

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW

February 18, 2016

RECEIVED

FEB 22 2016

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

S.C. SUPREME COURT

RE: Johnnie Frazier, SCDC # 265586, vs. State of South Carolina
Appeal of Case No. 2011-CP-32-2879

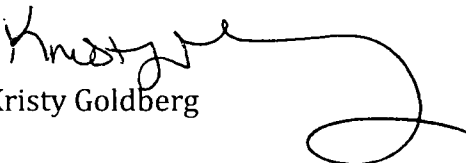
Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal so that they may begin representation of Mr. Frazier, as I was appointed to represent him in this PCR action. I am also hereby requesting that Appellate Defense obtain a copy of the court transcript within the time required by this court.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,


Kristy Goldberg

CC: Patrick Schmeckpeper
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Johnny Frazier, SCDC # 265586
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

The Honorable Beth Carrigg
Clerk of Court
205 East Main Street
Lexington , South Carolina 29072

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

RECEIVED

FEB 22 2016

S.C. SUPREME COURT

Case No. 2011-CP-32-2879

Johnnie Frazier, SCDC # 265586, Appellant

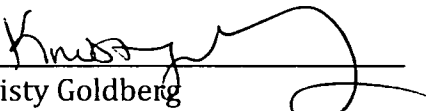
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Johnnie Frazier hereby appeals from the Order of the Honorable Brian M. Gibbons presiding Judge for the 11th Judicial Circuit, filed January 1, 2016, and Order Denying Applicant's Motion to Alter or Amend, filed January 28, 2016 and received by counsel for the Applicant on February 17th, 2016 in the matter of Johnnie Frazier v. State of South Carolina, Case No. 2011-CP-32-2879.

February 18, 2016



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:

Assistant Attorney General, Patrick Schmeckpeper

Office of the Attorney General

Post Office Box 11549

Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

FEB 22 2016

Brian M. Gibbons, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2011-CP-32-2879

Johnnie Frazier, SCDC # 265586, Appellant

v.

State of South Carolina, Respondent.

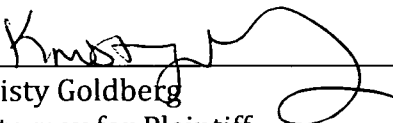
PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and

She has served the NOTICE OF APPEAL on the following party on February 18, 2016 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Patrick Schmeckpeper
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.

1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:
Assistant Attorney General, Patrick Schmeckpeper
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA) FILED IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) ELEVENTH JUDICIAL CIRCUIT
15-2 P 4:20

Johnnie Frazier,
SCDC # 265586

Applicant,

vs.

The State of South Carolina,

Respondent.

)
) J. A. CARRIGG
) CLERK OF COURT
) LEXINGTON SC

C.A. #: 2011-CP-32-02879

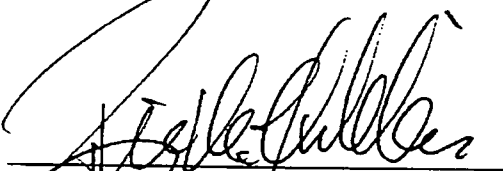
**ORDER DENYING APPLICANT'S
MOTION TO ALTER OR AMEND**

After having thoughtfully considered Applicant's motion referenced above,
and after reviewing the Court's notes and considering the applicable statutory law,
case law and evidence presented, I respectfully deny Applicant's motion.

AND IT IS SO ORDERED.

Chester, SC

January 27, 2016



Brian W. Gibbons
Circuit Court Judge

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2011CP3202879

Johnnie Frazier #265586

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

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

Circuit Court Judge

Judge Code

2/11/2016

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on February 11, 2016, to attorneys of record or to parties (when appearing pro se) as follows:

Kristy Grafton Goldberg 1720 Main Street, Suite 303
Columbia, SC 29201

Patrick Lowell Schmeckpeper PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/kpk

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) ELEVENTH JUDICIAL CIRCUIT

2019 JAN 1

Johnnie Frazier,
SCDC # 265586

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2011-CP-32-02879

Applicant,

vs.

MOTION TO ALTER/AMEND

The State of South Carolina,

Respondent.

FILED
2019 JAN 11 4:11:25
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

Counsel for the Applicant has received the order of the Court dismissing the Applicant's claims for Post-Conviction Relief. Pursuant to South Carolina Rule of Civil Procedure Rule 59(e) the Applicant hereby request this Court consider to Alter or Amend the current Judgement based upon the following arguments:

Failure to Request an Alibi Charge in Jury Instructions

(1) Deficient Representation

South Carolina courts have consistently held that "counsel's failure to request an alibi charge is deficient representation where there is evidence presented the defendant was in another place at the time the crime was committed." Roseboro v. State, 317 S.C. 292 (1995), Ford v. State, 314 S.C. 245, 248 (1994), 308 S.C. 361, 363 (1992). It is clear that an alibi charge was not included in the jury instructions at the conclusion of the trial. See, Transcript pages 524-545. The transcript does not include a discussion of requested jury charges that were denied. See, transcript generally. No additions or exceptions to the instructions were requested by defense counsel after the jury was charged. See, Transcript page 545.

During the evidentiary hearing Applicant Johnnie Frazier testified that he believed he

presented an alibi defense. Similarly, Attorney Wayne Floyd agreed that he presented several defense witnesses that testified solely regarding the Applicant's alibi and he argued alibi as a substantial part of the defense to the jury. Floyd also recalled that he drafted a timeline for the jury during his closing argument to clarify and explain the alibi defense. Floyd testified that he should have requested an alibi charge to be included in the jury charges and he had no strategic basis for not requesting it. Floyd testified that he did not recall an "off the record" charge conference with the Judge whereupon he specifically requested the alibi charge and the Judge denied his request. The Respondent did not present any contrary evidence from the Solicitor or any other witness regarding whether or not Floyd made the request. Accordingly, this Court should find that there exists credible evidence that Floyd failed to request the charge. Failure to request an alibi charge "is deficient representation where there is evidence presented that the defendant was in another place at the time the crime was committed." Roseboro v. State, 317 S.C. 292 (1995).

(2) Prejudice

In order to establish prejudice the Applicant must show that the alibi charge was appropriate and should have been charged and presented to the jury for consideration in this case. An alibi charge "is not required when an accused person merely denies committing the criminal act, alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal acts because he was in another place at the time of its commission." State v. Robbins, 275 S.C. 373, 271 S.E.2d 319, 320 (S.C.1980). Moreover, "since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." Id.

A review of the transcript shows that trial counsel called fifteen witnesses during presentation of his defense, nine of which were related to establishing the timeline and/or alibi defense (Chasity Davis, Tina Davis, Robert Hursey, Francis Cooper, Mark Mayers, Tommy Jaco, Elbert Bolton, Terry Bolton, Dorothy Drawdy). The most substantial portion of the alibi defense came from witnesses Elbert Bolton, Terry Bolton, and Dorothy Drawdy.

The State presented evidence that the time of death may have been around 8:00 a.m. but it could not be established with certainty. See, Transcript page 132. Accordingly, the State was only able to establish that the death occurred sometime between when the victim was last seen at 6:00 a.m. and when her body was discovered at 2:30 p.m. or 3:00 p.m. See, transcript generally. Dorothy Drawdy testified that she saw the Applicant at her house on Highway 6¹ in Swansea around 6:45 a.m. and he left with her husband, James², in James' truck at 7:00 a.m. See, Transcript page 479-480. Terry Boltin testified that he saw Frazier walking down Sharon Church Road³ and picked him up sometime between 8:30 and 10:00 a.m. that morning and stayed with him until between 1:00 and 3:00 that afternoon. See, Transcript page 462-463. Elbert Boltin testified that Frazier came to his house with Terry Boltin around 10:00 a.m. that morning and stayed until 2:00 or 3:00 in the afternoon. See, Transcript page 452-453.

It is indisputable that testimony presented covers a substantial portion of the window of time in which the State claimed the murder/home invasion occurred. The only portion of the timeline where there was no direct testimony as to the Applicant's whereabouts was the period between 7:00 a.m. and 8:30 a.m. when the Applicant was alone with James Drawdy, now deceased. The testimony also reflected that the Applicant was alone on foot 10 miles away from

¹ Dorothy Drawdy lived approximately 14 or 15 miles from the incident location. See, transcript page 167.

² James was not called as a witness because he died prior to trial. See, Transcript page 479.

³ Sharon Church Road near Avon Court is approximately 10 miles away from the incident location. See, transcript page 167.

the incident location during a portion of this time. See, transcript page 167.

It is clear that the jury specifically considered the Applicant's alibi evidence during their deliberations. The jurors submitted a note to the Judge requesting to have the defense attorney's timeline in the jury room. See, Transcript page 545. They also requested to re-hear the testimony of alibi witnesses Elbert Boltin and Terry Boltin. See, Transcript page 557.

The State argues the evidence submitted by the Defense was insufficient to justify an alibi charge because every minute of the 8 ½ hour window during in which this incident happened was not accounted for with evidence from the defense. The State asserts that even if Attorney Floyd had requested this charge the request would have been denied by Judge Johnson. Such argument is speculative as it appears the request was never made. Nonetheless, the State is wrong. The State takes the position that a complete alibi is required, and an "alibi defense must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime." Walker v. State, 397 S.C. 226, 237 (Ct. App. 2013), citing Glover v. State, 318 S.C. 496, 498 (1995). However, Walker and Glover are factually distinguishable from the case at bar. Walker and Glover, both PCR cases, involved claims that the attorney was deficient by not investigating and presenting witnesses at trial to testify regarding an alibi defense. In Walker, the witness could not even testify as to the specific day she was with the defendant, and in Glover, the witness only provided testimony as to the defendant's whereabouts 11 hours prior to the incident occurring.

The alibi evidence presented in Frazier's case was reasonably sufficient to have justified an alibi charge. First of all, the State was not able to provide the defense with anything more specific than an 8 ½ hour window during which time the incident could have occurred at any time. The Applicant offered a firm and true alibi for the majority of that window. If the jury had

made the factual determination that the murder/home invasion occurred before 7:00 a.m. or after 8:30 a.m., then the jury could have also fairly determined that the Applicant had a complete alibi when the crime was committed.

Secondly, given the substantial testimony offered to account for the Applicant's whereabouts during the State's 8 ½ hour window, the jury was entitled to be instructed that the Defendant did not have the burden to prove alibi, but rather the State had the burden to disprove the alibi. What sense does it make that a jury would only be advised of this important legal principle if the Applicant presents evidence of his whereabouts during the entire 8 ½ hour period, but the jury is not instructed about the proper burden for each side when the defendant presents evidence of his whereabouts during only 7 hours?

It is also important to note that the Solicitor acknowledged and attacked the alibi defense during trial. In closing argument he said: "Mr. Floyd wants to tell you that Terry Boltin alibies Mr. Frazier...". See, Transcript, page 523. He then proceeded to attack the credibility of the alibi witnesses by saying: "I submit it is more believable that they know whether that is Johnnie Frazier's book bag than it is that they picked him up at 8:00 in the morning or 9:00 in the morning or 10:00 in the morning." Id. The Solicitor is entitled to challenge the credibility of defense witnesses. However, in making this argument the Solicitor is telling the jury that the witnesses are not credible and the Defendant has not met his burden at proving alibi. This is precisely why the Defendant is and should be entitled to the alibi instruction when actual alibi evidence is presented. "An alibi charge places no burden on the defendant, but emphasizes that it is the Sate's burden to prove the defendant was present at and participated in the crime." Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1994). Further, "[a]n alibi charge is

considered especially crucial when the evidence is entirely circumstantial⁴ and when the Solicitor disparages the alibi defense. Id.

Failure to Introduce Exculpatory Evidence related to Forensic Evidence Obtained from Cigarette Butts in Car

The State has argued that the cigarette butt evidence was not exculpatory and too insignificant to call into question the Applicant's conviction. During trial the State's case alleged that Frazier stole the victim's car and disposed of it near his father's house in a wooded area. See, Transcript pages 154-159. A State's witness testified that *after* the car was found in this location the primary suspect became Johnnie Frazier. Id. at page 159 (emphasis added). Therefore, the Applicant became a suspect based on the specific location of the car which they believed was incriminating. The State is now taking a contradictory position by arguing that the location of the cigarettes (near the car) were insignificant because they were found in an area frequently traversed by the general public. This reasoning is inconsistent with the evidence offered at trial.

The State completely misses the fact that trial counsel attempted to argue the significance of the cigarette butts during his closing argument but was prevented from making this argument because the butts were not offered into evidence. See, Transcript, page 505 and 509. When asked at the evidentiary hearing, trial counsel testified that he was attempting to explain to the jury that cigarette butts were found near the victim's car when it was discovered abandoned and burned and one of the cigarettes had DNA present that did not match Frazier. Trial counsel

⁴ No direct witness or direct forensic evidence was offered by the State to incriminate the Applicant at trial. The State's theory was that Frazier committed this act alone. In proving their case they relied on evidence of the Applicant's behavior around the time of the incident, the Applicant's alleged motive for committing the crime, the fact that the victim's car was found near the Appellant's father's house and evidence of a drop of the victim's blood found on a backpack allegedly belonging to the Defendant. While the State may argue that the drop of the victim's blood on the backpack constitutes direct evidence, the bag was not found at the scene or in the presence of the Defendant. Additionally, no testimony was presented as to exactly how or when the blood got onto the bag. Further, the defendant was not convicted of the murder. Therefore, this blood evidence would be circumstantial evidence of the Defendant's alleged involvement in any home invasion.

testified that he mistakenly thought that the State had introduced this evidence at trial and he admittedly overlooked the fact that the State did not offer the evidence. Trial counsel testified that he believed this evidence was important to Frazier's defense, and had he realized at the time that the State had failed to present this evidence he would have presented this evidence himself. Trial counsel testified that he fully intended for the jury to be aware of this evidence. Trial counsel's testimony is supported by the transcript which shows that he was of the mistaken belief that the evidence had been presented to the jury. See, Transcript pages 505 and 509. Trial counsel testified that he did not have a strategic reason for not introducing the evidence in his defense. Counsel was admittedly deficient in his representation of Frazier by not introducing this evidence in trial.

The State used the location where the car was found as incriminating evidence against Frazier but neglected to introduce evidence of DNA found at that same location which did not belong to Frazier. At this point, it became the responsibility of trial counsel to pay attention and ensure that the exculpatory DNA evidence was brought to the jury's attention. Trial counsel mistakenly overlooked the fact that the evidence wasn't brought forth by the State and failed to introduce it himself. The evidence of the unknown DNA on the cigarette butt could have been used by Defense counsel to show that another individual may have disposed of the vehicle, to counter the State's allegation that the car's location itself was incriminating, or simply in arguing that law enforcement improperly focused on Frazier as a suspect in this matter. Regardless of which argument trial counsel would have made, it is clear that he intended to argue these facts and was prevented from doing so due to his own negligence in not realizing that the evidence had not been offered.

Failure to Object to “Golden Rule” Violation in State’s Closing Argument

During closing arguments, the Solicitor stated as follows:

“If you are standing in your own house and somebody comes in with a gun and says, I am taking your money and you know it is somebody that you know, you know it is somebody you know what do you think she would feel like. Don’t you think every muscle in her body got rigid like this before she got killed, that she was exhausted in those few minutes it took from the time they came in and the time that bullet was through her brain, you be the judge of that.”

See, Transcript page 520. Defense counsel failed to object contemporaneously or after the completion of the State’s closing argument. During the evidentiary hearing for this post-conviction relief matter trial counsel stated that he did not have a strategic reason for not objecting to this statement.

The State correctly cites the law related to this issue. However, it should be noted that the intent of this argument in the Applicant’s case was specifically to have the jurors imagine and relate to fear from the victim’s standpoint at the exact time of the murder. The Solicitor attempted to make this statement to explain why the time of death could not be more exact, citing to the testimony offered by the pathologist that trauma or stress of combat situations can cause rigamortus to set in sooner than it would in a normal death. In making this argument, the Solicitor asked the jurors to imagine, from the victim’s point of view, the type of fear involved with having a home invader point a gun at them and rob them. The Solicitor used this strategy to argue that this victim found herself in a highly stressful situation (similar to combat) which could have affected when rigamortis set in.

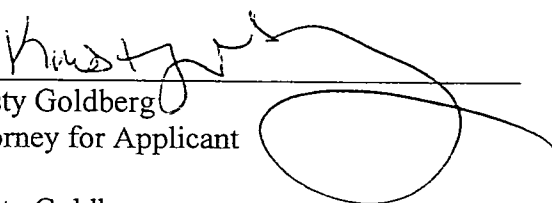
The prejudicial statement made by the Solicitor was not only made to arouse the passions of the jury and have them relate to the victim during the incident, but was also made in an attempt to explain the State’s evidence and lack of an exact time of death. The State’s argument

that the time of death could not be certain allowed them to create an eight hour window during which they argued the incident took place. The larger the State could make their window, the more challenging it made the Defense's job in proving alibi. The argument, therefore, was also indirectly intended to combat the Defendant's alibi defense.

The statement made by the Solicitor was extremely prejudicial. Further, it was used to attack the defense asserted by trial counsel. For these reasons, it is very reasonable to believe that this statement affected the outcome of the jury's decisions.

CONCLUSION

As to the Applicant's other claims not addressed in this Motion, Applicant does not waive any arguments previously made and hereby asserts that all allegations offered in his Post-Conviction Relief application and during the hearing were valid claims for Post-Conviction Relief that were sufficiently addressed in the record. Applicant simply does not have any additional argument to present on those claims and counsel intends to file a Notice of Appeal regarding the Court's decision on those grounds upon the final conclusion of this case after a ruling on this Motion to Alter/Amend Judgment is received.



Kristy Goldberg
Attorney for Applicant

Kristy Goldberg
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
803-667-6633
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina

This 8th day of January, 2016

FILED
2016 JAN 11 A 11:30
BETH A. CARRINGG
CLERK OF COURT
LEXINGTON, SC

ORIGINAL

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) FILED FOR THE ELEVENTH JUDICIAL CIRCUIT

Johnnie Frazier,
S.C.D.C. No. 265586,

2015 JAN 11 AM 11:41 C.A. No. 2011-CP-32-2879

BETH A. CANNIGG
Applicant CLERK OF COURT
LEXINGTON, SC

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 29, 2011. Respondent made its Return and Motion to Dismiss requesting the matter be summarily dismissed on or about February 28, 2012. Amended applications were filed on October 1, 2012, and April 24, 2013. An evidentiary hearing into the matter was convened on January 22, 2014, at the Lexington County Courthouse. Applicant was present and was represented by Kristy Goldberg, Esquire. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Wayne Floyd, Esquire, also testified. This Court had before it a copy of Applicant's trial transcript, the records of the Lexington County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, appellate records, and the pleadings. The Court finds as follows:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the



March 2006 term of the Lexington County Grand Jury for possession of a firearm during the commission of a violent crime (2009-GS-32-0667); armed robbery (2006-GS-32-0670); and burglary – first degree (2006-GS-32-0671).¹ He was represented by Wayne Floyd, Esquire. From November 26-28, Applicant proceeded to trial by jury before the Honorable James W. Johnson, after which he was convicted as indicted on each of the three charges. Judge Johnson sentenced him to confinement for a period of five (5) years for violating the firearms provision; thirty (30) years for armed robbery; and life for burglary. Each sentence was set to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Wanda H. Carter, Esquire, represented Applicant on appeal. The South Carolina Court of Appeals dismissed Applicant's appeal in a written Order. State v. Frazier, Op. No. 2010-UP-391 (S.C. Ct. App. filed August 25, 2010). The Remittitur was issued on May 5, 2011.

Allegations

In his application for post-conviction relief, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. "There is no reason for me to be found guilty for everything but murder when I was the only suspect."
2. "There is no evidence to put me at the scene of crime."
3. "There is no evidence to say I Armed Robbed [sic] the victim."
4. There is no gun to be brought in courtroom."

Applicant was subsequently appointed attorney Jack Duncan as counsel, who filed an amended application was filed on October 1, 2012, raising the following issues:

¹ Applicant was also indicted for murder (2006-GS-32-0668). Applicant proceeded to trial on this indictment at the same time as his burglary, armed robbery, and weapon possession indictments. However, the jury was unable to reach a verdict as to murder and a mistrial was declared on that offense only.



1. Ineffective assistance of counsel in that trial counsel failed to call essential witnesses; did not properly advise applicant of his right to testify; and did not seek appropriate charges on the law by the court, nor object to the court's failure to charge the law of alibi.

In November 2012 Attorney Duncan was relieved as counsel due to a conflict and Kristy Goldberg was appointed. Attorney Goldberg filed an amended application on April 24, 2013, and then a Second Amended Application on January 22, 2014, ultimately raising the following allegations:

1. Ineffective assistance of counsel, specifically:
 - a. Failure to request an alibi charge in jury instructions.
 - b. Failure to introduce exculpatory evidence including, but not limited to, forensic evidence obtained from cigarette butts in car.
 - c. Failure to object when Solicitor requested that Judge sentence Applicant as if he caused the death of the victim.
 - d. Failure to argue that the State did not present sufficient evidence regarding the Indictment for Armed Robbery, as there was no evidence presented that the victim's car was taken from her presence by force, threats, or intimidation.
 - e. Failure to argue that the State did not present sufficient evidence regarding the Indictment for Burglary 1st, as there was no evidence presented regarding the circumstances under which the Applicant allegedly entered the dwelling and whether it was consensual or not;
 - f. Failure to call witness regarding third party guilt.
 - g. Failure to object and move to strike when Ashley Cougar submitted testimony of a prior bad act by Applicant and alleged that he stole her car.
 - g. Failure to effectively communicate to Applicant his right to testify and failure to have the Court instruct the Defendant as to his right to testify or remain silent.²
 - h. Failure to object to "Golden Rule" argument in State's closing argument.
 - i. Failure to argue that proffered testimony by Robert Hursey regarding Ashley Cougar should have been admitted as impeaching evidence.

At the evidentiary hearing, Applicant further alleged counsel was ineffective in failing to object to a purported "Golden Rule" violation by the State during closing arguments.

² Due to a typo in the amendment, there were two allegations labeled "g."



FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, appellate records, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the post-conviction relief transcript, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler, 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, (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).

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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.

Failure to Request Alibi Charge

This Court finds that Applicant's allegation that counsel was ineffective for failing to request an alibi charge on the record is without merit. The Supreme Court has held that trial counsel's failure to request an alibi charge is deficient representation where there is evidence presented that the defendant was in another place at the time the crime was committed. Ford v. State, 314 S.C. 245, 42 S.E.2d 604 (1994). However, "[a] charge on the defense of alibi is not required when an accused person merely denies committing the criminal act; alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal acts because he was in another place at the time of its commission." State v. Robbins, 275 S.C. 373, 271 S.E.2d 319, 320 (1980). Moreover, "since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." Id.

Sidney Hursey discovered his wife's body between 2 and 3 p.m. that day. (Trial Tr. p.50). Detective Grimes testified that the victim's body appeared to be in a state of full rigor mortis when law enforcement removed her from the scene that night at 10 p.m. (Trial Tr. p.100). She



noted that the body of a recently deceased person typically takes twelve hours to reach a state of full rigor mortis. (Trial Tr. p.104). Thus, based upon all the relevant information, Dr. Sexton testified that to a reasonable degree of medical certainty, the victim died approximately between 4 a.m. and early evening on August 14, 2003. (Trial Tr. p.139). Importantly, Sidney Hursey testified he went to work at 6 a.m. and returned home around 3 p.m. and discovered the crime scene. (Trial Tr. pp.50-52). No other witness entered the bedroom during this time frame.³

Our Courts have held that the propriety of an alibi charge is contingent upon evidence of a complete alibi. State v. Baker, 411 S.C. 583, 591, 769 S.E.2d 860, 865 (2015) (*quoting Robins* at 375, 271 S.E.2d at 320). The South Carolina Supreme Court has unequivocally held that any gap in the relevant timeframe precludes the trial judge from issuing an alibi charge. Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995). The record clearly shows that an alibi charge was not warranted at Applicant's trial because there was no evidence or testimony in the record that definitively accounted for Applicant's whereabouts between 7 a.m. and 10 a.m. on the morning of the home invasion and murder. Thus, counsel's performance was not deficient in failing to request an inappropriate jury charge that the trial judge would have correctly denied.

The following is a chronological account of the relevant witness testimony at trial concerning Applicant's whereabouts on August 13 -- August 14, 2003: Terry Bolton testified he was with Applicant at Melton's home on August 13, 2003. (Trial Tr. p.462). Terry Bolton recalled doing drugs with Applicant but was unable to remember what time Applicant left Elbert Bolton's residence. (Trial Tr. p.462). Terry Bolton spent the night at Elbert's residence. (Trial Tr. p.462). Elbert Bolton also testified Applicant left his residence late on August 13, 2003. (Trial Tr. p.453).

³ Because Applicant was convicted of burglary, first-degree, this time frame for determining whether Applicant presented a complete alibi, necessary for the jury charge, is more important than the victim's time of death.

Stanley Gleaton testified he abused crack cocaine with Applicant at Elbert Bolton's residence on August 13, 2003. (Trial Tr. p.249). Gleaton alternatively testified he stayed up until daybreak with Applicant. (Trial Tr. p.250). Gleaton testified he believed daybreak to be around 7 a.m. on August 14, 2003. (Trial Tr. p.260). When Gleaton awoke somewhere between 10 a.m. and 12 p.m., he testified that Applicant was gone from Elbert Bolton's residence. (Trial Tr. p.250).

Dorothy Drawdy, Applicant's sister, testified that Applicant was in her Gaston home at 6:45 a.m. on August 14, 2003. (Trial Tr. p.481). Drawdy testified Applicant arrived on bicycle to catch a ride with her husband to work. (Trial Tr. p.479). Drawdy left her home at 7:00 a.m. in her husband's vehicle. (Trial Tr. p.480). Applicant did not make it all the way to the worksite after he had an argument with her husband (Trial Tr. p.481).

Terry Bolton testified he saw Applicant walking down the side of the road at some point between 8:30 and 10:00 am and offered him a ride. (Trial Tr. p.464). Terry Bolton testified that he drove Applicant to Elbert Bolton's residence. A few hours later, he testified he drove Applicant to his father's or mother's home. (Trial Tr. p.462). Terry Bolton had been smoking crack and marijuana along with consuming liquor on the day in question. (Trial Tr. p.466).

Jacqueline Burke testified to her interactions with Applicant. Counsel questioned Burke on whether she gave a statement to police that she saw Applicant walking on Old Wire Road at 10:30 a.m. on August 14, 2003. (Trial Tr. p.277). Burke did not recall the statement or acknowledge its validity. (Trial Tr. p.277).

Elbert Bolton testified Applicant was at his residence at 10 a.m. on August 14. (Trial Tr. p. 454). Elbert Bolton also testified Applicant left his residence around 2 or 3 p.m. that



afternoon. (Trial Tr. p.454). Stanley Gleaton testified Applicant returned to Elbert Bolton's residence on a bicycle at night on August 14, 2003. (Trial Tr. p.258).

Thus, Respondent submits that because no witness testified with any certainty to Applicant's whereabouts between 7:00 a.m. and 10:00 a.m. on August 14, 2003, Applicant has not met his burden to make a prima facie showing of a complete alibi during the relevant time frame.⁴ The victim's husband, Hursey, established that the robbery occurred between 6 a.m. and 3 p.m. on August 14, 2004. Dr. Sexton gave his expert opinion that the victim died between 4 a.m. and the early evening of August 14, 2004. Counsel did not present witnesses or evidence to dispute either time frame. It is of note that counsel testified he exhausted his alibi investigation in anticipation of trial. Furthermore, Applicant presented no new evidence at the PCR hearing on the matter. Accordingly, Applicant failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms.

Similarly, Applicant failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. As a result, this allegation is denied and dismissed.

Failure to Introduce Cigarette Butt as Exculpatory Evidence

Applicant has also failed to meet his burden to show that counsel's performance in failing to introduce cigarettes found in the vicinity of the victim's abandoned vehicle almost three months after the offense would have changed the outcome of the trial. "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006). "Failure to conduct an independent investigation does not constitute ineffective

⁴Terry Bolton was only certain that he picked up Applicant by 10 a.m, admitting he was unsure of when, exactly, "because at that time, [he] didn't have a value of time." (Trial Tr. p. 462). Mr. Bolton



assistance of counsel when the allegation is supported only by mere speculation as to the result.” Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Failure to investigate allegedly beneficial evidence does not constitute ineffective assistance of counsel when the evidence does not exculpate an applicant’s guilt. See Taylor v. State, 404 S.C. 350, 358, 745 S.E.2d 97, 101 (2013).

In the present case, the evidence at issue simply was not exculpatory. Crucially, the property where the discarded cigarette butts were discovered was often used by the general public, and there was a significant duration between its abandonment and subsequent discovery by police. At trial, Wayne Birchmore testified he was the caretaker for 217 acres of property off Cassidy Road. (Trial Tr. p.222). The owner hired him to perform minimal duties to care for the property in 1984. He testified that he investigated a charred vehicle on August 23, 2003 in a heavily wooded area on the property. (Trial Tr. p.225). The vehicle had been burned down to its chassis. He explained that trespassers had frequently misused this area on the property as a dumping ground for years. (Trial Tr. p.228). On October 31, 2003, the police investigated the scene and determined the vehicle belonged to the victim. Cigarette butts were located **near** the vicinity of the vehicle. Id. (emphasis added). The evidence was processed and D.N.A. samples were retrieved. Police ran a C.O.D.I.S. search that failed to match the D.N.A. to any known offenders in the system. Counsel did not move the cigarette butts into evidence.

Respondent submits the evidence in question was too insignificant to call into question Applicant’s conviction. First, and most importantly, the victim’s charred vehicle was discovered in an area frequently traversed by the general public. Even if the charred vehicle appeared suspicious, it is certainly illogical to surmise that a trespasser having a smoke near the vehicle would have reported it and implicated himself for minor criminal behavior. The trial judge took



judicial notice that over 216,000 people resided in Lexington County. Birchmore traveled frequently during the time period in question and was rarely at the property. Second, the charred vehicle and nearby cigarettes butts were not investigated by police until months after the offense. Notably, Birchmore did not testify he noticed any cigarette butts near the vehicle on August 23, 2003. These three facts alone negated any exculpatory weight of the evidence. Last, the record shows that the persons investigated or implicated in the offense mostly had criminal records. (Trial Tr. p.241; p.264; p.459). Therefore, the lack of a C.O.D.I.S. match suggests that the cigarette butts were discarded by an irrelevant trespasser. The only significant evidentiary weight of the discovery of the victim's charred vehicle on the property was its proximity to the home of Applicant's father. Applicant testified at the PCR hearing that he had no alternative explanation of how the victim's blood got on his book bag to call into question the strength of the State's evidence of his guilt. Thus, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. This allegation is therefore denied and dismissed.

Failure to Object to Solicitor's Statement During Sentencing

Concerning Applicant's claim that counsel was ineffective in failing to object when the Solicitor "requested the Judge sentence Applicant as if he caused the death of the victim," this Court finds he has failed to meet his burden. A trial judge generally has wide discretion in determining what sentence to impose, and "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider to the source from which it may come." State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976); see also State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (S.C. Ct. App. 2008) ("A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear

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on the proper sentence for the particular defendant, given the crime committed.”). This Court first note’s the solicitor requested the judge base his sentencing “on [Applicant’s] prior record and the harm that he ha[d] done.” (Sentencing Tr. p. 15). Applicant has failed to present any reason why it would have been inappropriate for the sentencing judge to have considered any harm resulting from the crime he was convicted of. Accordingly, there was no basis for an objection, and counsel’s performance was not deficient.

Applicant has also failed to show that any prejudice resulted from counsel’s purported deficiency. The trial court stated on the record that he was “completely disregarding” the murder charge. (Sentencing Tr. p. 17). Instead, the court took all factors into account⁵ and issued its sentence based on the circumstances. This Court therefore finds Applicant has failed to meet his burden with respect to this allegation. As such, it is denied and dismissed.

Sufficiency of the Evidence Argument

Applicant further argues counsel was ineffective for failure to argue that the State did not present sufficient evidence regarding indictments for armed robbery and burglary, first degree. This allegation is also without merit. This Court first finds counsel was not ineffective because these issues were raised and preserved for appeal. Counsel challenged the sufficiency of the State’s evidence against Applicant when he moved for directed verdict, (Trial Tr. p. 399), and then renewed that motion twice. (Trial Tr. p. 488; Sentencing Tr. p. 4-5). Counsel argued that there was “absolutely no evidence to place [Applicant] in the home at the time of the murder,” and that there was “absolutely no evidence to place [Applicant] in possession or control of any of the items that were taken from the home, nor any evidence to connect him with any murder weapon . . .” (Sentencing Tr. p. 5). The trial court ruled that there was “sufficient evidence in

⁵ The trial judge seemed particularly concerned by Applicant’s prior criminal history, noting that he had faced approximately eighty (80) years of exposure based on prior offenses he had been convicted of or pled guilty to. (Sentencing Transcript, p. 17).



the record that support[ed] the verdict of the jury” for each offense. (Sentencing Tr. p. 9). Accordingly, Applicant has failed to raise any deficiency for which this Court can grant relief.

In addition, Applicant has failed to show any prejudice resulting from this purported deficiency. In order to show prejudice stemming from a failure to move for directed verdict, an applicant must show that such a motion would have changed the outcome of the trial.⁶ Sellers v. State, 362 S.C. 182, 189, 607 S.E.2d 82, 85 (2005). When ruling on a criminal defendant’s motion for directed verdict, a trial court is concerned with the existence of evidence, not its weight. State v. Wiggins, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998). If there is any direct or substantial evidence tending to prove the guilt of the accused, or from which guilt may be fairly and logically deduced, the case should be submitted to the jury. State v. Johnson, 334 S.C. 78, 84, 512 S.E.2d 795, 798 (1999).

This Court finds sufficient evidence was presented to submit the charges of armed robbery and burglary, first degree, to the jury. Testimony and evidence were presented at trial from which a jury could reasonably conclude Applicant was guilty of armed robbery and burglary. Scottie Carson testified that Applicant had approached him on one or more occasions inquiring about getting a “clean” gun, and informing him that the victim kept a large amount of money in her house. (Trial Tr. p. 194-95). Another witness testified Applicant told her, referring to the victim, that “one day that bitch is going to get what she is asking for.” (Trial Tr. p. 181). The day the victim was murdered, her car and a large amount of money and jewelry were stolen from her house. (Trial Tr. p. 55-56; 65). A witness testified that she saw Applicant coming from the victim’s driveway *in the victim’s* car the day she was murdered. (Trial Tr. p. 208-09; p. 212;

⁶ While Applicant’s argument appears to be that counsel’s argument in support of his motion for directed verdict was improperly argued, this Court finds the same prejudice analysis argument applies. See Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (“To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving . . . but for counsel’s errors, there is a reasonable probability the result at trial would have been different.”).



p. 218). The victim's abandoned and destroyed vehicle was discovered near Applicant's father's residence. (Trial Tr. p. 159). Applicant was seen with a book bag matching its description the night before and after the victim was robbed and murdered. (Trial Tr. p. 251-52; p. 268; p. 298). That bag was subsequently recovered by police, and contained both the victim's blood, as well as DNA evidence linking it to Applicant. (Trial Tr. p. 388-394). This Court finds that the jury could have fairly and logically deduced from this evidence that Applicant was guilty of armed robbery and first degree burglary.

Failure to Object to Introduction of Prior Bad Acts

Applicant's allegation that counsel was ineffective in failing to object to testimony of a prior crime is similarly without merit. As a general rule, "[e]vidence of crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404, SCRE (2015). However, where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992); see also Rhodes v. State, 349 S.C. 25, 32-33, 561 S.E.2d 606, 610 (2002) (failure to object to introduction of improper character evidence not ineffective assistance where supported by valid, strategic decisions). In evaluating such strategic decisions, it is crucial to "eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Edwards v. State, 392 S.C. 449, 456-58, 710 S.E.2d 60, 64-65 (2011) (*citing Strickland* 446 U.S. at 689, 104 S.Ct. 2052).

This Court acknowledges that counsel stated, on direct examination, that there would have been "no strategic reason" not to object to Ms. Cougar's testimony that Applicant stole her car. (PCR Tr. p. 19). Such a retrospective admission, however, is not dispositive of ineffective assistance. See Edwards at 458, 710 S.E.2d at 65 (Disregarding counsel's hindsight-based



testimony that he would now reconsider action taken at trial). Counsel's decisions must be evaluated "at the time they were made," and without "the distorting effects of hindsight."⁷ Id.

This Court finds that counsel articulated, albeit tepidly, sufficiently valid reasons to preclude a deficiency finding. By allowing the prior bad act testimony to come in, counsel acknowledged he was able to elicit testimony from Ms. Cougar to the effect that Applicant had roughly ten thousand (10,000) dollars in cash prior to robbing the victim in this case. (PCR Tr. p. 30-31). He further agreed that getting this testimony had been a positive for Applicant's case. Id.⁸ This Court finds such a strategy was reasonable. First, it presented serious questions about the State's characterization of Applicant's motive to rob and murder the victim. Additionally, it brought to the jury's attention Ms. Cougar's bias against Applicant, potentially raising doubts as to her credibility. This Court therefore finds no deficiency in regard to this allegation.

Applicant has also failed to meet his burden to show any resulting prejudice from counsel's supposed deficiency. Applicant has presented no evidence that but for this purported deficiency, the outcome of the trial would have been different. Moreover, this Court finds persuasive counsel's admission that getting the testimony in concerning the cash in the car constituted a "positive" for Applicant's case. (PCR Tr. p. 31). Accordingly, this allegation is denied and dismissed.

Failure to Object to Alleged Golden Rule Violation

Applicant also alleges that counsel was ineffective in failing to object to a purported "Golden Rule" violation. This Court finds that the solicitor's closing argument did not warrant an objection. "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744

⁷ Indeed, counsel admits on cross-examination that his current belief that he should have objected and moved to strike Ms. Cougar's testimony is a result of hindsight. (PCR Tr. p. 30).

⁸ Despite counsel's testimony to the contrary, it does not appear that he referenced this in his closing argument.

(2004). “The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.” Id. at 609–10, 602 S.E.2d at 744. “While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done.” State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)). “ ‘The solicitor's closing argument must, of course, be based on this principle.’ ” Id. “A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice.” State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006). “Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id.; see State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) (“A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.”).

The alleged impermissible argument at issue was nothing more than a rebuttal comment on counsel's defense theory that the State's inability to determine the victim's time of death constituted a glaring weakness in the State's case.

[Counsel] wants to make a big argument about the time of death and rigamortus [sic], I don't know, he started talking about they brought the coroner, if the coroner explains it better than Dr. Sexton, I don't know, Dr. Sexton said you could die standing up in combat. I assume that is from trauma and stress of being in that situation. I don't know how long it lasted. But I will tell you this, if you are standing your own house and somebody comes in with a gun and says, I am taking your money and you know it is



somebody that you know, you know it is somebody you know what do you think she would feel like. Don't you think every muscle in her body got rigid like this before she got killed, that she was exhausted in those few minutes it took from the time they came in and the time that bullet was through her brain, you be the judge of that.

(Trial Tr. p.520, lines 8-19). While counsel did not make an objection to these statements, such an abstention did not constitute ineffective assistance in this case. The comment did not have the effect of arousing the jury's fears and prejudices. It was not accusatory and noticeably did not even mention Applicant by name. The syntax at issue was presented in the general sense. The comments addressed the possibility in variance of the victim's time of death in this case. Furthermore, the comment was in rebuttal to counsel's cross-examination questions of Dr. Sexton. Counsel posed questions intended to elicit testimony that the victim was an average person where there was an absence of factors that would have accelerated the rigor mortis. (Trial Tr. pp.134-44). The comment was a permissible inference from the record where counsel had opened the door to the matter. See State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000). For instance, counsel posed such questions as "Now, another thing that might speed up rigamortus [sic] you say is like a combat situation?" and "[a]ssuming there was no seizure, assuming normal around 70 degrees, room temperature, when in your opinion would rigamortus [sic] begin?" (Trial Tr. p.134, lines 15-16; p.136, lines 11-13).

Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009), is instructive to the present case. The Brown Court identified a clear golden rule violation but reversed the PCR Judge in finding counsel's failure to object constituted harmless error. The Brown Court held, "trial counsel was deficient in failing to object to the challenged portion of the solicitor's closing argument because it constituted a Golden Rule argument which impermissibly appealed to the passion of the jurors

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by asking them to speak up for the child victim.” Id. (internal quotations omitted). The Brown solicitor made the following improper argument:

I embrace my burden because I represent the State of South Carolina. And I think someone said at the beginning of this trial this is trying to protect the rights of people. Well, I tell you what. I'm here to protect the innocent. I'm here to protect [child victim] a four-year-old child now. Three-year-old little child at that time. And I am the last person that you're going to hear speak up for her.

So, I ask you, when you go back in that jury room, you speak up for [child victim]. We can never put her back to where she was before this abuse occurred. But we can make sure that the perpetrator is punished. So when you go back in that jury room to deliberate, ladies and gentlemen, speak up for [child victim].

Id., at 511-12, 680 S.E.2d at 912. The Brown Court found that the Petitioner did not satisfy his requisite burden of proving that there was a reasonable probability that but for counsel's deficient performance the result of his trial would have been different. It held that the limited duration and improper use of personal pronouns was limited. Id.

Even incorrectly presuming the extracted portion of the solicitor's argument here constituted an impermissible “Golden Rule” argument, it was significantly less concerning than closing argument at issue in Brown. Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. Therefore, this allegation is denied and dismissed.

Failure to Introduce Rodney Hursey's Proffered Testimony to Impeach Ms. Cougar

Applicant also alleges counsel was ineffective in failing to argue Rodney Hursey's proffered testimony should have been admitted for impeachment purposes. This allegation is similarly without merit.

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First, Applicant has failed to provide any basis for which the statement was admissible for impeachment purposes. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility may, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the witness' character for truthfulness or untruthfulness. Rule 608(b)(1), SCRE (2015). In addition, "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE. Applicant has failed to show Ms. Cougar's statement indicates character for truthfulness or untruthfulness; nor has he presented any evidence of bias. Accordingly, because the proffered testimony was not proper impeachment evidence, this Court finds counsel was not ineffective in failing to make that argument.

Applicant has also failed to meet his burden to show prejudice. This Court would first point out that Ms. Cougar's testimony – that one day the victim would "get what's coming to her" – was most probative with respect to the murder charge, which was ruled a mistrial. In any event, the proffered testimony by Mr. Hursey does not appear to be of the weight or nature that it would have cast any more doubt on Ms. Cougar's credibility than counsel's effective cross-examination of her. In fact, as discussed previously, the jury was already aware that she was angry with Applicant for stealing her car. (Trial Tr. p. 189). Accordingly, Applicant has failed to prove counsel ineffective in failing to argue Mr. Hursey's proffered testimony should have been introduced for impeachment purposes. This allegation is therefore denied and dismissed.

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, the Court finds Applicant failed to present

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any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

CONCLUSION

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

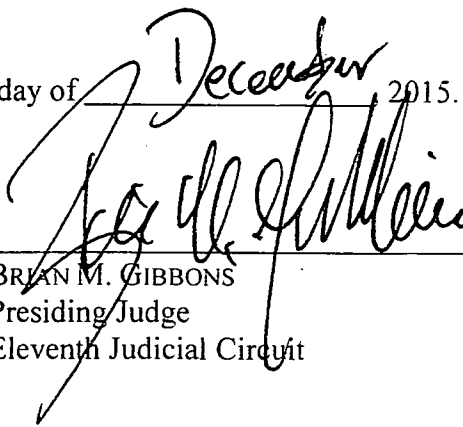
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.


IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

FILED
2016 JAN 11 11:41
BETH A. CANNIGG
CLERK OF COURT
LEXINGTON SC

AND IT IS SO ORDERED this 2 day of December 2015.


BRIAN M. GIBBONS
Presiding Judge
Eleventh Judicial Circuit


_____, South Carolina

FORM 4

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

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP3202879**

Johnnie Frazier #265586

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

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

Circuit Court Judge _____ **Judge Code** _____ **Date** 1/11/2016
For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on 12th of January 2016, to attorneys of record or to parties (when appearing pro se) as follows:

Kristy Grafton Goldberg
1720 Main Street, Suite 303 Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

Patrick Schmeckpeper
PO Box 212069 Columbia, SC 29211-9930

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/mh

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW
1720 MAIN STREET, SUITE 303
COLUMBIA, SOUTH CAROLINA 29201

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

COLUMBIA SC 292
FRI 19 FEB 2016 AM

