THE
GIESE
LAW FIRM, LLC

RECEIVED
DEC 15 2016
S.C. SUPREME COURT

December 11, 2016

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

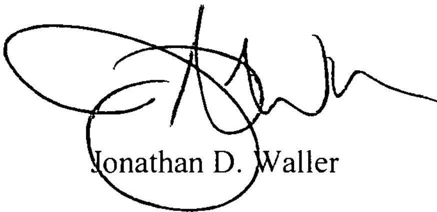
Re: Thomas Lewis Bloodsaw vs. State of South Carolina
C/A No: 2015-CP-40-01846

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Bloodsaw in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,



Jonathan D. Waller

Cc: Johnny E. James, Jr., South Carolina Office of Attorney General

Enclosures

Barney Giese · Keith Giese · Kelly Giese · Justin Kata · Jonathan D. Waller
1315 Blanding Street, Columbia, SC 29201 · 803-708-6767 · www.gieselawsc.com

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
D. Craig Brown, Circuit Court Judge

RECEIVED
DEC 15 2016
S.C. SUPREME COURT

2015-CP-40-01846

Thomas Lewis Bloodsaw, #354735,
Appellant,

v.

STATE OF SOUTH CAROLINA,
Respondent.

NOTICE OF APPEAL

Thomas Lewis Bloodsaw, #354735, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed September 29, 2016 and served on counsel by email dated November 30, 2016, issued by the Honorable D. Craig Brown, Presiding Judge, Fifth Judicial Circuit.

Jonathan D. Waller
Giese Law Firm
SC Bar No.: 76290
1315 Blanding Street
Columbia, SC 29201
803-708-6767 (phone)
803-708-6769 (fax)
jwaller@thegieselawfirm.com
ATTORNEY FOR PETITIONER

This 12 day of December, 2016.

Other Counsel of Record:
Johnny E. James, Jr., Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
D. Craig Brown, Circuit Court Judge

2015-CP-40-01846

RECEIVED
DEC 15 2016
S.C. SUPREME COURT

Thomas Lewis Bloodsaw, #354735,

Appellant,

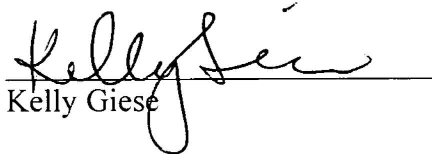
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Johnny E. James, Jr., Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 13th day of December 2016, to his office located at P.O. Box 11549, Columbia, SC 29211.



Kelly Giese

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4001846

Thomas Lewis #354735 Bloodsaw — PLAINTIFF(S)

State of South Carolina — DEFENDANT(S)

2016 SEP 29 AM 11:58
RICHLAND COUNTY
FILED
JEANETTE W. MCBRIDE
C.C.P., G.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
		$
		$
		$

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** ______

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of ________, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 30 day of Sept, 20 16 to attorneys of record or to parties (when appearing pro se) as follows:

Jonathan D Waller

Jessica Elizabeth Kinard

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter ____________

Clerk of Court Jeanette W. McBride

SCANNED

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS) FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)
	) 2015-CP-40-01846
Thomas Lewis Bloodsaw, S.C.D.C. No. 354735	)
v.	) **ORDER OF DISMISSAL**
State of South Carolina	)
Defendant.	)

RICHLAND COUNTY
FILED
2016 SEP 29 AM 11:52
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter comes before the Court by way of an application for post-conviction relief filed March 27, 2015 ("the Application"). Respondent made its return on or about June 30, 2015. The Court convened an evidentiary hearing into the matter on July 14, 2016 at the Richland County Courthouse. Applicant was present at the hearing and represented by Jonathan D. Waller, Esquire. Johnny E. James Jr., Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Victor K. Li, Esquire, ("Counsel") also testified. The Court had before it a copy of the trial transcript, the records of the Richland County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. On September 1, 2011, the Richland County Sheriff's Department sought and obtained an arrest warrant against Applicant for the crimes of Burglary, First Degree (I-959437) and Larceny, Value more than $1,000 but less than

SCANNED

$5,000 (I-959438). Applicant was thereafter indicted by the Richland County Grand Jury during the May 2012 term for Burglary, First Degree (2012-GS-40-01158) and Petit Larceny, $2000 or Less (2012-GS-40-01159). Victor K. Li, Esquire represented Applicant on the charges. Applicant proceeded to a jury trial before the Honorable R. Knox McMahon from March 11 to March 13, 2013 and was found guilty as indicted. Judge McMahon sentenced Applicant to concurrent terms of eighteen (18) years incarceration for Burglary, First Degree and thirty (30) days for Petit Larceny.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudek, Esquire, and Austin H. Crosby, Esquire filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed Applicant's convictions by unpublished opinion. State v. Bloodsaw, Op. No. 2015-UP-002 (S.C. Ct. App. filed January 7, 2015). The Remittitur issued on January 26, 2015.

Present Allegations

In his application for post-conviction relief, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
   a. "Failed to object to States closing argument"
   b. "Failed to move for Direct Verdict for 1st degree burglary-closing argument"
2. "Prosucutorial [sic] Misconduct"

At the hearing, Applicant proceeded only on his claims of ineffective assistance of counsel.

II. 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. Applicant must overcome this presumption in order 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. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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.

"Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)).

Where overwhelming evidence of guilt is introduced at trial, Applicant cannot show prejudice from the deficient performance of counsel, as the reasonable probability of a different result does not exist. See Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009); Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991).

DCB

III. 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 has reviewed the Clerk of Court's records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. 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.

Failure to Object during Closing– Appealing to Passions of the Jury

Applicant alleges that Counsel failed to properly object to the solicitor's appealing to the passions of the jury during State's closing argument. "A solicitor's argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Webb, 389 S.C. 174, 697 S.E.2d 662 (Ct. App. 2010) (quoting State v. Rudd, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003)). An argument asking the jurors to place themselves in victim's shoes does nothing but endeavor to arouse passion and prejudice. Brown at 515-16, 680 S.E.2d at 914 (quoting State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006)). However, "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant," and the applicant has the burden of proving that prejudice. Id. at 516, 680 s.E.2d at 915.

"When objection is timely made to improper remarks of counsel, the judge should rule on the objection, give a curative charge to the jury, and instruct offending counsel to desist from improper remarks." McElveen v. Ferre, 299 S.C. 377, 385 S.E.2d 39 (Ct. App. 1989). If the curative instruction is not satisfactory, counsel must further object in order to preserve the error

DCB

for appeal. Id., see also Kalchthaler v. Workman, 316 S.C. 499, 450 S.E.2d 621 (Ct. App. 1994). Where improper remarks or arguments are made in the course of a closing argument, the charge given by the trial judge to the jury may be adequate to cure prejudice therefrom. See Smith v. State, 375 S.C. 507, 524, 654 S.E.2d 523, 533 (2007) (Finding adequate cure in trial court's jury charge that "[y]ou must not consider as evidence any statement of counsel made during the trial.").

At trial, immediately prior to closing arguments, the trial judge briefly instructed the jury that "what the attorneys say is not evidence in the case[.]" T.R. p. 404, l.19-20. During the State's closing argument, the solicitor touched on firearms as a broader issue and began to implicate Applicant as a reason for the validity of each side; Counsel objected before the solicitor could finish and the trial judge immediately sustained that objection:

> [MS. BODMAN:] [The Victim's] sense of security being invaded, which is really why there is probably two issues to – or two sides to this gun issue that's out there. It's because there are people like the Defendant (indicating) who will come into your home and take—
>
> MR. LI: Your Honor, I object—
>
> MS. BODMAN: —what they want.
>
> THE COURT: Okay.
>
> MR. LI: I object to pledging to the passions of the jury.
>
> THE COURT: All right.
>
> You can rephrase that, Solicitor.
>
> Thank you, Mr. Li.
>
> Thank you, Solicitor. You may continue.

T.R. p. 416, l. 1-15. The solicitor thereafter continued without rephrasing, referring to, or expanding upon the improper remark. Counsel did not seek further curative instruction. The

DCB

trial judge did not offer a specific curative instruction, but again offered general guidance as part of the jury charge:

> [THE COURT:] You are to consider only the competent evidence before you. You are to consider only the testimony which has been presented from the witness stand and any exhibits which have been made part of the record.

T.R. p. 434, l. 11-13. After the jury returned its verdict of guilty, Counsel renewed his prior motions and objections and made a motion for a new trial, which was denied from the bench.

At the evidentiary hearing in this present action, Counsel testified during Applicant's direct examination that his failure to seek a further curative instruction was not subject to any strategy, that he should have done so, and that he "just missed it." On cross-examination, Counsel acknowledged that he renewed his objection and moved for a new trial after the jury returned its verdict.

The Court finds that Counsel's conduct fell within prevailing professional norms. Counsel did indeed object and did so with attentive haste, so as to prevent the solicitor from completing her remark. Any further action regarding the comment on the part of Counsel or the Court would have done little more than draw further attention to argument that was otherwise at least partly drowned by Counsel's objection.

Even if Counsel's conduct was deficient, Applicant has failed to demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. First, the solicitor's improper comment was interrupted by Counsel's objection, diminished thereby, and was not returned to by the solicitor afterward. To the extent a cure was necessary, the Court finds that the trial judge's admonition prior to closing arguments, along with his general charge on what to consider in rendering a verdict was sufficient to orient the jury to the proper contemplation of the evidence. <u>See</u> <u>Smith</u>. As such, the Court finds the

solicitor's comment did not so infect the trial with unfairness so as to make the resulting conviction a denial of due process. See Brown at 517, 680 S.E.2d at 915 (citing Smith v. State, 375 S.C. 507, 654 S.E.2d 523; Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004))

Second, Applicant cannot prove prejudice, as overwhelming evidence exists to show his guilt. The victim testified that his house was burglarized and among the items missing were three firearms. Fingerprint evidence placed Applicant in the burglarized house and was found on a file cabinet and a box of Winchester ammunition for one of the stolen firearms. When Applicant's efforts to undermine that fingerprint evidence failed, the Applicant himself testified to burglarizing the victim's house, stealing a computer found therein, to at least touching the box of Winchester ammunition, and to lying to investigators. The only question remaining for the jury was whether or not to believe Applicant's story exculpating himself from the theft of the firearms by blaming a conveniently deceased co-conspirator—ample evidence existed for the jury to disbelieve Applicant and overwhelming evidence existed to place entire responsibility for the burglary upon his shoulders.

Therefore, Applicant has failed to show any prejudice rising from the deficiency he alleges. Accordingly, this allegation shall be dismissed.

Failure to Object during Closing– Comments on the Right to Remain Silent, Remorse

Applicant also alleges that Counsel failed to properly object to the solicitor's statements on Applicant's exercise of the right to remain silent during State's closing argument. When an accused unambiguously asserts a constitutional right, "it is impermissible for the state to comment upon or argue in favor of guilt or punishment based upon his assertion of that right. For example, when a defendant invokes the Fifth Amendment, the prosecutor cannot proffer the accused's silence as evidence of guilt." State v. Johnson, 293 S.C. 321, 323, 360 S.E.2d 317,

DCB

319 (1987) (citing Doyle v. Ohio, 426 U.S. 610 (1976)); see also Berghuis v. Thompkins, 560 U.S. 370 (2010) (Defendant's invocation of the right to remain silent must be unambiguous). However, "[t]he underpinnings of Doyle, and the need for its application, are diminished where a defendant waives his right to silence," whether by offering a statement or taking the stand in his own defense. State v. Simmons, 360 S.C. 33, 40, 599 S.E.2d 448, 451 (2004). Indeed, "Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." Anderson v. Charles, 447 U.S. 404, 408 (1980).

A corollary of the right to remain silent is the prohibition against argument that a defendant has failed to show remorse when he chooses not to testify. State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000); see also Sloan at 440, 398 S.E.2d at 95 ("[N]o right is more fundamental than the right of an accused to plead not guilty and put the state to its proof."). "This constitutional prohibition, however, does not preclude a prosecutor from making a fair response to a claim made by defendant or his counsel." McClure at 407, 537 S.E.2d at 274 (quoting United States v. Robinson, 485 U.S. 25, 32 (1988)). Where a defendant takes the stand, the State may comment on his or her general demeanor in the courtroom, including his remorse or lack thereof. Bates v. Lee, 308 F.3d 411 (4th Cir. 2002) (citing Gaskins v McKellar, 916 F.2d 941, 951 (4th Cir. 1990)) ("This court has found that prosecutorial comments about the lack of remorse demonstrated by a defendant's demeanor during trial do not violate a defendant's Fifth Amendment right not to testify."); compare McClure at 408, 537 S.E.2d at 275 (distinguishing Six v. Delo, 94 F.3d 469 (8th Cir. 1996)) (holding Six was inapplicable and statements on

DCB

remorse in sentencing phase were reversible error where the statements were *not* "prefaced with a reference to the jury's observance of the defendant during the trial").

Testimony in the trial transcript and testimony at the evidentiary hearing consistently show that, upon arrest, Applicant was given warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). Applicant thereafter asked questions of the law enforcement officers. Inv. Don Robinson stated that he was investigating a burglary and asked Applicant if he knew anything about it. The Applicant replied that he had "no idea what you're talking about[.]" T.R. p. 305, l. 7-13. Applicant took the stand in his own defense at trial and offered a partially exculpatory narrative, admitting his complicity in burglarizing the house and stealing a computer, but only after another individual by the name of Moses McKnight[1] had burglarized the house, stolen other items and guns, and departed.

Near the end of direct examination, Counsel asked Applicant a series of questions addressing the inconsistency between his testimony and the statement he gave to law enforcement. Counsel explicitly asked Applicant twice whether his courtroom testimony was the first time he had offered his Moses narrative; in each instance, Applicant replied in the affirmative. During cross-examination, the State asked the same, and Applicant again affirmed that trial was the first time he had offered his Moses narrative.

During closing arguments, Counsel predicted that the State would attack Applicant for not offering the story before trial. The State argued as predicted:

> [MS. BODMAN:] So more than 20 months have passed since Leroy Kelly's home was invaded. He tells not a single soul, nobody, nobody, that means not his momma, not the mother of his child. There was testimony that, apparently, he's had multiple attorneys. Not a single soul does he tell this story to until yesterday

[1] Moses McKnight was deceased prior to Applicant's trial. Though not relevant to the allegations properly brought and argued before this Court, Counsel testified Mr. McKnight was murdered before an investigator could look into Applicant's story.

DCB

> after he watches all of that fingerprint testimony that he is not going to be able to overcome.

T.R. p. 425, l. 2-7. The solicitor subsequently emphasized that Applicant lied to investigators, that he admitted to lying, and that he lied rather than invoke his right to remain silent. She then continued attacking Applicant's credibility by noting his courtroom demeanor:

> [MS. BODMAN:] You did not see – in the credibility of the witnesses, you judge their demeanor. You judge their demeanor as he sat here and he just – there was not one bit of remorse or apology.

T.R. p. 427, l. 14-17.

Counsel testified on direct examination at the evidentiary hearing that there was no strategy leading to the absence of his objection to the solicitor's closing remarks, but rather offered that after hearing so many ridiculous arguments during trial and argument, he had become numb to their continued proliferation. However, during cross-examination by the State, Counsel acknowledged that in his own closing argument, he predicted that the solicitor would remark that Applicant had never told his story before. Upon further examination by the State, Counsel also acknowledged that the successful anticipation of the State's closing argument was a strategy he typically found effective. Counsel agreed that he did renew his objections and request a new trial after the jury returned its verdict.

The Court finds that Counsel's conduct fell within prevailing professional norms. First and foremost, the State's closing arguments at trial did not constitute impermissible comments on the right to remain silent. Doyle is inapplicable to examination and argument on inconsistent statements. Anderson, 447 U.S. 404. Applicant never unambiguously invoked his right to remain silent, but rather lied to investigators that he knew nothing about the burglary, as he admitted at trial. Applicant's lie opened the door to argument addressing Applicant's inconsistent admission of involvement at trial. The solicitor was within the bounds of fairness to

DCB

question Applicant and argue that his testimony at trial was not credible given his inconsistent statement to law enforcement, especially where Counsel preemptively elicited the subject.

The rule that a solicitor is not to argue a defendant's supposed lack of remorse is similarly dissolved by Applicant's decision to take the stand and testify at length to his involvement in burglarizing the victim's house. The prohibition against comments on lack of remorse exists to protect a defendant's right to remain silent and not testify; it does not shield a defendant from critical observation of his courtroom demeanor, especially where he takes the stand and admits to significant wrongdoing. The solicitor prefaced her remarks with explicit reference to Applicant's courtroom demeanor and thereby framed her argument within the bounds of Bates, 308 F.3d 411 and Gaskins, 916 F.2d 941.

Furthermore, although Counsel initially agreed with Applicant's PCR counsel that there was no strategy to his decisions, the Court finds credible his later testimony elicited on cross-examination that he executed a strategy of predicting the State's argument in his own closing and that his strategy was rendered more effective when the State thereafter argued as predicted. The Court so finds the later testimony credible because the execution of such a strategy is clear and evident upon review of the trial transcript. In light of that strategy, the Court cannot and will not deem Counsel's action ineffective assistance of counsel. See Caprood at 110, 419 S.E.2d at 517.

Still further, even if Counsel's conduct was deficient, Applicant has failed to demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. As previously stated, Applicant cannot prove prejudice, as overwhelming evidence exists to show his guilt. Therefore, Applicant has failed to show any prejudice rising from the deficiencies he alleges. Accordingly, these allegations shall be dismissed.

DCB

Failure to Move for a Directed Verdict

Applicant also alleges that Counsel failed to properly move for a directed verdict or mistrial. To the extent that this allegation pertains to the allegations previously discussed herein, the Court relies primarily upon its above reasoning. The Court finds that Counsel did in fact seek a directed verdict at the end of the State's case-in-chief, renewed that motion at the end of Applicant's own case-in-chief, and again renewed that motion, renewed all objections, and further moved for a new trial after the jury returned its verdict. Counsel acknowledged as much at the evidentiary hearing. Therefore, Applicant has failed to show any deficiency. Furthermore, even if Counsel's conduct was deficient, Applicant has failed to demonstrate that there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different. As is the case with respect to the previous allegations, he cannot do so given the overwhelming evidence against him. Therefore, Applicant has failed to show any prejudice rising from the deficiency he alleges. Accordingly, this allegation shall be dismissed.

Prosecutorial Misconduct

As previously indicated, Applicant proceeded only on his claims of ineffective assistance of counsel in State's closing argument and did not argue on the claim of prosecutorial misconduct alleged in his application. As such, the Court must find that Applicant has abandoned this allegation and failed to meet his burden to support either prong of Strickland. Thus, this allegation shall be dismissed.

DCB

CONCLUSION

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

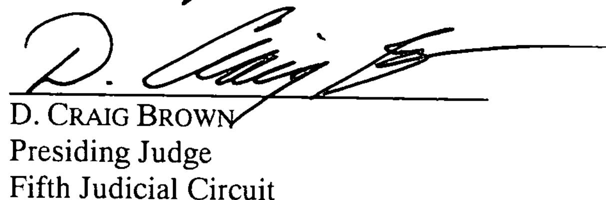
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 19 **day of** Sept., **2016.**



D. CRAIG BROWN
Presiding Judge
Fifth Judicial Circuit

Florence, South Carolina

DCB

B78798.01
$1.78 0
US POSTAGE
FIRST-CLASS
062S0009473977
29201

stamps.com

THE
GIESE
LAW FIRM, LLC
1315 Blanding Street
Columbia, SC 29201

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