

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

APPEAL FROM OCONEE COUNTY  
COURT OF COMMON PLEAS

JUN 24 2016

SC SUPREME COURT

HONORABLE BROOKS P. GOLDSMITH

2012-CP-37-0404

DAVID LEE COWARD, #332888

APPELLANT,

vs

STATE OF SOUTH CAROLINA,

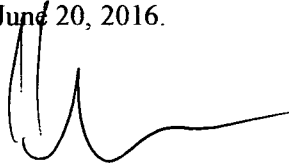
RESPONDENT.

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**NOTICE OF APPEAL**

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David Lee Coward, #332888 appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Brooks P. Goldsmith, Circuit Court Judge on February 10, 2016, and Order of Dismissal issued on June 7, 2016, and filed on June 13, 2016. The Appellant received Order of Dismissal on June 20, 2016.



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Hugh W. Welborn  
Attorney for the Appellant  
Post Office Box 173  
Anderson, South Carolina 29622  
(864) 226-5787  
Attorney for David Lee Coward, #332888

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

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM OCONEE COUNTY  
COURT OF COMMON PLEAS  
HONORABLE BROOKS P. GOLDSMITH

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JUN 24 2016  
SC SUPREME COURT

2012-CP-37-404

DAVID LEE COWARD, #332888

APPELLANT,

vs

STATE OF SOUTH CAROLINA,

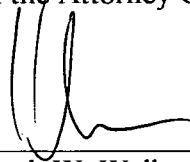
RESPONDENT.

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**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail postage prepaid on June 20, 2016, addressed to its attorney of record Patrick Schmeckpeper, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



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Hugh W. Welborn  
Attorney for the Appellant  
Post Office Box 173  
Anderson, South Carolina 29622  
(864) 226-5787  
Attorney for David Lee Coward, #332888

Anderson, South Carolina

20 June, 2016

*Hugh W. Welborn*

Attorney at Law  
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RECEIVED

JUN 24 2016

SC SUPREME COURT

Office (864) 226-5787  
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email to:  
hughwelborn@bellsouth.net

June 20, 2016

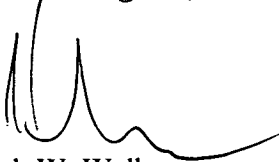
South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

In RE: David Lee Coward, #332888 vs. State of South Carolina  
Case #: 2012-CP-37-404

Dear Sir/Madam:

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Patrick Schmeckpeper, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,



Hugh W. Welborn

HWW/sba

cc: Office of the Appellate Defense  
Office of the Attorney General  
SC Court of Appeals  
Client

STATE OF SOUTH CAROLINA  
COUNTY OF OCONEE

David Lee Coward, #332888,  
Plaintiff(s),

-vs-

State of South Carolina,  
Defendant(s).

) IN THE COURT OF (Select one.)  
)  COMMON PLEAS  FAMILY COURT  
) TENTH JUDICIAL CIRCUIT  
) CASE NO.: 2012-CP-37-404  
) APPOINTMENT OF COUNSEL OR GAL  
) (Select one.)  
)  ORDER  
)  AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- |  |  |  |
|--|--|--|
| <input checked="" type="checkbox"/> Post-Conviction Relief (PCR)/habeas case | <input type="checkbox"/> Adoption                  | <input type="checkbox"/> Juvenile          |
| <input type="checkbox"/> SVP case  | <input type="checkbox"/> Custody and/or Visitation | <input type="checkbox"/> Abuse and Neglect |
| <input type="checkbox"/> Minor Name Change                                   | <input type="checkbox"/> Other:                    |  |

It appears that David Lee Coward, #332888, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
- counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on: \_\_\_\_\_
- counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
- court appointed counsel has obtained \_\_\_\_\_, Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
- Other:

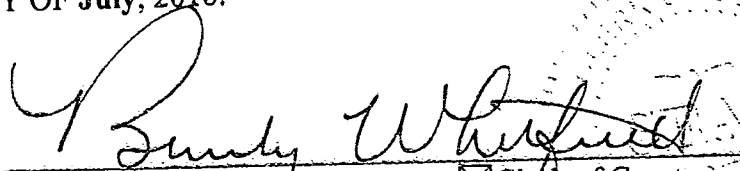
- counsel     lead counsel (if capital PCR case)     guardian ad litem

Therefore, it is ordered that HUGH WELBORN, P.O. Box 173, Anderson, SC, 29622, telephone (864) 226-5787, hereby is appointed as (Select one.)  
for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that \_\_\_\_\_, Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 30th DAY OF July, 2015.

  
\_\_\_\_\_  
 Circuit Judge     Clerk of Court

FILED OCONEE, SC  
BEVERLY H. WHITEFIELD  
CLERK OF COURT

2015 July 30 AM 11:27

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at [www.sccid.sc.gov](http://www.sccid.sc.gov), and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.



A timely notice of appeal was filed and perfected on Applicant's behalf. Elizabeth Franklin Best, Esq., represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Coward, Op. No. 2011-UP-583 (filed December 21, 2011). Counsel for Applicant then filed a Petition for Rehearing on January 4, 2012. By Order dated January 27, 2012, the South Carolina Court of Appeals denied the Petition. Counsel for Applicant finally filed a Petition for Writ of Certiorari on February 27, 2012. By Order dated June 20, 2013, the Supreme Court of South Carolina denied the Petition. The Remittitur was issued on June 25, 2013.

### **Allegations**

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

1. "Violation of my Due Process and Equal Protection Rights Guaranteed by the United States Constitution. Trial Judge in violation."
  - a. "Hearsay statement was allowed three (3) times in [t]rial, which clearly influenced jury."
  - b. "Applicant got 15 years, co-defendants got probation – one got nothing – equal protection."

At the evidentiary hearing, Applicant also proceeded the allegation that counsel failed to question a witness about a prior conviction for possession of cocaine.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has reviewed the testimony presented at the evidentiary hearing. Applicant during his testimony, passed upon his 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.

and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact and conclusions of law 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (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).

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." Id. at 117-18, 386 S.E.2d at 625.

### Hearsay Statements

Applicant first alleged hearsay statements were allowed at trial, which he says influenced the jury. Applicant argued Debra Miller's testimony constituted hearsay when she said "[h]e told me that him and his friends had been making [pipe bombs] just to play with." Tr. p. 51, l. 24-25. He acknowledged, however, that trial counsel objected to this testimony as hearsay, and that the court sustained that objection. Tr. p. 52, l. 1-20. Applicant next alleged hearsay statements were allowed when Ms. Miller testified that "David's mother called me and told me that --". Tr. 55, l. 13. Again, he acknowledged that counsel objected to the testimony and the court sustained his objection. Tr. p. 55, l. 14-15. Counsel objected to a subsequent statement by Ms. Miller as hearsay, which was overruled by the judge. Tr. p. 55, l. 22 - p. 56, l. 4. Applicant also alleged hearsay statements were allowed from Scott Arnold, Tr. p. 121, l. 15-19, but that counsel objected, and that the court overruled his objection. Tr. p. 121, l. 20-25.

This Court finds Applicant has failed to meet his burden with respect to the above allegations. First, to the extent he is alleging any deficiency on counsel's part, Applicant has not provided any factual basis for such a finding. In each instance, counsel objected on the record to the purported rule violation, and the judge made a ruling -- several of which were favorable. Accordingly, this Court cannot find his performance fell below the standard of reasonable under professional norms. Butler, supra.

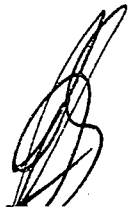
To the extent Applicant is alleging the trial judge erred in admitting hearsay testimony, this is a direct appeal issue not appropriate for consideration on post-conviction relief. Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b); *see also, Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is

uniformly held that an application for post-conviction relief is not a substitute for an appeal.”). Therefore, a post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal unless couched as claims of ineffective assistance of counsel. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (citing, *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983)). Applicant could have argued on appeal that the trial judge erred in his evidentiary rulings. The failure to do so bars this allegation as a ground for relief. Applicant simply cannot use post-conviction relief to bring this free standing claim of a constitutional violation.

### **Disparate Sentencing**

Applicant next alleges his rights were violated because he received a different sentence than his co-defendants. A reviewing court has no jurisdiction to review a sentence, provided it is within the limits provided for the discretion of the trial court, and is not the result of prejudice, oppression, or corrupt motive. *State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976). Moreover, a trial judge is allowed broad discretion in sentencing within statutory limits. *Garrett v. State*, 320 S.C. 353, 465 S.E.2d 349 (1995).

This Court finds Applicant has failed to meet his burden to show his sentence was unlawful. He was sentenced to fifteen (15) years for burglary, 1st degree. The statutory range for burglary, 1st degree is from fifteen (15) years to life imprisonment. S.C. Code Ann. § 16-11-311(B) (2015). Applicant has not presented any evidence that his sentence was the result of prejudice, oppression or corrupt motive. Accordingly, this allegation is denied and dismissed.



### Failure to Impeach Witness

Applicant next alleges counsel was ineffective for failing to impeach Russell Rogers – a co-defendant who testified against him at trial – with prior convictions for possession of cocaine. This Court finds Applicant has failed to meet his burden.

First, Applicant has not presented any evidence which would overcome the “strong presumption” that counsel’s rendered effective assistance. See Butler, supra. Cross-examination must be objectively reasonable, but not flawless. Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000). An attorney’s decision about the extent of cross-examination and whether to refrain from certain lines of inquiry is entitled to great deference. Id.; see also Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (the manner and extent of cross-examination should not be second-guessed).

Here, Applicant has not met his burden to prove counsel deficient in failing to ask question about Mr. Rogers’ prior record, where that information had already been elicited by the State on direct-examination. Mr. Rogers testified on direct examination that he was a convicted felon, and that he had previously pled guilty to another count of burglary, 2nd degree, and possession of cocaine. Tr. p. 78, l. 4-19. Counsel was therefore free to tread new ground and raise other questions about Mr. Rogers’ credibility. He confirmed with Mr. Rogers, for example, that he had been drinking while underage the night of the crime. Tr. p. 81, l. 12-17. Counsel also pointed out that Mr. Rogers was, in fact, charged with shooting a dog at the scene of the burglary, even though he denied doing so. Tr. p. 81, l. 1-4. Accordingly, this Court finds counsel’s cross-examination of Mr. Rogers to be objectively reasonable.

Applicant has also failed to show any prejudice from counsel’s alleged deficiency. As explained above, the State elicited Mr. Rogers’ prior record on direct examination. As a result,

Applicant has failed to meet his burden to show that counsel's failure to impeach could have reasonably affected the outcome of the proceeding where that information was already before the jury. 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 any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

*[Signature follows]*



**CONCLUSION**

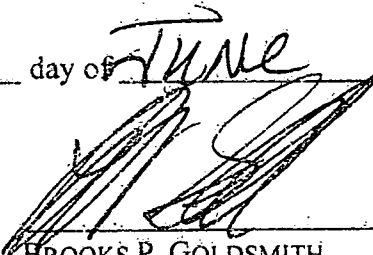
Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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**

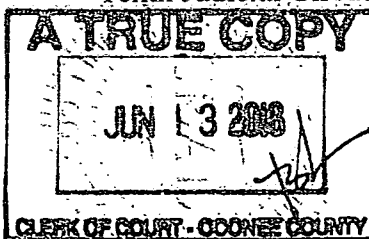
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 7 day of JUNE, 2016.



BROOKS P. GOLDSMITH  
Presiding Judge  
Tenth Judicial Circuit

Greenwood, South Carolina



FILED COONEE COUNTY, SC  
BEVERLY H. WHITEFIELD  
CLERK OF COURT  
2016 JUN 13 P 2:20

*Hugh W. Welborn*

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June 20, 2016

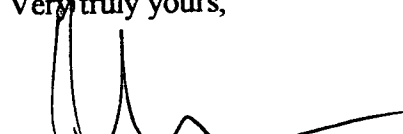
South Carolina Office of Appellate Defense  
P. O. Box 11589  
Columbia, South Carolina 29211-1589

In RE: David Lee Coward, #332888 vs. State of South Carolina  
Case #: 2012-CP-37-0404

Dear Sir or Madam:

In connection with the foregoing matter, please be advised that I was the Court Appointed Attorney and enclose herewith a copy of my appointment. I also enclose copies of all documents you requested for filing a copy of the Appellant's Notice of Appeal in this matter together with a copy of the Order and Proof of Service. I ask that your office assume representation of this indigent Applicant.

Very truly yours,

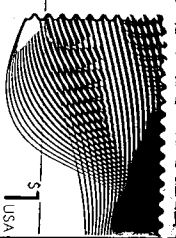


Hugh W. Welborn

HWW/sba  
Enclosures

cc: South Carolina Supreme Court  
Court of Appeals  
Office of Attorney General  
Client

Hugh W. Welborn  
Attorney At Law  
P. O. Box 173  
Anderson, SC 29622



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JUN 24 2016

**SC SUPREME COURT**

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Post Office Box 11330  
Columbia, South Carolina 29211

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