VOLUME III OF III

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Brooks P. Goldsmith, Circuit Court Judge

OCTAVIA MIDDLETON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001080

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

CLAY MITCHELL
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

PAGES 1001-1044

INDEX

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.
>
> *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.

2014CP4003607

FORM 5

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

OCTAVIA MIDDLETON, #253919,
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

APPLICATION FOR POST-CONVICTION RELIEF

2014 JUN -4 AM 9:36
JEANNETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LEE CI, 990 WISACKY HWY., BISHOPVILLE, SC 29010
2. Name and location of Court which imposed sentence RICH. CO. GEN. SESS. Ct.
3. Name(s) of co-defendant(s) (if any) SEE ORIGINAL PCR, etc.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) ASSAULT WITK, TEN (10) YEARS,
   (b) ARMED ROBBERY THIRTY (30) YEARS,
   (c) BURGLARY/MURDER FIFTY (50) YEARS
5. The date upon which sentence was imposed and the terms of the sentence:
   (a) SEPTEMBER 2005 SENTENCED ON ALL CHARGES, etc.
   (b)

Revised 3/2003

(c) ____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty ____

(b) after a plea of not guilty xxx

(c) after a plea of nolo contendere ____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. ____ S.C. COURT OF APPEALS

ii. ____

iii. ____

(b) the result in each such Court to which you appealed:

i. ____ DENIED, etc.

ii. ____

iii. ____

(c) the date of each such result:

i. ____ MAY 27, 2010.

ii. ____

iii. ____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. ____ SEE OP. NO. 2010-UP-296 (SC Ct. App. (MAY 27, 2010)

ii. ____

iii. ____

9. If you answered "no" to (7), state your reasons for not so appealing: N/A

(a) ____

(b) ____

(c) ____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: SEE ATTACHED ADDENDUM TO PCR.

(a) ____

(b) ____

(c) ____

11. State concisely and in the same order the facts which support each of the grounds set out in (10): SEE LAW ARGUMENT CONSISTED OF THE AUSTIN MANDATES FOR APP,, ect.

(a) ____

(b) ____

(c) ____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? ____

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? XXX

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? ____

(d) any other petitions, motions or applications in this or any other Court? ____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. ____ POST CONVICTION RELIEF APPLICATION, etc.

ii. ____

iii. ____

iv. ____

(b) the name and location of the Court in which each was filed:

i. ____ RICH. CO. COMMON PLEAS COURT, 2010-CP-40-00486, etc.

ii. ____

iii. ____

iv. ____

(c) the disposition thereof:

i. ____ DISMISSAL ORDER

ii. ____

iii. ____

iv. _____

(d) the date of each such disposition:

i. _____ FEBRUARY 21, 2012.

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____ SEE ORDER OF DISMISSAL ISSUED BY PCR COURT.

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

_____ N/A

15. If you answered "yes" to (14) identify: N/A

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented: N/A

(a) _____

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? xxx

(c) your sentencing? xxx

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? xxx

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? xxx

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. _____ STEVEN HISKER, Esq.

ii. _____ APPELLATE DEFENSE DIV.

iii. _____ ROBERT C. FITZSIMONS, Esq.

(b) the proceedings at which each such attorney represented you:

i. _____TRIAL

ii. _____ APPEAL

iii. _____POST CONVICTION RELIEF

19. State clearly the relief you seek in filing this application:

_____ RESTATE MY PCR APPEAL AS IS ENTITLED TO ONE ACCORDING REINSTATEMENT TO RULE 243, SCACR, etc. initially.

20. Are you now under sentence from any other court that you have not challenged?

_____ NO

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of LEE)

I, OCTAVIA MIDDLETON, 253919, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Octavia Middleton

SWORN to and subscribed before me this 27 day of May, 2014.

Debra Sires (L.S.)
Notary Public

My Commission Expires: 11-4-2015

RICHLAND COUNTY
FILED
2014 JUN -4 PM 3:16
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Octavia Middleton, # 253919, Applicant, v. State of South Carolina, Respondent.	)	2014-CP-40-3607 **RETURN AND MOTION TO DISMISS ALL CLAIMS BEYOND <u>AUSTIN</u> REVIEW**

In response to the post-conviction relief application filed June 4, 2014, Respondent would show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted for three counts of assault and battery of a high and aggravated nature (ABHAN) (2005-GS-40-7884; -7938; -7941); one count of assault with intent to kill (AWIK) (2005-GS-40-7942); five counts of armed robbery (2005-GS-40-7885; -7891; -7892; -7931; -7939); two counts of burglary, first degree (2005-GS-40-7942; -7894); and one count of murder (2005-GS-40-8121). Applicant was represented by Steven Hisker, Esquire. Applicant proceeded to a jury trial from August 27-31, 2007, before the Honorable G. Thomas Cooper, Jr. Applicant was convicted as indicted. Judge Cooper sentenced Applicant to ten (10) years imprisonment for each ABHAN and AWIK conviction; thirty (30) years for each armed robbery conviction; and fifty (50) years on each burglary and murder conviction. The sentences were set to run concurrently.

A notice of appeal was filed and an appeal perfected by Robert C. Fitzsimons, Esquire. The appeal was denied. State v. Middleton, Op. No. 2010-UP-294 (S.C. Ct. App. filed May 27, 2010). The Remittitur was sent on June 14, 2010.

Applicant subsequently filed an application for post-conviction relief on July 23, 2010 (2010-CP-40-4866). In her first application, Applicant asserted claims of ineffective assistance of counsel, violation of U.S. Constitution, and prosecutorial misconduct. An evidentiary hearing was convened on January 10, 2012, at the Richland County Courthouse before the Honorable J. Ernest Kinard, Jr. Applicant was present at the hearing and was represented by Robert C. Fitzsimons, Esquire. By written Order filed February 23, 2012, Judge Kinard denied and dismissed Applicant's post-conviction relief action.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the prior post-conviction relief records, and appellate records. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In her current Application, the Applicant alleges that she is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of PCR Counsel
    a. "See law argument consisted of the Austin Mandates for App,, ect."

III.

There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under §17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation . . ." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Respondent requests an evidentiary hearing solely on the matter of the Applicant's entitlement to an Austin Review.

IV.

This Court should summarily dismiss the current PCR application because it is successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or

> was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised...in the previous application." Id. at 450, 409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then Applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant failed to establish any sufficient reason why his current grounds for relief were not properly raised in his previous application. Respondent moves to summarily dismiss this application because it is successive to Applicant's previous PCR application.

V.

Respondent submits this application should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. *See* S.C. Code Ann. §§ 17-27-10 to -160 (2003). South Carolina Code Section 17-27-45(a) reads as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court held the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was convicted of the offenses he challenges in his application on August 31, 2007.

The remittitur from Applicant's appeal was issued on June 14, 2010. Therefore, Applicant was required to file his PCR application on or before June 14, 2011. Applicant filed this application on June 4, 2014, **more than two years** after the statutory filing period expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, South Carolina Code Section 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings...that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, Respondent moves to summarily dismiss this application for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

VI.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

WHEREFORE, with the exception of Applicant's allegation that she is entitled to a review of her first PCR application pursuant to Austin v. State, Respondent moves to summarily dismiss the application because it is successive to Applicant's prior PCR action and was filed after the statute of limitations expired. Respondent requests an evidentiary hearing solely on the matter of the Applicant's entitlement to an Austin Review.

(signatures on following page)

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: _____
Attorneys for the Respondents
Post Office Box 11549
Columbia, South Carolina 29211

August 28th, 2014.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
	)	2014-CP-40-03607
	)	
OCTAVIA MIDDLETON, #253919	)	
	)	
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 **Return and Motion to Dismiss All Claims Beyond Austin Review** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Jonathan Waller, Esquire
The Law Office of Jonathan Waller, LLC
1720 Main Street, Suite 104
Columbia, South Carolina 29201

DATED this 28th day of October, 2014.

Sara Moore, Legal Assistant
For Respondent

State of South Carolina)) County of Richland)	In the Court of Common Pleas Fifth Judicial Circuit 2014-CP-40-3607
Octavia Middleton, Applicant, vs. State of South Carolina, Respondent.	Transcript of Record

April 2, 2015
Columbia, South Carolina

B E F O R E:

The Honorable Brooks P. Goldsmith, Judge

A P P E A R A N C E S:

Jonathan D. Waller, Esquire
Attorney for Applicant

J. Clayton Mitchell, III, Esquire
Attorneys for Respondent

Maryann S. Nevers, CVR-M-CM
Circuit Court Reporter

INDEX

E X H I B I T S

NO.	DESCRIPTION	I.D.	EVID.

No exhibits introduced during proceeding.

TRANSCRIPT OF RECORD

(Whereupon, the proceeding was commenced at 9:57 a.m.)

THE COURT: And whenever you're ready, Mr. Mitchell.

MR. MITCHELL: Your Honor, this case is *Octavia Middleton v. State of South Carolina*, 2014-CP-40-3607.

Mr. Middleton was indicted for ABHAN, assault and -- assault with intent to kill, five counts of armed robbery, two counts of burg first, one count of murder. He proceeded to trial in 2007 before Judge Cooper. He was convicted. Obviously, he was sentenced to 10 years on ABHAN and the ABWIK, 30 years on the armed robbery, and 50 years on the burglary and murder charges. Those sentences are all concurrent.

He filed a notice of appeal; that appeal was denied. Mr. Middleton filed his first application for postconviction relief in July of 2010. That was also denied; that was heard by Judge Kinard. He was represented in that PCR by Mr. Robert FitzSimons. This is his second PCR, and this was filed June 4th of 2014.

He -- in -- in that application he requests an appeal from his first PCR and alleged that PCR counsel was ineffective for failing to file notice of appeal -- a timely notice of appeal from his initial PCR case.

So we filed a return to motion to dismiss all claims besides the *Austin* belated-appeal issue. And we're here

before you today consenting to that. We've spoken -- Mr. Waller, I'd note for the record, is also present; represents Mr. Middleton.

We have spoken to his prior PCR attorney, who is Mr. FitzSimons. And I think he might've moved offices or something at the time, but he wrote a letter to -- well, he wrote a letter to Mr. Middleton, conveying that he intended to file a notice of appeal but had failed to do so. So we're here before you today consenting to the grant of a belated PCR appeal, the *Austin*, and consent to all other allegations being dismissed.

THE COURT: All right.

MR. MITCHELL: And I'll let Mr. Waller address ---

THE COURT: Mr. Waller?

MR. MITCHELL: --- any other points.

MR. WALLER: Your Honor, Mr. Mitchell is correct. I don't see any valid grounds for the -- the -- other grounds was raised in -- in the subsequent application for postconviction relief. Mr. Middleton did receive a letter from Mr. FitzSimons back in August 2013, explaining that he failed to file a notice of appeal from his PCR application denial. And Mr. Mitchell and myself both seek -- received an e-mail from Mr. FitzSimons in the last month or so, confirming that. So we would ask you to -- to -- to grant the belated appeal of the initial PCR application.

THE COURT: And dismissing all other ---

MR. WALLER: Yes, sir ---

THE COURT: --- claims?

MR. WALLER: Yes, sir, Your Honor.

THE COURT: Okay. The Court will grant that motion.

MR. WALLER: Thank you, Your Honor.

MR. MITCHELL: Thank you, Your Honor.

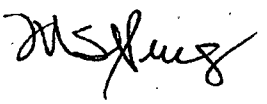
(Whereupon, the proceeding was concluded at 10:00 a.m.)

--- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED MARYANN S. NEVERS, CERTIFIED VERBATIM REPORTER - MASTER, CERTIFICATE OF MERIT, OFFICIAL COURT REPORTER FOR THE EIGHTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 2ND DAY OF APRIL, 2015.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



MARYANN S. NEVERS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JULY 28, 2015

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Octavia Middleton, #253919,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2014-CP-40-03607

CONSENT ORDER GRANTING AN APPEAL PURSUANT TO AUSTIN V. STATE[1]

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed June 4, 2014. Respondent made its Return on November 3, 2014, requesting an evidentiary hearing be convened solely on the issue of whether Applicant was entitled to an appellate review of his first post-conviction relief action pursuant to Austin. Jonathan D. Waller, Esquire was appointed by the Richland County Clerk of Court. An evidentiary hearing was held on April 2, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Waller. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted for three counts of assault and battery of a high and aggravated nature (ABHAN) (2005-GS-40-7884; -7938; -7941); one count of assault with intent to kill (AWIK) (2005-GS-40-7942); five counts of armed robbery (2005-GS-40-7885; -7891; -7892; -7931; -7939); two counts of

[1] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

burglary, first degree (2005-GS-40-7942; -7894); and one count of murder (2005-GS-40-8121). Applicant was represented by Steven Hisker, Esquire. Applicant proceeded to a jury trial from August 27-31, 2007, before the Honorable G. Thomas Cooper, Jr. Applicant was convicted as indicted. Judge Cooper sentenced Applicant to ten (10) years imprisonment for each ABHAN and AWIK conviction; thirty (30) years for each armed robbery conviction; and fifty (50) years on each burglary and murder conviction. The sentences were to run concurrently.

A notice of appeal was filed and an appeal perfected by Robert C. Fitzsimons, Esquire. The appeal was denied. State v. Middleton, Op. No. 2010-UP-294 (S.C. Ct. App. filed May 27, 2010). The Remittitur was sent on June 14, 2010.

Applicant subsequently filed an application for post-conviction relief on July 23, 2010 (2010-CP-40-4866). In his first application, Applicant asserted claims of ineffective assistance of counsel, violation of U.S. Constitution, and prosecutorial misconduct. An evidentiary hearing was convened on January 10, 2012, at the Richland County Courthouse before the Honorable J. Ernest Kinard, Jr. Applicant was present at the hearing and was represented by Robert C. Fitzsimons, Esquire. By written Order filed February 23, 2012, Judge Kinard denied and dismissed Applicant's post-conviction relief action.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of PCR Counsel in that Counsel failed to appeal the denial of Applicant's prior PCR application.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin, a post-conviction relief applicant may petition

the South Carolina Supreme Court for discretionary review of the dismissal of his prior application. Prior to the start of the evidentiary hearing, the State indicated to this Court that they would be consenting to the grant of an Austin appeal. The State informed this Court that they were consenting based off of their discussion with prior PCR Counsel, who indicated that although he considered an appeal frivolous, he did acknowledge receiving a letter from Applicant which indicated Applicant's wishes to appeal the PCR Court's decision.

After review of the facts and circumstances surrounding the waiver of the Applicant's right to appeal the denial of his post-conviction relief application, this Court finds that the Applicant is entitled to appeal the denial of his first post-conviction relief application (2010-CP-40-4866). Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. This Court finds that Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of his prior post-conviction relief action.

Based upon the foregoing, this Court finds that the granting of an appeal of the Applicant's first post-conviction relief action (2010-CP-40-4866) pursuant to Austin v. State is warranted.

IT IS THEREFORE ORDERED:

1. That the Applicant be granted an appeal of case 2010-CP-40-4866 pursuant to Austin v. State; this second application for post-conviction relief is hereby denied and dismissed with prejudice;

2. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate appellate review of the Applicant's first post-conviction relief action. Counsel and the Applicant are direct to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR for the appropriate procedure for a belated appeal; and

3. That the Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 12 day of April, 2015.

BROOKS P. GOLDSMITH
Presiding Judge

Edisto, South Carolina

The Supreme Court of South Carolina

Octavia Middleton, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2013-001713

ORDER

Petitioner has filed a *pro se* petition for a late appeal. This document, which was served on respondent's counsel on July 30, 2013, has been construed as a notice of appeal.

Counsel for petitioner has advised this Court that he received written notice of entry of the order on appeal on or about February 25, 2012. Accordingly, the notice of appeal has not been timely served and the notice of appeal is dismissed. Rule 263(b), SCACR; *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004) ("The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice.").

This dismissal is without prejudice to whatever right petitioner may have to seek relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) by filing an application for post-conviction relief in the circuit court. *See King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992) (discussing appellate procedure to be followed depending on findings of PCR judge on the *Austin* claim). The remittitur will be

sent as provided by Rule 221, SCACR.

C.J.

FOR THE COURT

Columbia, South Carolina
September 3, 2013

cc: Salley W. Elliott, Esquire
Robert Cleland FitzSimons, Esquire
Mr. Octavia Middleton, #253919