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June 15, 2018

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

RECEIVED

JUN 18 2018

S.C. SUPREME COURT

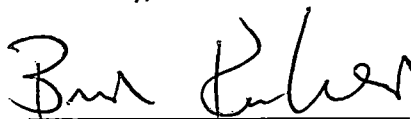
Re: Nathaniel Bradley v. The State of South Carolina
Case No. 2012-CP-43-01519

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on respondent; Office of Indigent Defense, and the Sumter County Court of Common Pleas.
- (2) A copy of the order which is to be challenged on appeal.

Sincerely,



Bradley M Kirkland
2007 Lincoln Street
Columbia, SC 29201
(803)254-9007

Other Counsel of Record:
Julie Coleman
1000 Assembly Street
Columbia, SC 29209
(803)734-5178

NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A
POST CONVICTION RELIEF

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

RECEIVED
JUN 18 2018

George C. James, Jr., Circuit Court Judge S.C. SUPREME COURT

Case No. 2012-CP-43-01519

The State,.....Respondent,

Nathaniel Bradley,.....Appellant,

Notice of Appeal

Maurice Abrams appeals the order of the Honorable George C. James, Jr., dated May 16, 2018, which affirmed his conviction in Circuit Court. Appellant received written notice of the order on May 21, 2018.



Bradley M Kirkland
2007 Lincoln Street
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Attorney for Appellant

Other Counsel of Record:

Julie Coleman
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(803) 734-5178
Attorney for Respondent

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUN 18 2018

S.C. SUPREME COURT

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Case No. 2012-CP-43-01519

Julie Coleman, Assistant Attorney General

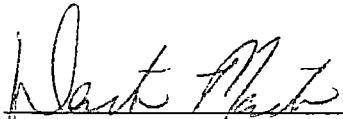
The State,.....Respondent,

Nathaniel Bradley,.....Appellant,

I certify that I have served the Notice of Appeal on Julie Coleman, Assistant Attorney General by United States mail on June 15, 2018, at 1000 Assembly Street Columbia, South Carolina 29201.

I certify that I have served the Notice of Appeal on the Office of Appellate Defense by United States mail on June 15, 2018, at 1330 Lady Street Columbia, South Carolina 29201.

I certify that I have served the Notice of Appeal on the Clerk of Court of Common Pleas by United States mail on June 15, 2018, at 141 N. Main Street Sumter, South Carolina 29150.



Danita Martin, Assistant to Brad Kirkland
2007 Lincoln Street
Columbia, South Carolina 29201
(803) 386-1116

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED
2018 MAY 16) PM 2:21

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Nathaniel Bradley, #262526,

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Case No. 2012-CP-43-01519

RECEIVED
DEPUTY CLERK OF COURT
MAY 18, 2018

Applicant,

v.

State of South Carolina,

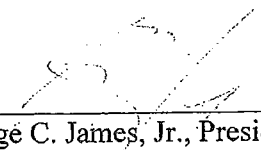
Respondent.

**ORDER DENYING APPLICANT'S
POST-HEARING MOTIONS**

By order filed September 5, 2018, this court denied Applicant's claims for post-conviction relief. Applicant timely filed his motion for amendment and reconsideration pursuant to Rules 52(a), 52(b), and 59(e), SCRCP on September 22, 2017. However, the motion was not transmitted to the court until March 2018.

The court has carefully reviewed the issues raised in the motion. The motion is denied.
AND IT IS SO ORDERED.

May 15, 2018


George C. James, Jr., Presiding Judge

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

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IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Nathaniel Bradley, #262526,

Applicant,

v.

State of South Carolina,

Respondent.

JAMES C. DANIEL
CLERK OF COURT
SUMTER COUNTY, S.C.

Case No. 2012-CP-43-01519

CERTIFIED TRUE COPY
OF ORIGINAL FILED

DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

**ORDER DENYING
POST CONVICTION
RELIEF APPLICATION**

This matter comes before the Court by way of a post-conviction relief application filed on July 27, 2012. The Respondent made its Return on February 12, 2013. An evidentiary hearing into the matter was convened on April 15, 2015, and on July 5, 2016, at the Sumter County Courthouse. The Applicant was present at the hearings and was represented by Bradley M. Kirkland. The Respondent was represented by Assistant Attorney General Daniel Gourley and Assistant Attorney General Julie Coleman. After the July 5, 2016 hearing, the Court granted the Applicant's request for leave to obtain the transcripts of the two PCR hearings, and after the transcripts were delivered, the parties submitted proposed orders to the Court on March 20, 2017. The Court has undertaken an exhaustive review of the trial transcript, the PCR transcripts, the evidence submitted, and the arguments of counsel. The Court concludes the application for relief must be denied.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. He was indicted in May 2007 by the Sumter County Grand Jury for murder and possession of a firearm during the

commission of a violent crime (2007-GS-43-390). Ernest A. Finney, III, Esquire (trial counsel), represented him. On January 14-18, 2008, the Applicant proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr. On January 18, 2008, Applicant was found guilty of murder and not guilty of possession of a firearm during the commission of a violent crime. The trial judge sentenced the Applicant to thirty years imprisonment for murder.

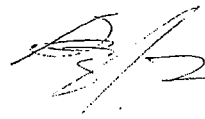
The Applicant appealed, and the South Carolina Court of Appeals affirmed the conviction. *State v. Nathaniel Noel Bradley*, 2010-UP-494 (filed November 8, 2010). The Court of Appeals denied the Applicant's Petition for Rehearing. The Applicant filed a Petition for Writ of Certiorari on April 1, 2011. The State submitted its Return to Petition for Writ of Certiorari on July 12, 2011. The Supreme Court of South Carolina denied the petition on June 21, 2012. The Remittitur was sent July 5, 2012.

In his original Application, the Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of Counsel
 - a. "Counsel was ineffective for failing to investigate this case by failing to interview potential witnesses. Counsel has a duty to investigate, See Ard v. Catoe, 642 S.E.2d 590, 597 (2007)."

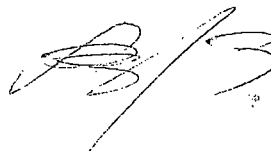
On April 9, 2015, through PCR counsel Bradley M. Kirkland, the Applicant amended his application to include the following grounds:

1. Trial Counsel erred when he failed to move to quash the arrest warrant on the basis that the information in the warrant was demonstrably false and therefore the magistrate issued the warrant based on false information. The warrant claimed that Mr. Bradley committed the murder in Sumter County and an eyewitness placed Mr. Bradley at the scene of the crime. However, at trial, Investigator McMillan admitted that he had no evidence that the victim was killed in Sumter County. (Tr. p. 729-730).
2. Trial counsel erred when he failed to argue in his directed verdict motion that the state had failed to place him at the scene of the crime or show any evidence of his participation in the murder of the victim. (Tr. p. 820-831).
3. Trial counsel erred when he waived the *Neil v. Biggers* hearing and allowed in testimony concerning the identification of Mr. Bradley by the states witness, Darrell Koenig.



Additionally trial counsel failed to object to the line-up introduced through Mr. Koenig and Mr. Koenig's in court identification of Mr. Bradley. (Tr. p. 583-585; Koenig Testimony p. 621-661).

4. Trial counsel failed to investigate Easy Auto to see if they in fact used yellow temporary tags on their vehicles and if other cars, similar to the blue Volvo, had been sold near the time of the murder. Additionally, trial counsel failed to object to hearsay testimony by an employee of Easy Auto during trial. (Tr. p. 522-524; p. 628, l. 12-18; p. 680-681)
5. Trial counsel failed to object to the prosecutor referring to Mr. Bradley as a liar in her closing argument while arguing that her witnesses were credible. (Tr. p. 1009, l. 3-5; p. 1016, l. 23-25; p. 1017, l. 1-6; p. 1024, l. 3-18; p. 1025, l. 19-24).
6. Failure to call expert witnesses to challenge the testimony of prosecution witnesses. Furthermore trial counsel informed Mr. Bradley that experts would be at the trial to introduce phone records and give an expert opinion as to the location of the phone. Additionally witnesses that were familiar with the condition of the car at the time of the recovery were not called to testify as to the condition of the car.
 - a. Arson Expert: An arson expert could have testified that a burning car would have produced an immense amount of smoke and would have been easily visible for a long distance during the day. Furthermore, the expert could have testified that the car would have still retained some heat at the time it was discovered if it had in fact been burned after 10:30 am on the day the car was discovered. Mr. Bradley's position is that it is impossible for the car to have been burned after 10:30 am on Sunday morning (when he was allegedly seen by Mr. Koenig driving the car 30 miles away). Therefore, Mr. Koenig's identification of Mr. Bradley was in error and, in fact, impossible.
 - b. Telecommunications Expert: This expert could have testified that Mr. Bradley's phone was in use during the time frame when Darrell Koenig allegedly saw Mr. Bradley driving the victim's car. The phone records would indicate that Mr. Bradley's phone was miles away from the location that Mr. Koenig allegedly saw Mr. Bradley driving the victim's car and during the time frame in which the car was allegedly burned by Mr. Bradley. Furthermore, the phone records would have corroborated Mr. Bradley's alibi witnesses.
 - c. Eyewitness Identification Expert: This expert could have testified to the inherent unreliability of eyewitness identifications.
7. Trial counsel failed to properly investigate Mr. Bradley's alibi witnesses. Although trial counsel did call Calvin Davis as an alibi witness (Tr. p. 864-884) he failed to call Glenn Moses (and others) who were also present and would have corroborated Mr. Davis' testimony. (ISSUE ABANDONED).
8. Trial counsel failed to move for a mistrial when the security belt worn by Mr. Bradley accidentally discharged and caused Mr. Bradley to fall out of his chair. (Tr. p. 201-206).
9. Trial counsel erred when he called the defendant's brother, Paul Bradley, to testify that the defendant told him that the victim was deceased prior to police finding the body. (Tr. p. 934-935).
10. Trial counsel failed to object to hearsay testimony entered by Mr. Koenig. Mr. Koenig testified that his neighbors told him that the police were looking for a blue Volvo with temporary tags. (Tr. p. 634-635).
11. Trial counsel failed to object to the prosecutor asserting that she did not have to prove

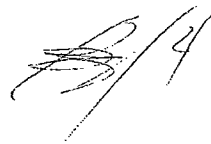
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- when or where the victim was murdered. (Tr. p. 93).
12. Trial counsel erred when he failed to object to two letters introduced by Gloria Portee into evidence. The letters were primarily character evidence and had little to no relevance at trial. (Tr. p. 378-386)
 13. Trial counsel erred in allowing Wayne Johnson to say that he had an altercation with Bradley and armed himself (Tr. p. 560).
 14. Trial counsel failed to object to Bobby Lee Hughes saying that he thought the Defendant might have had something to do with the death. (Tr. p. 570, 580)
 15. Trial counsel failed to object to hearsay of Officer Wesley Gardner and Clarence McMillan when saying Koenig said he was 100% sure of his identification. (Tr. p. 613, 715).
 16. Appellate counsel erred by not appealing the decision by the trial Judge to give a jury charge on accomplice liability (hand of one is the hand of all). Additionally, appellate counsel did not include relevant case law in her brief that would have likely resulted in a reversal of the conviction. (Tr. p. 972-974; p. 979).

FACTUAL BACKGROUND

On Monday, May 23, 2005, the victim was found dead floating in Boyle's Pond in Sumter County. He had been shot dead. A coat hanger was wrapped around his ankle and around a cement block in an unsuccessful effort to keep him submerged. He was last seen by his girlfriend, Martha Ransom, driving out of her driveway in Rembert the immediately preceding Saturday, May 21, at around 5:30 p.m. The Applicant was seen driving his own vehicle, a Chevrolet Beretta, with an unknown black male passenger. According to Ransom, the victim was outside talking with the Applicant and came inside the house in an unsettled state, got the keys to her blue Volvo, went outside, and drove it off, with the Applicant and the unknown man following behind in the Applicant's vehicle. The Applicant gave a statement to law enforcement that when he and the unknown man drove off in front of the victim, they stopped at the end of the driveway, and the unknown man exited his vehicle and got in the Volvo with the victim. The Applicant stated he never saw the victim again.

Trial witness Darrell Koenig testified he owned a vacant six-acre residential lot on Cobblestone Road in Sumter County. Cobblestone Road is across Sumter County from Martha



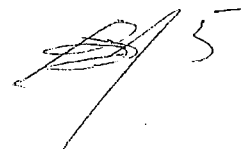
Ransom's residence in Rembert. Koenig testified he went to his lot early Sunday morning, May 22, to run a backhoe to remove some trees and do other work. He recalled it being a Sunday because he skipped church to go to his lot. He testified that at approximately 9:30 a.m., he saw the Applicant slowly driving a blue Volvo with a bright yellow paper tag with red letters on Cobblestone Road. The victim's body was found the next day—Monday, May 23—in Boyle's Pond, less than a mile from Cobblestone Road.

The blue Volvo was found in Lee County by local resident pedestrians on Sunday, May 22, between 2:30 and 3:30 p.m., the same day Mr. Koenig testified he saw the Applicant driving the vehicle. The Volvo had been totally burned. The Lee County pedestrians testified they had walked in this area the afternoon before, but the vehicle was not there. The location at which the vehicle was found is 20-30 miles away from Cobblestone Road and Boyle's Pond.

SUMMARY OF APPLICABLE LAW

This Court has reviewed the record in its entirety and has considered the testimony and other evidence presented at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

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 "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*, 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 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 counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Below are this Court's findings as to each of the Applicant's allegations of ineffective assistance of counsel.

ISSUE 1: Is the Applicant entitled to a new trial on the ground trial counsel failed to move to quash the arrest warrant on the basis the information in the warrant was demonstrably false and therefore the magistrate issued the warrant based on false information?

A. Summary of Testimony

The Applicant claims the arrest warrant for his murder charge contained demonstrably false statements that resulted in his arrest and prosecution. PCR Tr., July 5, 2016, p. 11. Investigator Clarence McMillan was the affiant. The sole statement in the arrest warrant under the heading of "PROBABLE CAUSE" was "LAW ENFORCEMENT HAS A STATEMENT FROM A WITNESS WHO PLACED THE DEFENDANT AT THE CRIME SCENE. LAW ENFORCEMENT WILL ATTEST TO THE SAME." Applicant's PCR Exhibit 24. The only



witness to whom McMillan could have been referring was Darrell Koenig, who identified the Applicant as the driver of the blue Volvo on Sunday morning, May 22, within one-half mile of where the victim's body was found the following day floating in Boyle's Pond with a cement block tied around his ankle with a coat hanger. There is no evidence in the trial record or the PCR record of any witness placing the Applicant at the scene of the crime. This is obviously because it has never been established *where* the victim was killed, only that his body was found in Boyle's Pond, again, within one-half mile of where Mr. Koenig testified he saw the Applicant driving the blue Volvo the day before the body was found. Indeed, McMillan testified on cross-examination by trial counsel that he had identified no witnesses who saw the murder, that he did not know the date of the murder or the county in which the murder occurred, and that Mr. Koenig only saw the Applicant driving the blue Volvo "in the area where the body was located". Trial Tr. p. 729-730.

B. Findings of Fact and Conclusions of Law

"In *Franks v. Delaware*, the United States Supreme Court held that the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed." *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). The *Franks* test, used primarily with regard to search warrant affidavits, applies in cases in which officers include demonstrably false information in a search warrant affidavit and in which officers omit potentially exculpatory information. *Missouri*, 337 S.C. at 554, 524 S.E.2d at 397. Although *Franks* concerned a search warrant affidavit, the *Franks* rationale has been applied to an arrest warrant affidavit in South Carolina. *State v. Porch*, 417 S.C. 619, 790 S.E.2d 440 (Ct. App. 2016).

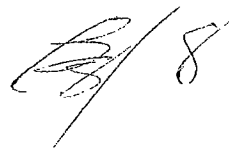
Under *Franks*, when the defendant makes a substantial preliminary showing that a false

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statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires a hearing be held at the defendant's request. If, at that hearing, the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978).

The Applicant claims Investigator McMillan knowingly and intentionally, or with reckless disregard for the truth, made a demonstrably false statement in the arrest warrant affidavit, as there was no witness who placed the Applicant at the scene of the murder. The Applicant correctly submits that neither McMillan nor any other witness offered evidence as to where or when the murder occurred. The Applicant claims pursuant to the mandate of *Franks*, if the “PROBABLE CAUSE” portion of the arrest warrant is excised, all that is left is the conclusory statement that Mr. Bradley committed the offense with no explanation whatsoever as to why he was considered connected to the crime. The Applicant claims that by not challenging the arrest warrant, trial counsel's performance was deficient, and that had trial counsel challenged the arrest warrant, the charges against the Applicant would have likely been dismissed.

In *Franks*, the United States Supreme Court held the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed. The Court provided the following two-part test: (1) to mandate an evidentiary hearing, the challengers' attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be



allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof; and (2) if these requirements are met, and if, when material that is subject of the alleged falsity or recklessness disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. *Franks*, 438 U.S. at 171-72, 98 S.Ct. at 2684, 57 L.Ed.2d at 682.

The Court agrees the Applicant could have satisfied the first prong above and an evidentiary hearing would have been required. The Court agrees that if the false portion of the affidavit had been set aside, there would have been no probable cause to arrest the Applicant, and charges would more than likely have been dismissed; however, the Court concludes the Applicant is not entitled to relief on this ground. Trial counsel testified that had the arrest warrant been challenged before indictment and had the warrant been quashed at that time, the solicitor would have simply obtained an indictment through direct presentment to the grand jury, and the case would have proceeded as it did. Therein lies one practical fallacy of applying the *Franks* test to arrest warrant affidavits. With a *search* warrant affidavit, the impact of a finding of a lack of probable cause due to a defective warrant is clear— the evidence may well be excluded at trial and never become admissible. With a defective *arrest* warrant affidavit, the arrest warrant may be voided and the defendant freed, but there remains the likelihood of an indictment obtained by direct presentment to the grand jury. The Court concludes that even if a proper objection would have caused the arrest warrant to have been quashed prior to indictment or trial, the solicitor would have simply obtained an indictment through direct presentment to the Sumter County Grand Jury, and the case would have proceeded to trial exactly as it did, though perhaps at a later date. Therefore, even assuming there was deficient performance by trial counsel in not making a pre-trial motion to quash the warrant before indictment, the Applicant

has not established prejudice, as the Applicant has not established the outcome of his trial would have been different; instead, he has established that his trial would have been held at a different time. The Applicant is therefore not entitled to relief on this ground.

ISSUE 2: Did Trial counsel err when he failed to argue in his directed verdict motion that the state had failed to place him at the scene of the crime or show any evidence of his participation in the murder of the victim?

A. Summary of Issue

The Applicant testified at the PCR hearing that his attorney incorrectly argued the directed verdict motion during his trial. He alleges there is very clear case law requiring the prosecution to place the defendant at the scene of the crime. PCR Tr., July 5, 2016, p. 14. The Applicant argues that while trial counsel did argue the State had not submitted any evidence of the defendant's connection to the crime, he did not specifically argue the State failed to place the Applicant at the scene of the crime. The Applicant also argues trial counsel did not present any case law in support of his position. See Trial Tr. pp. 822-823 and p. 951 for directed verdict motions made by trial counsel after the State rested and at the close of all the evidence.

B. Findings of Fact and Conclusions of Law

The trial court has a duty to submit the case to the jury when the evidence is circumstantial if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000); *State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996). Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error. *State v. Irvin*, 270 S.C. 539, 243 S.E.2d 195 (1978). The trial judge should grant a directed verdict, however, when the evidence merely raises a suspicion that the accused is guilty. *State v. Martin*. By bringing the case, the State assumes

the burden of proving the accused is guilty beyond a reasonable doubt. *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984). In a murder case, the State may meet this burden by establishing the defendant committed the murder himself or by proving the defendant is guilty under the accomplice liability theory.

There was no direct physical evidence linking Mr. Bradley to the murder. The prosecution admitted it had to prove its case by the use of circumstantial evidence. Trial Tr. p. 1010, 4-19. The State admitted it did not know the time of death or the location of the death. Trial Tr. p. 729-730. Direct physical evidence established only that the victim was shot and his body placed in Boyle's Pond.

The Court respectfully rejects the Applicant's claim that trial counsel failed to properly argue the directed verdict motion. At the close of the State's case, trial counsel argued in his directed motion that the State had failed to show the Applicant "had anything to do with the death of Mr. James." He further argued "[t]he best evidence is that there's no connection to Mr. Bradley to that death. The best evidence is that there's --no assistance was given to or by Mr. Bradley to anyone who caused Mr. James' death."

At the close of all the evidence, trial counsel renewed his directed verdict motion by stating, "there has been no evidence showing that the defendant committed the crime of murder, that he even circumstantially was around the victim at the time of death, and that he had no way of causing this death through the evidence that's been submitted to this Court."

The trial record clearly refutes the Applicant's claim that trial counsel did not argue the State had not placed him at the scene of the crime or show any evidence of his participation in the murder. That is precisely what trial counsel argued.

ISSUE 3 and Issue 6 (c): Was trial counsel deficient in waiving a *Neil v. Biggers* hearing, thus allowing testimony concerning the identification of Mr. Bradley by the State's witness,



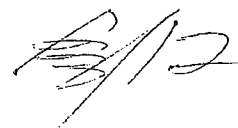
Darrell Koenig? Additionally, did trial counsel deficiently fail to object to the line-up introduced through Mr. Koenig and Mr. Koenig's in court identification of Mr. Bradley? Finally, should trial counsel have called an identification expert?

A. Summary of Testimony

The Applicant testified trial counsel never informed him of his right to challenge the eyewitness identification of Darrell Koenig. He claims trial counsel waived the *Neil v. Biggers* hearing without his consent at trial. PCR Tr., July 5, 2016; Trial Tr. 584-585.


Darrell Koenig, a trial witness for the prosecution, claimed to have seen the Applicant driving the victim's car approximately five hours before the car was found burned in Lee County 20 or 30 miles away but very near to where the victim's body was found the next day. Officer McMillan conceded his "theory of the case" revolved around Mr. Koenig's testimony. Trial Tr. p. 730. Mr. Koenig testified he owned a vacant residential lot on Cobblestone Road near where the victim's body was found. He testified that on Sunday, the day before the body was found, he was working along the edge of the road in a ditch leveling out soil. He testified he saw a blue Volvo sedan drive past him twice. Trial Tr. pp. 627-628. Mr. Koenig initially testified he was sitting down in the ditch looking up when the Volvo passed. Trial Tr. 637. The transcript of trial counsel's cross-examination reflects Mr. Koenig stating he was "back in the woods" when he saw the Volvo. Trial Tr. p. 659. The Court concludes this is a clerical error in the transcript and that the transcript should have reflected that some *equipment* he had rented was "back in the woods". The Court so concludes because Koenig testified several times that when the Volvo passed him, he was at the edge of the street and was only several feet away from the Volvo; this would make it impossible for him to have been back in the woods. Whatever the case, Koenig picked the Applicant out of a six-person photo lineup. Trial Tr. pp. 638-639.

At the PCR hearing, Lori Van Wallendael was called by the Applicant and was qualified



as an expert in the field of the psychology of eyewitness identification. Initially Ms. Van Wallendael testified that in studies in which she has participated and relied upon in her research, the standard "six-pack" style line-up was less reliable than showing a potential eye witness one photo at a time and asking them if they recognize the person. PCR Tr., April 15, 2016, p. 13-14. She further testified she reviewed the testimony of Darrell Koenig, the testimony of the two officers who administered the line-up to Mr. Koenig, and a black and white copy of the photo line-up that was shown to Mr. Koenig. PCR Tr., April 15, 2015, p. 20. She also explained the currently accepted theory of the model of memory. PCR. Tr., April 15, 2015, pp. 21-25.

Ms. Van Wallandael explained there are many decades of studies indicating cross-racial identifications are not as accurate as same-race identifications and that in this case Mr. Koenig is a white male and the Applicant is a black male. PCR Tr., April 15, 2015, pp. 25-26. Furthermore she noted law enforcement used a standard "six-pack" style line-up rather than the more reliable sequential line-up. PCR Tr., April 15, 2015, p. 28. She explained a sequential lineup is when a witness is shown photographs one at a time instead of placing the photos on one page for the witness to view at the same time, which is a "non-sequential" or "simultaneous" lineup. She noted Mr. Bradley's photo in the line-up was slightly different than the other photos as he was looking to the side and his mouth was slightly open whereas the others in the lineup were not looking to the side and did not have their mouths open. PCR Tr., April 15, 2015, p. 29. She testified she was concerned Koenig expressed he was 100% sure of his identification even though he testified that at the time he saw the Applicant drive by, he didn't think too much of it. PCR Tr., April 15, 2015, p. 35-36. She also was concerned about false memories being created because prior to Koenig's identification of the car, he was told by a neighbor the police were looking for a blue Volvo with temporary tags. PCR Tr., April 15, 2015, pp. 35-36. She testified

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that although at trial Koenig had relied almost entirely on identification of the Applicant's mouth, he did not mention the Applicant's mouth in his voluntary statement. PCR Tr., April 15, 2015, p. 38. She further explained that although Koenig stated he locked eyes with the Applicant for 15 seconds, it was likely between 5 and 10 seconds based on the fact people tend to overestimate time when recalling an event. PCR Tr., April 15, 2015, pp. 39-40. Finally she was also concerned that despite Koenig's apparent perfect memory of the driver and the car, he could not recall specific details concerning the passenger of the car. PCR Tr., April 15, 2015, pp. 40-41.

On cross-examination, Ms. Van Wallandael admitted that at the time of the Applicant's trial, no field studies had been conducted on the difference in accuracy between sequential and non-sequential lineups. She also agreed there are some factors that lead to reliable identification, such as good opportunity to view, good lighting, the witness being reasonably close to the suspect, and the witness not being under a great deal of stress. She agreed all of these factors applied in favor of an accurate identification by Koenig. She also agreed the fact Koenig was surprised to see a strange car in his isolated neighborhood occupied by two black males he did not know would have caused Koenig to look more closely at the vehicle and its occupants as they rode by.

B. Findings of Fact and Conclusions of Law

In *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 385 (1972), the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood

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of misidentification existed. *Biggers*, 409 U.S. at 198. The factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (citing *Biggers*, 409 U.S. at 199-200).

The trial transcript reflects that when the identification issue came up at trial, trial counsel had a private conference with the Applicant. Trial counsel testified his recollection was not as strong as he would like it to be, but testified he consulted with the Applicant as to whether the Applicant wanted to waive an *in camera* hearing to challenge Koenig's identification of the Applicant as the driver of the Volvo; trial counsel claims the Applicant agreed to waive the hearing. The Applicant denies he waived the hearing. Whether the Applicant agreed to waive the hearing is of no consequence, as he would have agreed to waive the hearing only upon the advice of trial counsel. Therefore, the question is whether trial counsel was deficient in so advising the Applicant or in choosing on his own to waive the hearing.

Trial counsel testified at the PCR hearing that in his judgment, there was enough evidence to allow the identification to survive a *Neil v. Biggers* hearing. He testified his approach was to challenge the reliability of Koenig's identification on cross-examination in front of the jury on the following grounds: (1) it was a cross-racial identification, (2) Koenig did not have time to make a convincing identification, and (3) when Koenig supposedly saw the Applicant driving the Volvo near where the body was found, the car was already sitting in a field

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burned in Lee County 20 or 30 miles away.¹ PCR Tr., July 5, 2016, pp. 88-89.

The Court first concludes a *Neil v. Biggers* challenge to the identification would have undoubtedly been unsuccessful. Analysis of the *Biggers* factors would have led the trial judge to allow the lineup into evidence. Koenig claimed he and the Applicant "locked eyes" for several seconds and that he had a good view of the Applicant both times the Volvo drove by. Koenig claimed he was several feet away from the Applicant. He expressed a high level of certainty as to the identification. He formerly flew C-141s in the Air Force and was trained in aircraft and equipment recognition from both the air and ground, which he claimed made him able to look at an object for just a moment and be able to identify what it was. He testified his eyesight was "very good". He testified he was concentrating on the Volvo and the driver because it was a vehicle he did not recognize in his isolated neighborhood. Based on the entirety of the lineup testimony, the Court concludes that any motion to suppress the identification would have been denied.

As for the Applicant's claim that he is entitled to relief for trial counsel's failure to call an eyewitness identification expert, the Court denies relief on that ground as well. First, to the extent the Applicant maintains such an expert could have testified at trial in January 2008 that sequential lineups were more reliable than the six-pack lineup that was used, the Court must deny that claim because Ms. Van Wallandael admitted research on that particular issue was in its early stages in 2008, and she testified no field studies had been conducted by the time of trial. Therefore, one theory she espouses had not been fully developed at the time of trial, and trial counsel could not be faulted for failing to present evidence of such a theory. Second, the Court concludes that even if trial counsel were deficient in not retaining an identification expert, and

¹ The timing of the burning of the vehicle is discussed in great detail in this order.

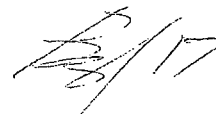
had the expert testified as Ms. Van Wallandael did, the Applicant has not proven there is a reasonable probability the outcome of the trial would have been different. As noted above, Ms. Van Wallandael agreed the factors important to an accurate identification by Mr. Koenig were present in this case. The Court concludes the Applicant has failed to establish an identification expert would likely have altered the outcome of the trial.

ISSUE 4: Was trial counsel deficient in failing to investigate Easy Auto to see if that car business used yellow temporary tags on their vehicles and if other cars similar to the blue Volvo had been sold near the time of the murder? Additionally, was trial counsel deficient in failing to object to hearsay testimony regarding an out-of-court statement made by an employee of Easy Auto?

A. Summary of Testimony

Martha Ransom, the owner of the blue Volvo, testified at trial that her Volvo, which the victim was last seen driving, was in fact light blue and was purchased at Easy Auto. She initially testified she thought there were regular, not temporary, tags on the car. She then stated temporary tags might have been on the car and she thought they might have been red. Trial Tr. pp. 522-524. Darrell Koenig was certain that when he saw the Applicant driving the Volvo, it had a bright yellow paper tag with red letters. Trial Tr. p. 628.

The dealership from which Martha Ransom purchased the Volvo was referred to at trial as Easy Auto and alternatively as Boyle Buy-Here Pay-Here. Apparently, the dealership was actually the latter. Investigator McMillan testified at trial that he spoke to James Fields at Boyle Buy-Here Pay-Here on May 24, one day after the victim's body was found. McMillan testified Fields told him, among other things, the Volvo had a bright yellow Easy Auto paper tag on it when Ransom purchased it. Trial Tr. pp. 680-681. Trial counsel did not object to this testimony. The Applicant claims trial counsel's failure to object to this hearsay testimony allowed the State to introduce evidence corroborating Koenig's testimony that the vehicle he saw had bright yellow



paper tags.

B. Findings of Fact and Conclusions of Law

Rule 802, SCRE, provides hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute. Hearsay is defined in Rule 801(c) as a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted. Rules 803 and 804 list various exceptions to Rule 802.

Investigator McMillan's testimony of what he was told by Mr. Fields was hearsay and does not fit under any exception. Other than McMillan's hearsay testimony, no witness who was familiar with the car was able to describe the car as having a yellow paper tag on the day of the sale of the car or on the day of the murder. Ms. Ransom first testified she thought the vehicle had a permanent tag but then said that if there were a paper tag on the vehicle, she thought it might have been red. The Applicant claims that without this hearsay testimony, there would have been no testimony as to the color of the tag on the Volvo owned by Ms. Ransom and driven by the victim. The Applicant claims this would have rendered Mr. Koenig's testimony far less convincing as to the color of the paper tag. The Applicant claims that had the testimony been excluded, there would have been no corroborating evidence the car driven by the victim had a yellow paper tag; he claims this would have likely changed the outcome of the trial. The Court disagrees.

Again, the subject testimony was hearsay and no exception applied. Trial counsel perhaps should have objected,² even though his explanation for not objecting to

² Trial counsel testified he believed the testimony was not objectionable because it was information acquired by McMillan in the course of his investigation of a crime. PCR Tr. p. 130.

everything possible makes complete sense in the practical world of trial advocacy.

Trial counsel testified:

I'm in charge of winning the war when I'm trying a case, not every battle. And so this battle about Mr. McMillian (sic) verifying what Mr. Fields has said to him, that is not going to win me the war. Because the Volvo was the car that was found burned. It is the car that [the victim] was seen driving away on Saturday evening.

PCR Tr., July 5, 2016, p. 126.

Trial counsel further testified:

I'm thinking that if I'm going to try to make this jury believe that I'm not trying to hide anything, or I'm not trying to berate a man who is a citizen -- who lived a mile from where the body was found, who says 100 percent to the officers, I know who that driver was, I've got to win that argument on more than just the fact that he might have described the color of the tag incorrectly.

PCR Tr., July 5, 2016, p. 128.

Trial counsel also explained that if he had objected to McMillan's testimony of what Mr. Fields told him, the solicitor would have simply called Mr. Fields to testify to the same information. PCR Tr., July 5, 2016, p. 126.

Even though trial counsel was perhaps technically deficient in not objecting to this hearsay testimony, the Applicant has not established there is a reasonable probability the outcome of the trial would have been different if an objection had been made and the testimony excluded. The crucial evidence pertaining to the automobile was (1) the victim had been last seen on Saturday driving Ms. Ransom's blue Volvo, (2) Koenig saw a man he identified as the Applicant driving a blue Volvo the next morning—Sunday— at 9:30, and (3) Ms. Ransom's blue Volvo was found burned on Sunday at 2:30 p.m., 20-30 miles away from where Koenig had seen the vehicle earlier that day. If the testimony about the color of the tag had never come into evidence, Koenig's testimony would have been no

Perhaps this is a reference to Rule 803 (8), SCRE; however, the Court concludes this exception does not apply.

more and no less credible. Though it is apparent the State thought it was important to introduce evidence about the color of the tag, that does not mean the Applicant has established prejudice. The Applicant's claim for relief on this ground is denied.

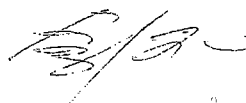
Issue 5: Was trial counsel deficient in failing to object to the prosecutor, in closing argument, referring to Mr. Bradley as a liar and arguing that her witnesses were credible?

A. Summary of Testimony

During closing arguments the assistant solicitor argued the Applicant's "own lies, his own inability to tell the truth created a trap in which he now finds himself." Trial Tr. p. 1009, l. 3-5. She further argued that one of her witnesses, Donna McDuffie, was telling the "obvious truth" and the jury could believe what was in her original statement to law enforcement. Trial Tr. pp. 1024, l. 3-18; p. 1025, l. 19-24. The assistant solicitor also argued witness Gloria Portee was obviously telling the truth because the Applicant was staring at her and trying to intimidate her. Trial Tr. p. 1027.

B. Findings of Fact and Conclusions of Law

A solicitor's closing argument must neither appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences thereto. *State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999). A solicitor has a right to state her version of the testimony and to comment on the weight to be given such testimony. *Id.* Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Humphries v. State*, 351 S.C. 362, 570 S.E.2d 160 (2002).



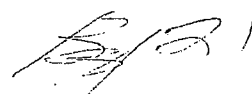
A solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990). A solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record. *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001). Vouching for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction. *Id.* It is inappropriate for the State to assure the jury of a witness' credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record. *Id.* None of these circumstances were present. In this case, the Solicitor's comments were appropriate and within the parameters the law permits. Trial counsel was not deficient in objecting. Even if the solicitor's comment about the Applicant staring at witness McDuffie was improper, the comment did not so infect the trial with unfairness that the Applicant's due process rights were violated. Relief is denied on this ground.

ISSUE 6(a) and 6(b): Was trial counsel deficient in failing to call telecommunications and arson expert witnesses to challenge the testimony of prosecution witnesses?

A. Summary of Evidence

The Applicant claims he is entitled to relief because trial counsel did not call any expert witnesses during the Applicant's trial. The Applicant claims trial counsel should have retained and called an identification expert (discussed above), a cell phone tower expert, and an arson expert. Trial counsel testified he did not consider retaining any experts in the Applicant's case. PCR Tr., July 5, 2016, pp. 95-96.

The Applicant testified trial counsel told him he would be able to cross-examine the state's cell tower expert—Investigator McMillan— as to the cell tower locations off which the

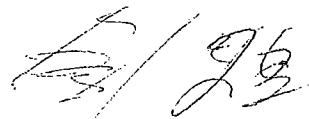


Applicant's phone pinged at various times during the weekend of the murder. PCR Tr., July 5, 2016, p. 32. Trial counsel testified at the PCR hearing that he believed "the cell phone records were probably the strongest factor that we had in proving that Mr. Bradley was innocent." PCR Tr., July 5, 2016, p. 96. Trial counsel cross-examined Investigator McMillan concerning the location of the Applicant's phone throughout the weekend. Trial counsel testified McMillan was not particularly prepared and had not reviewed the records carefully, but trial counsel was able to establish the locations of the Applicant's phone relative to the cell towers during cross-examination. PCR Tr., July 5, 2016, pp. 96-97. Trial counsel's cross-examination of McMillan established the Applicant's cell phone was used to make eighteen calls on Sunday, May 22, 2005 between 7:16 a.m. until 10:32 a.m. McMillan acknowledged at trial that all eighteen of these calls pinged off towers in the Bishopville (Lee County), Wisacky Road (Lee County), and Camden (Kershaw County) areas. McMillan confirmed none of these towers was close to where the Applicant was allegedly seen by Mr. Koenig driving the Volvo at 9:30 that morning. McMillan acknowledged during cross-examination that if the Applicant had been using his phone in the Bishopville, Wisacky, and Camden areas from 9:00 until 11:00 on Sunday morning, Mr. Koenig could not have seen him driving the blue Volvo on Cobblestone Road within one-half mile of where the victim's body was found.

The Applicant called Ben Levitan to testify at the PCR hearing. Levitan was qualified as an expert in historical cell phone analysis. Levitan used the cell phone data provided to trial counsel by the solicitor and compared the testimony of the trial witnesses to the locations of the mobile phone from the point the victim was last seen to the moments the body and the burned-out car were located. He noted the phone appeared to be in locations consistent with the defendant's alibi witnesses and other trial testimony. Levitan's testimony confirmed Investigator

McMillan's testimony as to the locations of the phone at the times the calls were made Sunday morning between 7:16 and 10:32.

Levitan testified the Applicant's phone was likely at the victim's address the last time the victim was seen. PCR Tr., April 15, 2015. This confirmed Martha Ransom's trial testimony and places the phone with the Applicant the day before the victim's body was found. Levitan testified the Applicant's phone was at the locations testified to by alibi witnesses Tenisha Williams and Eloise Sinkler. PCR Tr., April 15, 2015, pp. 94-97. This tends to confirm the Applicant's PCR testimony and places the phone in his hands. Levitan testified the phone also appeared to be at the locations of alibi witnesses Calvin Davis and Donna McDuffie. PCR Tr. pp. 100-101, 103. This again places the phone in the Applicant's hands. Levitan also testified the Applicant's phone was approximately 23 miles from where eyewitness Koenig claimed to have seen the Applicant driving the blue Volvo the morning the burned vehicle was discovered and he was near Donna McDuffie's house. PCR Tr., April 15, 2015, pp. 104-105, 108-109. Levitan testified the phone's location was consistent with Rick Nelson's testimony that he spoke with the Applicant between 3:00 and 5:00 pm on Sunday (again placing the phone in the Applicant's hands). PCR Tr., April 14, 2015, p. 113. Levitan stated the phone location was also consistent with the testimony of Loubbertha Bradley that the Applicant was at her house at a cookout on Sunday, again placing the phone in the Applicant's hands. PCR Tr., April 14, 2015, pp. 116-117. Levitan further testified the Applicant's phone was in the area of alibi witness Tina Leon between the hours of 10:00 am and 4:00 pm on Sunday, again placing the phone in the Applicant's hands. PCR Tr., April 14, 2015, pp. 121-122. Levitan testified the Applicant's phone was 23 miles from Cobblestone Road at the time Mr. Koenig claims to have seen the Applicant. PCR Tr., April 14, 2015, pp. 123-124.

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The foregoing testimony was also elicited by trial counsel from Investigator McMillan on cross-examination at trial, as noted above. Trial counsel cross-examined Investigator McMillan as to the timeline leading up to the point when the Volvo was discovered burned in Lee County. Through McMillan, trial counsel established Koenig claimed to have seen the vehicle between 9:00 a.m. and 11:00 a.m. During trial, trial counsel cross-examined Investigator McMillan about the amount of heat coming from the car and how long it would take for a car to cool off after being completely burned out. Trial Tr. pp. 738-74. McMillan was not able to effectively answer these questions.

During the PCR hearing, the Applicant called Daniel Olson, an expert qualified in the origin and cause of automobile and machinery fires. PCR Tr., April 15, 2015, p. 141. He testified there was a clear timeline according to trial testimony that the car was seen intact between 9:30 am and 10:15 am and that the car was found burned at around 2:30 p.m. (or later) the same day. PCR Tr., April 15, 2015, p. 143, 145. Olson further testified the burned car was 26.66 miles away from Cobblestone Road, approximately a 47 minute drive. According to Mr. Olson, the earliest the car could have been set on fire would have been 10:17 am. PCR Tr., April 15, 2015, pp. 150-153.

Olson testified the Volvo was completely burned out. PCR Tr., April 15, 2015, pp. 183-184. Mr. Olson testified this type of car fire produces tremendous flame and smoke. PCR Tr., April 15, 2015, pp. 158-160; see Applicant's PCR Exhibits 8-10. He testified the car would have burned for approximately 45 minutes and the earliest the fire could have ignited was 10:17 a.m. PCR Tr., April 15, 2015, 162-163. He believed the fire would have been burning at 1800 degrees or more based on the fact that aluminum parts appeared to be melted. PCR Tr., April 15, 2015, p. 169. He testified the tires could smolder "for a very long time". PCR Tr., April 15,

2015, pp. 170-171. He opined that if the car finished burning at around 11:30 a.m. or so, it would have still been hot at the time it was discovered. He testified parts of the car, particularly the tires, would have still been smoking at the time of discovery. (Pp. 171-174) He further testified there was absolutely no arson or burn investigation performed on the vehicle and it left many questions unanswered that would have helped a jury. (Pp. 176-178). He opined the car that was seen at 9:30 a.m. on Cobblestone Road was not the car found at 2:30 or 3:00 burned in the cemetery many miles away. PCR Tr., April 15, 2015, pp.181-182.

Mr. Olson considered the trial testimony of Matt Bramlett. Mr. Bramlett lived directly across the street from the cemetery in which the burned car was found.³ Trial Tr. pp. 453-454. Mr. Bramlett testified at trial that between midnight and 1:30 a.m. on Sunday, May 21, he heard his dog barking for approximately 25 minutes. This, according to Mr. Olson, would have been much more consistent with when the car would have been burned considering the condition in which it was found. PCR Tr., April 15, 2015, pp. 185-187. Trial counsel elicited similar testimony from Investigator McMillan during trial. Trial Tr., pp. 736-738. Also, Bramlett's trial testimony aided the Applicant by establishing the scenario in which the Volvo was left in Lee County and burned during the early morning hours of Sunday, thereby making it impossible for Koenig to have seen it in his neighborhood between 9:00 and 11:00 a.m.

Derrick Slater, the tow truck driver who removed the car from the scene, was called by the Applicant to testify at the PCR hearing. He testified he arrived at the burn scene around 5:30 or 6:00 p.m. the day the Volvo was found burned, and he testified he did not notice any heat whatsoever emanating from the vehicle. PCR Tr., July 5, 2016, pp. 73-76. Slater arrived at least

³ Mr. Olson mistakenly testified Mr. Bramlett lived a quarter mile from the cemetery. PCR Tr., April 15, 2015, p. 185. However, Mr. Bramlett clearly testified at trial he lived across the street from the cemetery. Trial Tr. pp. 453-454.

two hours after the vehicle was found, so his testimony as to whether the vehicle was hot and/or smoldering is of less significance than the testimony of Mr. Bramlett, Mr. McCutchen, and Mrs. McCutchen, who were all present when the vehicle was found. None of the latter three witnesses noticed any smoldering or heat emanating from the vehicle.

B. Findings of Fact and Conclusions of Law

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. “[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (emphasis omitted) (citation omitted). “[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.” *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. “[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.* at 690–91, 104 S.Ct. 2052. “[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions [.]” *Id.* at 691, 104 S.Ct. 2052.

“[T]he United States Supreme Court has held that the defendant must have ‘a fair opportunity to present his defense,’ thereby requiring the State to provide the ‘basic tools’ for an adequate defense to an indigent defendant.” *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)). “Thus, although the State is not required to provide the indigent defendant with unlimited funding, it must ensure that the defendant has competent counsel and the services of experts

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necessary to a meaningful defense[.]” Id.

South Carolina Code section 17-3-50(B) (2003) provides in pertinent part:

Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense, of fees and expenses not to exceed five hundred dollars as the court considers appropriate.

An applicant is entitled to fees to pay for expert witnesses if the applicant shows a need for the expert testimony. *Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 683 (1996). The mere possibility the applicant could find a witness somewhere to support an allegation is insufficient to warrant authorization of funds. *Id.* Where counsel articulates a valid trial strategy for failing to call an expert witness to testify at trial, such conduct will not be deemed ineffective. *Legare v. State*, 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998).

The Applicant claims he is entitled to relief because trial counsel did not employ an expert such as Mr. Levitan to establish that certain calls made by the Applicant pinged off cell towers in locations that confirmed his whereabouts at certain times and that confirmed his cell phone was being used 23 miles away at the time the Applicant was allegedly seen driving the blue Volvo. The Court respectfully disagrees. Trial counsel's cross-examination of Investigator McMillan was thorough and created a substantial question as to whether the Applicant was in the area where Mr. Koenig claims to have seen him driving the Volvo on Sunday morning. Trial counsel thoroughly addressed the cell tower issues in his closing argument, referring not only to the inconsistency between the Applicant's phone being used 24 miles away from where Koenig claims he saw the Applicant, but also to the fact that the cell tower records confirmed the Applicant's phone was being used in areas where the Applicant and other witnesses claimed they

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saw the Applicant at certain relevant times. As trial counsel argued to the jury in his closing:

All of the calls were made from the north area of [Sumter] county, from Bishopville or in Camden. How could [the Applicant] be driving around on Cobblestone? He's making phone calls 24 miles away?

(Trial Tr. p. 997)

As for the origin and cause evidence presented at the PCR hearing by expert Olson, trial counsel testified at the PCR hearing he had not formed a theory of when the car burned but did think it would still be smoking and burning for hours. PCR Tr., July 5, 2016, pp. 97-99. He offered no reason for failing to call an expert and admitted he did not think it mattered how hot the car got, only that it was found in a particular location. However, he testified that if expert testimony established the car could not have possibly been cool and not smoking at the time it was found, such evidence would have discredited Mr. Koenig's testimony. PCR Tr., July 5, 2016, pp. 143-144.

Whether trial counsel was deficient in not calling an origin and cause expert such as Mr. Olson, and whether the failure to call such an expert prejudiced the Applicant is a closer question. The Applicant maintains the issue of when the car was burned was of paramount importance because Mr. Koenig claimed he saw the car being driven at 9:30 a.m., 20-30 miles away from where it was found burned five hours later. The Applicant claims the car could not have been driven at 9:30, burned at 10:17, and be cool to the touch and not smoldering at 2:30 p.m.; he therefore claims it would have been impossible for Mr. Koenig to have seen the car at 9:30.

While the Court agrees that Koenig's testimony may have been discredited in the jury's eyes by Olson's testimony, that does not necessarily lead to the conclusion the outcome of the trial would likely have been different if the testimony had been presented to the jury. One aspect

of Olson's testimony emphasized by the Applicant is that Olson's testimony, if believed, would make it more likely than not the vehicle was set on fire in Lee County some hours before it was allegedly seen by Koenig at 9:30. Removing Koenig's account from of the evidentiary equation would leave remaining Olson's expert testimony that the fire was set in the early morning hours of Sunday. As referenced above, the cell tower testimony from both McMillan and Levitan tended to establish two things. First, the Applicant had his cell phone with him during the day on Saturday (the day the victim was last seen) and during Saturday night. Second, the Applicant's phone was used to participate in 18 calls between 7:16 a.m. until 10:32 a.m. in Lee County and Kershaw County. Employing the testimony of Olson to establish the fire was set much earlier than 10:17 a.m. would have perhaps incriminated the Applicant even more, because if the Volvo was burned in Lee County hours before 10:17, the Applicant was in *Lee County* using his phone as early as 7:16 a.m. As Investigator McMillan (at trial) and Levitan (at the PCR hearing) testified, all eighteen of the calls to or from the Applicant's phone pinged off towers in the Bishopville (Lee County), Wisacky Road (Lee County), and Camden (Kershaw County) areas. While Levitan confirmed these cell towers were 20-30 miles from where the Applicant was allegedly seen by Mr. Koenig driving the Volvo at approximately 9:30 that morning, McMillan's and Levitan's testimony tended to place the Applicant in Lee County several hours before 10:17 a.m., within the time frame Olson opines the fire was set. Calling expert witnesses such as Olson and Levitan "sounds good on paper", but their testimony casts the Applicant in an incriminating light as well. The Court concludes the Applicant has not met his burden that trial counsel was deficient in not calling these two experts, but even he were deficient, the Applicant has not proven the outcome of the trial would likely have been different had the witnesses testified at trial.

ISSUE 7: Abandoned by Applicant

Issue 8: Was trial counsel deficient in failing to move for a mistrial when the security belt worn by Mr. Bradley accidentally discharged and caused Mr. Bradley to fall out of his chair? (Trial Tr. p. 201-206).

A. Summary of Testimony

During the trial the Applicant was required by the Sheriff's Department to wear a security Taser belt. During trial the belt discharged in front of the jury and caused the Applicant to receive an electric shock that knocked him out of his chair and caused him to holler. Trial counsel and the prosecutor discussed the issue with the trial judge and all decided a curative instruction was appropriate. When the jury returned to the courtroom the trial judge gave the following instruction:

Thank you ladies and gentlemen. I apologize about the delay. I need to explain to you that the defendants in this court are required to wear a security belt. The security belt in this case malfunctioned and the defendant received an electrical shock. We have cured that problem and we're ready to proceed with the trial.

At that point the trial continued. Trial Tr. pp. 201-206.

The Applicant argues a mistrial would have been in order. He maintains the jury could not simply erase the event from its mind and would potentially consider him a dangerous felon because of the requirement of security. PCR, July 5, 2016, pp. 41-42. Trial counsel testified at the PCR hearing that he believed the curative instruction was appropriate; he also stated he did not want a mistrial at that stage because he thought the trial was going "very well" for the Applicant and he thought he had a good jury. PCR Tr. pp. 100-101. Trial counsel credibly testified that he discussed the issue with the Applicant and they decided to go forward.

B. Findings of Fact and Conclusions of Law

The use of physical restraints, such as a stun belt, during trial and the sentencing phase

implicates a defendant's right to due process. *Deck v. Missouri*, 544 U.S. 622, 629, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). *Deck* and the bulk of federal cases discussing the use of physical restraints during trial and sentencing, involved traditional methods of securing the accused, such as handcuffs and shackles. The Applicant correctly submits a trial judge's decision to use a stun belt must be subjected to at least the same close judicial scrutiny required for the imposition of other physical restraints. Citing *United States v. Durham*, 287 F.3d 1297, 1304 (11th Cir.2002), the Applicant correctly claims "physical restraints should be used as rarely as possible." The Applicant points to *U.S. v. Miller*, 531 F.3d 340 (6th Cir. 2008) for the proposition that it is an abuse of discretion for the trial court to fail to hold a hearing to determine if restraints are necessary for a particular defendant during trial. However, the issue here is not whether the belt should have been used in the first instance. The issue is two-fold—whether trial counsel should have moved for a mistrial, and whether a mistrial would have been required as a matter of law.

The jurors were certainly aware the Applicant was wearing a security belt because they were told he was. The Applicant claims that although trial counsel claims he thought it was more appropriate to continue with the trial, the jury could not simply set aside the fact that the trial judge and/or law enforcement considered the Applicant to be so dangerous that he was required to wear a stun belt. The Court concludes trial counsel's decision to go forward was not deficient performance. The Court further concludes a mistrial would not have been mandated as a matter of law.

Issue 9: Was trial counsel deficient in calling the Applicant's brother, Paul Bradley, to testify the defendant told him the victim was deceased prior to police finding the body?

A. Summary of Testimony

Sheriff's Captain James Turner testified at trial that he commanded the Criminal

Investigations Division. On Monday, May 23, 2005, he received a call that a body had been found in Boyle's Pond. He recalled receiving the call around 1:30 pm to 2:00 p.m. Trial Tr. 109-110. Trial counsel called Tina Leon to testify at trial. Ms. Leon stated that on May 23, 2005, the Applicant was at her house painting from 10:00 am until 4:00 pm. She stated the Applicant did not leave the house during that time and that she picked up lunch from Sonic for the Applicant and another man assisting him. Trial Tr. pp. 902-907. Subsequent to calling Ms. Leon, trial counsel called the Applicant's older brother, Paul Bradley. Mr. Bradley testified he saw the Applicant in his blue Beretta with Tanisha the Saturday night of her prom, and confirmed the Applicant came to his house to borrow \$20 to buy a camera. He testified he saw the Applicant on Monday the 23rd "around 1:00" and the Applicant was crying and said his friend had been killed. Trial Tr. p. 935.

B. Findings of Fact and Conclusions of Law

The Applicant claims trial counsel was deficient in calling Paul Bradley, as he directly contradicted the testimony of alibi witness Tina Leon, who testified the Applicant was at her house and did not leave between 1:00 and 4:00 p.m. on Monday May 23. The Applicant also claims Mr. Bradley's testimony suggested the Applicant was aware the victim was deceased before the body had been recovered and identified by law enforcement. The Applicant points to the solicitor's closing argument, wherein she referenced Mr. Bradley's testimony concerning the 1:00 time frame and stated Mr. Bradley "provided one of the most important pieces of evidence in this case . . ." Trial Tr. pp. 1035-1036.

The Applicant claims this testimony was extremely damaging to the defense and was elicited by trial counsel after he had already established through other witnesses the Applicant's location on the day the body was recovered. The Applicant claims trial counsel did not

thoroughly investigate Paul Bradley and therefore did not realize his testimony would be one of the major pieces of evidence the prosecution would rely on in its closing argument. Trial counsel testified at the PCR hearing he would not have called Paul Bradley to testify had Mr. Bradley told him the Applicant told him, before law enforcement identified the body, his friend had been killed. The Applicant maintains this is proof trial counsel's performance was deficient and that Paul Bradley's testimony was particularly damaging to the Applicant's defense and the outcome of the trial would likely have been different had he not been called as a witness. The Court disagrees. The trial transcript clearly reflects Mr. Bradley testified at trial he saw the Applicant "around 1:00". The Applicant ignores the reality that time-of-day estimates are just that—estimates. Trial counsel explained he called Paul Bradley to testify primarily because he was the leader of the Applicant's family and would tend to cast the Applicant in a good light. The Court concludes trial counsel's performance relative to the calling of Mr. Bradley's testimony was not deficient. Even if it were deficient, the content of Mr. Bradley's testimony did not likely play an important part in the jury finding the Applicant guilty, and absent his testimony, it is not likely the outcome of the trial would have been different.

Issue 10: Was trial counsel deficient in failing to object to hearsay testimony from Mr. Koenig, who testified his neighbors told him the police were looking for a blue Volvo with temporary tags?

A. Summary of Testimony

Darrell Koenig testified that the day after he saw the blue Volvo, he spoke to his neighbors and was told by them "that on the news that they were looking for a blue 1990 Volvo with a temporary tag on it." He testified he immediately knew that was the car he saw the previous day. Trial Tr. pp. 634-635.

B. Findings of Fact and Conclusions of Law

Rule 802, SCRE, provides hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute. Hearsay is defined in Rule 801(c) as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rules 803 and 804 list various exceptions to Rule 802.

It is clear the statement by the neighbors was hearsay and trial counsel did not object to the introduction of that evidence. Mr. Koenig's credibility could well have been bolstered by this inadmissible evidence. This Court finds trial counsel was deficient in failing to object to the testimony of Mr. Koenig. However, the Court concludes the Applicant has not established this deficiency resulted in prejudice to the Applicant. Any bolstering of Koenig's credibility through the hearsay statements of his neighbors was minimal at best and cannot reasonably be considered to have made a difference in the outcome of the trial.

Issue 11: Trial counsel failed to object to the prosecutor asserting she did not have to prove when or where the victim was murdered. (Tr. p. 93).

A. Summary of Testimony

The solicitor admitted in her closing argument she had to prove her case by the use of circumstantial evidence. Trial Tr. p. 1010, 4-19. The State conceded at trial it did not know the time of death or the location of the death. Trial Tr. p. 729-730. In both her opening statement and her closing argument, the solicitor argued to the jury she did not have to prove where or when the victim was murdered. Trial Tr. pp. 93 and 1012. The Applicant claims trial counsel was deficient in failing to object to these statements.

B. Findings of Fact and Conclusions of Law

The Applicant cites South Carolina cases discussing circumstantial evidence and what

must be proven in order for a trial judge to submit a circumstantial evidence case to the jury. As argued by the Applicant, at the time of the Applicant's trial, the trial court had a duty to submit the case to the jury if there was substantial circumstantial evidence which reasonably tended to prove the guilt of the accused or from which his guilt may have been fairly and logically deduced. *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000); *State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996). The Applicant correctly submits that unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error. *State v. Irvin*, 270 S.C. 539, 243 S.E.2d 195 (1978). The trial judge should grant a directed verdict, however, when the evidence merely raises a suspicion that the accused is guilty. *State v. Martin*.

The Applicant submits the State must submit sufficient circumstantial evidence to prove the defendant was at the scene of the crime. *See State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004) ("The fact that the BMW was found abandoned in Tennessee, the same state where respondent was located after his stay in Savannah, raises a suspicion of guilt but is not evidence that respondent killed[the victim]. Further, there is no evidence respondent was at the scene of the crime, which according to the State's theory was in Colleton County."). *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984) ("By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act.").

It is apparent the Applicant has conflated the issue of what must be proven in a circumstantial evidence case with the issue of whether the State must prove where and when a murder occurred. The cases relied upon by the Applicant address only the level of proof that must be presented by the State in a circumstantial evidence case, not whether the State must

prove where and/or when the murder occurred. The solicitor admitted the State could not prove where or when the murder occurred but argued the State was not required to do so. The Court concludes trial counsel was not deficient in not objecting to the solicitor's statement because her statement was a correct statement of the law.

Issue 12: Was trial counsel deficient in failing to object to two letters (written by the Applicant to Gloria Portee) into evidence on the ground the letters were primarily character evidence and had little to no relevance at trial?

A. Summary of Testimony

During trial, two letters written by the Applicant to a former girlfriend, Gloria Portee, were introduced into evidence through Ms. Portee without objection. Trial Tr. 378-386. In portions of the letters, the Applicant directly discussed the charges against him. The Applicant expressed his displeasure with Ms. Portee's statement to law enforcement that the Applicant told her he was going to kill the victim. Trial Tr. 378, ll. 14-24. However, in the remaining portions of the letters, the Applicant discussed his transgressions in their relationship and professed his undying love for Ms. Portee. Trial Tr. pp. 379-386. See Applicant's PCR Exhibits 25, 26. No objection was made by trial counsel to the introduction of these letters. Trial Tr. 384, l. 3.

B. Findings of Fact and Conclusions of Law

The S.C. Supreme Court has defined the term "character," as "a generalized description of a person's disposition or a general trait such as honesty, temperance, or peacefulness." *State v. Nelson*, 331 S.C. 1, 7, 501 S.E. 2d 716, 719(1998). In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. *Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989). Evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. *State v.*

Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). These rules are grounded on the policy that character evidence is not admissible "for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged." *State v. Peake*, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990). These rules have been codified in Rule 404, SCRE.

The Applicant concedes portions of the Gloria Portee letters were admissible, specifically those portions in which the Applicant directly discusses his case and asks Ms. Portee why she told law enforcement he was going to kill the victim were admissible. Trial Tr. p. 378, ll. 14-21. However, the Applicant claims the rest of the letters are inadmissible character evidence. The Applicant submits that even the prosecutor, in her closing argument, commented on the character of the defendant, as revealed by the letters:

And finally, the letters. I'm going to say I had to laugh when I read that. Here's a man, he's got three women going on at the same time, juggling them in the air. They're talking about breaking up, talking about getting together. Trial Tr. p. 1027, ll. 18-22.

Additionally, the prosecutor asked Ms. Portee what she thought of the letters professing his love for her and Ms. Portee replied, "Bull shit." Trial Tr. p. 383.

The Applicant claims it is clear from the record the solicitor used the letters, in part, to impugn the character of the Applicant. The solicitor specifically commented on his character in her closing argument, accusing him of "juggling" three women at the same time. The Applicant argues the character evidence contained in the letters was not admissible and trial counsel was deficient for not objecting to the letters being placed into evidence without redaction, and the Applicant further argues the evidence unfairly prejudiced the Applicant by painting him in a poor light in front of the jury. The Court disagrees. The portions of the letters addressing the number

of women with whom the Applicant had relationships tended to establish that the Applicant's attempts to have Ms. Portee give positive information to law enforcement, and that he loved her very much were empty gestures and an effort to sway her to give more beneficial information to the police, as they had not had a relationship for quite some time. This is evidenced by Ms. Portee's testimony that she thought the Applicant's romantic overtures, as expressed in the letters, were "Bull shit". Trial Tr. p. 383. The Court concludes trial counsel had no valid ground to object to these letters, so trial counsel was not deficient in not objecting.

Issues 13 and 14: Was trial counsel deficient in allowing Wayne Johnson to say he had an altercation with Bradley and armed himself? Was trial counsel deficient in failing to object to Bobby Lee Hughes testifying he thought the Defendant might have had something to do with the murder?

A. Summary of Testimony

Trial witness Wayne Johnson—the Applicant's son-in-law—was asked by the solicitor about a phone conversation the Applicant had with the victim when Johnson was with the Applicant, some three weeks to two months before the murder. Johnson testified the Applicant was upset with the victim about something and phoned the victim and told the victim he was "going to send some boys at [him]". Trial Tr., p. 542. Johnson testified he never told law enforcement he heard the Applicant say he was going to kill the victim, and he testified he did not think the Applicant was upset with the victim to the point where he would do the victim bodily harm. Trial Tr. p. 544. Johnson also testified that after the murder, there "was talk" the Applicant had committed the murder and that one night the Applicant called him and asked him to help the Applicant move his girlfriend's car. Johnson testified he did not know what to expect, so he armed himself with several knives. Johnson testified that as he and the Applicant were riding in the car, the Applicant saw the knives and said, "[b]oy, what's wrong with you?" and that

the Applicant said, "I would never do anything to hurt you man." Trial Tr. pp. 559-561.

Bobby Lee Hughes, the victim's older brother, was also called to testify by the prosecution. During direct examination by the solicitor, Mr. Hughes testified he met the Applicant several years before the murder and that his brother and the Applicant were best of friends and as close as brothers. Hughes testified that after the murder, he saw the Applicant at the home of one of the victim's old girlfriends and that the Applicant asked to talk to him privately. Hughes testified it appeared the Applicant was "playing crying" and not truly upset. Hughes testified the Applicant told him that the Saturday before the victim's body was found, he drove up to the victim's house and saw an unknown man with the victim. Hughes testified the Applicant told him "[the three of them] were supposed to go do a deal", but that the Applicant couldn't go because he had to take his daughter or step-daughter to the hairdresser. Trial Tr. p. 567. Hughes testified the Applicant told him the victim and the unknown man rode off together. Hughes testified he told law enforcement he thought the Applicant was involved in the murder "in some kind of way" and that if the Applicant didn't commit the murder, he knew something about it. The solicitor asked him if he thought the murder "had anything to do with the defendant," and Hughes responded he kind of did and kind of didn't think the Applicant was involved but he did think the Applicant knew more than he told anyone because the Applicant and the victim were so close. Trial Tr. p. 570. On re-direct, the solicitor addressed the issue again by asking Hughes exactly what he said to law enforcement concerning the Applicant's involvement with the murder. Mr. Hughes responded, "I said somewhere or another if he didn't commit the murder himself, he knows something about it and he got something to do with it. If he actually didn't do the killing, he know something about it, he's involved some kind of way." Trial Tr. p. 580.

B. Findings of Fact and Conclusions of Law

The Applicant claims the foregoing testimony of Johnson and Hughes were improper attacks on the Applicant's character. Our Supreme Court has defined the term "character" as "a generalized description of a person's disposition or a general trait such as honesty, temperance, or peacefulness." *State v. Nelson*, 331 S.C. 1, at 7. In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. *Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989) (per curiam). In a similar vein, evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. *State v. Stokes*, 279 S.C. 191, 304 S.E.2d 814 (1983); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Both rules are grounded on the policy that character evidence is not admissible "for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged." *State v. Peake*, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990). As noted above, these rules have been codified in Rule 404, SCRE.

The Applicant argues the foregoing testimony of Mr. Johnson and Mr. Hughes was inadmissible character evidence and not relevant to the issue of whether the Applicant murdered the victim. The Applicant argues the testimony did not establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity, and served only to impugn the character of the defendant. The Applicant claims trial counsel was deficient in failing to object to this testimony and further deficient for himself asking Mr. Hughes if he thought the Applicant was involved in the crime. The Applicant claims the statements were speculation at best, as both witnesses were recalling interactions with the Applicant after they had been led to believe the Applicant was involved with the crime. The Applicant claims these

statements were highly prejudicial to the Applicant as they portrayed him as a dangerous person in the eyes of those close to him.

As for the testimony of Mr. Johnson, the Applicant's son-in-law, the Court concludes counsel was not deficient in failing to object but even if he were, no prejudice resulted to the Applicant. Trial counsel testified he decided not to object because Johnson's account tended to establish the Applicant "was the cool head in the picture" and "was trying to calm [Johnson] down. The Court concludes that was a valid reason not to object.

As for Mr. Hughes' testimony, the Court concludes that some of it was certainly objectionable. Trial counsel should have objected to the solicitor's question as to whether Hughes thought the Applicant had anything to do with the murder, because such testimony was irrelevant. Trial counsel should have also objected to Hughes' testimony that he sort of did and sort of did not believe the Applicant was involved in the murder, and trial counsel should have objected to Hughes' testimony that if the Applicant did not commit the murder himself, he knew something about the murder and was involved in some way. The Court concludes trial counsel was deficient in not objecting; however, the Court concludes that had counsel objected and the testimony not given, there is not a reasonable probability the outcome of the trial would have been different.

Based on the foregoing, relief is denied on this issue.

Issue 15: Was trial counsel deficient in failing to object to Officer Wesley Gardner's and Investigator McMillan's hearsay testimony that Mr. Koenig said he was 100% sure of his identification?

A. Summary of Testimony

Both Investigator Wesley Gardner and Investigator McMillan were asked by the solicitor how certain Mr. Koenig was of his identification of the Applicant as being the driver of the blue Volvo. Both officers indicated Mr. Koenig stated he was 100 percent certain of his identification of the Applicant.

B. Findings of Fact and Conclusions of Law

Again, Rule 802, SCRE provides that hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by statute. Hearsay is defined in Rule 801(c) as a statement, other than one made by the declarant while testify at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rules 803 and 804 list various exceptions to Rule 802.

The Applicant points to SCRE Rule 608(a), which states in relevant part:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Initially, the Applicant argues pursuant to rule 801(c), the officers' testimony concerning the statement made by Mr. Koenig was hearsay and should have been objected to by trial counsel. The Applicant claims Mr. Gardner improperly bolstered the testimony of Darrell Koenig as Mr. Koenig had not testified at the time he was asked how certain Mr. Koenig was of his identification. Therefore, the Applicant claims, there was no possibility Mr. Koenig's credibility had been attacked as contemplated by SCRE 608.

The Court concludes the testimony from Gardner and McMillan of Mr. Koenig's 100 percent certainty of his identification of the Applicant was indeed hearsay and no exception to the rule against hearsay applied. Trial counsel should have objected. However, the Applicant's

contention that this entitles him to a new trial ignores the fact that Mr. Koenig himself testified he was absolutely sure of his identification; he was clearly a confident witness and any bolstering by Gardner and McMillan was of no significance. The Court concludes there is no possibility the outcome of the trial would have been different if a proper objection had been made.

Issue 16: Was appellate counsel deficient in not appealing the decision by the trial judge to give a jury charge on accomplice liability? Additionally, was appellate counsel deficient in not including relevant case law in the appellate brief relative to trial counsel's directed verdict motion that would have likely resulted in a reversal of the conviction?

A. Summary of Evidence

At the Applicant's trial, trial counsel made an objection to the trial judge charging the jury concerning the "hand of one is the hand of all", or accomplice liability. Trial Tr. 973. The trial judge ruled against trial counsel and charged accomplice liability. Trial Tr. p. 979, ll. 10-14.

Appellate counsel for the Applicant filed a final brief on behalf of the Applicant and argued there was no direct or substantial circumstantial evidence reasonably tending to prove the Applicant had murdered the victim. Applicant's PCR Exhibit 27.

B. Findings of Fact and Conclusions of Law

The trial court is required to charge only the current and correct law. *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472-73 (2004). "The law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. at 302, 555 S.E.2d at 394 (2001). If any evidence supports a requested jury charge, the trial court should grant the request. *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004).

Under the accomplice liability theory, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d

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98, 101 (1999). Trial counsel objected to an accomplice liability charge. Appellate counsel did not raise this issue on appeal. The Applicant argues appellate counsel should have raised the accomplice liability issue because there was no direct or sufficient circumstantial evidence the murder was carried out by more than one person. The Applicant submits a second person was mentioned only twice during trial testimony, but the Court recalls a second person was mentioned three times, at least. The first time a second person was mentioned was during testimony that the victim was last seen alive leaving Martha Ransom's house with the Applicant and an unidentified man. The second time a second person was mentioned was in Koenig's testimony that he saw an unidentified man in the blue Volvo with the Applicant. The third time a second person was mentioned was in the testimony of the victim's brother, Bobby Lee Hughes. The Applicant claims this evidence was not enough to support an accomplice liability charge. The Applicant claims the Applicant was prejudiced in that the accomplice liability charge suggested the state's case was stronger than it actually was, while there simply was no sufficient evidence to suggest another person was involved with the murder.

When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight. *State v. Gaster*, 349 S.C. 545, 564 S.E.2d 87 (2002). The trial court has a duty to submit the case to the jury where the evidence is circumstantial if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000); *State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996). Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error. *State v. Irvin*, 270 S.C. 539, 243 S.E.2d 195 (1978). The trial judge should grant a directed verdict, however, when the evidence merely raises a

suspicion that the accused is guilty. *State v. Martin*, supra. The Applicant cites *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (S.C. 1984) for the proposition that by bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act. However, *Schrock* provides no authority for what evidentiary standard is to be employed when there has been no proof of the location of the murder scene. Also, as was the case in *State v. Frazier*, 386 S.C. 526, 689 S.E. 2d 610 (2010), the Court concludes the Applicant has overstated the holding in *Schrock*.

This Court is frankly of the view that the Applicant's quarrel is not with the trial judge's decision to charge the accomplice liability theory. The Applicant's quarrel is as ably stated in trial counsel's closing argument to the jury, i.e., that there was significant reasonable doubt that the Applicant committed the murder. Unfortunately for the Applicant, the jury considered all the evidence and concluded beyond a reasonable doubt that he committed the murder. Whether accomplice liability was charged had no impact upon the jury's verdict, as there was sufficient evidence to allow the jury to conclude the Applicant committed the crime alone.

The Applicant also claims appellate counsel failed to argue correct case law in his brief on the directed verdict issue. The Applicant argues that if appellate counsel had cited the case law that the Applicant raised in his PCR hearing, the conviction would have been reversed and the case remanded for a new trial. The Court disagrees. The brief filed on behalf of the Applicant with the court of appeals and the petition for a writ of certiorari filed with the Supreme Court adequately cover the directed verdict issue.

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, this Court finds Applicant failed to present

any evidence regarding such allegations. Accordingly, this Court finds Applicant abandoned such allegations and failed to meet his burden of proof regarding them. Therefore, they are denied and dismissed.

CONCLUSION

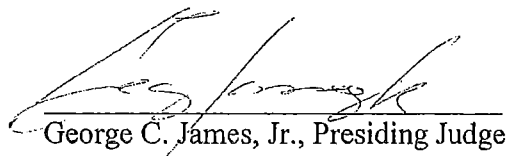
The Court has exhaustively reviewed the record and concludes trial counsel zealously and ably represented the Applicant. The Court also notes PCR counsel has zealously and ably represented the Applicant. Trial counsel's performance was deficient in some respects, as noted herein. However, it is a practical impossibility for any trial lawyer to perfectly address every issue that arises during a complex trial. Trial counsel's deficiencies in this case did not result in prejudice to the Applicant. The Applicant has not established "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). Finally, appellate counsel's performance was not deficient.

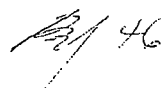
Based upon the foregoing, the Court concludes the Applicant has not established constitutional violations or deprivations that require this court to grant his application. Therefore, this application for post-conviction relief must be denied.

The Applicant must file and serve a notice of appeal within thirty 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 should a notice of appeal be filed.

IT IS SO ORDERED.

August 31, 2017
Sumter, S.C.


George C. James, Jr., Presiding Judge



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June 15, 2018

Robert M. Dudek
South Carolina Appellate Defense
P.O. Box 11629
Columbia, SC 29211

RECEIVED

JUN 18 2018

S.C. SUPREME COURT

RE: State v. Nathaniel Bradley
Case No. 2012-CP-43-01519

Dear Mr. Dudek:

Enclosed please find certified true copies of the indictments and sentencing sheets for the above referenced defendant.

Should you have questions or concerns regarding this letter or its contents please do not hesitate to contact our office.

Sincerely,

Bradley M. Kirkland



Horney Bradley M. Kirkland.
 2007 Lincoln Street
 Columbia, SC 29201



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