SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 15, 2012

RECEIVED

FEB 15 2012

S.C. Supreme Court

Ms. Renee H. Tollison
Circuit Court Reporter
Post Office Box 4321
Anderson, SC 29622

Dear Ms. Tollison:

Please provide us with the following transcript:

James Randolph Frady v. State of South Carolina Case #: 09-CP-37-000451

County: Oconee Date of Trial: October 3, 2011

Presiding Judge: J. Cordell Maddox, Jr.

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

Lorlene French
Legal Services Coordinator

cc: S.C. Supreme Court
Attorney General's Office

pcl

RICHEY AND RICHEY

ATTORNEYS AT LAW

A Professional Association

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January 24, 2012

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

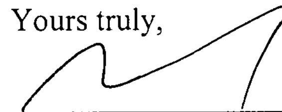
Re: James R. Frady, SCDC # 317328 vs. The State of South Carolina
Case No: 2009-CP-37-451

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,



Rodney Richey

RWR/tlg
enclosures
cc: Kaelon E. May, Esquire

RECEIVED

JAN 27 2012

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

HONORABLE J. CORDELL MADDOX, JR.

2009-CP-37-451

JAMES R. FRADY, SCDC#: 317328

APPELLANT,

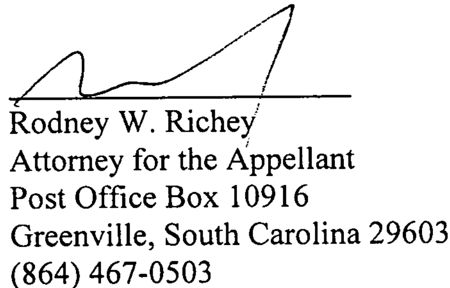
against

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

James Frady appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable J. Cordell Maddox, Jr., Circuit Judge on October 3, 2011 and Order issued on January 4, 2012 and filed on January 19, 2012. The Appellant received notice of the judgment on January 23, 2012.



Rodney W. Richey
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(864) 467-0503

Other Counsel of Record:
Kaleon E. May, Esquire
Office of Attorney General State of SC
Post Office Box 11549
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RECEIVED
JAN 27 2012
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

HONORABLE J. CORDELL MADDOX, JR.

2009-CP-37-451

JAMES R. FRADY, SCDC#: 317328

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on January 24, 2012, addressed to their attorney of record, Kaleon E. May, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: January 24, 2012

RICHEY & RICHEY, P.A.

Rodney W. Richey
Attorney for the Appellant
Post Office Box 10916
Greenville, South Carolina 29603
(864) 467-0503

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

James Randolph Frady, #317328
☐ Plaintiff

CASE NO.
2009-CP-37-0451

v.

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

State Of South Carolina
☒ Defendant.

COPY

Plaintiff's Attorney:	Defendant's Attorney:
Rodney Richey, Esquire, Bar No.	Kaleon E. May, Bar No. 80469
Address:	Address:
P.O. Box 10916 Greenville, SC 29603	Post Office Box 11549 Columbia SC 29211-1549
phone: fax:	phone: (803) 734-3747 fax: (803) 734-4113
e-mail: other:	e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

[signature] December 13, 2011
Signature of Attorney for ☐ Plaintiff / ☒ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE
☐ Other:	CODE: ______ Date: ______

CLERK'S VERIFICATION

Collected by: Exempt
Date Filed:
☐ MOTION FEE COLLECTED: ______

2012 JAN 19 PM 2 57
FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JAN 19 PM 2
CLERK OF COURT

STATE OF SOUTH CAROLINA COUNTY OF OCONEE	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT
	2009-CP-37-0451
James Randolph Frady, #317328 Applicant, v. State of South Carolina, Respondent.	**ORDER OF DISMISSAL**

COPY

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JAN 1? PM 2 57

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed April 13, 2009. Respondent made its Return and Amended Return on October 19, 2009 and June 13, 2011, respectively. An evidentiary hearing into the matter was convened on October 3, 2011 at the Oconee County Courthouse. The Applicant was present at the hearing and was represented by Rodney Richey, Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Additionally, Applicant offered the testimony of Michael Harper (Mr. Harper) and Tammy Harper (Ms. Harper). The State offered the testimony of Donald Allen, Esquire (Mr. Allen) and Elizabeth Waldrep, Esquire (Ms. Waldrep), Applicant's trial counsels. This Court also had before it the records of the Oconee County Clerk of Court, the transcript of the proceedings against the Applicant, the Applicant's records from the South Carolina Department of Corrections, and the records from Applicant's prior appeal proceeding.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. The Applicant was indicted at the December 2004 term of the Oconee County Grand Jury for one (1) count of Arson, Second Degree (04-GS-37-2070), one (1) count of Grand Larceny (04-GS-37-2071), two (2) counts of murder (04-GS-37-2072, 2073), one (1) count of Possession of A Weapon During Commission of a Violent Crime (04-GS-37-2074), and one (1) count of Burglary, First Degree (04-GS-37-2078). The Applicant was represented at trial by Donald Allen, Esquire. On August 29, 2006, the Applicant proceeded to trial and was found guilty and sentenced on August 31, 2006. The Honorable Perry M. Buckner sentenced the Applicant to confinement for a period of five (5) years for Grand Larceny (04-GS-37-2071), five (5) years for Possession of a Weapon During Commission of a Violent Crime (04-GS-37-2074), twenty five (25) years for Arson, Second Degree (04-GS-37-2070), thirty (30) years for Burglary First Degree (04-GS-37-2078), and for a term of life for each murder (04-GS-37-2073, 20720), all to be served concurrently. The Applicant then filed a timely notice of appeal.

The South Carolina Court of Appeals dismissed his appeal by written order filed November 12, 2008. State v. Frady, Op. No. 2008-UP-634 (S.C. Ct. App. Filed November 12, 2008). The case was returned to the lower court by Remittitur dated December 3, 2008

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

1. "Ineffective Assistance of Counsel"

a. "Defense counsel failed to conscientiously discharge his professional responsibilities while handling Applicant's case;"
b. "Defense counsel failed to effectively challenge the arrest and seizure of Applicant;"
c. "Defense counsel failed to act as Applicant's diligent, conscientious advocate;"
d. "Defense counsel failed to properly prepare and investigate Applicant's case prior to the trial of the case;"
e. "Defense counsel failed to do the necessary legal research to adequately argue a Miranda violation in the Applicant's case;"
f. "Defense counsel failed to pursue plea negotiations that may have proven advantageous to the applicant;"
g. "Defense Counsel failed to properly consult with the applicant or keep the applicant informed about the status of the case;"
h. "Defense counsel failed to explain to the applicant or discuss with him any kind of defense strategy;"
i. "Defense counsel failed to explain to Applicant or discuss with him any of the tactical choices that were available or that counsel was planning on using;"
j. "Defense counsel, knowing that Applicant was uninformed in legal matters, dictated to the applicant exactly how the case was going to be handled, offered no alternative options, and convinced Applicant to relinquish his right to testify on his own behalf;"
k. "Defense counsel failed to properly acquaint themselves with the law and facts surrounding Applicant's case, and as a direct result of their intentional negligence, there was a very serious error in their assessment of both the law and the facts;"
l. "Defense counsel failed to put forward any argument at all for a minimum sentence at Applicant's sentencing;"
m. "Defense counsel failed to adequately challenge a statement made by state's witness on the basis that the statement was sheer speculation;"
n. "Defense counsel failed to challenge the admission of evidence in the case that had been withheld from the applicant in violation of Rule 5;"
o. "Defense counsel failed to adequately investigate and pursue fingerprint evidence that indicated someone other than the applicant stole the van and committed the murders;"
p. "Defense counsel failed to challenge the admission of evidence at trial on the basis that the chain of custody had been broken, and that he had not been given an opportunity to examine the evidence;"
q. "Defense counsel failed to adequately object and press for a better curative instruction from the judge when the solicitor argued during closing arguments that Applicant had threatened to kill the victims prior to their actual murders;"
r. "Defense counsel failed to do the necessary legal research to adequately argue for a change of venue in Applicant's case;"

s. "Defense counsel failed to do legal research necessary for him to adequately argue for the suppression of evidence, and withdrew a potentially meritorious Motion to Suppress;"
t. "Defense Counsel failed to call alibi witnesses that would have proven Applicant's innocence."

2. Prosecutorial Misconduct
   a. "Prosecutor's remarks which include both inflammatory comments and erroneous statements of law, amount to misconduct and the proceedings fundamentally unfair."

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

Mr. Harper's Testimony

At the PCR hearing Mr. Harper testified that he testified at the Applicant's trial and that he was the owner of the vehicle that was used as evidence at the Applicant's trial. Mr. Harper testified that he found out about the murder on September 23, 2004 and that the police seized Mr. Harper's van thereafter. Mr. Harper testified that he drove the van to work prior to the police seizing the vehicle and that he did not miss any time from work.

Ms. Harper's Testimony

At the PCR hearing Ms. Harper testified that she is married to Michael Harper (Mr. Harper) and that she recalled the van that her husband owned being part of the Applicant's case. Ms. Harper testified that the van was stolen out of the Harper's yard and that they reported the van stolen on the night of September 22, 2004, which was the night the murders were committed. Ms. Harper testified that the van was found later the night of September 22, 2004 and that a gas can was found with the van. Ms. Harper testified that the police had Mr. Harper drive the van home the night of September 22,

2004, after finding the van. Ms. Harper testified that the police took the van into custody for about one week.

Applicant's Testimony

At the PCR hearing Applicant testified that there were pre-trial investigation issues, that he was aware an investigator was hired to work on his case, but that the investigator only ran phone records. Applicant testified that the investigator did not review any of the evidence that was eventually presented at trial, that there were unidentified fingerprints found at the scene but that Applicant's trial counsel did not investigate the fingerprints nor discuss the fingerprints with Applicant. Applicant testified that his counsel prepared a motion to change venue but that the motion was never heard and that Applicant's trial counsel informed Applicant that counsel could beat the case in Oconee County just as well as anywhere else in the state. Applicant testified that Oconee County is small, that everyone knows what is going on, and that there was no way a jury could be selected with persons who had not been subjected to the publicity that surrounded the case.

Applicant testified that the ballistics involved in the case were not tested by trial counsel, that Applicant knew about the shotgun shell, and that Applicant's counsel did hire Kelly Fite to test the ballistics but that Applicant never received a report from Kelly Fite's testing. Applicant testified that he did not know about Mr. Fite's investigation until the trial. Applicant testified that there was a plea offer of thirty (30) years for the murder charges. Applicant testified that his grandfather is a victim because it was his son and grandson that were killed. Applicant testified that he spoke with his grandfather during the trial and that his grandfather did not testify at Applicant's trial. Applicant testified

that he did not put up any evidence at trial in order to have the last argument and that Applicant did not know what to think and trusted his attorney's advice. Applicant testified that he wanted to testify at trial in his own defense because Applicant could refute the testimony presented during the trial. Applicant testified that his attorney should have refuted Kelly Cromer's testimony that Applicant asked how much LSD it would take to kill someone, because more than one person would have heard this conversation.

Applicant testified that prior to trial he was not informed of any discovery and what testimony might be presented at trial. Applicant testified that his trial counsel advised Applicant not to testify and that Applicant recalled the trial judge questioning Applicant about his right to testify and not testify. Applicant testified that he never informed counsel or Ms. Waldrep that he did not want to testify, and that Applicant was instructed not to testify by counsel. Applicant testified that counsel should have investigated the fingerprint evidence, that counsel should have presented the pre-trial motion concerning the search and seizure and change of venue issues. Applicant testified that his trial should not have been held in Oconee County. Applicant testified that he was not waiving any grounds in his Application and that if Applicant's counsel had represented Applicant properly that the outcome of Applicant's trial would have been different.

Mr. Allen's Testimony

At the PCR hearing counsel testified that he has been practicing law since 1987 and that approximately one-third to eighty percent of his practice is in criminal law. Counsel testified that he was the third attorney appointed to represent Applicant and that his representation began in August 2006. Counsel testified that Applicant's previous

attorneys provided counsel with all materials pertinent to Applicant's case. Counsel testified that he filed a pre-trial motion regarding the publicity surrounding the case and that counsel discussed the motion with Applicant. Counsel testified that the trial judge examined each juror about the extent of pre-trial publicity they had been exposed to and reached the conclusion that the pre-trial publicity would not hinder Applicant's right to a fair trial. Counsel testified that he did not move forward with the motion regarding pre-trial media because of the judge's findings and that counsel discussed this decision with Applicant.

Counsel testified that he hired a private investigator, Jody McCurley, and that Elizabeth Waldrep (Ms. Waldrep) worked as an associate on the Applicant's case. Counsel testified that the investigation revealed that the van used in the incident had fingerprints of a third-party, that this was a circumstantial case, and that there were no forensics except for one shotgun shell. Counsel testified that he informed the jury that there were no fingerprints, no footprints, no hair, and no blood evidence in Applicant's case. Counsel testified that the third-party fingerprints found in the van could go toward third-party liability for the crimes. Counsel testified that he visited the Harper's home and investigated the theft the van and that counsel hired Kelly Fite to test and/or review the ballistics evidence and to refute that state's evidence. Counsel testified that Kelly Fite's conclusion was consistent with the state's experts. Counsel testified that he met with Applicant approximately six to seven times and that counsel discussed Kelly Fite's analysis with Applicant.

Counsel testified that by the time he began representing Applicant, Applicant did not want to plead guilty and that the case qualified for the death penalty. Counsel testified

that he met with Applicant's grandfather three times and that Applicant always maintained his innocence. Counsel testified that the police returned Mr. Harper's van to Mr. Harper within a matter of days, maybe within one week. Counsel testified that the Sherriff took custody of the van but that the chain of custody for the van was not properly preserved. Counsel testified that he investigated the 'jail-house' snitch and cross-examined the 'jail-house' snitch at trial.

Counsel testified that he filed a discovery motion and received the discovery materials from the state, which included but was not limited to police reports, warrants, and investigator notes. Counsel testified that he reviewed the discovery materials with Applicant and that the only forensics in the case was a single shotgun shell. Counsel testified that he reviewed the results from his and Jody McCurley's investigation and that there was not anything tangible. Counsel testified that he had tried murder cases prior to Applicant's trial and was familiar with the legal issues involved in murder cases. Counsel testified that he asked Ms. Waldrep to assist him with Applicant's case. Counsel testified that he discussed the state's evidence with Applicant prior to trial. Counsel testified that he discussed possible defenses with Applicant but that Applicant did not present counsel with any defenses.

Counsel testified that as the shotgun shell testimony and evidence developed at trial, Applicant's testimony became critically important. Counsel testified that he discussed the shotgun shell testimony with Applicant and that Applicant did not want to testify at trial. Counsel testified that the trial strategy developed with Applicant consisted of a lack of evidence, Applicant's from at the scene, and poking holes in the state's case. Counsel testified that Applicant agreed with the trial strategy that counsel and Applicant

developed. Counsel testified that he discussed Applicant's right to testify and not testify as a part of the trial strategy. Counsel testified that Applicant made the decision not to testify. Counsel testified that when it came time for Applicant to make the decision to testify or not testify during the trial, that counsel and Applicant again discussed Applicant's right to testify or not testify. Counsel testified that Applicant ultimately decided not to testify.

Counsel testified that he was sufficiently able to confer with Applicant before and during the trial. Counsel testified that he had ample time to prepare for Applicant's trial and conduct the necessary research.

Ms. Waldrep's Testimony

At the PCR hearing Ms. Waldrep testified that she became involved in the Applicant's case shortly after Mr. Allen was appointed to represent Applicant. Ms. Waldrep testified that prior to Applicant's trial she was employed by the Office of Indigent Defense in Columbia and that at Indigent Defense she prepared motions and was familiar with the procedures for obtaining money from Indigent Defense to assist with investigations. Ms. Waldrep testified that she was able to obtain money for Applicant's case and investigation, including background checks, prior records, and expert analysis. Ms. Waldrep testified that she conducted case law research for the various pre-trial and trial motions, including the motion for change of venue. Ms. Waldrep testified that the trial judge questioned each juror regarding the amount of publicity they had been exposed to.

Ms. Waldrep testified that she met with Applicant on several occasions, that Applicant was very forthcoming and helpful with his case, and that Applicant provided

Ms. Waldrep and counsel with the names of witnesses. Ms. Waldrep testified that she spoke with the people whom Applicant informed her and counsel of. Ms. Waldrep testified that she and counsel discussed trial strategy with Applicant and reviewed testimony with Applicant. Ms. Waldrep testified that there was an issue with the van and that the defense could argue the evidence had been tainted. Ms. Waldrep testified that investigator McCurley and counsel spoke with the Harpers and that the timeline was an important issue because Applicant would not have had the time to commit the crimes if Applicant was on foot. Ms. Waldrep testified that Applicant was very engaged in all their discussions and that the state was concerned with the lack of evidence. Ms. Waldrep testified that she was present during counsel's discussion with Applicant concerning Applicant's right to testify or not testify, and that Applicant was concerned about cross-examination, that Applicant did not want to say anything wrong and look bad for the jury. Ms. Waldrep testified that Applicant never informed counsel that Applicant wanted to testify and that counsel never told Applicant he could not testify.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Ineffective Assistance of Counsel

1. Failure to Adequately Represent Applicant

The Applicant asserts that trial counsel was ineffective for failing to discharge his professional responsibilities while handling Applicant's case; failing to act as Applicant's advocate; failing to pursue plea negotiations that may have proven advantageous to Applicant; failing to properly consult with Applicant and keep Applicant informed of the status of his case; failing to discuss any kind of defense strategy with Applicant; and for failing to explain or discuss with Applicant the tactical choices that were available or that counsel planned on using. This Court finds that these allegations are without merit. This Court finds Applicant's testimony is not credible. Thus Court further finds counsel and Ms. Waldrep to be credible. Counsel testified that he met with Applicant six to seven times and that counsel and Applicant extensively discussed Applicant's case. Counsel testified that he met with Applicant to discuss the state's evidence, Applicant's version of events, the results of Kelly Fite's ballistics investigation, the results of Jody McCurley's investigation, possible defenses, and trial strategy. Ms. Waldrep also testified that she met with Applicant several times to discuss the case as well as Applicant's right to testify or not testify and that Applicant was very informative and helpful in forming his defense. Counsel testified that when he was appointed to represent the Applicant, Applicant did not want to plead guilty and wanted to proceed to trial.

The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from

counsel's alleged lack of time to prepare. United States v. Cronic, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). Here, the Applicant could not point to any specific matters counsel failed to discover or discuss with Applicant which would have likely caused the outcome of Applicant's trial to be different. This Court finds that counsel and Ms. Waldrep met with Applicant multiple times and kept Applicant informed of the status of his and that Applicant was actively involved in preparing his defense. This Court finds that prior to counsel's representation there may have a plea offer on the table, however when counsel began to represent Applicant, Applicant had made the decision to proceed trial and did not want to plead guilty. This Court finds that Applicant has failed to show that counsel's representation was deficient and any resulting prejudice; therefore, this Court finds that these allegations are denied and dismissed.

2. Failure to Investigate

The Applicant alleges that trial counsel was ineffective for failing to prepare and investigate Applicant's case prior to trial; failing to conduct legal research regarding Miranda violations, suppression motion, and motion for change of venue; and for failing to adequately investigate and pursue fingerprint evidence. This Court finds that these allegations are without merit. At the PCR counsel testified that he hired a private investigator, Jody McCurley, to assist with Applicant's case. Counsel testified that he obtained funds for Kelly Fite to review the ballistics in Applicant's case. The results of both investigations were discussed with Applicant by counsel and Ms. Waldrep. Ms. Waldrep testified that she conducted legal research concerning the motion to change venue and counsel testified that he filed a written motion to change venue. Counsel explained that he decided to withdraw the motion to change venue after the trial judge

questioned each individual juror concerning pre-trial publicity. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). The record reflects that the trial judge extensively questioned each juror about the amount of pre-trial publicity they had been exposed to. The trial judge found that the jurors selected could put aside the media and decide the case solely upon the evidence presented at trial. It was after the trial judge's finding that counsel withdrew his motion to change venue. This Court finds that counsel articulated valid strategic reasons for withdrawing the motion. Additionally, this Court finds that even if counsel proceeded with his motion, the motion would have been denied based on the trial judge's findings in the record. Moreover, the record reflects that Applicant agreed with the decision to withdraw the motion. The Applicant has not shown counsel was deficient in that choice of tactics. This Court also finds that Ms. Waldrep adequately researched change of venue. Applicant has not shown counsel's performance was deficient and any resulting prejudice. This Court finds that this allegation is denied and dismissed.

With regard to Applicant's allegation that trial counsel failed to research and argue the motion to suppress based on a Miranda violation, Applicant has failed to meet his burden of proof. Ms. Waldrep testified that she conducted legal research regarding the motion presented at the pre-trial hearing. The record reflects counsel presented the motion to suppress and argued the motion at the pre-trial hearing. Counsel presented case

law in support of his argument; however the trial court overruled counsel's objections and denied the motion to suppress. The Applicant did not present any evidence or testimony concerning a more adequate argument for the motion to suppress, nor did Applicant present any case law to support his allegation. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds and the record reflects that counsel articulated valid strategic reasons for his strategy in arguing the motion to suppress. The Applicant has not shown counsel was deficient in that choice of tactics. This Court finds the necessary legal research was done and the motion properly presented and argued at trial. The Applicant failed to show any resulting prejudice; therefore this allegation is denied and dismissed.

As to Applicant's claim that counsel failed to investigate the fingerprint evidence, Counsel testified that the prints found on the van did not belong to the Applicant. Counsel testified that the absence of Applicant's fingerprints and the presence of a third-party's fingerprints was something that counsel brought out during trial. The record reflects that counsel cross-examined Mr. Steven Curtis regarding the fact that the Applicant's fingerprints were not found and that the van had evidence of someone else's fingerprints. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Applicant did not present a fingerprint analysis or any type of evidence concerning the lack of a fingerprint

investigation at the PCR hearing. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore this allegation is denied and dismissed.

3. Failure to Properly Advise of Right to Testify and Not Testify

Applicant asserts that trial counsel was ineffective for failing to properly advise Applicant of his right to testify or not testify and coerced Applicant to relinquish his right to testify on his own behalf. This Court finds that this allegation is without merit. Counsel testified that he and Applicant discussed Applicant's right to testify or not testify prior to trial and during trial. Counsel testified that he wanted Applicant to testify at trial in order to refute the state's evidence and testimony. Counsel testified that Applicant made the decision not to testify. Ms. Waldrep testified as well that Applicant never informed counsel that he wanted to testify and counsel never told Applicant he could not testify. Ms. Waldrep testified that Applicant was concerned about being cross-examined and did not want to look bad for the jury. The record reflects the trial judge discussed Applicant's right to testify or not testify and the Applicant indicated that he understood his rights. (Tr. p.585). The trial judge asked Applicant if the decision was Applicant's and not anyone else's, and the Applicant indicated that it was has decision alone. (Tr. p.585, lines10-12). Applicant informed the trial court that it was his decision not to testify. (Tr. p.585, lines16-20). This Court finds that Applicant was adequately advised of his right to testify or not testify by both counsel and Ms. Waldrep as well as by the trial judge on the record. Applicant testified under oath that it was his decision not to testify at trial. This Court finds that Applicant has failed to show that counsel's performance was deficient or that counsel coerced Applicant into not testifying. This Court finds that Applicant cannot

show any resulting prejudice as he informed the trial judge that he did not want to testify; therefore, this allegation is denied and dismissed.

4. Failure to Effectively Challenge the State's Case

The Applicant asserts that trial counsel was ineffective for failing to effectively challenge the search and seizure issue; failing to adequately challenge a statement made by a witness for the state; failing to challenge the admission of evidence that had been withheld from the defense in violation of Rule 5; and for failing to challenge the admission of evidence based on a broken chain of custody. This Court finds that these allegations are without merit. This Court has already found that trial counsel was not ineffective in researching and arguing the motion to suppress based on a Miranda violation. The record reflects that counsel filed a motion to suppress the search warrant based on a violation of S.C. Code §17-13-140. (Aug. 28, 2006 Tr. p.24, lines5-13). The record reflects that counsel filed this motion out of an abundance of caution and that counsel discussed this issue with Applicant. (Id. p.31, lines16-22). The record further reflects that counsel explained his reasons for withdrawing the motion to suppress. (Id. p.31, line23 – p. 32, line25).

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds that counsel articulated valid strategic reasons for withdrawing the motion to suppress the search warrants. Applicant did not provide an alternative argument that

counsel should have argued in the motion to suppress, nor did Applicant provide any additional support that counsel failed to present in the motion. This Court finds that Applicant has not shown counsel was deficient in that choice of tactics. This Court also finds that Applicant has not shown resulting prejudice from counsel's alleged deficiency; therefore this allegation is denied and dismissed.

Applicant alleges that trial counsel was ineffective for failing to challenge Mr. Harper's testimony at trial that was sheer speculation. Applicant directs this Court's attention to Mr. Harper's testimony "that due to a defect in the door handle of the van, that he, his son, and Applicant were the only people who knew how to open the doors to get in the van." (Tr. p.473-475). A review of the record reflects that counsel objected to the testimony and a bench conference was held. (Tr. p.473, line25 – p. 474, line3). Additionally, Mr. Harper's testimony at the PCR hearing did not differ from Mr. Harper's testimony at trial. The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. This Court finds that Applicant failed to show counsel's

performance was deficient and any resulting prejudice; therefore this allegation is denied and dismissed.

Next, Applicant alleges trial counsel was ineffective for failing to challenge admission of evidence that was withheld from the defense in violation of Rule 5. At the PCR hearing counsel testified that he filed a discovery motion and received the discovery materials from the state. Applicant does not point any specific evidence that was withheld. Applicant did not present any testimony or introduce into evidence at the PCR hearing the alleged evidence that had been withheld. This Court notes and the record reflects that counsel made a motion to produce certain photographs at the pre-trial motion hearing and that the defense was provided with the photographs. (Aug. 28, 2006 Tr. p.34-36). In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268. This Court finds that Applicant failed to show that any evidence was suppressed. Applicant is unable to show that counsel's performance was deficient and any resulting prejudice. This Court finds that this allegation is denied and dismissed.

As to Applicant's allegation that trial counsel was ineffective for failing to challenge the admission of evidence based on a broken chain of custody, this Court finds

Applicant has failed to meet his burden of proof. Applicant generally asserts counsel failed to make a challenge to the evidence on the basis that the chain of custody was broken. Applicant does not specify what evidence counsel should have directed his objection at, nor does Applicant provide this Court with arguments that counsel should have made. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore this allegation is denied and dismissed.

5. Failure to Adequately Defend

Applicant alleges that trial counsel was ineffective for failing to put forth any argument for a minimum sentence at Applicant's sentencing; failing to adequately object and request a better curative instruction when the solicitor stated in closing argument that Applicant had threatened to kill the victims prior to the actual murders; and for failing to call alibi witnesses that would have proven Applicant's innocence. This Court finds that these allegations are without merit. As to Applicant's claim that trial counsel failed to argue for the minimum sentence, this Court finds that Applicant has not met his burden of proof. This Court notes that Applicant was found guilty of multiple violent and most serious crimes. The record reflects that the trial judge gave Applicant the opportunity to speak during sentencing and the Applicant declined to address the court. (Tr. p.668, lines1-4). The Applicant has failed to show what argument counsel should have made for a minimum sentence. This Court finds that when given the opportunity, Applicant did not request and/or argue for a minimum sentence on his own behalf. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

Applicant alleges that trial counsel was ineffective for failing to object and request a better curative instruction when the solicitor stated in closing argument that Applicant had threatened to kill to the victims prior to the actual murders. The record reflects counsel made an objection to the solicitor's comment regarding a prior threat made by Applicant towards the victims. (Tr. p.614, line24 – p.615, line2; p.628-635). Counsel's objection was sustained by the trial court. (Tr. p.634, lines4-9). The record further reflects that the trial court gave the jury a curative instruction. (Tr. p.635, line16 – p.636, line5). This Court finds that contrary to Applicant's assertion, counsel did object to the solicitor's comment and that this objection was sustained by the trial court. Additionally, this Court finds that Applicant failed to show how the curative instruction was insufficient and what instruction counsel should have requested. Applicant has failed to show counsel's performance was deficient and any resulting prejudice. This Court finds that this allegation is denied and dismissed.

The Applicant further alleges counsel was ineffective for failing to call alibi witnesses that would have proven Applicant's innocence. At the PCR hearing Ms. Waldrep testified that Applicant provided the names of witnesses for his defense and that those witnesses were contacted. This Court finds that Applicant did not present any alibi witnesses at the PCR hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness'

failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Accordingly, Applicant has failed to show resulting prejudice and cannot meet his burden of proof that trial counsel was ineffective. This Court finds that this allegation is denied and dismissed.

Prosecutorial Misconduct

Applicant alleges that the prosecutor's closing remarks to the jury were both inflammatory and erroneous statements of law, and that this amounted to misconduct rendering the proceedings fundamentally unfair. The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Furthermore, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. To be entitled to a new trial for improper closing arguments, the test is whether "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001). After reviewing the entire record, this Court does not find any comments by the solicitor so infected the trial that a new trial is warranted. This Court is not convinced that the solicitor's arguments even reach the level of being improper, but certainly there is no evidence that Applicant was prejudiced. This Court finds that Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

V. CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court

to grant his application for post conviction relief. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

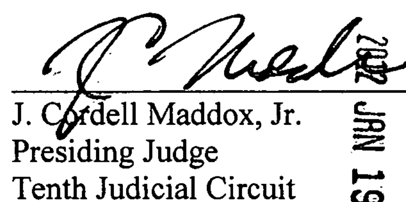
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's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

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent

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



J. Cordell Maddox, Jr.
Presiding Judge
Tenth Judicial Circuit

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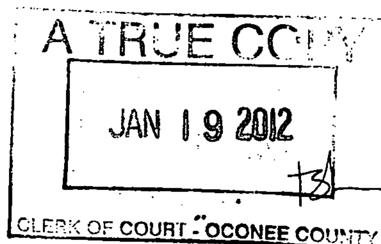
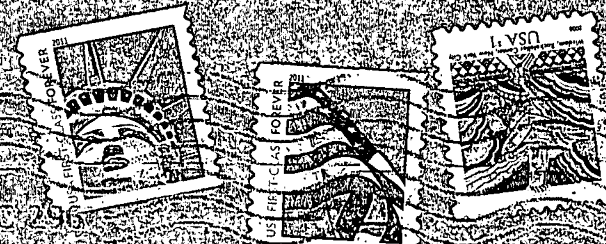
CLERK OF COURT

Anderson, South Carolina





Greenville PSDC 296
WED 25 JAN 2012

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