STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
	)	2010CP4004866
	)	
Middleton, Octavia, #253919,	)	
Applicant,	)	
v.	)	ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 23, 2010. The Respondent made its Return on February 17, 2011. An evidentiary hearing into the matter was convened on January 10, 2012 at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Robert C. Fitzsimons, Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented the Respondent.

At the hearing, the Applicant testified on his own behalf. The Applicant's trial counsel, Steven Hisker, Esquire also testified. This Court had before it the records of the Richland County Clerk of Court, the transcript of the proceedings against the Applicant, the records from the Applicant's direct appeal, and the Applicant's records from the South Carolina Department of Corrections.

The Applicant is presently incarcerated following Richland County Grand Jury indictments against Applicant, Octavia Middleton, in September 2005, on the following charges, all stemming from one incident on or about August 8, 2005, at an apartment complex on Faraway Drive in Columbia: three counts of assault and battery of a high an aggravated nature; two counts of burglary first degree; five counts of armed robbery, one count of assault with intent to kill, and one count of murder. (Tr. p. 15, line 11 - p. 16, line 7). A jury trial on the charges was held August 27-31, 2007, before the Honorable G. Thomas Cooper, Jr. Applicant was convicted as charged. (Tr. p. 894, line 11, - p. 896, line 9). The judge sentenced Applicant to ten (10) years imprisonment for the assault convictions; thirty (30) years imprisonment on the armed robbery convictions; and fifty (50) years on the burglary convictions and murder conviction. (Tr. p. 918, line 14 - p. 919, line 7).

The Applicant appealed his plea. The South Carolina Court of Appeals denied the appeal.[1] State v. Middleton, Op. No. 2010-UP-294 (S.C. Ct. App. filed May 27, 2010):

> **PER CURIAM:** Octavia Middleton appeals his convictions of assault with intent to kill, three counts of assault and battery of a high and aggravated nature, five counts of armed robbery, two counts of first-degree burglary, and murder, for which he received an aggregate fifty-year sentence. Middleton argues the trial court erred in admitting photographs of scratches on his arms and in failing to direct a verdict in his favor. We affirm [We decide this case without oral argument pursuant to Rule 215, SCACR.] pursuant to Rule 220(b), SCACR, and the following authorities:

[1] Anders v. California, 386 U.S. 738 (1967).

1. As to the admission of photographs: State v. Beckham, 334 S.C. 302, 310-11, 513 S.E.2d 606, 610 (1999) (affirming the admission of photographs of defendant's scratched back and arms as relevant and probative evidence when defendant's accomplice testified defendant fled the murder scene by running through a wooded area).

2. As to the directed verdict motion: State v. Hicks, 330 S.C. 207, 217, 499 S.E.2d 209, 214 (1998) (holding preservation requires the objection to be contemporaneous); McGee v. Bruce Hosp. Sys., 321 S.C. 340, 347, 468 S.E.2d 633, 637 (1996) (finding an issue cannot be raised for the first time in a new trial motion).

The Remittitur was dated June 14, 2010.

In the PCR application, the Applicant made the following allegations:

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
   (a) Ineffective Assistance of Counsel
   (b) Violation of U.S. Constitution
   (c) Prosecutor Misconduct
10. State concisely and in the same order the facts which support each of the grounds set out in (9):
   (a) Petition of review will follow
   (b)
   (c)

18. State clearly the relief you seek in filing this application.
   Vacate this conviction and remand for a new trial

At the evidentiary hearing, Applicant proceeded – for the most part - on the allegations stated in the application for post-conviction relief.

Statement of the Facts

During the early evening hours of August 8, 2005, Applicant and co-defendant forced their way into two local apartments, robbed and brutalized several victims, and robbed, shot and killed James Greene. Applicant has admitted his participation in "brutaliz[ing]" the victims in this case during an unauthorized entry into the two apartments. (BOA, p. 4). He denies only the murder, specifically he denies pulling the trigger. Id. (See also Tr. p. 609, line 16 - p. 617, line 6).

The testimony at trial showed that Applicant, with Co-defendant, decided to rob a gambling house in a local apartment complex because they did not think such a robbery would be reported. (Tr. p. 614, lines 18-22). Because access to the apartment was restricted, (Tr. p. 326, lines 20-24), the two used a resident from across the hall, Karl Jones, to gain entry. (Tr. p. 324, lines 1-10; p. 610, lines 3-22). One of the men held a shotgun on Mr. Jones and Mr. Jones knocked on the door. After Mr. Jones saw the two had "barged in" he ran to another apartment and asked a neighbor to call 911. (Tr. p. 258, line 5 - p. 263, line 23). Thereafter, Applicant and Co-defendant brutalized and terrorized several victims, and shot and killed Mr. Greene. (Tr. p. 270, line 3 - p. 275, line 10 (Walter Huggins); p. 290, line 11 - p. 298, line 25 (Eliana Garcia and her boyfriend's son); p. 311, line 4 - p. 313, line 7 (Jerry Gordon); Tr. p. 324, line 23 - p. 326, line 4 (Randy Wigfall); p. 334, line 1 - p. 338, line 24 (Regina Pinckney); p. 402, line 11 - p. 406, line 25). (See also Tr. p. 610, line 25 - p. 612, line 15).

Walter Higgins, present in the gambling house, testified that two assailants barged into the apartment, hitting him in the head with a chair. Then, one of the men began beating the murder victim, Mr. Greene, demanding money and cursing. Mr. Greene was shot in the chest. Mr. Higgins was shot at, but escaped injury. (Tr. p. 271, line 8 - p. 274, line 25).

The pathologist testified that Mr. Greene's body showed a gunshot wound to the right chest and blunt trauma to the left side of the head indicating repeated hitting. (Tr. p. 676, lines 23-24; p. 681, lines 6- p. 682, line 1). The gunshot wound to the chest was the fatal wound. (Tr. p. 682, lines 8-13). The pathologist described the wound as a "contact wound" that indicated "the barrel of the shotgun was right up against the victim's chest when the trigger was pulled." (Tr. p. 677, line 15 - p. 679, line 5). The pathologist described the chest injury as "catastrophic" and opined that death would have followed within minutes. (Tr. p. 682, lines 14-17).

Eliana Garcia lived in the apartment across the hall from the gambling house. She testified that when she heard the noise from the other apartment, she opened her door. She was pulled out, hit, and fell into the other apartment, was repeatedly hit thereafter, and that one of the assailants took her wallet. She testified the "tall one" had a rifle, and "[t]hey began hitting everyone." (Tr. p. 290, line 11 - p. 295, line 3). She was instructed to strip and was told she would be killed. (Tr. p. 296, lines 6-23). She hit the gun away from her and ran to her apartment, and locked the door. She was followed. The "tall one" broke the door in

and hit her boyfriend's son, who also lived in the apartment, demanding the phone and money. He hit the boy with a rifle. (Tr. p. 297, line 1 - p. 298, line 25). Capt. James Smith testified that Applicant is taller than Co-defendant. (Tr. p. 746, line 16 - p. 747, line 4).

Jerry Gordon testified that he was in the back playing a poker machine when he heard the "chaos start," and heard a gunshot. One of the assailants came into the back and demanded money from him. He took him to the bathroom and made Mr. Gordon strip. The assailant looked through Mr. Gordon's pants for money. (Tr. p. 311, line 4 - p. 312, line 7). The assailant took Mr. Gordon's ID cards, credit cards and money. (Tr. p. 313, lines 9-23).

Randy Wigfall testified that he hid in a closet in the same bathroom Mr. Gordon was later forced into. Mr. Wigfall heard the gunshots and the demands for money. He slid "several hundred dollars to" Mr. Gordon in hopes of appeasing the assailants so that they would leave. (Tr. p. 324, line 7 - p. 326, line 4).

Regina Pinkney, who was playing one of the machines as Mr. Gordon had been, testified that she heard the assailants burst in and begin yelling for the house managers, Ojetta and Randy, and robbing everyone. She testified she heard "a lot of commotion" from the front of the apartment. She hid in a closet, but could hear people getting hit and gunshots. (Tr. p. 334, line 1- p. 336, line 17). When she came out of the back she saw blood around the apartment and "[c]hairs overturned." In her words, "[i]t was just a mess." (Tr. p. 337, line 12-25).

Anita Thompson was also in the apartment that night, in a back room playing a poker machine. She heard the noise from the front, then one of the assailants came into the room she was in, held a gun to her face, and demanded money. He took her purse, jewelry, keys and cigarettes. (Tr. p. 402, line 11 - p. 403, line 12). She crawled to the hallway and saw the assailants beating a man while the man said, "I don't have no money. I gave you all I got. And they kept calling him Randy." (Tr. p. 404, lines 10-15). As she tried to leave, she passed the apartment across the hall. She heard noises that to her sounded as if "[s]omebody was over there like torturing those people, just all kind of curse words and give me this and just, you know, all kind of stuff." (Tr. p. 405, line 22 - p. 406, line 4). As she tried to leave the complex, she saw the assailants get in a green truck and follow her. She eventually escaped and obtained a ride out of the complex from a nearby driver. (Tr. p. 406, lines 5-25).

The first responding officer testified, in describing the scene, that the murder victim was laying on the floor, there were copious amounts of blood in the apartment, "chairs knocked over" and the apartment was in "disarray." (Tr. p. 244, lines 21-25). Another officer testified that the door to Eliana Garcia's apartment was damaged, forced open and "split at the deadbolt areas," and that Ms. Garcia "had some red marks on her forehead" and "her left eye area was red and swollen." (Tr. p. 248, lines 5-14).

As above noted, Applicant gave a statement three days later admitting to everything except pulling the trigger. (BOA, p. 4). Applicant also indicated in his confession that Harry Dukes, aka "Boo," accompanied Applicant and Co-defendant to the apartment. (Tr. p. 609, line 25 - p. 610, line 19; p. 616, lines 20-21). Mr. Dukes testified at trial and confirmed he was with Applicant and Co-defendant at the apartment complex, but essentially denied prior knowledge or involvement beforehand. (Tr. p. 693, line 10 - p. 694, line 25). Applicant also indicated in his statement that the group went to see Frank "Dogman" Hughey after the crime. (Tr. p. 613, line 18 - p. 614, line 17; p. 617, lines 11-16). Mr. Hughey, along with Jessica Richardson, who is related to Co-defendant, assisted in the recovery of the weapon. (Tr. p. 619, line 1 - p. 620, line 1). Applicant, in another statement to police, identified the recovered gun as the gun used in the August 8, 2005 crimes. (Tr. p. 734, line 20 - p. 736, line 17). The gun recovered also matched a fired shell recovered near the murder victim's body in the apartment. (Tr. p. 368, line 20 - p. 369, line 5; p. 543, line 5 - p. 550, line 19).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

The Applicant explained that while he testified during the Denno hearing, he did not testify at the trial itself. The Applicant explained that appellate counsel was ineffective for failing to argue on appeal that the trial court erred in admitting his confession – in violation of Edwards v. Arizona.[2] The Applicant also claimed that trial counsel was ineffective for failing to present an expert as to "blowback." The Applicant explained that trial counsel failed to exploit some of the inconsistent statements made by the co-defendant(s). The Applicant also expressed dissatisfaction with the fact that some scratches on his arm were revealed to the jury that tied him to the scene.[3]

Trial counsel testified that he recalled his representation of the Applicant. Trial counsel explained that his role was limited to the trial, that he had nothing to do with the appeal. Trial counsel explained that he specifically chose not to call a blowback expert because he did not want to lose closing argument – counsel

[2] Edwards v. Arizona, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).
[3] *See*, Court of Appeals decision, issue no. 1.

explained that the State's expert conceded the essentials that they needed anyway. Counsel explained that the State's case had significant circumstantial evidence coupled with some direct evidence. Trial counsel explained that he absolutely understood that one of the burglary first degree charges was not valid. Trial counsel explained that there is no debate that the gambling house was not a dwelling for the purposes of burglary first degree. Counsel explained however, that the strategically chose not to make that argument until closing so that he could at least have something to clearly demonstrate that the State's case was deficient.[4] Counsel explained that specifically did not immediately make a directed verdict motion because that burglary was the least of their concern [there was another burglary and the murder]; counsel explained that he and the Applicant specifically discussed the strategy, i.e. to instead exploit the defect in the State's case as part of the reasonable doubt argument. Counsel explained that had he made the directed verdict motion, the State would have simply argued for second degree burglary for the gambling house and that would have deflated a strong angle of the defenses closing theme. Counsel explained that he and the Applicant had in depth discussions about the case; counsel explained that the Applicant told him he was present at the scene. Counsel explained that there was not much they could do, *hand of one* is what convicted him.

[4] Tr. P. 860 – 861.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance

was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

Beyond his review of the undisputed procedural history, this Court finds Applicant's testimony is not credible. Plea counsel's testimony is credible. Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

Ineffective Assistance of Appellate Counsel

> A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). A PCR applicant has the burden of proving appellate counsel's performance was deficient. *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (S.C.2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, *Tisdale v. State*, 357 S.C. 474, 594 S.E.2d 166 (S.C.2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." *Jones v. Barnes*, 463 U.S. 745, 752, 103 S.Ct. 3308, 77 L.Ed.2d

987 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. *Id.*

To obtain relief a petitioner must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. *Southerland v. State,* 337 S.C. 610, 524 S.E.2d 833 (S.C.1999). In other words, the petitioner is required to demonstrate "that his counsel was objectively unreasonable in failing to find arguable issues to appeal" and that he was prejudiced-i.e., that there was "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." *Smith v. Robbins,* 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (citations omitted). *See also Gray v. Greer,* 800 F.2d 644, 646 (7th Cir.1986) ("When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal."). Indeed, " 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray,* 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (*quoting Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)); *see also Smith v. South Carolina,* 882 F.2d 895, 899 (4th Cir.1989) (finding counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims.").

Cabrera v. McCall, CIV.A. 1:09-2801, 2010 WL 3699867 (D.S.C. Aug. 5, 2010) report and recommendation adopted, CIV.A. 1:09-2801, 2010 WL 3703281 (D.S.C. Sept. 13, 2010) appeal dismissed, 437 F. App'x 234 (4th Cir. 2011) cert. denied, 11-6904, 2012 WL 33421 (U.S. Jan. 9, 2012)

The Applicant claim regarding ineffective assistance of appellate counsel revolves around the trial court's ruling as to the admissibility of the Applicant's confession supposedly in violation of Edwards v. Arizona. Our South Carolina Supreme Court has addressed the Edwards issue as it relates to when it is the accused who initiates contact with law enforcement:

> Once an accused requests counsel, police interrogation must cease unless the accused himself "initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona,* 451 U.S. 477, 485, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378, 386 (1981).

State v. Kennedy, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998).

"Only in instances in which the suspect initiates subsequent conversations or communication with the investigating authority is a waiver of the right to counsel possible." State v. Henderson, 286 S.C. 465, 468, 334 S.E.2d 519, 521 (Ct. App. 1985).

> In addition, a criminal suspect's rights are not violated when the suspect, not the police, "initiates further communication, exchanges, or conversations with the police." *State v. Howard,* 296 S.C. 481, 489, 374 S.E.2d 284, 288 (1988) (citing *Edwards,* 451 U.S. at 485, 101 S.Ct. 1880). Finally, this Court has held that, after it has been determined that the waiver was valid, the analysis is over:
>
> > [o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.
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> *State v. Drayton,* 293 S.C. 417, 426, 361 S.E.2d 329, 334-335 (1987) (citing *Moran v. Burbine,* 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)).

State v. Binney, 362 S.C. 353, 360, 608 S.E.2d 418, 421 - 422 (2005). *See also* State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001).

The trial judge ruled on the Denno issue in a detailed manner with the necessary credibility findings. (Tr. P. 114 – 121). The Applicant has not explained how the trial court's ruling was an error of law or an abuse of discretion. There is no

merit to the Applicant's claim that appellate counsel was ineffective for failing to argue the Denno ruling on appeal.

Burglary First Degree

Burlgary first degree is committed when a "person enters a dwelling without consent and with intent to commit a crime in the dwelling" under certain circumstances. S.C. Code § 16-11-311 (A). While the circumstances vary, the dwelling requirement is always applicable. Id. What constitutes a dwelling is well defined in statute:

> With respect to the crimes of burglary and arson and to all criminal offenses which are constituted or aggravated by being committed in a dwelling house, any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, *watchman, clerk, laborer or person who lodges there with a view to the protection of property shall be deemed a dwelling house*, and of such a dwelling house or of any other dwelling house all houses, outhouses, buildings, sheds and erections which are within two hundred yards of it and are appurtenant to it or to the same establishment of which it is an appurtenance shall be deemed parcels.

S.C. Code § 16-11-10 (emphasis added).

In short, the statute "requires that an apartment have an identifiable occupant sleeping or residing therein for it to qualify as a dwelling house." *State v. Ferebee*, 273 S.C. 403, 405, 257 S.E.2d 154, 155 (1979). *See also State v. Evans*, 376 S.C. 421, 424-425, 656 S.E.2d 782, 784 (Ct.App. 2008). "The rationale for requiring that an identifiable occupant reside and sleep within the dwelling rests upon the development of burglary as an offense against habitation rather than against

property." *Ferebee*, 273 S.C. at 406, 257 S.E.2d at 155. Clearly, there is an "identifiable occupant" who stayed at the apartment "with a view to the protection of" the apartment. Randy Wigfall testified that he was a "paint and body" man who worked during the day, but also worked at the gambling house at night. (Tr. p. 320, line 8 - p. 322, line 18; p. 327, lines 14-16). As part of his job, Mr. Wigfall restricted access to the apartment, kept the door locked, and admitted only those people he could identify. (Tr. p. 326, line 14- p. 327, line 16). The evidence certainly suggested Mr. Wigfall's conduct could support the required element. Moreover, the issue is without merit as the credible testimony shows that trial counsel articulated valid strategic reasoning to save the burglary/dwelling issue until his closing argument to be used as part of his reasonable doubt argument. 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).

Blowback expert

The Applicant's claims that trial counsel's performance was deficient for failing to present an expert regarding blowback evidence fails for multiple reasons. The Applicant had the burden of proof and needed to present such an expert to this Court. 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). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). 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). Moreover, counsel explained that he did not want to give up closing argument – and he was able to get what he needed out of the State's expert. Last argument is "a substantial right." State v. Mouzon, 326 S.C. 199, 203-04, 485 S.E.2d 918, 921 (1997) (where a defendant in a criminal prosecution introduces no testimony, he is entitled to the final closing argument to the jury); State v. Pinkard, 365 S.C. 541, 543, 617 S.E.2d 397, 398 (Ct.App 2005) ("The right to open and close the argument to the jury is a substantial right, the denial of which is reversible error"); State v. Rodgers, 269 S.C. 22, 24-25, 235 S.E.2d 808, 809 (1977).

CONCLUSION

Based on all the foregoing, 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. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice. 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 issue 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.

This Court cautions the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant and counsel are 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 must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 21st day of February, 2012.

The Honorable J. Ernest Kinard, Jr.
Presiding Judge
Fifth Judicial Circuit

Camden, South Carolina.