THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

W. Jeffrey Young, Eleventh Judicial Circuit

Case No. 2007-CP-32-00907

Randall S. Tyler,..... Appellant,

v.

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

NOTICE OF APPEAL

Randall S. Tyler appeals the Orders of The Honorable Judge W. Jeffery Young, dated May 4, 2012 and March 13, 2013, dismissing Appellant's Petition for Post-Conviction Relief and denying Appellant's Motion for Reconsideration, respectively. Appellant received an executed copy of the order denying reconsideration on April 2, 2013.

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal, by depositing a copy of it in the United States by mail postage paid, on April 10, 2013, addressed to the following:

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Robert M. Dudek, Esq.
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SC Appellant Defense
P.O. Box 11433
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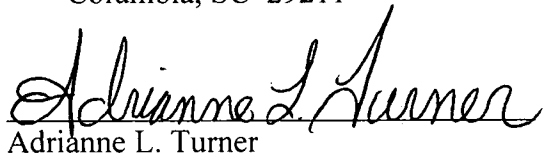

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April 10, 2013

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 608
Columbia, South Carolina 29201

Re: Randall S. Tyler v. State of South Carolina
2007-CP-32-00907

Dear Mr. Shearouse:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also, enclosed are the following:

(1) Proof of Service of the Notice of Appeal on the Respondent and The South Carolina Appellant Defense;
(2) A Copy of the Orders, which are to be challenged on appeal.

As this is a PCR case, the filing fee is waived. Please return a file-stamped copy of the pleadings in the enclosed, self-addressed stamped envelope. By copy of this correspondence, we are also filing the Notice of Appeal on the Lexington County Clerk of Court.

Thank you for your assistance with this matter.

Sincerely,

Adrianne L. Turner

Adrianne L. Turner

/tbc
Enclosures
cc: The Honorable Beth Carrigg, (w/Notice of Appeal)
J. Walter Whitmire, Esq. (w/encls.)
Robert M. Dudek, Esq. (w/encls.)

(2)

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) ELEVENTH JUDICIAL CIRCUIT
LMC
FILED
2013 MAR 28 A 11:46
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

Randall S. Tyler,) 2007-CP-32-00907
)
Applicant,)
)
vs.) **ORDER**
)
State of South Carolina,)
)
Respondent.)

This matter comes before the Court by way of Applicant's Motion to Alter or Amend Judgment pursuant to Rule 59, SCRCP. The Final Order of Dismissal in this matter was signed by me on May 4, 2012. A hearing into the matter was convened on August 15, 2012 at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Adrianne L. Turner, Esquire. Respondent was represented by Kaelon E. May, Esquire, of the South Carolina Attorney General's Office.

Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Applicant's motion and subsequent hearing on the matter, this Court is not persuaded to alter or amend the judgment. The previous order fully comports with the requirements of Rule 52(a) SCRCP.

IT IS THEREFORE ORDERED:

1. That the Applicant's motion is denied and dismissed.

AND IT IS SO ORDERED this 13 day of March, 2013

W. JEFFREY YOUNG
Presiding Judge
Eleventh Judicial Circuit

Sumter, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2007CP3200907

Randall S Tyler	State Of South Carolina Henry McMaster
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

_____

_____

INFORMATION FOR THE JUDGMENT INDEX Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

	2156	3/29/2013
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **n/a**, and a copy mailed first class or placed in the appropriate attorney's box on **29th day of March 2013**. to attorneys of record or to parties (when appearing pro se) as follows:

Adrianne LaVonne Turner PO Box 11844 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

John Walter Whitmire 1301 Heidt St. Columbia, SC 29204

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/wh

Beth A. Carrigg - Clerk of Court

Court Reporter

ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
	)	2007-CP-32-907
Randall S. Tyler, # 294029, Applicant, v. State of South Carolina, Respondent.	)	**ORDER OF DISMISSAL**

FILED

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 16, 2007. Respondent made its Return on or about June 14, 2007. An evidentiary hearing into the matter was convened on February 1, 2012 at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Adrianne L. Turner, Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Additionally, Applicant offered the testimony of Vickie Hallman (Ms. Hallman) and August Swarat, Esquire (Mr. Swarat). The State offered the testimony of Dennis bolt, Esquire (Mr. Bolt) Applicant's trial counsel. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against the Applicant, the Applicant's records from the South Carolina Department of Corrections, and the records from Applicant's prior appeal proceedings.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the June 2003 term of the Lexington County Grand Jury for criminal conspiracy (03-GS-32-2264), burglary-

1st degree (03-GS-32-2265) and murder (03-GS-32-226). Dennis Bolt, Esquire, represented him. On June 12, 2003, Applicant underwent trial, pursuant to which he was found guilty. He was sentenced by the Honorable Marc H. Westbrook to confinement for life for murder, life for burglary and five (5) years for criminal conspiracy.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Tyler, Op. No. 05-UP-274 (S.C. Ct. App. filed April 19, 2005). Applicant subsequently filed a Petition for Rehearing on July 6, 2005. The South Carolina Court of Appeals denied Applicant's motion by order dated August 29, 2005. Applicant subsequently filed a Petition for Writ of Certiorari in the original jurisdiction of the South Carolina Supreme Court, which was denied by order dated January 4, 2007.

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

1. Ineffective Assistance of Counsel

   a. failure to object to the highly prejudicial opinion testimony from a state's witness, who had not been qualified as an expert by the trial court;

   b. failure to object to the prosecution soliciting highly prejudicial opinion testimony from a state's witness who had not been qualified as an expert by the trial court;

   c. failure to object to the prosecution impeaching Applicant's exculpatory version of events that were told for the first time at trial that resulted in the prosecution crossing the Doyle-Ohio line that resulted in a denial of due process that denied Applicant his right to a fair trial;

   d. failure to object to the prosecutions improper closing that resulted in misquotes of law, lying to the jury about rules, and deliberately placing highly prejudicial remarks of misquoted evidence that resulted in prosecutorial misconduct and denied Applicant his right to a fair trial;

e. failure to object to the solicitor's improper closing comments on malice that bolstered the state's case;

f. failure to object to the trial court's malice instructions that in effect shifted the burden of proof;

g. failure to impeach state's witness, Donna Hutto, with her three prior inconsistent statements that contradicted her testimony given during trial and as a result denied Applicant his right to effective cross-examination;

h. failure to introduce Donna Hutto's three prior inconsistent statements into evidence that contradicted her testimony given during trial;

i. failure to object to prosecution pitting Applicant against alleged co-defendant who was not present during the trial, and thus the alleged statements of Travis Harsey could not be challenged;

j. failure to do any pretrial investigation, including, but not limited to SLED reports;

k. failure to introduce a non-testifying co-defendant Travis Harsey's written and complete oral statements into evidence when the state elicited only portions of Harsey's oral statements made to Detective Frier.

2. Denial of Due Process
3. Prosecutorial Misconduct

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

Ms. Hallman's Testimony

At the PCR hearing Ms. Hallman testified that at the time she testified at the Applicant's trial she was employed by the Lexington County Sheriff's Office as a Senior Investigator. Ms. Hallman testified that she took pictures of the Applicant's hands, that the photographs she took were entered into evidence at the Applicant's trial, and that the photographs entered at trial were colored. She

testified that she took the photographs labeled State's exhibit 18, 19, and 20. Ms. Hallman testified that she photographed the Applicant's hands only one time. Ms. Hallman testified that she was not qualified as an expert at the Applicant's trial. Ms. Hallman testified that it appeared the form in the gunshot residue kit for the subject John Marshall Hutto was not fully completed and that the form is folded into the kit for the trace department at SLED.

Mr. Swarat's Testimony

At the PCR hearing Mr. Swarat testified that he was the lead prosecutor for Applicant's case and that Mr. Marion Moses assisted him in prosecuting the Applicant. Mr. Swarat testified that the prosecution used the photographs taken at the scene and the blood left at the scene in trying to determine the source of the blood. He testified that the pictures taken of the Applicant's hands were taken nine to ten days after the homicide. Mr. Swarat testified that another exhibit that went with the color photographs labeled exhibits 3 and 5 were the ceiling tiles that had knuckle marks. Mr. Swarat testified that exhibits 1 and 2 showed the same abrasions on the Applicant's hands but that these photographs were not the same as the other photographs taken of Applicant's hands.

Mr. Swarat testified that Donna Hutto may have given statements to the police but that he could not recall. He testified that Donna Hutto was questioned about what took place the night of the incident, that he could not recall why Donna Hutto gave a second statement, and that Donna Hutto heard the argument between the victim and Applicant, that she ran to her brother's house and that Hutto's brother returned with her to the scene with a gun. Mr. Swarat testified that Donna Hutto had an issue with telling the police that her brother brought a firearm back to the scene but that this was not an issue with the facts of the case.

Mr. Swarat testified that with regard to the statement made by the state in closing that, "rules prevented the state from having the co-defendants tried together." (Tr. p.352, lines 5-10) he may have been referring to an evidentiary issue; that the two co-defendants were not tried together because they both gave statements pointing the finger at each other and that this was a Bruton issue. He testified that trying the two co-defendants together would have prevented the prosecution from going into the statements made by each co-defendant and that it was a strategic decision not to try the codefendant together. Mr. Swarat testified that Applicant's co-defendant gave two statements to police.

Applicant's Testimony

At the PCR hearing Applicant testified that with regard to the black and white photographs of his hands, that Applicant remembered when these photographs were taken, that they were not taken ten days after the homicide, but that they were taken on the day Applicant was arrested referring to Applicant's exhibit 3. Applicant testified that trial counsel should have objected to these photographs at trial. Applicant testified that trial counsel failed to object to Ms. Hallman's testimony at trial based on that she was not qualified as an expert. Applicant testified that Ms. Hallman's testimony at trial contained forty-eight references to "blood," and that this testimony was prejudicial.

Applicant testified that trial counsel failed to object based on Doyle v. Ohio and that Applicant has invoked his right to remain silent. Applicant testified that his co-defendant's entire statement given to police was not entered into evidence at trial and that only an excerpt of the statement was entered into evidence. Applicant testified that the state made improper comments concerning "malice" in the closing arguments (Tr. p.329), and that due to the fact that the jury was aware that Applicant either dealt drugs or engaged in drug use that the jury could conclude there was

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an unlawful act; and that Applicant was not trial for any drug charges. Applicant testified that trial counsel failed to object to the state's improper comments on malice during closing arguments. Applicant testified that trial counsel in his opening statement to the jury referenced the witnesses as having given multiple statements; that Donna Hutto was one of these witnesses; that trial counsel promised the jury these statements and then did not deliver; and that trial counsel did not cross-examine Donna Hutto and impeach her using her own statement. Applicant testified that Hutto's third statement lays out a timeline that does not match one of her previous statements and this would have been critical for the jury to hear.

Applicant testified that he met with trial counsel three to four times prior to trial, that counsel said Applicant's co-defendant would be at the trial but the co-defendant was not present at Applicant's trial. Applicant testified that he wrote letters to the South Carolina Bar Association and the presiding Judge prior to trial concerning counsel's performance, that Applicant never received a preliminary hearing, and that counsel did not prepare a defense. Applicant testified that SLED documents were not entered at trial, that the ballistics reports were inconsistent with each other, and that counsel failed to inform the jury that Hutto's brother had a gun. Applicant testified that counsel should have interviewed Hutto's brother, that Hutto's brother gave two inconsistent statements, and that counsel should have contacted Debra Harsey, who was the mother of Applicant's co-defendant. Applicant testified that his co-defendant's wife and brother all gave the police multiple statements and that counsel failed to interview these people. Applicant testified that counsel failed to interview James Williams, that counsel failed to obtain and/or review James Williams' statement and the tape of James Williams' statement.

Applicant testified that counsel failed to introduce his co-defendant's entire statement into evidence at trial. Applicant testified that trial counsel objected to the hearsay testimony. Applicant testified that his co-defendant never said, "hid," as reflected in his statement, and that the jury needed Harsey's entire statement to see that Harsey never hid the car at Applicant's direction. Applicant testified that Harsey's statement includes information about his brother and how the gun was disposed of, that the statement would have refuted the state's theory, and that in his statement Harsey denied the conspiracy.

Mr. Bolt's Testimony

At the PCR hearing trial counsel testified that he has practiced law for thirty-eight years, that he started out practicing law as a prosecutor, and that sixty percent of his practice was in the area of criminal law. Counsel testified that he was the second attorney on the Applicant's case and that he was retained to represent Applicant. Counsel testified that he met with Applicant at least eight to ten times if not more; that counsel discussed with Applicant the indictments, the charges, the elements of the offenses Applicant was charged with; the possible punishments for the charges; and the Applicant's version of the events. Counsel testified that the problem with Applicant's initial statement to the police, in which Applicant told the police to look at his brother, was that Applicant made this statement on his own volition as he was leaving and being escorted by the police.

Counsel testified that Applicant's blood and DNA was found at the murder scene, that Applicant informed counsel the police planted said blood evidence, and that counsel explained to Applicant the planting of evidence could not be used as a defense for Applicant. Counsel testified that Applicant was offered a plea to manslaughter but could not recall the term of years offered. Counsel testified that he explained to Applicant, Applicant's right to testify at trial and not testify,

that they could argue mere presence at trial, and that ultimately counsel decided upon the best defense which was presented at trial. Counsel testified that he reviewed the SLED documents, that three shell casings were found and traced to the pistol, that the bullets were fragmented, and that counsel received all the discovery materials from the state. Counsel testified that he reviewed all the discovery materials with Applicant, that Applicant provided counsel with potential witnesses, but that there were no witnesses who could vouch for the Applicant's whereabouts when the victim was killed.

Counsel testified that he did speak with James Williams, that the defense presented was mere presence and that there was a discrepancy in the time frame. Counsel testified that he spoke with the Applicant's family in preparation for trial, that counsel reviewed the ballistics report, but that counsel could not recall whether he reviewed the ballistics report with Applicant. Counsel testified that he had sufficient time to prepare for Applicant's trial.

III. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in their 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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

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, Id. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced 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.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the exhibits introduced at the PCR hearing, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

1. Ineffective Assistance of Counsel

a. & b. Failure to object to prejudicial opinion testimony from a state's witness who had not been qualified as an expert by the trial court

Applicant asserts that trial counsel was ineffective for failing to object to the state's solicitation of blood testimony by Vickie Hallman, who was not allowed to give expert witness testimony without having been qualified as an expert by the trial court. At the PCR hearing, Applicant testified that Ms. Hallman's trial testimony included testimony concerning blood spatter, transferred blood, and ninety-degree angled blood spatter. Mr. Bolt testified that he did not object to Ms. Hallman's trial testimony concerning blood spatter because Ms. Hallman was a forensic scientist and testimony concerning blood spatter was proper from a forensic scientist. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds that Mr. Bolt articulated valid strategic reasons for not objecting to Ms. Hallman's trial testimony concerning blood spatter. This Court accepts Mr. Bolt's reasoning as to why he did not object. Furthermore, there has been no showing by the Applicant that the outcome of his trial would have been different if this objection had been made based upon his cross-examination and evidence adduced at trial. This Court finds that Applicant has failed to how that he was prejudiced by trial counsel's failure to object. Therefore, this allegation is denied and dismissed.

c. Failure to object based on Doyle v. Ohio

Applicant asserts that trial counsel was ineffective for failing to object to the prosecution impeaching Applicant's exculpatory version of events that were told for the first time at trial that resulted in the prosecution crossing the Doyle-Ohio line that resulted in a denial of due process that denied Applicant his right to a fair trial. Applicant directs this Court's attention to pages 299-300 of

the trial transcript. In Doyle v. Ohio, 426 U.S. 610 (1976), the Supreme Court held that the prosecution could not attempt to impeach a defendant's exculpatory story, told for the time at trial, by cross-examining him about his failure to the story after receiving Miranda warnings. However, the Court also reasoned that this prohibition did not apply in situations where the defendant's post-arrest silence was not the result of Miranda warnings. Miranda v. Arizona, 384 U.S. 436 (1966). The Constitution does not prohibit the use for impeachment purposes a defendant's silence prior to arrest or after arrest if no Miranda warning were given. Such silence is probative and does not rest in any implied assurances by law enforcement authorities that it will carry no penalty. Brecht v. Abrahamson, 507 U.S. 619 (1993). Mr. Bolt testified that he did not object because Applicant invoked his right to remain silent, but that Applicant then waived his right to remain silent by way of Applicant's self-initiated comment about his brother. Mr. Bolt also testified that Applicant waived Miranda with attorney Simmons present.

Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds that Mr. Bolt articulated valid strategic reasons for not objecting based on a violation of Doyle v. Ohio. This Court accepts Mr. Bolt's reasoning as to why he did not object. Furthermore, there has been no showing by the Applicant that the outcome of his trial would have been different if this objection had been made based upon his cross-examination and evidence adduced at trial. This Court finds that Applicant has failed to how that he was prejudiced by trial counsel's failure to object. Therefore, this allegation is denied and dismissed.

d. & e. Failure to object to solicitor's improper closing comments

Applicant asserts that trial counsel was ineffective for failing to object to the prosecution's improper closing that resulted in misquotes of law, lying to the jury about rules, and making highly prejudicial remarks of misquoted evidence. Applicant directs this Court's attention to pages 353-365 of the trial transcript. Mr. Bolt testified that in regards to Applicant's allegation that the solicitor encouraged the jury violate the 'Golden rule,' that he did not recall objecting to the state's closing, that he usually objects to any improper closing arguments, and that he probably did not object because he did not find the statement objectionable. Mr. Bolt testified that he did not object to the 'rules' comment by the solicitor (Tr. p.353, lines5-15) because Applicant's defense was to put Applicant's absent co-defendant, Travis Harsey, on trial; to establish the gun was Harsey's; and rely on the fact that the state would have to explain why Harsey was not at the Applicant's trial. Mr. Bolt testified that he did not object to the solicitor's statement that "finding Applicant innocent would be an insult to common sense" (Tr. p.356, lines14-20), because he did not find the statement objectionable and that there was no ground on which to base an objection. Additionally, Mr. Bolt testified that he did not object to what Applicant alleged to be a misquote of the law when the solicitor told the jury they have would have to believe everything that Applicant said to find Applicant not guilty, because Mr. Bolt did not find the comment objectionable. Mr. Bolt testified that sometimes whether to object during closing arguments is a matter of trial strategy and that he does not typically shy away from objecting during closing arguments when it is proper. Counsel further testified that he did not object to the solicitor's closing argument concerning "malice" (Tr p.329) because there was no basis on which to object. Counsel testified that the statement did not shift the burden of proof, that the intention to commit an illegal act had nothing to do with drugs as Applicant

was not on trial for any drug charges, and that Applicant was mistaken as to what the law on malice actually means. Counsel testified explaining that the solicitor never specified the 'unlawful' or 'intentional' act in his comments on malice and that the state is not required to specify the unlawful act they are referring to.

This Court finds that the solicitor's closing arguments must be viewed in the context of the entire record. McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). While the State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence, Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); to be entitled to a new trial for improper closing arguments Applicant must show "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001). After reviewing the entire record, this Court does not find any comments by the solicitor so infected the trial that a new trial is warranted. The solicitor's arguments were proper comments on the facts but, even if improper, the arguments did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process." See Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001). This Court is not convinced that the solicitor's arguments even reach the level of being improper, but certainly there is no evidence that Applicant was prejudiced. Additionally, this Court does not find that Mr. Bolt was ineffective for failing to object. He provided a rational explanation was to why he did not object and this Court accepts Mr. Bolt's reasoning as to why he did not object. Therefore, these allegations are denied and dismissed.

f. Failure to object to the trial court's malice instruction

Applicant asserts that trial counsel was ineffective for failing to object to the trial court's malice instruction that in effect shifted the burden of proof. Applicant directs this Court's attention to

pages 374-375 of the trial transcript. Counsel testified that he did not object to the court's malice instruction because there was nothing objectionable about the instruction. Counsel testified that criminal intent was charged, to the extent malice incorporates intent. The South Carolina Court of Appeals held that evidence that Applicant told James Williams Applicant was mad at the victim and that Applicant and Harsey conversed in low tones in the back room with a gun pointed to the presence of malice. State v. Tyler, Op. No. 05-UP-274 (S.C. Ct. App. filed April 19, 2005). The Court of Appeals further held that the evidence that Applicant wore a mask and ordered the victim into the house, and that Applicant's blood was found on the ceiling tiles tended to show motive and a preconceived plan. Id. The Court of Appeals found that there was overwhelming evidence of Applicant's guilt as to all three charges. Id.

"In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2003). "A jury charge is correct if, when the charge is read as whole, it contains the correct definition and adequately covers the law." Id. at 318, 577 S.E.2d at 464. A jury charge which is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). "[T]he trial court is required to charge only the current and correct law of South Carolina." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "The substance of the law is what must be charged to the jury, not any particular verbiage." Adkins, 353 S.C. at 318–19, 577 S.E.2d at 464. If a jury charge given at trial is a correct statement of law, trial counsel is not ineffective for failing to object. Toomer v. State, 339 S.C. 434, 529 S.E.2d 719 (2000). This Court finds that trial counsel articulated valid

reasons for not objecting to the trial court's instruction on malice. This Court agrees with trial counsel and finds that the trial court's instruction on malice contained the correct definition and adequately covered the law. This Court finds that trial counsel was not ineffective for failing to object to the trial court's instruction on malice; therefore, this allegation is denied and dismissed.

g. & h. Failure to utilize Donna Hutto's statements at trial

Applicant asserts that trial counsel was ineffective for failure to impeach a state's witness, Donna Hutto, with her three prior inconsistent statements that contradicted her testimony given during trial and as a result denied Applicant his right to effective cross-examination. Applicant also asserts trial counsel was ineffective for failing to introduce Hutto's statements into evidence. Counsel testified that Donna Hutto's statements were very incriminating to Applicant and contained a lot of incriminating information concerning Applicant, and that counsel did not want to enter Hutto's statements into evidence because they did not have a high impeachment value. Counsel testified that he could not introduce Hutto's statements until she testified and that Hutto was a very compelling witness for the state. Counsel testified that he discussed the feasibility of what Hutto could see through the house with Applicant, that Applicant claimed Hutto could not see what she claimed to see from where she claimed to have stood, and that counsel did not visit the victim's house to stand in the same place as Hutto did. Counsel testified that Hutto's testimony was that she was looking out the kitchen window when she saw Applicant walking into the garage, that Hutto identified Applicant's voice, and that Applicant had a friendly ongoing relationship with Hutto and the victim. Counsel testified that Applicant claimed he was in the garage, so it would have been hard to incorporate Applicant's defense with trying to establish that Applicant was not in the garage, and that this strategy would have given Applicant no credibility with the jury. Additionally, counsel

testified that with regards to his opening statement (Tr. p.57, lines1-9), this was not a promise made by counsel to the jury that the defense would introduce statements from the witnesses.

Strickland requires that trial counsel be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Id. 466 U.S. 668. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds that trial counsel articulated valid strategic reasons for not introducing Hutto's statements into evidence. This court accepts counsel's reasoning and finds that there has been no showing by the Applicant that the outcome of his trial would have been different if counsel had introduced the statements into evidence. This Court finds that Applicant has failed to show counsel's performance in this respect was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

As to Applicant's assertion that counsel was ineffective for failing to impeach Hutto with her statements, this Court finds that Applicant failed to meet his burden of proof. The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). Trial counsel testified that he was not going to beat up on Hutto (the victim's widow) in front of the jury and that Hutto's statements did not have a high impeachment value. This Court finds that Applicant has not shown that trial counsel was deficient in that choice of tactics or any resulting prejudice. Accordingly, the Applicant has not shown that a different approach

to cross-examination would have been beneficial to the defense; therefore, this allegation is denied and dismissed.

i. Failure to object to prosecution pitting Applicant against co-defendant

Applicant asserts that trial counsel was ineffective for failing to object to the prosecution's pitting of Applicant against his alleged co-defendant, who was not present during the trial, and thus the alleged statements of Travis Harsey could not be challenged. Applicant directs this Court's attention to page 303, lines24-25 of the transcript. Counsel testified that 'pitting' has to do with witnesses commenting on the veracity of another witness, a witness versus a witness, and that 'pitting' is not applicable to co-defendants against each other. Counsel testified that he did not object based on improper pitting of co-defendants, one of whom was not present, because that was not a proper objection. It is improper to cross-examine in a way that requires a witness to attack another witness's credibility. Burgess v. State, 329 S.C. 88, 495 S.E.2d 445 (1998) ("No matter how a question is worded, anytime a solicitor asks a defendant to comment on the truthfulness or explain the testimony of an adverse witness, the defendant is in effect being pitted against the adverse witness. This kind of argumentative questioning is improper.")

Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds that trial counsel articulated valid strategic reasons for not objecting to the solicitor's cross-examination of Applicant on the grounds of improper pitting of witnesses. The record reflects that Travis Harsey was not a witness at Applicant's trial. This Court accepts counsel's reasoning and finds that there has been no showing by the

Applicant that the outcome of his trial would have been different if counsel had made such an objection. This Court finds that Applicant has failed to show counsel' performance was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

j. Failure to conduct pre-trial investigation

Applicant asserts that trial counsel was ineffective for failing to do any pre-trial investigation, including but not limited to SLED reports. At the PCR hearing Applicant alleged that counsel did not prepare a defense and that the SLED documents were not entered into evidence at trial. Applicant also alleged that counsel failed to contact and interview the following individuals: Johnny Hutto, Travis Harsey's wife, Sammy Harsey, James Williams, and Travis Harsey's mother. Counsel testified that he met with Applicant eight to ten times prior to trial and that counsel discussed with Applicant the charges, discovery materials, and possible defenses. Counsel testified that he received and reviewed the SLED documents prior to trial. Additionally, Counsel testified that he received and reviewed all the statements made by Travis Harsey's wife, Sammy Harsey (Travis Harsey's brother) and James Williams, and that these individuals were represented by attorneys. Counsel testified that he did not interview Hutto's brother, but that he did review his statement. Counsel testified that none of the Harsey's statements were beneficial to Applicant's defense. Counsel testified that Applicant never asked counsel about matching Applicant's hands to the knuckle impressions found in the ceiling tiles. Counsel testified that he interviewed the Detectives who investigated Applicant's case and learned that someone had discovered money at the victim's house in the ceiling, that someone tried to get the ceiling tiles loose to obtain the money, and that this resulted in the knuckle marks in the ceiling tiles. Counsel testified that he asked Applicant about the blood found on the ceiling tiles, that Applicant told counsel the police must have planted his blood, and that Applicant denied trying

to steal the money from the ceiling.

"Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). To establish counsel failed to adequately prepare for trial, Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Here, the Applicant could not point to any specific matters or evidence that counsel failed to discover that would have been likely to have any outcome more favorable to the Applicant.

The Applicant did not produce any witnesses or offer any other evidence from which this Court could conclude that the outcome of the case would likely have been different, had that evidence been developed. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). The Applicant presented no such witness at the PCR hearing. This Court finds that Applicant has failed to show counsel's performance was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

k. Failure to introduce Applicant's co-defendant's full statement into evidence

Applicant asserts that trial counsel was ineffective for failing to introduce a non-testifying co-

defendant's. Travis Harsey's, complete written and oral statements into evidence when the state elicited only portions of Harsey's oral statements made to Detective Frier. Counsel testified that he did not introduce Travis Harsey's entire statement into evidence because it reflected that Applicant was mad at the victim, that Applicant had paranoia regarding the victim's relationship with Applicant's wife, and that Applicant had the gun. Counsel also testified that Travis Harsey stated in his second statements that "he lied" and that while it is disparaging to lie counsel could not imagine anything more incriminating to Applicant than Travis Harsey's statement. Counsel testified that he did object to the state's 'cherry-picking' of lines from Harsey's statement; however the trial court overruled his objection. Counsel testified that with regard to Harsey's initial statement dated July 16, 2002, in which Harsey said "told Applicant come over if he wanted $2,000," that if the state's theory was that Applicant needed money then the statement would have been somewhat relevant; however counsel testified that this was not the state's theory. Counsel testified that he explored the feasibility of calling Applicant's co-defendant, Travis Harsey to testify, but that counsel believed Harsey was going to stick to his statement and that Harsey's testimony was going to be consistent with his statement.

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court has reviewed the statements of Travis Harsey presented by Applicant at the PCR hearing. This Court agrees with counsel in that Travis Harsey's statements were very damaging and incriminating to Applicant. Trial counsel articulated valid strategic reasons

for not entering the statements into evidence at trial. The Applicant has not shown that counsel was deficient in that choice of tactics. This Court finds that there has been no showing by the Applicant that the outcome of his trial would have been different if counsel had introduced the statements into evidence. This Court finds that Applicant has failed to show any resulting prejudice; therefore, this allegation is denied and dismissed.

2. Prosecutorial Misconduct

The Applicant has alleged prosecutorial misconduct in the following instances: by taking part of the investigatory apparatus; by making improper comments during closing arguments; and Brady violations. It is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). This Court has already found that the solicitor's comments during closing argument were not improper and certainly did not so infect the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001). As to Applicant's allegation of a Brady violation, this Court finds this allegation is without merit. Trial counsel testified that he did not have any issues or problems obtaining all the discovery materials from the state. The Applicant provided no evidence or testimony showing that the state withheld any evidence from the defense in this case at the PCR hearing. In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of

the proceeding would have been different." Id., 434 S.E.2d at 268. Accordingly, the Applicant has failed to meet his burden of proof, therefore this allegation is denied and dismissed.

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

V. CONCLUSION

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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the

obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

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 Respondent

AND IT IS SO ORDERED this 4 day of May, 2012.

W. Jeffrey Young
Presiding Judge

Sumter, South Carolina

FILED

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
	)	
	)	2007-CP-32-907
	)	
RANDALL S. TYLER, #294029	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Order of Dismissal** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Adrianne L. Turner, Esquire
Post Office Box 11844
Columbia, SC 29211

DATED this 16th day of May, 2012.

Lena Pelishenko

Lena Pelishenko, Legal Assistant
For Respondent

FILED

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2007CP3200907

Randall S Tyler	State Of South Carolina Henry McMaster
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP: ☐ Rule 41(a), SCRCP (Vol. Nonsuit):
☐ Rule 43(k), SCRCP (Settled): ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP: ☐ Bankruptcy:
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award: ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed: ☐ Reversed: ☐ Remanded: ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order: (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

	2156	5/18/2012
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **17th day of May 2012**, and a copy mailed first class or placed in the appropriate attorney's box on **17th day of May 2012**, to attorneys of record or to parties (when appearing pro se) as follows:

Adrianne Turner Hedrick Gardner Kincheloe & Garofalo P.O. Box 11267 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

Kaelon E May Office Of The S.C. Attorney General Post Office Box 11549 Columbia, SC 29201

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/wh

Beth A. Carrigg - Clerk of Court

Court Reporter

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

RANDALL S. TYLER, #294029, Applicant.

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

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

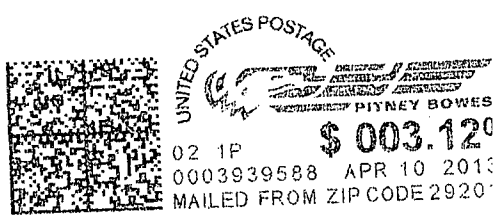
Adrianne L. Turner, Esquire
P.O. Box 11844
Columbia, SC 29211

This 30th Day of May, 2012.

Lena Pelishenko
Legal Assistant for Respondent

SWORN to before me this 30th Day of May, 2012.

Notary Public for South Carolina.
My Commission Expires: 9/25/19



BOYKIN & DAVIS, LLC
Attorneys and Counselors at Law

POST OFFICE BOX 11844
COLUMBIA, SOUTH CAROLINA 29211

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box ~~606~~ 11330
Columbia, South Carolina 29201