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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

R. Markley Dennis, Jr., Circuit Court Judge

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APR 30 2013

S.C. Supreme Court

RANDALL SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213702

APPENDIX

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1 A. Yes. My wife had told me over the telephone that
2 if I would just say that I was sorry in a letter that she
3 would have the charges dropped against me. I wrote those
4 letters and then later I wrote the letters explaining.

5 Q. Who did you write those letters to.

6 A. To my wife.

7 Q. And to your knowledge, what did she do with the
8 letters?

9 A. She eventually turned them over to law
10 enforcement apparently in 2004.

11 Q. And when did you and your attorney first learn
12 that your wife had turned the letters over the law
13 enforcement?

14 A. That Sunday before the trial was supposed to
15 begin in October, he got 59 pages of letters faxed to my
16 father's home and he told me we had to talk.

17 Q. When you say the trial was scheduled in October,
18 what year?

19 A. Of 2005.

20 Q. And when Mr. Creech received the letters on the
21 eve of trial, what did he do the next day in court?

22 A. He went to court and asked for a continuance.

23 Q. Was that continuance granted?

24 A. It was granted until the following month to
25 November 8th, I think, was the trial start date.

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1 Q. What did you want him to do?

2 A. I didn't really know what to do because I wasn't
3 a lawyer but I wish now he had asked for an exclusion
4 rather than go ahead with trial and proceed with Brady
5 because they had not been in evidence for 10 days or at
6 least we had not seen them for 10 days.

7 Q. And did Mr. Creech move to exclude the letters
8 and proceed to trial?

9 A. No, he didn't. He just asked for a continuance
10 to the best of my knowledge.

11 Q. How would the trial or your case had been
12 different if those letters had been excluded?

13 A. I think if they were excluded -- I think they
14 definitely damaged my credibility in the first place. I
15 think credibility was the big issue in this case anyway
16 and I think they damaged my credibility because they were
17 taken out of context. There were other at least five
18 letters that I wrote to my wife explaining what I was
19 sorry about. The prosecution never turned those over.

20 I asked Mr. Creech to get those. He never
21 got them. The woman who did the handwriting analysis told
22 me about those and he never asked for those. Plus there
23 was a letter that had at my first bond hearing and said --
24 this was a video court and I didn't know that I could
25 actually speak to Mr. Creech -- she claimed I stated in

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1 all my letters that I was going to kill her and my
 2 children when I got out on bond and I never wrote such a
 3 letter. I believe that was a forgery.

4 The prosecutor asked her not to look at the
 5 other letters that she had turned over and this was after
 6 the continuance. This was in mid-October.

7 Q. Okay. You said that she wrote this letter in
 8 response to your wife's letters?

9 A. Letters and telephone calls as well. We spoke on
 10 the phone fairly frequently.

11 Q. Did your wife admit during trial that she had
 12 written you hoping you would write her back with a
 13 confession?

14 A. Yes. On her cross-examination from Mr. Creech
 15 she said she was hoping that he would admit what he done I
 16 think is the way she stated it. She wanted me to admit
 17 what she alleged that I did.

18 Q. Did you schedule a meeting to meet with your
 19 wife?

20 A. When I was arrested?

21 Q. Yes.

22 A. Yes, sure did.

23 Q. Where did you and she decide to meet?

24 A. First at Waffle House and I told her I didn't
 25 want to meet at Waffle House because it was not a place

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1 for us a talk and she suggested Perkins and that was where
2 I was to meet her but I met a SWAT team and two federal
3 marshals instead. That was Christmas Eve 2005.

4 Q. To your knowledge, who did the police find out
5 that you would be at Perkins at a certain time?

6 A. She stated in her direct testimony that she had
7 contacted them. She basically was working as an agent of
8 the State in my opinion, but she said that they told her
9 to let them know or try to get me back in the State, I
10 think that's how she put it in her testimony?

11 Q. Did Mr. Creech make a motion to exclude your
12 statements based on the fact that they gotten from your
13 wife that you believe was working as the State's agent?

14 A. He didn't ask for exclusion at all that I know of
15 nor did he ask for a Jackson Denno or Mesaih Hearing.

16 Q. In your petition you also address some evidence
17 that Minor had a motive to testify falsely.

18 A. Yes.

19 Q. Let's talk about that a little bit. What do you
20 mean when you listed that in your petition?

21 A. I believe that my wife was blackmailing Minor
22 to make these allegations against me. I don't believe
23 that just one day he woke up and said, well, I'm going to
24 try to put my uncle Randy in some horrible situation like
25 this with these accusations. I think there was some

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1 motive for him to lie. It had to be something to coerce
2 him.

3 Q. Do you have any evidence of a motive?

4 A. Well, one of the things that was excluded in the
5 letters that was redacted was the fact that I wrote to my
6 wife that Minor had confided in me that he was afraid
7 his father was going to find out that he was gay. I had
8 mentioned that in the letter. He was crying and this was
9 about a week before I was arrested -- allegations I should
10 say -- about a week before the allegations, he was crying
11 one night totally inconsolable saying he was afraid that
12 his father was going to find out that he was gay.

13 Something had happened but he didn't tell me
14 what it was.

15 Q. You mentioned earlier that that statement was in
16 a letter of yours?

17 A. Yes, that was redacted in the letters that was
18 presented to the court.

19 Q. How did that get redacted?

20 A. They went through round and round of discussions
21 as to what was to be redacted. Mr. Creech asked that it
22 be left in, but you know it went to motive for lying, I
23 think would be under Lane or Schmidt because it's parallel
24 to those cases, but especially Lane it's parallel.

25 Q. Ultimately, was there an agreement to keep that

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1 portion of the letter out?

2 A. Yes, ma'am. Mr. Creech eventually conceded to
3 let that part, without terribly much argument, conceded to
4 let that -- whatever Finley, Lane, Robinstein, Schmidt,
5 those all are actually admissible evidence because it goes
6 to bias and motive to lie.

7 Q. Did you testify about this information and
8 Minor motive to testify falsely?

9 A. He told me I couldn't testify to that since they
10 had the Rape Shield Law that I couldn't mention that
11 because of that. As I said Lane and Schmidt in particular
12 that was Rape Shield issue with those cases and I didn't
13 know any better. I was not a lawyer but apparently he
14 didn't know about Lane and Schmidt either. That testimony
15 should be able to be given. I felt like I wasn't able to
16 confront my witness with the evidence in my favor.

17 Q. Do you believe that that changed the outcome of
18 your trial?

19 A. I think most definitely. The fact that I had no
20 way to present that Minor had a motive to lie was
21 extremely damaging. Like I said this kid didn't just wake
22 up one day and decide that he was going to get me in a
23 horrible situation here. The prosecutor brought up motive
24 to lie in her close summation. There was no evidence in
25 the trial one way or the other to lie but she said in her

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1 closing statement who has more reason to lie to you, a man
2 who is fixing to face a conviction or someone who had to
3 tell the most embarrassing story of his life.

4 Q. Did your wife also testify?

5 A. Yes, ma'am, she did.

6 Q. Do you have any evidence -- you also listed you
7 had some evidence she had a motive to lie but it was not
8 presented at trial?

9 A. Right. I had told Mr. Creech about LA Moore who
10 was a very close friend of mine and another photographer.
11 That's what I did for a living at the time. We did a lot
12 of work together. There were actually three different
13 women that I worked with very close with and I spent a
14 good bit of time with them but I was not having an affair
15 with them and I think my wife was honestly thinking I was
16 having an affair. I know my son in particular accused me
17 of having an affair with Laurin Moore, LA Moore.

18 Q. Did you discuss this with your attorney?

19 A. Yes, I did. And he never bothered to contact
20 them. Laurie had charged her phone number and I had no
21 way to reach her. We had a two year old phone booth in
22 Greenville County and I was unable to contact her. I
23 can't find her now. The last I heard she was on
24 disability and her mother and her father both passed away.
25 That was my only link to try to find her.

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1 Q. In your petition, you also refer to something
2 that your attorney made during opening statement. Tell
3 the Court about that.

4 A. I don't know verbatim what he said, but he said
5 Minor the person in this case, the victim in this case,
6 that's the part I remember exactly. That's on Page 56 of
7 trial transcript. He said the victim in this case,
8 referring to Minor it's an indication basically that he
9 believed that Minor was raped. I was accused of rape, I
10 was the only one that was there, the only one accused, so
11 by calling him a victim I think that prejudiced me. It
12 showed that my own advocate didn't believe in me.

13 Q. You also in your petition discussed some remarks
14 that the State's attorney made in her closing argument.
15 Tell the Court a little bit about that.

16 A. Right. In her summation she referred to me as a
17 criminal, twice, and Mr. Creech objected the same time she
18 did so. Then after the jury instructions, Mr. Creech
19 objected -- excuse me. Rather than object, he asked for a
20 motion for mistrial. The Judge in his statement said I'm
21 going to respectfully deny your motion; I think I gave a
22 curative instruction when I ruled on the objection. That
23 was Page 383 of the transcript.

24 However on Page 363 is where they actually
25 took place, the Judge did not give a curative instruction

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1 nor did he rule on the objection, so essentially it ended
2 up being a tacit judicial opinion that the jury basically
3 felt like the Judge agreed with the prosecutor that I was
4 a criminal.

5 Q. On Page 383 of the transcript, did Judge Hill
6 give a curative instruction?

7 A. No. The jury was already out to deliberate.

8 Q. Was there any curative instruction given by the
9 Judge?

10 A. No, ma'am. He didn't even rule on the objection.
11 Like I said it's like a tacit approval of what she said.

12 Q. Did Mr. Creech point out to the Court there was
13 no curative instruction made?

14 A. No, ma'am. He didn't bring that to the Judge's
15 attention, however, moments later the prosecutor brought
16 to the Judge's attention that I had pled guilty to his
17 charge to the jury and in fact I had never pled guilty.
18 So he brought the jury back in the cure that. Had
19 Mr. Creech asked the Judge to cure that then, that would
20 have been a chance for the Judge to cure that error. I
21 think it greatly damaged my credibility.

22 Q. Was there also some evidence of DNA or condom
23 that did not come into evidence at your trial?

24 A. There sure was. My wife brought a condom into
25 the Law Enforcement Center apparently before I was even

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1 arrested from what I read in the transcript. At any rate
2 I knew whose DNA was on it, it was my wife's sister's
3 daughter and one of my son's friends. I knew it wasn't
4 mine. I voluntarily submitted to give my DNA to test
5 against it. I never saw the DNA results until I got my
6 case file from Mr. Creech in 2009. But I think that could
7 have been used to impeach my wife and her motive to, you
8 know -- what this was all about was to get a divorce and
9 get custody of the children.

10 It's clearly marked on there. It says,
11 "Female epithelial cells," and the only way they would
12 have known that was to have looked at it under a
13 microscope. I was a premed major at Wafford so I know a
14 cytologist can look at that and tell what type of
15 epithelial cells those are and males don't have vaginal
16 epithelial cells.

17 (SLED Law Enforcement report marked as
18 Applicant's Exhibit No. 1 for identification.)

19 BY MS. HORLBECK:

20 Q. Mr. Smith, I'm showing you Applicant's 1.

21 A. This is the SLED Law Enforcement report and on
22 Page -- well, I have a page that says female epithelial
23 cells that Mr. Creech sent to me. This is a different one
24 that the one I got. It's right there on the desk there,
25 but it clearly stated female epithelial cells?

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1 Q. Is there anything on that report that says you
2 match any of the items analyzed by SLED?

3 A. No, ma'am. In fact it partially matches my wife
4 and that's why I said it related to her.

5 Q. And you wanted it admitted why?

6 A. First of all it goes to show that it was
7 irrelevant to my trial to begin with because the
8 prosecutor had my wife tested and my daughter later
9 tested. So that's proof that there was female DNA on
10 there. She basically lied to the judge. The fact that
11 she lied to the judge in the preliminary motions and at
12 the end of the day SLED can't tell whether this is male
13 DNA and female DNA, quite clearly she knew otherwise.
14 Falsus innuons(ph) falsus innonobus(ph).

15 Q. You thought that those DNA results should go in
16 to show motive for your wife to testify falsely?

17 A. Yes, ma'am, it damaging that she didn't have
18 something to show that she had motive to try to frame me.

19 Q. Did your attorney and the Solicitor's Office have
20 an agreement that either side would mention the DNA
21 results?

22 A. Right. Not only that during the bond hearing she
23 stated to Judge Miller in court she said, Your Honor, this
24 is going to convict this man and at the time she knew darn
25 well it wasn't because she knew there was female vaginal

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1 epithelial cells. In fact, Mr. Creech afterwards told me
2 that while we were back at the little window back there in
3 the courthouse, he said I don't know why she said that.
4 She knew it was irrelevant because the female epithelial
5 cells partially match your wife. And then I asked him,
6 why didn't you call her on that, he said, I can't very
7 well call her a liar in court; I used to work with her.
8 That's conflict of interest as well because the loyalty
9 seemed to be more to her than it was to me.

10 Q. Is there anything that you want to bring up
11 today?

12 A. Well, Mr. Creech never served me with a copy of
13 the indictment.

14 Q. Anything else? You put that on the record.
15 Anything additional that we have not discussed.

16 A. The other thing was the Rule 3 violation, the
17 Rule 3(d). My indictment was not had for 273 days into
18 the fourth 90 day period according to Rule 3(d). Search
19 warrant expires in 10 days and that indicates -- Rule 3(d)
20 indicates that a search from an arrest warrant expires in
21 90 days. So basically I was denied due process by not
22 having that hearing and I should have been granted a
23 motion to extend that. I was being held without bond
24 during all that time.

25 I don't think it was fair. I was being kept

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1 in medical housing. I was not allowed to have any canteen
2 items other than hygiene items or cough drops while other
3 parts of the jail could get food and soft drinks and that
4 sort of thing.

5 My teeth were starting to fall apart. They
6 don't do anything to take care of your health. My mental
7 health ---

8 Q. Anything else, though, specifically that you're
9 referring to your attorney and the job that he did?

10 A. I think that prejudiced me because my mental
11 health when I got out from trial I think I was suffering
12 from post-traumatic stress disorder.

13 The other thing was during trial I was the
14 last one to testify -- actually I was the only one to
15 testify on my behalf. I was my only witness. They had
16 put me in a drunk tank that night. They had revoked my
17 bond and put me in the drunk tank until 3:30 in the
18 morning and then they finally gave me my CPAP machine. I
19 have a severe case of sleep apnea. So I only had like an
20 hour roughly worth of sleep before that night and I was my
21 only witness.

22 I didn't take the witness stand until 4:01 in
23 the afternoon and I think Mr. Creech should have asked for
24 a continuance until the next day. When I don't have
25 enough sleep -- with the sleep apnea, I don't sleep well

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1 to begin with but the CPAP, it's like a hurricane blowing
2 in your nose. But I had trouble with memory problems.

3 Last night I didn't get in a jail cell until
4 11:30 and I got maybe four hours of sleep last night and
5 I'm not running on all cylinders today.

6 Q. Do you understand that this Court can not reduce
7 your sentence?

8 A. I understand that.

9 Q. Do you understand that the only thing this Court
10 can do is grant your petition or deny your petition?

11 A. That's all I'm asking.

12 Q. Do you understand that if this petition is
13 granted that the prosecution on this charge starts all
14 over again from square one?

15 A. That's right. I hope to have another chance in
16 court and knowing what I know now, I was definitely not a
17 lawyer then and I certainly not a lawyer now, but I know a
18 lot more about what should have been done than I did at
19 the time. Being locked up in Greenville County for 21
20 months, I had no access to the law library or any of the
21 things that I could have had to help in my own defense.

22 As I said that whole second day of the trial,
23 I was without sleep ---

24 THE COURT: Sir, you've already talked about
25 that. That's not relevant.

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1 BY MS. HORLBECK:

2 Q. Mr. Smith, please answer any questions that
3 Ms. Ratigan may have.

4 MS. RATIGAN: I have no questions for
5 Mr. Smith.

6 THE COURT: You may come down.

7 Call your next witness.

8 MS. HORLBECK: Judge, applicant rests.

9 THE COURT: The State have any witnesses?

10 MS. RATIGAN: Yes, Your Honor. The State
11 would call Mr. Creech.

12 THE CLERK: Mr. Creech, would you come around
13 to be sworn.

14 THOMAS CREECH, having been duly sworn,
15 testified as follows:

16 Thank you. You may be seated. Please state
17 your full name for the record.

18 THE WITNESS: Thomas Young Creech, Jr.

19 DIRECT EXAMINATION

20 BY MS. RATIGAN:

21 Q. Mr. Creech, do you recall representing Mr. Smith
22 on this charge?

23 A. I do, yes.

24 Q. And were you appointed in this case or were you
25 retained?

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1 A. I was appointed.

2 Q. Did you file the usual Brady and Rule 5 discovery
3 motions?

4 A. Yes, I did.

5 Q. Did you receive those materials from the State?

6 A. I did.

7 Q. Did you review them with Mr. Smith?

8 A. Yes.

9 Q. Mr. Smith stated that approximately one month
10 before the trial you received some letters from the State
11 that he had written his wife, do you recall that?

12 A. I do remember receiving letters, yes.

13 Q. Would it have been about a month before the trial
14 or was it prior to that?

15 A. I can not recall specifically. It was a month or
16 two months, around that time frame to the best of my
17 recollection.

18 Q. Did you have adequate time to review those
19 letters prior to Mr. Smith's trial?

20 A. Yes.

21 Q. Did you review those letters with Mr. Smith prior
22 to the trial?

23 A. Yes.

24 Q. Was there any kind of physical evidence linking
25 your client to the crime?

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1 A. No.

2 Q. And Mr. Smith stated there was a DNA test run on
3 a condom, do you recall that?

4 A. Yes.

5 Q. And do you recall how the condom was in the
6 possession of the police department?

7 A. I think the wife did take it to the police
8 department or make it known to law enforcement
9 authorities, the Solicitor's Office or somebody. The wife
10 made it known to law enforcement authorities and that's
11 how I remember they got wind of it. I think it was found
12 underneath the bed or something like that.

13 Q. And was there any of your client's DNA found on
14 that condom?

15 A. I'll have to refer to the report but it was
16 inconclusive and there was no identification made of
17 anyone DNA being found on the condom. It had just been
18 something like female.

19 Q. Did you discuss that DNA report with your client
20 prior to trial?

21 A. Yes.

22 Q. There was an agreement on the record between you
23 and the State not to mention to condom or DNA test, do you
24 recall that?

25 A. Yes.

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1 Q. Why was it that you entered into that agreement
2 with the State?

3 A. The evidence had no probative value at all. It
4 was a condom found under a bed. It provided no evidence
5 other than that and I did not want this image of a condom
6 being brought out in the case in front of the jury. So
7 that was the reason why I did not want that anywhere near
8 the case.

9 Q. Did you consider attempting to use this
10 information to impeach Mr. Smith's wife?

11 A. I'm sure I may have considered it but it was
12 nothing -- again, there was nothing. It was just a condom
13 with the profile of a female. Other than that it meant
14 nothing and we were going to get left with questions and
15 no way of establishing that there was any probative value
16 to the condom.

17 Q. Did Mr. Smith share his opinion with you that his
18 wife was blackmailing the victim?

19 A. No.

20 Q. Did he ever share with you his opinion of whether
21 or not the victim had any kind of motive to lie in this
22 case?

23 A. The only thing that he said to me was that he
24 thought the victim's dad, who is Mr. Smith's brother-in-
25 law, did not like Mr. Smith and that also the dad was very

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1 mean, mad, or always angry at the son or something and the
2 dad had set all this up or that the dad had something
3 about getting the child to lie.

4 Q. In one of these letters that the defendant sent
5 to his wife it made a comment about the victim being gay
6 and you agreed to redact that part of the letter, do you
7 recall that?

8 A. I looked at the transcript and I saw that, yeah.
9 First I objected to that. We went around and around with
10 the Court but at the end of the day it didn't really
11 provide any kind of motive or argument or assistance in
12 the case. That was just not the focus of the case. I did
13 not believe it was a defense strategy to try and attack
14 the child as being homosexually potentially and there was
15 no evidence that the child was. It would do anything to
16 assist our defense.

17 Q. And did you, in fact, explain the Rape Shield
18 Statute to Mr. Smith?

19 A. Now, I don't if that -- I don't think we ever
20 talked about that. I don't think that was the basis for
21 my allowing that to be redacted. Again, it really just
22 did not factor into the defense, our defense strategy for
23 Mr. Smith.

24 Q. Did your client ever share with you why he
25 believed -- if he believed his wife had a motive to

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1 testify against him falsely?

2 A. I think that it just was a divorce situation that
3 his wife didn't like.

4 Q. Do you recall during the closing argument the
5 prosecutor referring to Mr. Smith as criminal?

6 A. Yes.

7 Q. Do you recall, the record speaks for itself and
8 there was no curative instruction, but do you recall
9 recognizing at the time the Judge did not give a curative
10 instruction?

11 A. Well, to the best of my recollection I did object
12 on the record and of course I wanted to maintain that
13 objection so we could have that objection on appeal. If
14 the Judge would have given that curative instruction, that
15 would have cured any alleged error and that was
16 essentially gutted that entire issue had it come up on
17 appeal. So I objected and maintained my objection and
18 that's what I did.

19 Q. And you moved for a mistrial?

20 A. Yes, I did.

21 Q. Were you successful in having the Judge charge
22 any lesser included offenses in this case?

23 A. Yes, we requested the Judge charge ABHAN as well
24 as simple assault and battery and we went back and forth
25 about that and the Judge ultimately agreed to do that.

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1 Q. Obviously, this is kind of a Monday morning
2 quarterback kind of a question, but was there anything you
3 think you could have done to prepare for trial?

4 A. No.

5 MS. RATIGAN: That's all I have, Your Honor.

6 THE COURT: Cross-examine, Ms. Horlbeck.

7 CROSS-EXAMINATION

8 BY MS. HORLBECK:

9 Q. Mr. Creech, I'm handing you Applicant's 1 and I
10 just ask that you take a look at it.

11 A. Okay.

12 Q. What is that?

13 A. It appears to be a form from the South Carolina
14 Law Enforcement Division, case involving Randall Smith,
15 Jr., Senior, Nancy Smith, ^{Minor} (inaudible) Smith.

16 Q. And is that a copy of the report that you
17 received from the State as part of the discovery?

18 A. I would say, yes.

19 MS. HORLBECK: Judge, at this time I'd move
20 this into evidence.

21 THE COURT: Any objection?

22 MS. RATIGAN: No objection.

23 THE COURT: Without objection it is admitted.

24 (SLED report previously marked as Applicant's
25 Exhibit No. 1 for identification was admitted into

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1 evidence.)

2 (Letter marked as Applicant's Exhibit No. 2
3 for identification.)

4 BY MS. HORLBECK:

5 Q. Mr. Creech, I'm going to show you Applicant's 2
6 and ask you if you recognize this?

7 A. This appears to be the defendant's -- appears to
8 be notes or a letter the defendant wrote to me that was
9 received on June 24, 2005 in my office.

10 Q. And is it stamped?

11 A. Yes, that's what I'm looking at. It says stamped
12 received June 24, 2005, Law Offices of Thomas Creech.

13 Q. Flip to Page 4 of Applicant's 2.

14 A. Okay.

15 Q. What does that page appear to be about?

16 A. It says outline motives.

17 Q. And would those be motives for what if you just
18 want to review that. What would that be motives of what?

19 A. Well, just apparently motives for Lane, his son,
20 who seems to be mad at him.

21 Q. Does the letter just address motives regarding
22 Lane?

23 A. It says, "Lane and Steve Julian," the father of
24 the victim. Lane is his son. The victim in the case is
25 Minor

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1 Q. Does the letter discuss any other motives?

2 A. It doesn't say, not that I can see.

3 Q. Okay.

4 MS. HORLBECK: Judge, at this time I would
5 move Applicant's 2 into evidence.

6 MS. RATIGAN: No objection.

7 THE COURT: Without objection it is admitted.

8 (Letter previously marked as Applicant's
9 Exhibit No. 2 for identification was admitted into
10 evidence.)

11 BY MS. HORLBECK:

12 Q. Was this the first and only time this case was
13 scheduled for trial?

14 A. It was scheduled I believe a month or two
15 beforehand and there were two things. I had just tried
16 another case the month before that was a week-long case
17 and this case came up for trial the week after that one.
18 The Judge knew that I had just tried that case that lasted
19 a week and I believe that they had just turned over those
20 letter also, so the Judge taking all that into
21 consideration granted my request for a continuance. I
22 don't think the State argued against it.

23 Q. To your memory, do you know what bed the condom
24 was allegedly found under?

25 A. Yes. I think it was under the bed where these

Smith versus State of South Carolina

1 alleged incidents had occurred.

2 Q. Where the incidents occurred under Mr. Smith's
3 bed?

4 A. No, the condom was found, I believe, under the
5 bed where the incidents involving Mr. Smith and his nephew
6 occurred. They occurred in the bed.

7 Q. Were you aware that bed was a water bed?

8 A. I think I remember him saying that.

9 Q. Did you make that point in your case?

10 A. What?

11 Q. That there was a water bed and no underneath to
12 it.

13 A. No, I don't believe.

14 MS. HORLBECK: That's all I have.

15 MR. RATIGAN: No, redirect, and the State
16 would rest.

17 THE COURT: Thank you, Mr. Creech. You may
18 step down.

19 Any reply testimony, Ms. Horlbeck?

20 MS. HORLBECK: No, sir.

21 THE COURT: Alright. Whenever you're ready,
22 I'll be happy to hear from you.

23 MS. HORLBECK: Judge, we would just rest on
24 the record.

25 MS. RATIGAN: We would just argue that

Smith versus State of South Carolina

1 Stricklen has not been met in this case, Your Honor.

2 THE COURT: I appreciate all the concerns
3 expressed by Mr. Smith. He's obviously read some law and
4 is very articulate, but I don't believe there is any error
5 or anything that would rise to the level to say that
6 counsel was inefficient or that the outcome would be
7 changed. So neither prong has been met.

8 Please prepare the appropriate order.

9 MS. RATIGAN: Thank you, Your Honor.

10 ---END OF TRANSCRIPT RECORD---

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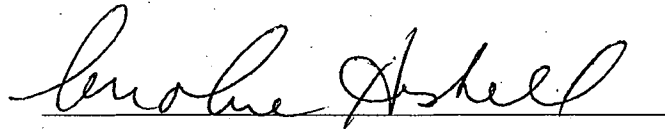
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Smith versus State of South Carolina.

1 I, the undersigned Caroline Hiskell, Official
2 Court Reporter for the Thirteenth Judicial Circuit of the
3 State of South Carolina, do hereby certify that the
4 foregoing is a true, accurate, and complete transcript of
5 record of all the proceedings had and evidence introduced
6 in the trial of the captioned case, relative to appeal, in
7 the Court of Common Pleas, Greenville, South Carolina on
8 the 31th day of October, 2012.

9 I do further certify that I am neither of
10 kin, counsel, nor interest to any party hereto.

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CLK

SOUTH CAROLINA LAW ENFORCEMENT DIVISION FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor



ROBERT M. STEWART
Chief

INV LORRAINE HENDERSON
GREENVILLE COUNTY SHERIFF'S OFFICE
4 MCGEE STREET
GREENVILLE, SC 29601

Department of Forensic
DNA Analysis
September 16, 2005
SLED Lab No.: L05-4736
Your Case No.: 03-178798
Incident Date: 11/13/03
(V) Randall Lane Smith, Jr.
(S) Randall Lane Smith, Sr.
(V) Nancy Smith
(V) Minor
(V) Nastassia Smith

SUPPLEMENTAL REPORT

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

SEROLOGY ANALYSIS

ITEMS SUBMITTED:

RESULTS OF EXAMINATIONS:

1	Used condom		
1.1	Swabs from outside of condom (as submitted)	1.1	Semen indicated. No blood indicated. See DNA analysis.
1.2	Swabs from inside of condom (as submitted)	1.2	Semen indicated. No blood indicated. See DNA analysis.
2	Tissue		
2.1	Cutting	2.1	Blood identified. See DNA analysis.
2.2	Cutting	2.2	No semen identified.



Page 2 of 5

SLED LAB NO.: L05-4736

September 16, 2005

ITEMS SUBMITTED:RESULTS OF EXAMINATIONS:

3	Blood standard from Nancy Smith	3	See DNA analysis.
4	Blood standard from Randall Lane Smith, Jr.	4	See DNA analysis.
5	Blood standard from Minor	5	See DNA analysis.
6	Blood standard from Randall Smith, Sr.	6	See DNA analysis.
7	Blood standard from Nastassia Allyn Smith	7	See DNA analysis.

DNA ANALYSISITEMS ANALYZED:

3	Blood standard from	Nancy Smith
4	Blood standard from	Randall Lane Smith, Jr.
5	Blood standard from	Minor
6	Blood standard from	Randall Smith, Sr.
7	Blood standard from	Nastassia Smith
1.1	Swabs from outside of condom	(as submitted)
1.2	Swabs from inside of condom	(as submitted)
2.1	Cutting from tissue	

EXAMINATIONS

Short Tandem Repeat (STR) PCR DNA analysis was performed on the above items. The results of the analysis are shown in Table 1 and Table 2.



Page 3 of 5

SLED LAB NO.: L05-4736

September 16, 2005

RESULTS

The DNA profile developed from the epithelial cell fraction of item 1.1 is a mixture of at least two individuals. No interpretation can be made as to the contributors to this mixture.

No DNA profiles were developed from the sperm fraction of item 1.1 or from the epithelial and sperm fractions of item 1.2.

The DNA profile developed from the blood on item 2.1 matches Randall Smith, Sr. The probability of selecting an unrelated individual at random that matches this item is approximately one in 4.8 trillion.

Table 1 - Profiler Plus

Items	D3S1358	vWA	FGA	D8S1179	D21S11	D18S51	D5S818	D13S317	D7S820	Amelogenin
3 Nancy Smith	14,15	17	22,26	13,14	31.2	14	12,13	8,11	8,9	X
4 Randall Lane Smith, Jr.	14, (16)	(17,19)	(25,26)	(12,14)	(30,31.2)	(14,15)	(11),13	13	(9,10)	(X),Y
5 Minor	16,18	17, (18)	(23,26)	11, (15)	28,30	14,17	12,13	(8),10	(11)	(X,Y)
6 Randall Smith, Sr.	14,16	18,19	24,25	8,12	29,30	15,19	11	12,13	10,12	XY
7 Nastassia Smith	14,16	17,19	22,24	8,14	30,31.2	14,15	11,12	8,12	8,10	X
1.1 Epithelial	14	17	(22,24, 26)	(12,13 14)	31.2	(14)	(11,12 13)	(8,11 12,13)	(9)	X
1.1 Sperm	-	-	-	-	-	-	-	-	-	-
1.2 Epithelial	-	-	-	-	-	-	-	-	-	-
1.2 Sperm	-	-	-	-	-	-	-	-	-	-
2.1	14,16	18,19	24,25	8,12	29,30	15,19	11	12,13	10,12	XY

Alleles in parentheses are between 75 and 149 rfu

- = No result



Page 4 of 5
 SLED LAB NO.: L05-4736
 September 16, 2005

Table 2 - Cofiler

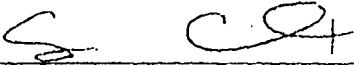
Items	D3S1358	D16S539	TH01	TPOX	CSF1PO	D7S820	Amelogenin
3 Nancy Smith	14,15	9,13	7,9.3	8,11	10,12	8,9	X
4 Randall Lane Smith, Jr.	(14,16)	(10,13)	(6)	(8,11)	(10,11)	(9,10)	X(Y)
5 Minor	(16),18	9,(11)	6,(9.3)	(8),11	12	(9,11)	X(Y)
6 Randall Smith, Sr.	14,16	10,13	6,9	8,10	11,12	10,12	XY
7 Nastassia Smith	14,16	9,13	6,9.3	8,10	10,11	8,10	X
1.1 Female	(14),15 (16)	(9)	(9.3)	(8,11)	-	-	X(Y)
1.1 Male	-	-	-	-	-	-	-
1.2 Female	-	-	-	-	-	-	-
1.2 Male	-	-	-	-	-	-	-

Alleles in parentheses are between 75 and 149 rfu
 - = No result



Page 5 of 5
SLED LAB NO.: L05-4736
September 16, 2005

These examinations were conducted by S/A Stephen J. Lambert, Ph.D.,
Forensic Analyst, South Carolina Law Enforcement Division.



Stephen J. Lambert, Ph.D.
Senior Agent

9-19-05

Date

jmj

cc: Greenville County Solicitor's Office

Note: Any remaining evidence and/or packaging will be returned to the
requesting agency.





RECEIVED

JUN 24 2005

LAW OFFICES OF THOMAS CREECH

Tom: Please argue the following points.

1. I was not trying to flee the country!

I told my wife that I was going to Atlanta to look for a job and that I would return before Christmas. I also told her that I would contact Loraine Henderson on 12-26-03. On 12-18-03 I accepted a temporary job with the possibility of a fulltime position with Sacred Images in Atlanta. On 12-19-03 I drove to New Orleans, LA to start work on the 20th-21st there in LA only about 230 miles from Mexico. On the 21st I drove to Meridian, MS and spent the night. On the 22nd I drove to Birmingham, AL and worked til about 8:00. I called home at around 9:00 PM about 40-50 miles East of Birmingham to tell Nancy that I was headed back to Greenville. I drove to the Northeast of Atlanta and spent the night. Then I drove to Spartanburg to spend the night of 12-23-03 at the home of a friend. I had agreed to meet Nancy @ 1:00 PM on 12-24. I showed up @ 1:00 and she was mad that I didn't call earlier. She said that we were to meet at the Waffle House on Woodruff Rd. (this had not been discussed.) I agreed then to meet her at Perkins Restaurant @ 2:00 PM. That is where and when I was arrested.

2. I had been accused of the same allegations 5 years earlier and I was not arrested and I did not expect to be arrested then ^{is time} either. My wife lied in order to get them to arrest me. I had no intention to flee.

3. Two of the alleged victims share a reputation for lying. One denied these same allegations and we both were the subject of an intense investigation

- by both the Sheriff's dept. and by DSS for 3 years.
4. Medical exams of both alleged victims showed no sign of abuse.
 5. My wife's family has used this same ploy before as a means to an end and they have a reputation of such actions.
 6. If any mention of my owning guns please remind them that my wife has possession of such and She and her brother have threatened to kill me. The Police report mentioned that they had to insist that Steve Julian not interfere with my arrest as he had indicated that he wished to harm me.
 7. I have lived most of my life in the Upstate; ^{the last} 23 years in Greenville. I attended Wofford College, served on the Board of Directors for the Jaycees, Was a member of ~~the~~ Chamber of Commerce, Edited the newsletter for my ~~and~~ children's school PTA for 2 years, Served 1 yr as the President, and one year as Ways and Means Chair, and in both years I helped the PTA raise over \$90,000 each. I have done volunteer work for several non-profit organizations over the years and am well respected in my community.
 8. I wish to see this through to an acquittal and clear my good name.
 9. I feel that I have been unjustly held for over the last year and a half and it is important to my defense that I be released.

In order to aid in my defense. I need to do some of the leg work to get statements and the names, addresses, and phone numbers of potential witnesses for my trial.

10. There is no need for me to wear a monitor. I would be unable to aid in my defense in such a situation and I will be staying with my parents who will at most all times know where I am.

11. The prosecution has drag their feet in getting me to trial and we filed for a fast and speedy trial last year. Remind them that the evidence that wished to test they have had for a week longer than they had me. I also consented to giving a DNA sample and would have done so at anytime in the last 18 months.

12. It appears that since they have me locked away without any bond that I have been given a low priority to take to trial; especially with such weak evidence. Instead of being afforded due process I have been a victim of OVERDUE PROCESS.

The 26th (30 days from last hearing) is this Sunday. I will call this Friday.

Thanks,

Landy Smith

Outline of motives

Lane (My Son) There are several reasons for him to be upset or mad at me.

1. I have always been much stricter on him than his mother. I would take his video games and gameboy away for weeks and months at a time. I restricted his use of the computers and access to the internet. Especially when his behavior was a problem.

2. I would not let him get his drivers' ~~license~~ license until he improved his grades. He had failed 9th grade English and still wasn't passing in his 2nd attempt. I wanted him to have to go to summer school to catch up, but his mom sided with him and ~~so~~ so he didn't go to summer school.

3. I would not let him go to a party where the parents of the host would be out of town. (This was a week before)

4. He thought that I was having an affair with L.A. Moore. He asked me about that several times, but I don't think that he really believed that I wasn't.

5. His mother and I weren't getting along very well of late and I asked him how he would feel if we split up. He didn't want to discuss it and he said I shouldn't ask him to choose. (that was not my intent)

2

6. He seemed to hate my business the last 5 years. He especially hated to help me with my props business. I needed help shipping and packing what I sold and he was very vocal about my making him help.

7. He was arrested at age 13 for making a bomb threat against an old girlfriend. The judges would not release him on bond and he was incarcerated for over 3 months. I think he felt that I didn't do enough to try to get him out of jail. He also spent about 6 weeks at Patrick B. Harris during this time. He had a complete psyc. work up there. He plead Nolo Contre to illegal use of a phone and got 6 month probation.

8. My wife always took his side when I tried to punish him. He called her a 'bitch' one day while I was seated at my desk a few feet away from him. I stood up and when I said you can't talk to your mother like that he went into the kitchen and grabbed a 10" Chef's knife and raised it at me. I grabbed his forearm and pushed him against the sink and made him drop the knife. She took his side in this episode.

3

Steve Julian: (My wife's brother,) He dislikes me for several reasons:

1. Both of his boys wanted to live with my family and they told him this. The youngest, Ashton did live with us for several months. He was having a lot of problems at school. His behavior was pretty much out of control. His grades and behavior improved during the time that he was in our home. Ashton's grades don't indicate how intelligent he is. He reads on a high school level and he is only in the 6th grade. Ashton said that he told his dad that I cared more about him than he did. Patrick also told him that he would rather live with us.

2. I think that Steve tried to get close to Lane due to jealousy about how his boys liked me.

3. I think Lane and my wife Nancy told Steve that they thought I was having an affair.

4. I think he resents me because I am more educated than he. I helped rework his resume and helped him land a better job. He nearly doubled his salary and got a company truck.

5. He still owes us money

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Randall Lane Smith,)
 S.C.D.C. No. 312339,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2010-CP-23-8027

ORDER OF DISMISSAL

ENTERED COMPUTER

FILED CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL A. WICKER

2012 DEC -5 AM 10:26

JW

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 27, 2010. The Respondent made its return on February 4, 2011. An evidentiary hearing into the matter was convened on October 31, 2012 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Thomas M. Creech, Jr., Esquire. The Court had before it the trial transcript, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the Respondent's return, the appellate records, and the Exhibits entered into evidence at the hearing.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the September 2004 term of the Greenville County Grand Jury for second-degree criminal

12/14

SCANNED

sexual conduct with a minor (2004-GS-23-6874). He was represented by Thomas M. Creech, Jr., Esquire.

After the State called the case to trial, the Applicant was found guilty. On November 8, 2005, the Honorable D. Garrison Hill sentenced the Applicant to twenty (20) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. State v. Smith, Op. No. 2008-UP-673 (S.C. Ct. App. filed December 9, 2009). Counsel filed a petition for writ of certiorari at the South Carolina Supreme Court. By order dated October 7, 2009, the Supreme Court denied the petition.

ALLEGATIONS

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

1. Ineffective assistance of trial counsel:
 - a. Failed to challenge constitutional issues, jurisdiction, and prosecutorial misconduct.
 - b. Failed to file a timely motion for speedy trial.
 - c. Failed to obtain the Applicant's medical records.
 - d. Failed to obtain expert testimony.
 - e. Failed to investigate victim.
 - f. Failed to investigate victim's father.
 - g. Failed to properly cross-examine witnesses.
 - h. Failed to attack credibility of both the victim and the Applicant's wife.
 - i. Failed to question the State's expert witness regarding the Applicant's erectile dysfunction.
 - j. Failed to examine all of the letters from the Applicant's wife.
 - k. Failed to ask for curative instructions.
 - l. Failed to object to hearsay.
 - m. Failed to properly question the Applicant's wife about her motives.

Rm 2/12

- n. Failed to file a motion in limine to preclude use of the word "victim."
- o. Failed to object to the judge's improper comment when he introduced the solicitor.
- p. Failed to object to the State's bolstering.
- q. Failed to object to one of the jurors.
- r. Failed to inform the judge that the Applicant was exhausted and physically ill during trial and could not properly assist in his defense.
- s. Failed to schedule a polygraph examination.
- t. Gave a prejudicial closing argument.
- 2. Ineffective assistance of appellate counsel:
 - a. Failed to raise jurisdictional issues.
 - b. Failed to move to disqualify Judge Konduros from the panel.
- 3. Court was without jurisdiction:
 - a. Was denied a preliminary hearing.
 - b. Violation of Rule 3, SCRCrimP.
- 4. Prosecutorial misconduct:
 - a. At the third bond hearing, the solicitor stated the case should be continued without bond because more time was needed to run a DNA test. This was untrue because this test had already been performed.
 - b. Solicitor misstated the truth about the DNA evidence during pre-trial motions.
 - c. The State compelled his wife to work against him (as an agent of the State).
- 5. Violation of United States and South Carolina Constitutions:
 - a. Was denied counsel for arraignment.
 - b. Denied bond due to a fraudulent letter shown to the judge.
 - c. Held without bond or indictment for an excessive time.
 - d. Denied bond at third hearing due to extrinsic fraud upon the court.
 - e. Denied a preliminary hearing.
 - f. Denied the right to speedy trial.
 - g. Was without bail for nineteen months, which affected the ability to procure witnesses.
 - h. Violation of Rule 3, SCRCrimP.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their

credibility. This 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 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he and trial counsel reviewed the discovery materials and that he received a copy of most of these items. The Applicant stated trial counsel should have objected because the State violated Rule 3(c) of the Rules of Criminal Procedure. The Applicant stated trial counsel should have questioned the victim about his motive to lie – that the Applicant’s wife was blackmailing the victim because he was homosexual. The Applicant stated the prosecution did not provide trial counsel with some evidence – letters he wrote his wife while in the

detention center – until the last minute. The Applicant stated trial counsel received a one month continuance after he received these letters but that counsel should have moved to exclude them under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). The Applicant stated trial counsel should have questioned his wife about her motive to lie (that she believed he was having an affair). The Applicant stated trial counsel should have impeached his wife by asking her about a condom she brought to the police (and was ultimately found not to contain his DNA). The Applicant stated trial counsel erred in calling his nephew “the victim” during his opening argument. The Applicant stated trial counsel should have brought out to the trial judge that he failed to give a curative instruction after counsel objected during the State’s closing argument.

Trial counsel testified he filed discovery motions, received those materials, and reviewed them with the Applicant. Trial counsel confirmed he received copies of the Applicant’s letters to his wife approximately one month before the eventual trial in this case. Trial counsel testified he received a continuance and had enough time to review the letters. Trial counsel testified the Applicant never told him that the victim was motivated to lie because he was being blackmailed by the Applicant’s wife. Trial counsel testified he recalled the DNA test on the condom did not match to the Applicant. Trial counsel testified he and the State agreed not to mention this at trial because it was not probative and he did not want the jury to have an image of a condom found under the bed where the sexual assault occurred. Trial counsel confirmed he objected and moved for a mistrial when the solicitor referred to the Applicant as a criminal during closing argument.

This Court finds the Applicant’s testimony is not credible, while also finding trial counsel’s testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

RMD/JL

This Court finds the Applicant failed to meet his burden of proving trial counsel was deficient in not challenging that the delay in his case violated Rule 3(c), SCRCrimP. The Supreme Court has found, however, that the failure to indict a charge within ninety days of the issuance of the arrest warrant does not nullify the charge. See State v. Culbreath, 282 S.C. 38, 40, 316 S.E.2d 681, 681 (1984) (“[T]he failure of the solicitor to act upon a warrant within ninety (90) days . . . does not within itself invalidate a warrant or prevent subsequent prosecution.”). Further, this Court finds the Applicant failed to provide evidence of any prejudice that resulted from the delay. See, e.g., State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (noting one must prove prejudice in order to prevail on an allegation that one’s speedy trial rights were violated).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have moved to exclude – under Brady – the letters written to his wife. Both the Applicant and trial counsel testified these letters were received, a one month continuance was granted, and then the case went to trial. Trial counsel testified he had adequate time to review the letters prior to trial. This Court finds the Applicant has failed to prove the late disclosure of the letters was a Brady violation. See, e.g., Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). As such, the Applicant failed to prove trial counsel should have objected on that ground.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly challenge the credibility of his wife and the victim. The Applicant stated his wife was motivated to lie because she believed he was having an affair and that the victim was motivated to lie because he was being blackmailed by the Applicant’s wife for being homosexual. This Court finds the Applicant failed to produce any credible evidence or testimony to support his assertion that these two witnesses were motivated to testify falsely. Without evidence to support

such an argument, it was not incumbent for trial counsel to have attempted to attack these witnesses' credibility on the stated grounds.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have introduced evidence about a condom that was found under the bed in the Applicant's home. Both the Applicant and trial counsel testified the Applicant's wife found this condom, brought it to police, and that the Applicant's DNA was not found. Trial counsel testified he discussed the matter with the Applicant. Trial counsel testified he made a decision not to mention the condom at trial because he did not feel it was probative evidence. Trial counsel also testified he did not want the jury to have the mental image of a used condom found under the bed where the Applicant was accused of sexually assaulting his nephew. This Court finds this was a valid strategic decision. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel).

This Court finds the Applicant failed to meet his burden of proving trial counsel was deficient during his opening statement. The Applicant stated the objectionable statement was when trial counsel said "Minor the person in this case, the victim in this case." (Trial transcript, p.56, lines 17-18). This Court finds trial counsel was not deficient in making this statement. This Court further finds that this statement did not prejudice the Applicant's case in light of the fact that the State produced ample evidence of guilt. See Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008); Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001).

This Court finds the Applicant failed to meet his burden of proving trial counsel improperly handled his objection during the State's closing argument. During the State's closing

argument, the solicitor stated the Applicant's action "makes him look bad, that makes him look like a criminal." (Trial transcript, p.363, lines 12-13). Trial counsel objected. (Trial transcript, p.363, line 14). After the jury charge, trial counsel noted that he moved for a mistrial based on the solicitor's comment. (Trial transcript, p.383, lines 3-6). The trial judge denied the motion and stated he did not believe the comment "would rise to the level meriting a mistrial." (Trial transcript, p.383, lines 10-14). This Court agrees with the trial judge's statement and finds there was no error in trial counsel failing to request a curative instruction because of the solicitor's comment. This Court further finds the Applicant failed to meet his burden of proving any prejudice resulted from the lack of a curative instruction because the State presented ample evidence of his guilt. See id.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they

are hereby denied and dismissed.

CONCLUSION

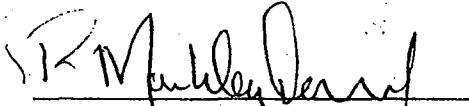
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 29 day of November, 2012.


 R. Markley Dennis, Jr.
 Presiding Judge

Moncks Cornet, South Carolina.

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