ORIGINAL

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	Case No. 2005-CP-32-0267
JEFFREY HASELDEN, Applicant,	**ORDER DENYING MOTION TO ALTER OR AMEND THE JUDGMENT**
v.	
JOHN OZMINT, Commissioner, South Carolina Department of Corrections, and State of South Carolina Respondent.	

This matter is before the Court on Applicant's Motion to Alter or Amend the Judgment, dated October 8, 2010, with regard to this Court's Order of Dismissal with Prejudice, which was filed on September 23, 2010. The parties were given an opportunity for a hearing or to provide written submissions, and the parties agreed to have the issues decided on written submissions. For the following reasons, this Court denies the Motion to Alter or Amend.

WPM
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A. Alcohol Ingestion Incident

Applicant first challenges this Court's conclusions as to the claims regarding counsel's alleged failure to cross-examine Tindal on the alcohol ingestion incident. This Court finds the issue was adequately addressed in the Order and rejects Applicant's claims.

In the Court's view, the Order of Dismissal did address the claim that the child, Josh, was forced to drink alcohol, and the assertion that Tindal was responsible. This prior order discussed the evidence and counsel's testimony in this regard, and accepted

that counsel made a reasonable strategic decision not to open the door, since the matter could be more harmful than helpful.[1] **{Order p. 22-28}**.

As to this Court's alternative conclusion that the evidence was inadmissible anyway, the Court does not believe that the trial judge had already ruled to allow the cross-examination of Tindal or rejected the State's claims that such an examination would violate the evidentiary rules. The discussion at trial focused on inadmissibility under the Rules 404 and 608, and the judge does not appear to have ruled when counsel decided to withdraw the proffer. **{R. 1427-36; 1441 l.23 - 1442 l. 2}**. Indeed, to the contrary, at one point when told how remote to the murder the incident was, the judge flatly ruled the evidence was NOT admissible under Rule 404. **{R. 1433}**.

In any event, and as set forth in the Order, the evidence appears to have been inadmissible under Rule 404. **{Order p. 29-30} and** Rule 608, SCRE. Under Strickland, regardless of how the uncompleted discussion at trial was going, the PCR analysis must "presume . . . that the judge or jury acted according to law", and "and assessment of the likelihood of result must exclude the possibility of arbitrariness, whimsy, caprice, nullification, or the like". 466 U.S. at 695. "A defendant has no entitlement to the luck of a lawless decisionmaker." Id. Counsel cannot be deficient nor could Applicant be prejudiced where the evidence was inadmissible anyway. See also Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without

[1] On page 26 of the Order, the first sentence in the first full paragraph should read: "After consulting with Applicant, and co-counsel Gaines, they decided the pitfalls did outweigh the potential benefits of going into that line of questioning."

objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

The Court also rejects Applicant's assertion that an analysis under Rules 404 or 608 is improper because the evidence had to be admissible under the third party guilt rules as discussed in Holmes v. South Carolina, 547 U.S. 319 (2006). Holmes held that third party guilt evidence could not be excluded merely because the State had produced strong forensic evidence, which, if believed, would support guilt. The opinion in Holmes expressly noted that it was not challenging the general "widely accepted" rule limiting introduction of third party guilt evidence to situations where the evidence is not speculative and is inconsistent with the defendant's guilt. 547 U.S. at 327. Nothing in Holmes creates an independent mandate or requirement for introduction of third party guilt evidence.

The issue at trial and before this Court appears to relate not only to admissibility under third party guilt rules, but to the evaluation and impact that the entirety of the evidence and the strategic decisions that had to be made concerning it. Other evidentiary rules were in play, such as Rule 404 or 608. Indeed, simply because something may meet the third party guilt rule – which is a rule for determining relevance – does not mean that one can ignore all the other evidentiary rules as to how and what relevant evidence may be submitted. Relevance is not an independent basis for admissibility to the exclusion of everything else in the rules.

More importantly on this issue, the evidence for third party guilt is strictly "limited to such facts as are inconsistent with [Petitioner's] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence. Evidence which can

have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible". State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) (citing 20 Am. Jur. 254). Here, even if Applicant had been able to prove that the ingestion was forced and that it was done by Tindal, the evidence appears to cast only suspicion on Tindal. The incident occurred over five months prior to the murder, and is completely unlike the beating that killed the child. Ultimately, counsel was correct (or at least strategically reasonable) that the evidence surrounding this issue was problematic and just as likely to condemn Applicant as help him. Counsel was not deficient in choosing to act as he did concerning the third-party guilt issue.

B. Leg Fracture

Applicant next contends this Court's Order ignores evidence that Tindal stated she saw Felicia stomping on Josh's leg. In the Court's view, that is incorrect. There is a quotation of the passage that the Applicant complains this Court ignored. **{Order 31-32}**. The Order goes on to conclude that, given all the conflicting evidence on the subject, including a number of statements from Applicant's own mouth, counsel made a sustainable strategic decision not to open the door; and, regardless, the Applicant had not proven the fact anyway. **{Order 31-38}**.

Applicant incorporates his argument here as to the inapplicability of Rules 404 and 608. This Court incorporates its discussion of those issues here with this claim as well. The evidentiary rules are applicable, and the Court does not find that the trial judge ruled against the State on them. The third party guilt rule has to be analyzed in the context of all the evidence. It has not been established by the Applicant that the

situation here meets the test for third party guilt, as the incident in question is remote and subject to different interpretations.

The Court does not accept the Applicant's contention that this Court erred by adopting as a "fact" that the State asserted at trial in argument on the motion that doctors would say Haselden was watching the child when he was kicked. **{Order 33}**. This portion of the order was merely recounting the events and discussions at trial, not making a finding of the underlying fact or adopting the solicitor's assertions. Importantly, the records from Dr. Green and Dr. Dacus do reflect discussion of the injury being caused by Felicia. Regardless, this Court points out in its Order four witnesses who said that the Applicant told them he was the one who saw the kicking incident. **{Order p. 37}**. Regardless of whether counsel had Tindal's audiotape, the State had four witnesses who would say that the Applicant told them he saw the incident – a version which was also repeated by Applicant's family to medical personnel. This Court finds no errors of fact in the order, and the problematic and conflicting evidence again supports this Court's rulings as to the reasonableness of counsel's strategic decision, the ultimate inadmissibility, and the lack of prejudice.

C. Pathology issues

Applicant next contends this Court erred in not taking judicial notice of the South Carolina Supreme Court's factual recitation in its opinion in State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999). Apparently, Applicant wants the Court to take judicial notice of the recitation that the victim in Beckham dropped off the kids at the defendant's house at 6:15 p.m., and was found dead in her car in a ditch at 9:15 p.m.

Judicial notice is a non-issue as Applicant at PCR fully cross-examined Dr. Sexton on the Beckham case. Dr. Sexton explained that case was unusual given the short range of time at issue and the fact that a pathologist working under him actually went to the scene and observed fixed lividity inconsistent with the victim's positioning in the car. Factors in that case indicated that the victim had been moved from the place of her death and put into her car. They also had other information from witnesses – including a confession – that was used in estimating the time of death. The notation in the pathologist's report from Beckham noted that the time of death could be as late as 7:15 p.m. **{PCR Tr. 494-502}**. It is this Court's view that the Applicant is putting improper emphasis upon and taking out of context a portion of Dr. Sexton's testimony stating that, "I've never given a time of death . . . We just don't do that." First, Dr. Sexton at the time was talking about someone misinterpreting his "work product" discussions about stomach contents during the course of the autopsy. Immediately after the quote, Dr. Sexton continued by testifying: "Now what we often do is list the time of death given to us by law enforcement and coroners unless we can determine a more specific time of death at time of autopsy, which is rare." **{PCR Tr. 480}**. That is what happened in the Beckham case.

Nothing about this cross-examination – on an unusual case with a short time range, a pathologist who was actually at the scene, and other witness testimony as to the time of death - calls into question Dr. Sexton's testimony about the vagaries normally associated with estimating time of death in a case like the murder of this child. There is no need to alter or amend this Court's resolution of the issues in this PCR case. Taking judicial notice of the 9:15 time does nothing of substance to add to

Applicant's cross-examination, which fully explored the issue (and elicited Dr. Sexton's reasonable explanation about the differences in the two cases). Indeed, Applicant cross-examined Dr. Sexton on the Beckham case as if the range was from 6:00 p.m. to 10:00 p.m. **{PCR Tr. 497}**, when the appellate opinion has the range as between 6:15 p.m. and 9:15 p.m. This shortens the range and further supports Dr. Sexton's explanation of the difference in the Beckham case, where lividity was fixed and a conclusion reached that the victim had been moved from the place of death.

D. Actual Innocence

Applicant next contends that this Court erred in analyzing his claim under §17-27-20(a)(4) under the standard for after-discovered evidence. Aside from the fact that the Order cites an Iowa case that did the same thing, and the fact that the after-discovered evidence test is well-established in South Carolina PCR law, see Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007), the Order goes on *in the alternative* to find no ineffective assistance from counsel's decisions regarding some of the challenged evidence and no Brady violations. Thus, the issue is rejected regardless of whether or not §17-27-20(a)(4) is co-extensive with the after-discovered evidence test.

E. *Brady* violations

Applicant finally contends this Court erred in failing to find the State committed some sort of prosecutorial misconduct in its argument on the proposed cross-examination of Tindal on the leg incident, because the State (and the defense, of course) had Tindal's statement in which she said that the child did not cry when Felicia stomped on his leg.

First, the Court cannot accept the argument that the State can accept every piece of evidence obtained. There seems to be an assertion that if the State in investigating an issue finds ten items of evidence going one way and one item going the other, the State is forever barred from relying on the ten items because it "knows" of the contrary one item. The State's obligation is to turn over contrary or exculpatory evidence, which it did. The State cannot knowingly present undeniably false evidence, which it did not. In this instance, the Court finds no impropriety and finds that the State was entitled to rely on evidence that supporting its theory of the case, in spite of the fact that there was some conflicting evidence. The defense was given the conflicting evidence in discovery, and the protections of cross-examination and presentation of the contrary evidence were available.

This case is not akin to Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006). There, the State did not provide the defense with a statement of a crucial witness containing inconsistencies with his trial testimony, and did not correct false testimony when the witness testified he had no further meetings with the State other than his first statement. Obviously, the State there undoubtedly knew the testimony was false, because its representatives personally participated in those meetings with the witness.

Here, there was no such error. Defense counsel, in his argument at trial, specifically cited Tindal's statement as to the leg incident. Obviously, he had been provided the statement. **{R. 1434}**. The State merely responded that there was other evidence that the Applicant was the one watching the kids when it happened, and the parties would have "to retry that whole thing in terms of presenting evidence that he was the one, in fact, watching the children at the time that injury occurred". **{R. 1435}**. And,

as this Court found, there were four witnesses who said Applicant said that he saw the leg incident **{Order p. 37}**. Further, Felicia's responsibility for the leg incident was the story Applicant's family told to the doctors. Similarly, as to the alcohol incident, the State merely responded that it could "reply" to the defense submission with evidence that the Applicant told people he was the one who left the drink out and that it was an accident. **{R. 1434-35}**. Again, there was ample evidence to support the State's assertion in several respects, including statements in the Applicant's handwriting, in his statements to police, in his statements to medical personnel, and in his statements to DSS. **{Order pp. 27-28}**.

As to the Applicant's claim regarding the supposed statement on June 17, 1999, this Court reiterates its findings in the Order of Dismissal rejecting such a claim. **{Order pp. 110-14; 126-27}**.

WPC #9

CONCLUSION

For the foregoing reasons as well as the reasons expressed in the Order of Dismissal with Prejudice, the Applicant's Motion to Alter or Amend the Judgment is DENIED.

IT IS SO ORDERED, this 11th day of April, 2012.

William P. Keesley
Judge

Edgefield, South Carolina

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FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2005CP3200267

Jeffrey T Haselden	State Of Sc Jon E Ozmint dir
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant or ☐ 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.

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ 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.**

4/26/2012

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on n/a, and a copy mailed first class or placed in the appropriate attorney's box on 26th day of April, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

Jeffrey P. Bloom
1911 Pickens St. Columbia, SC 29201
Diana L Holt
P.O. Box 6454 Columbia, SC 29260

ATTORNEY(S) FOR THE PLAINTIFF(S)

Samuel Creighton Waters
S.C. Attorney General'S Ofc.
P.O. Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/lc

Beth A. Carrigg - Clerk of Court

Court Reporter