

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FOR THE FIFTEENTH JUDICIAL CIRCUIT  
COUNTY OF Horry. )

Mario Tynes, ) Case No.: 2014-CP-26-01211  
S.C.D.C. No. 340936, )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

**ORDER TO ALTER/AMEND  
ORDER OF DISMISSAL**

RENEE M. ELVING  
CLERK OF COURT  
HORRY COUNTY, SC

2018 NOV - 7 AM 9:23

HORRY COUNTY

This matter comes before the Court by way of a motion to alter or amend filed by Mario Tynes ("Applicant") on August 4, 2017. Respondent filed a return conceding the need to amend the Court's Order of Dismissal filed July 14, 2017, and submitted a proposed amendment to the Court for consideration. Upon review of the proposal and upon the consent of the parties, the Court hereby **GRANTS** the motion to alter or amend, and amends the Order of Dismissal filed July 14, 2017, to include the additional findings of fact and conclusions of law set forth below:

**Failure to suppress evidence recovered due to false report**

Applicant alleges Counsel was ineffective in failing to object seek suppression of evidence recovered from the vehicle stop because it was based on false statements provided by witness Don L. Gause. "The Fourth Amendment permits brief investigative stops . . . when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" Navarete v. California, 572 U.S. 393, 396 (2014) (quoting United States v. Cortez, 449 U.S. 411, 417-18 (1981)); see also State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007) (quoting State v. Butler, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000)) ("The police . . . may also stop and briefly detain a vehicle if

they have a reasonable suspicion that the occupants are involved in criminal activity.”). “The ‘reasonable suspicion’ necessary to justify such a stop ‘is dependent upon both the content of information possessed by police and the degree of reliability.’” Id. at 397 (quoting Alabama v. White, 496 U.S. 325, 330 (1990)). Informants who are known and identifiable to law enforcement are generally more reliable than those who remain anonymous, as law enforcement can hold such individuals responsible for any falsehoods. Cf. United States v. Lawing, 703 F.3d 229 (4th Cir. 2012) (stating as much in the context of informants who report tips “face-to-face”).

“[T]he application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.” United States v. Leon, 468 U.S. 897, 908 (1984) (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). Real deterrent value is a necessary condition for the exclusion of evidence, and where suppression would fail to yield appreciable deterrence, exclusion is clearly unwarranted. Davis v. United States, 564 U.S. 229, 237 (2011) (citing United States v. Janis, 428 U.S. 433, 454 (1976); Hudson v. Michigan, 547 U.S. 586, 596 (2006)). “The analysis must also account for the ‘substantial social costs’ generated by the rule.” Id. (citing Leon, 468 U.S. at 907). “Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence.” Id. (citation omitted). “Our cases hold that society must swallow this bitter pill when necessary, but only as a ‘last resort.’” Id. (citing Hudson, 547 U.S. at 591). “For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.” Id. (citing Herring v. United States, 555 U.S. 135, 141 (2009); Leon, 468 U.S. at 910).

At trial, Dan Gause testified he placed a 911 call stating that he saw a vehicle occupied by five black males who were wearing all black clothing and waving guns. (Tr. 203-18). During

cross-examination by Counsel, Gause admitted that he did not actually see them waving guns, but he could tell they were concealing something and knew something was going on. (Tr. 211-13). Gause stated he did not lie, but that he saw them concealing something and he assumed it was a gun. (Tr. 213-14).

At the evidentiary hearing, Counsel William H. Monckton, IV, Esq. ("Counsel") recalled encountering the sudden change in testimony at trial and testified that he and co-defendant's counsel made note of the shift.<sup>1</sup> Applicant observed Counsel did not object to the playing of the 911 tape, which Counsel acknowledged, but explained he strategically considered the testimony in the context of something to argue to the jury. Confronted with the Court of Appeals opinion that the propriety of the traffic stop was not challenged at trial, Counsel offered that although the stop itself was not challenged, arguments were made that the evidence was the "fruit of the poisonous tree." Counsel continued and testified to his belief that where law enforcement reasonably relies on information given to them at the time, no matter how false that information may turn out to be, the stop made on suspicion raised by that information is valid.

On cross-examination, Counsel testified that, to his knowledge, law enforcement had no reason to doubt the veracity of Gause's report at the time of the 911 call and subsequent BOLO. Counsel noted that Gause never plainly admitted to lying, and explained that he does not typically confront a witness to make them admit they've lied, but instead simply tries to show what a witness didn't actually see or didn't actually say. Counsel offered that judges do not appreciate lawyers calling witnesses liars.

The Court finds no deficiency on the part of Counsel, nor any prejudice to Applicant. Counsel has no obligation to make baseless objections, and any such objection as here suggested

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<sup>1</sup> Counsel referred to "Mr. Wilson" at the evidentiary hearing, but both Ralph J. Wilson, Sr., Esq. and Ralph J. Wilson, Jr. Esq., represented co-defendant Lackey at trial. It is unclear whether Counsel was referring to senior or junior.

would have been overruled. The Court finds that law enforcement possessed a particularized and reasonable suspicion of criminal activity adequate to stop the vehicle based on the BOLO issued after Gause's report. There is no evidence to show anybody but Gause knew about the misleading character of Gause's statements until Gause offered inconsistent testimony at trial. Law enforcement acted in good faith reliance upon the report of criminal activity by an identifiable and known informant who could be held responsible for any falsehoods in his report. The Court also finds the application of the exclusionary rule would have been entirely inappropriate here. Because law enforcement had no knowledge of Gause's falsehood, but reasonably relied upon a detailed report by an identifiable informant, exclusion of evidence resulting from the traffic stop would serve no valid deterrent interest in support of the Fourth Amendment. Rather, the only thing it could deter would be prompt and timely action by law enforcement in response to reports of serious criminal activity. Put simply, it is in society's considerable interest that police do not hesitate and take seriously calls of reckless gunplay and the brandishing of weapons, and act accordingly. Because there would be no desirable deterrent effect, and because the costs to society would be extraordinarily high, the application of the exclusionary rule would be wholly inappropriate in the present case, and the objection would have been overruled. For all of these reasons, Applicant has failed to meet his burden as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

#### CONCLUSION

Based on all the foregoing, in addition to the findings set forth in the Order of Dismissal filed July 14, 2017, 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 reminds 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, 409 S.E.2d 395 (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. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 2 day of November, 2018.

  
\_\_\_\_\_  
J. CORDELL MADDOX, JR.  
Presiding Judge  
Fifteenth Judicial Circuit

Andy, South Carolina

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

MARIO TYNES, #340936,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE


The undersigned hereby certifies that a true copy of the **Order to Alter/Amend Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Tommy A. Thomas, Esquire**


**PO Box 88**

**Irmo, SC 29063**

This 8<sup>th</sup> day of November, 2018.

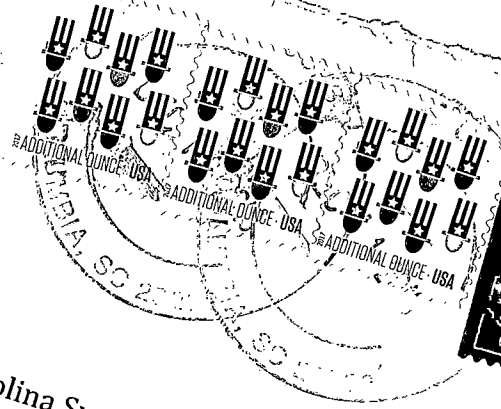
  
MALLORY MORRIS  
LEGAL ASSISTANT FOR RESPONDENT

SWORN to before me this 8<sup>th</sup> day of November, 2018.

  
Notary Public for South Carolina.

My Commission Expires: May 14, 2024

Tommy A. Thomas, P.C.  
ATTORNEY AND COUNSELOR AT LAW  
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IRMO, SOUTH CAROLINA 29063



The South Carolina Supreme Court  
Clerk, Daniel Shearouse  
P.O. Box 11330  
Columbia, SC 29211