Exhibit A

FORM 5

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
County of Charleston)

09-CP-10-1183

FILED
2010 FEB 27 AM 11:31
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Moses A. Frazier #317940)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Corr. Inst.
P.O. Box 205, Ridgeville, SC. 29472

2. Name and location of Court which imposed sentence
Charleston County Court of General Sessions

3. Name(s) of co-defendant(s) (if any)
N/A

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2006-GS-10-4259

(b) _____

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) October 5, 2006

(b) 30 years

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty yes

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. SC Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Affirmed

ii. _____

iii. _____

(c) the date of each such result:

i. January 2, 2009

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Op No 2009 US-052

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of trial and Appellate Counsel

(b) failure to investigate and present defense

(c) Denial of 5, 6, and 14 Amendment US Const.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Counsels inactions denied me my 6th Amendment Right to a

(b) SAME AS Above

(c) Counsel failed to protect my rights that denied me a fair Tr

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) First Filings of Post-Conviction Relief

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Beattie I. Butler, Jason Mikell - Charleston County Public Defenders Office, 101 Meeting Street, Charleston S.C. 29401

ii. Joseph L. Savitz - Appellate Defense P.O. Box 11589 Columbia, South Carolina, 29211

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Beattie I. Butler - AT TRIAL

ii. Joseph L. Savitz - On Appeal

iii. _____

19. State clearly the relief you seek in filing this application:

A New Trial

20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/2003

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Charleston)

I, Moses A. Frasier #317940, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Moses Frasier #317940

SWORN to ~~and~~ subscribed before me this 20 day of February, 2009.

(L.S.)
Notary Public

My Commission Expires: 27 June 2017

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Moses A. Frasier #317940, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Moses Frasier #317940
Applicant

SWORN or affirmed ~~to and~~ subscribed before me this 20 day of February, 2018.

Notary Public

My Commission Expires: 27 June 2017

Exhibit B

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CA/No. 09-CP-10-1183

MOSES FRASIER #317940.....PETITIONER,

-VS-

STATE OF SOUTH CAROLINA.....RESPONDENT,

AMENDED POST CONVICTION RELIEF

APPLICATION BROUGHT PURSUANT TO:

RULE 15 S.C.R.C.P.

Respectfully Submitted,

/s/ #317940

Moses Frasier #317940

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OTHER AUTHORITIES RELIED ON

RULE 15 SCRCP

Sixth Amendment U.S. Constitution

Fourteenth Amendment U.S. Constitution

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	

MOSES FRASIER #317940	)	CA/No.09-CP-10-1183
PETITIONER,	)	
-V-	)	**AMENDED POST CONVICTION RELIEF**
STATE OF SOUTH CAROLINA	)	**APPLICATION BROUGHT PURSUANT TO:**
RESPONDENT,	)	**RULE 15 S.C.R.C.P.**
	)	

COMES NOW, Moses Frasier, who respectfully moves this Honorable Court to amend the Original Post Conviction Relief Application in the above captioned case number pursuant to Rule 15 of the South Carolina Rules of Civil Procedure.

For the requested relief, the Petitioner will forever pray.

Respectfully Submitted,

/s/ M F #317940

Moses Frasier #317940

ISSUE (A) WAS APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO RAISE THE ISSUE ON APPEAL AS TO WHETHER THE TRIAL COURT ERRED IN REFUSING TO CHARGE THE JURY ON THE ISSUE OF INVOLUNTARY MANSLAUGHTER?

FACTS

During the testimony of witness Jamol Seabrook, the following colloguy's were recorded:

Testimony of Jamol Seabrook on Direct

Q. Where was Kenneth?

A. Behind Moses.

Q. Behind Moses. You got to the corner, and then what happened?

A. And then I -- and then that's when **Kenneth boxed Moses** by the light pole.

Q. You've got to speak clearly now. Say that again?

A. That's when **Kenneth boxed Moses** by the light pole and **stick his hand in his pocket.** [Tr.p.430, L.13-21].

A. Boxed him.

Q. Boxed him. Okay **Kenneth boxed Moses. That means he punched him**?

A. Uh-huh

Q. Where?

A. On the left side of his face.

Q. Okay. And then what happened?

A. And then that's when Moses was like "chill". [Tr.p.431, L.1-8].

Q. What was Kenneth saying to Moses?

A. I ain't -- I don't know what he was saying.

Q. All right. How was **Kenneth acting**?

A. I mean **aggressive.**

Q. Aggressive, okay. Can you describe what you mean by aggressive?

A. Like -- I don't know.

Q. How did Kenneth seem to you? Did he seem calm?

A. No.

Q. Did he seem normal?

A. No.

Q. All right. How did he seem?

A. **I mean he was high.**

Q. He was high?

A. Yes. [Tr.p.432, L.3-17].

Q. Who hit who?

A. Kenneth. Kenneth.

Q. Kenneth hit Moses?

A. Moses. [Tr.p.437, L.20-23].

Clearly through aforeseen testimony, the victim was the aggressor, and Petitioner by no means had the prerequisite intent to hurt the victim. The following was recorded on cross-examination:

COUNTY OF CHARLESTON)

MOSES FRASIER #317940) CA/No.09-CP-10-1183

PETITIONER,)

-V-) **AMENDED POST CONVICTION RELIEF**

STATE OF SOUTH CAROLINA) **APPLICATION BROUGHT PURSUANT TO:**

RESPONDENT,) **RULE 15 S.C.R.C.P.**

)

Moses Frasier
317940 ASU
Lee Corr. Inst.
990 Wisacky
Bishopville, SC
29010

CUSSION

e record to support the defendant's

judge may [not] refuse to grant the

z v. Commonwealth 11 Va.App. 335,

336, 398 S.E.2d 103, 105 (1990), also see McClung v. Commonwealth 212 S.E.2d 290, 293.

The trial court must determine the law to be charged based on the evidence presented during trial. State v. Crosby 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003). The lesser included offense is

one that requires no proof beyond that which is required for conviction of the greater. State v. Cribb 310 S.C. 518, 426 S.E.2d 306, also see State v. Dobson 279 S.C. 551, 309 S.E.2d 752 (1993).

In the instant case the evidence as placed before the jury could have supported the instruction on involuntary manslaughter. In State v. Chatman 519 S.E.2d 100, the Court held that the unintentional killing resulted from an unlawful assault and battery, not of a character itself to cause death is...."involuntary manslaughter." Id. (emphasis supplied)

In Evitts v. Lucey 469 U.S. 387, 105 S.Ct. 830 (1985), the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal. The Court held that right to effective assistance on appeal as a matter right stems from the fact that, when a state court chooses to create appellate courts, appellate review then becomes an integral part of the...system for finally adjudicating the guilt or innocence of a defendant. Id at 393, 105 S.Ct. at 834.

In short, the promise of Douglas v. California 372 U.S. 353 (1963), that a defendant has a right to counsel on appeal--like the promise of Gideon v. Wainwright 372 U.S. 335, 344 (1963) that a criminal defendant has a right to counsel at trial---would be a futile gesture unless it comprehended the right to the effective assistance of counsel on appeal as well. In Southerland v. State 524 S.E.2d at 836 the Court noted that a defendant is

constitutionally entitled to the effective assistance of appellate counsel, quoting Evitts v. Lucey (supra) (to be effective appellate counsel, counsel must give assistance of such quality as to make the appellate proceeding fair). In deciding a claim of ineffective assistance of counsel, the focus is on "the fundamental fairness" of the proceeding whose result is being challenged. Strickland v. Washington 466 U.S. 668, 685-696 (1984). First, the burden of proof is upon the petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under professional norms. Second, the petitioner must show that he was prejudiced by such a deficiency to the extent of there being a reasonable probability that but for counsel's errors the result of the proceedings could have produced a different outcome.

In the instant matter before the court, trial counsel requested the lesser included, involuntary manslaughter instruction and the trial court refused to instruct the jury. Trial Counsel candidly stated that he wanted to note his objection for the record as to the failure to charge involuntary manslaughter. [Tr.p.462, 16-19].

It is elementary that a contemporaneous objection preserves the issue for appellate review, and should specifically bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial court. State v. Blalock 357 S.C. 74, 591 S.E.2d 632 rehearing denied. In the instant matter

counsel clearly objected, thus preserving the issue for appellate review. Surely appellate counsel should have raised this issue on direct review, as there was more than ample evidence to support Petitioner's theory of defense of involuntary manslaughter. There is clearly a reasonable probability that had the involuntary manslaughter instruction been placed before the jury they could have reasonably found that Petitioner, if guilty, was in fact only guilty of involuntary manslaughter that would have resulted in a different outcome of the trial, and further there is a reasonable probability that the result of the appeal would have been different.

For the aforementioned reasons, Petitioner will respectfully pray that this Court will conclude that appellate counsel was ineffective for failing to raise this issue on appeal.

For the aforementioned, Petitioner will forever pray.

ISSUE (B) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE HIGHLY PREJUDICIAL OPINION TESTIMONY OF A STATE'S WITNESS WHO HAD NOT BEEN QUALIFIED AS AN EXPERT BY THE TRIAL COURT?

ISSUE (C) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTION SOLICITING HIGHLY PREJUDICIAL OPINION TESTIMONY FROM A STATE'S WITNESS WHO HAD NOT BEEN QUALIFIED AS AN EXPERT BY THE TRIAL COURT?

To save the Court's time, Petitioner will address these issues together since the facts of one encompass the other.

FACTS

Petitioner contends that the State's "BLOOD" evidence was presented by a NON-EXPERT Witness, and that this evidence was inadmissible due to it's unreliability, due to the fact the State's witness had not be qualified as an Expert by the Trial Court.

During the State's case in chief Sergeant McGowan gave the following testimony..(infra)[(Tr.ps.292-319)].

The Prosecution was also allowed to elict highly prejudicial opinion testimony from a State's witness who had not been qualified as an expert by the Trial Court.

The following testimony was given without objection from Counsel, as recorded:

A. Number one is where **I was told** that's where the victim was laying when they responded. He was already -- he was already transported by the time I arrived on the scene. There's a big pool of blood there. Number two was a towel with blood. Number four is a pole that had blood on it. And I took -- as you'll see on my list there's a -- on number one, I took a blood sample which is labeled A-1-A. [Tr.p.297, L.14-25].

A. These are photographs with the -- the number of labeled evidence. One is the blood, two is the towel, number three is the tennis shoes, four is the pole with blood on it. [Tr.p.298, L.5-8].

A. Well, the darker area of the photograph is where the blood is. [Tr.p.300, L.1-2].

A. Two was a towel that had some blood on it. [Tr.p.300, L.13].

A. Four was a pole, you know, pretty much in the middle of most of the other evidence that we found, and there was some blood spatter on it that I photographed.

Q. Now, when you say blood spatter, what do you mean?

A. Basically, it's a term that we use for a certain pattern that's left on a crime scene.

Q. There's different types of blood spatter, is that true?

A. Yeah, It varies in shape and size, and then you...[Tr.p.300, L.17-25].....have blood -- you know, it's very easy to determine a spatter from a stain or a smear.

Q. And in this case, you didn't have any smears or transfers or anything like that?

A. No. These are spatters on the pole. [Tr.p.301, L.1-5].

Q. When you searched that area, did you see any other evidence of blood spatter? [Tr.p.301, L.21-22].

Q. Did you see any places where there was other pooling of blood? [Tr.p.301, L.24-25].

Q. Sergeant, if you could, explain to the jury, using the exhibit, state's 21, what you mean by blood spatter.

A. Well, these red dots are blood against the pole. And this one here you see has a teardrop kind of effect, so..[Tr.p.302, L.22-25].

A. There was a little bit of blood on them, yes sir.

Q. Now, when you say blood do you recall what type of blood?, Was it spatter, or was it transfer, or do you recall?

A. If I remember correctly, it was spatter.

Q. And when you say spatter, similar to what's on the pole? [Tr.p.304, L.13-19].

Q. I'm going to put 19 up. When you talked about blood spatter, is that what you recall seeing?

A. Yes, Sir.

Q. That's a similar pattern and what you consider to be blood spatter?. [Tr.p.306, L.16-20].

A. Usually, what happens if there is blood on them, [Tr.p.306, L.25].

As was seen recorded, Sergeant McGowan was allowed to testify about alleged "spatter blood" evidence without objection from Trial Counsel. Yet, to add to the prejudice incurred by Petitioner in the eyes of the Jury, Trial Counsel himself elicts highly prejudicial testimony from Sergeant McGowan, as recorded:

CROSS BY MR. BUTLER

Q. Blood can be linked to a person? [Tr.p.309, L.17].

Q. You noted the pooling of blood in what's been marked state's 12 and by your notation number one?

A. Yes, sir.

Q. And that's the pool of blood where the victim was?

A. Yes, sir.

Q. And that was noticeable, obviously, to anybody with the naked -- by the naked eye, right? [Tr.p.310, L.7-14].

Q. -- you can see the red that spreads over a matter of, would you say, feet?

A. Yeah. Probably maybe two-foot.

Q. Okay. And the blood spatter on the pole was also something you took note of? [Tr.p.19-23].

Q. All right. And because of the blood on Mose's shorts, you took those? [Tr.p.311, L.21-22].

Q. All right. It's not that there was blood all over these shorts?

A. No.

Q. All right. And the spots that Mr. Williams showed you on the overhead, **those haven't been tested for blood**?

A. **I have no idea**. [Tr.p.312, L.15-21].

Q. And those pin-sized spots that you see on Moses' pants, those are significantly smaller than the blood drops that you saw on the telephone pole, right?

A. Yes, sir.

Q. And the size of drop in the blood spatter analysis is significant, right?

A. To a point, yes, sir.

Q. The shape is significant in the way that you describe it, that points in a certain direction?

A. Yes, sir.

Q. The size can also tell you how close or far away the spatter is from the source of blood? [Tr.p.313, L.14-25].

Q. You didn't take any photographs of Moses' shorts to show the blood spatter on the shorts?

A. I don't recall if I did or not. I haven't seen, [Tr.p.314, L.23-25].

Q. Are you aware of any testing done on the blood spatter on the pole?

A. I took a presumptive test to make sure that it was human blood.

Q. The blood spatter on the pole, the identification of the person whose blood that is would be significant? [Tr.p.315, L.3-15].

As was recorded it has not even been determined whether or not the evidence in question was even tested. See [Tr.p.312, L.15-21]. Coming directly after the elcited "blood spatter" testimony by Trial Counsel the following Redirect by Solicitor Williams was conducted, as recorded:

REDIRECT WILLIAMS

A. Basically, if you just -- if you fling something, in this case it would be blood that that was flung on something and that will give you a spatter.

Q. Is that consistent with -- that's one way spatter could get like, say, on a pole, for instance?

A. Yes, sir.

Q. And can you get castoff from a fist?

A. Oh, sure. Any -- any object that creates any kind of force.

Q. How would you get castoff from a fist?

A. Well if you're hitting somebody and you come back, **blood** can go that way.

Q. So when the fist stops, the blood comes off the hand? [Tr,p.316, L.4-17].

Q. And that could have removed a lot of blood [Tr.p.316, L.25].

Q. As far as the significance of the blood spatter on the scene, your understand and your impression in this case from ---[Tr.p.317, L.3-5].

Q. Based on your impression, whose, whose blood was that on the ground?

A. It was the victim because **I was told** that that's where the victim lay before he was transported.

Q. And the spatter, was that -- the spatter on the pole, was that near where the blood pool was? [Tr.p.317, L.10-15].

DISCUSSION

Petitioner contends that he was denied his constitutionally guaranteed right to the effective assistance of counsel when counsel failed to object to the highly prejudicial opinion testimony of a State's witness who had not been qualified as an expert by the Trial Court. Petitioner contends that the personal opinion or belief of a non-qualified expert witness jeopardized the integrity of the trial process.

Petitioner further contends that he was also denied his Fourteenth Amendment right to a fair trial by the Prosecution's improper trial methods by soliciting prejudicial opinion testimony. This is doubly true when the testimony is cast in a prejudicial manner and emotional term like the testimony that was solicited in the instant case. This was a baseless maneuver used in order to gain a tactical advantage for the State, as well it was inconsistent with the standards required of the State. In the context of criminal trials, the prosecution is held to uniquely high standards of conduct. In Berger v. U.S. 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935), The United States Supreme Court indicated: "the United States Attorney is the representative of not an

ordinary party to a controversy, but a sovereignty to govern all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

As, such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnest -- indeed, he should do so, but while he may strike hard blows, he is not at liberty to strike foul ones.

It is as much his [duty] to refrain from [improper] methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." 295 U.S. at 88, 55 S.Ct. 629 at 633 (emphasis added). The South Carolina Supreme Court echoed this same standard in State v. King 71 S.E.2d 793 (1952). "A solicitor is an officer of the court representing all the people, including the accused, and occupies a quasi-judicial position and must see that justice is done, that no conviction takes place except in [strict] conformity with the law and that the accused is not deprived of any constitutional rights or privileges and, however strong his/her belief may be of an accused's guilt, he/she must conduct the trial manner fair and impartial to the accused...."the Court has specifically indicated that the "duty of a solicitor is to see that justice is done and not just to convict the defendant" and furtherance, the solicitor is a quasi-judicial officer, and must not do things which prevent a fair trial." State v. Durden 212 S.E.2d 587 (1975).

Petitioner contends that this was all the more damaging because Sergeant McGowan was not qualified by the Trial Court as an expert to give such opinions, yet once Gowan was allowed to give such damaging opinion testimony without objection from Counsel the Prosecution was allowed to exploit the damaging testimony to the maximum in closing argument.

In South Carolina, opinion testimony by a lay witness is governed by the South Carolina Rules of Evidence (701), which states: ("if the witness is not testifying as an expert, the witness' testimony in the form of an opinion or inference is limited to those opinions or inferences which:

(A) Are rationally based on the perception of the witness;

(B) Are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue;

(C) Do not require special knowledge, skill, experience or training.

Petitioner contends that Counsel should have objected to McGowan's testimony on the grounds that the testimony given by McGowan [clearly violated] Section (C) of the S.C.R.E. (701).

South Carolina specifically drafted Section (C) "to emphasize that a lay person may not give Expert Opinions."

In 1993, the United States Supreme Court held that, "the trial judge must ensure that any and all scientific testimony or evidence admitted in, be not only relevant, but reliability." Daubert v. Merrell Dow Pharmaceuticals 113 S.Ct. 2786; also see

Taylor v. State 889 P.2d 319, Wherein the Court said: "Reliability refers to trustworthiness of the evidence. In a case involving scientific evidence, evidentiary reliability is based upon scientific validity.

This standard applies both to novel scientific techniques and well established propositions. Daubert (supra) 113 S.Ct. at 2796. In short, Daubert (supra) requires that any expert witness testimony pertaining to scientific knowledge requires special knowledge, skill and training which clearly Sergeant McGowan did not have. Here the unchallenged testimony infected the trial with unfairness as to make the resulting conviction a denial of due process that is protected by the Fourteenth Amendment. Donnelly v. DeChristoforo 94 S.Ct. 1868.

This unchallenged testimony was even more damaging because the Prosecution relied strongly on the testimony during closing arguments, i.e. "What's interesting about that is Kevin McGowan said he -- he would have scanned the whole area. He would have found more drops of blood..[Tr.p.483, L.23-25]; What he found there was a focussed crime scene where one person struggled and one person bled in one area, and you're getting "cast off blood" coming off the hand. The "cast-off blood" is on the ground, and that's where Kevin Boston was killed. [Tr.p.484, L.2-6].

While the State was free to argue the evidence may have supported such an inference, and while the jury certainly could have concluded such, Sergeant McGowan was not qualified to give such an "expert" opinion. An officer's improper opinion which

goes to the heart of the case is not harmless. Fordham v. State 325 S.E.2d 755 (Ga.1985) compare State v. Hogan 2000 Tenn.Crim.App. Lexis 398 (2000)(officer's testimony about the manner in which the shooting occurred and the position of the victim's body exceeded permissible scope of lay witness testimony). The error of counsel not objecting and challenging Sergeant McGowan's testimony was compounded by the Solicitor's closing argument. In closing argument the Solicitor continually used references referring the quotes of McGowan's testimony.

While a Court reviewing counsels conduct in ineffective assistance of counsel claims, is not to judge the actions of counsel in hindsight. Strickland 466 U.S. 668, 104 S.Ct. 2065, it's plainly clear that at the times this evidence was being introduced it would have been highly prejudicial to Petitioner's case. Trial Counsel however failed to make any contemporaneous objections to either the qualifications of the witness or the reliability of the testimony by a non-expert witness. The State's entire case against Petitioner consisted of circumstantial evidence, in light of the fact that Petitioner's defense was self-defense. And while a timely objection may not have excluded the testimony, the lack of any objection clearly prejudiced Petitioner, since the testimony was solicited from a lay witness clearly in violation of the South Carolina Rules of Evidence 701 Section (C).

Additionally the complete failure to lodge an objection later

foreclosed Petitioner from challenging such non-expert witness testimony on direct appeal.

For the aforegoing reasons and violations of Petitioner's rights Petitioner will forever pray that this Court will grant the requested relief of a new trial.

ISSUE (D) WAS COUNSEL INEFFECTIVE FOR ENGAGING IN IMPROPER CLOSING ARGUMENT TO THE JURY THAT DENIED PETITIONER A FAIR TRIAL?

FACTS

During closing summation to the jury the following argument by counsel was recorded:

> I guess he--it doesn't matter to me one way or the other whether that is, how it happened or not. I don't know how you bite somebody and only leave one tooth mark unless you only have one tooth, but it's neither here nor there. [Tr.p.469, L.11-15].
>
> But if you want to cover up a murder, if you know you're involved in a murder and you want to cover it up, how about this. [Tr.p.470, L.4-6]
>
> Put some ice on your hand and take some asprin. Why go at all. And the reason you go is because you don't know what happened after you left. [Tr.p.470, L.8-11].
>
> Well, you know, if you want to make somebody guilty, guilty of murder in this case because they're lying, then a lot of people in that part of town ought to be in jail because no one tells the truth when the police are involved if you're from that area. [Tr.p.471, L.3-7].
>
> The point is that if you're from this neighborhood, from this socio-economic class, okay, you don't talk to the police. [Tr.p.471, L.13-15].
>
> And none of those people had done anything wrong. They lied. It's just not done when you live in that area. [Tr.p.472, L.1-2].
>
> And how many times do you have to hit somebody, you know? You don't necessarily

> see injuries at all, he said. Kenneth had a scrape on his knuckle. [Tr.p.475, L.7-9].
>
> You don't have to wait until another person gets the drop on you. You don't have to wait until he hits you with a board. You don't have to wait until he hits you again. [Tr.p.477, L.6-9].
>
> Why didn't he run away? Why didn't he run away? Because you don't have to. An individual has no duty to retreat if by doing so he increases the danger of being killed. You don't have to turn your back on somebody wielding a board who's already punched you in the head and face twice. [Tr.p.477, L.12-17].
>
> If you're going to go out and pick your witnesses, you probably wouldn't have picked Jasmine. [Tr.p.477, L.21-22].

Petitioner asserts that he was denied his constitutionally guaranteed right to the effective assistance of counsel when counsel engaged in improper argument to the jury that impermissibly violated the Golden Rule argument and in doing so opened the door for the Prosecution to invoke the prohibited Golden Rule argument as that denied Petitioner his right to a fair trial.

DISCUSSION

In Herring v. New York 95 S.Ct. 2550 (1975), the United States Supreme Court recognized the importance of the opening and closing argument to a criminal defendant. The Court found that a New York law which allowed every judge in a non jury criminal trial to deny counsel any opportunity to make a closing argument

deprived the accused of his constitutional right to the assistance of counsel Id at 95 S.Ct. 2556.

The argument by counsel not only fails to uphold the responsibility of defense counsel, but it is wrong from another standpoint. As there is a wealth of cases that uphold admonitions by the trial court that defense counsel is not to inform the jury of his opinion of the guilt or innocence of the defendant. Customarily, this is when defense counsel asserts, ineffect, "I believe this young man is innocent because otherwise I would not be here defending him." This is universally held to be improper argument. United States v. Young 105 S.Ct. 1038 (1984)(defense counsel, like the prosecutor must refrain from interjecting personal beliefs into the presentation of his case). United States v. Swafford 766 F.2d 426 (10th.Cir.1985)(a lawyer's assertion of personal opinion during trial is an example of improper advocacy) United States v. Singer 660 F.2d 1295 (8th.Cir.1981)(a personal expression of a defendant's culpability, with an extraneous and irrelevant issue before the jury, is objectionable) 102 S.Ct. 1030 (1982) United States v. Alanis 611 F.2d 123 (5th.Cir)(an attorney may not express his personal opinion regarding a defendant's guilt) 100 S.Ct. 1067 (1980) United States v. Bess 593 F.2d 749 (6th.Cir.1979)(personal opinions of counsel have no place in trial) United States v. Cain 544 F.2d 1113 (1st.Cir.)(it is of course elementary that statements of counsel as to personal belief or opinions are improper).

In the instant case counsel has clearly engaged in improper argument, and as a result Petitioner was denied his right to the effective assistance of counsel. The United States Supreme Court recognized how important opening and closing argument is to a defendant. Herring v. New York 95 S.Ct. 2550 (1975). In the instant case counsel himself invoked the improper Golden Rule argument as is seen from the above underlined portions of closing argument. The traditional Golden Rule holds that a lawyer "shall not" urge jury members to imagine themselves or their families or friends in the place of the victim or the defendant, and to render their verdict from that perspective.

The Golden Rule argument, suggesting to jurors as it does that they put themselves in the shoes of one of the parties, is generally impermissible because it wrongly encourages the jurors to depart from the neutrality and decide the case on bias and personal interests rather than on the evidence. Petitioner asserts that counsel was ineffective for engaging in improper argument that denied Petitioner's right to the effective assistance of counsel as well as the right to a fair trial. See Golden Rule 75 Am.Jur.2d Trial §650 (1991); also see Lucas v. State 335 So.2d 566, 568 (Fla.Dist.Ct.App.1976) (holding that the technique of asking jurors to place themselves in the position of the victim has been held to be improper argument in both civil and criminal). Accord constituting reversible error. See State v. Henry 78 P.3d 430, 410 (Kan.2003). As is seen from the afore underlined portions of counsel's closing counsel has unwittingly

placed the jury themselves in the equation of the victim, defendant and the State. The argument complained of was improper and denied Petitioner his right to the effective assistance of counsel as well as his Fourteenth Amendment right to a fair trial.

For the aforementioned reasons, Petitioner respectfully prays that this Court will grant the requested relief of a new trial.

ISSUE (E) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTION'S IMPROPER CLOSING ARGUMENT THAT VIOLATED THE GOLDEN RULE AND DENIED PETITIONER HIS RIGHT TO A FAIR TRIAL?

FACTS

During closing summation to the Jury, the Prosecution argued the following without objection from Counsel, as was recorded:

> And I'll explain later, that if you listened to what Jaz said, if you're grabbing somebody by the head with your right arm and you're punching them in the face and your hand's getting bit, you're going to punch your forearm too. [Tr.p.485, L.6-10].
>
> It's a huge concept. What self-defense says is that you can intentionally kill somebody and we'll say it's ok. If you act in a lawful self-defense, it's telling somebody: killing someone, taking their life intentionally, is allowed. You don't get to kill people and get away with it except in wars, in self-defense, and in situation where no-body catches you. [Tr.p.489, L.9-16].
>
> Now, I'm going to explain the legality of this, that the law does not make it easy for you to get self-defense. There's three requirements. And getting -- earning self-defense or being entitled to defend yourself, the law says these three things, and it's kind of like jumping over a hurdle where you have to jump over each one. If you knock down one hurdle, you don't get it, you don't get self-defense. Or...[Tr.p.489, L.18-25]....it's like getting your driver's license. You need to be a certain age, you need to pass a written test, and you have to pass a seeing test. And if you fail any of those

tests, then you don't get your driver's license. [Tr.p.490, L.1-4].

And again, when the threat ends you don't get to defend yourself anymore. [Tr.p.490, L.15-16]

Finally, self-defense ends when the danger ends. When there's no other way to avoid the danger, you can defend yourself. [Tr.p.492, L.13-15].

And if you don't walk away, if you decide to fight, which he wasn't entitled to do, you can defend yourself until the danger ends. [Tr.p.492, L.19-21].

You say, "you know what?? I had to defend myself. I wish I didn't have to, but I was put in a situation where I had no other choice, and I had to do that. [Tr.p.495, L.5-8].

You can't go back, you can't go see what happened, You can't tell Kenneth that he shouldn't be out there, that he shouldn't be messing with Moses Fraiser, that is might get him killed. What you can do is what you took an oath to do, and that is find the truth. [Tr.p.500, L.1-6].

Petitioner contends that he was denied the effective assistance of trial counsel as guaranteed by the Sixth Amendment when Counsel failed to object to the Prosecution's improper closing argument that violated the "Golden Rule" and in doing so denied Petitioner his right to a fair trial that is protected under the Fourteenth Amendment Due Process Clause.

DISCUSSION

In Berger v. U.S. 295 U.S. 78, 55 S.Ct. 629 (1935), the United States Supreme Court indicated: "the United States

Attorney is a representative not of an ordinary party to a controversy, but of a sovereignty to govern all, and whose interest therefore in a criminal prosecution is not that it shall wing a case, but that justice shall be done. As, such he is in a peculiar and very definite sense the "servant of the law", the two-fold aim of which is that that guilty shall not escape, or the innocent suffer. He may prosecute with earnest and vigor -- indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. 55 S.Ct. at 633 (emphasis added). The South Carolina Supreme Court echoed this same standard in State v. King 71 S.E.2d (1952) "A solicitor is an officer of the court representing all the people, including the accused, and occupies a quasi-judicial position and must see that justice is done, that no conviction takes place except in strict conformity with the law and that the accused is not deprived of any constitutional rights or privileges, and however strong his belief may be of an accused's guilt, he must conduct the trial in a manner fair and impartial to the accused...". The Court has specifically indicated that the duty of the solicitor is to see that justice is done and not just to convict the defendant and further that the solicitor is a quasi-judicial officer, and must not do things which prevent a fair trial. State v. Durden 212 S.E.2d 587 (1975).

The remarks by the Prosecution unduly prejudiced Petitioner at a very critical stage of the proceeding. See Donnelly v. DeChristoforo 416 U.S. 637, 94 S.Ct. 1868.

Golden Rule arguments are generally improper and may constitute reversible error. State v. McHenry 78 P.3d 430, 410 (Kan.2003). A solicitor's closing argument must not appeal to the personal biases of the jurors, nor be calculated to arouse the jurors passions or prejudices. Humphries v. State 351 S.C. 362, 570 S.E.2d 160, 166 (2002); accord Simmons v. State 331 S.C. 333, 338, 503 S.E.2d 164, 165 (1998).

The traditional notion of the Golden Rule, though not contained in any rule of evidence or procedure, but can be seen at 75 Am.Jur.2d Trial §282, p.357, which holds that a lawyer shall not urge the jury members to imagine themselves or their families or friends in the place of the victim or the defendant and to render their verdict from that perspective. Although the forbidance of Golden Rule arguments began in civil trials to hinder the plantiff from urging the jury to put themselves in the place of the victim in order to obtain higher damages, the prohibition has now been made applicable to criminal actions as well. See 75A.Am.Jur.2d Trial §650 (1991); also see Lucas v. State 335 So.2d 566, 568 (Fla.Dist.Ct.App.1976)(holding that "[t]he technique of asking jurors to place themselves in the position of the victim has been held to be improper in "both civil and criminal").

"The Golden Rule argument, suggesting to jurors as it does,

that they put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to "depart from the neutrality" and to decide the case on the basis of personal interest and biases rather than on the evidence. Regardless of the nonmenclature used, any argument that importunes the jurors to place themselves in the shoes of one of the parties is [disallowed]. (emphasis supplied).

The Court, quoting State v. Gilstrap 205 S.C. 412, 416, 32 S.E.2d 163, 164-65 (1944) reasoned, "the rule in this State and we think in most jurisdictions, is that upon the whole case, it appears to the Court that the defendant was prejudiced by the language used, as a result of which he did not have a fair and impartial trial, it would be the duty of the Court to reveres the case and remand it for a new trial". The Court further opined, "an argument of this nature addressed to the jury tends to completely destroy and nullify all sense of impartiality in a case of this kind. It's logical effect is to arouse the passions and prejudices of the jury. Jurors are sworn to be governed by the evidence and it is their duty to regard the facts of the case impersonally" Id at 417.

Statements such as those made in State v. McDaniel 462 S.E.2d 883, 884, In her closing argument, the solicitor used **you** or a form of **you** some forty-five times, asking the jury to put themselves in the place of the victim. Moreover, the request concerned family members, as in White (infra), but directly to the jurors themselves. This was clearly reversible error under

White 144 S.E.2d 481. Surely Counsel should have objected to the Solicitor's improper closing in the instant case, for the language used in the instant case mirrors that of McDaniels (supra), and held impermissible in White (supra). Id. also compare Simmons v. State 331 S.C. 333, 503 S.E.2d 164 (1998)(solicitor improperly injected, without objection, parole considerations); Fossick v. State 317 S.C. 375, 453 S.E.2d 899 (1995), cert. denied 116 S.Ct. 271 (Oct.2, 1995)(failure to object to improper closing argument regarding the defendant's lack of remorse was ineffective assistance of counsel); Mincey v. State 314 S.C. 355, 444 S.E.2d 510 (1994)(failure to object to improper solicitor argument held ineffective assistance of counsel); State v. Hinton 210 S.C. 480, 43 S.E.2d 360 (1947)(solicitor's improper remarks probably affected the verdict).

The first prong of the Strickland test is deficient performance. Here trial counsel's failure to object to the many inappropriate statements made by the Solicitor was blatantly deficient. The record is conclusive and what is proven cannot be denied. The prejudice incurred is easily seen for Petitioner was denied his right to fair trial. For the aforementioned reasons, Petitioner will forever pray that this Court will grant the requested relief.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CA/No, 09-CP-10-1183

CERTIFICATE OF SERVICE

FILED
2009 NOV -5 AM 11:11
JULIE J. ARMSTRONG
CLERK OF COURT
BY

I, Moses Frasier, do hereby swear under the penalty of perjury, that I have mailed the Original and (1) one copy of the enclosed Amended Post Conviction Relief Application to the Charleston County Clerk of Court, 100 Broad Street, Suite 106, Charleston, SC. 29401-2258.

I further state that a copy of the aforesaid was also mailed to the Attorney General's Office, Mr.Henry McMaster, P.O. Box 11549, Columbia, SC. 29211.

This was done by way of the United States Mail.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 26 DAY OF October, 2009

NOTARY PUBLIC
MY COMM. EXPIRES 7/28/2019

Respectfully Submitted,
/s/ #317940
Moses Frasier

Exhibit C

cc!
AT
AG
SOL
BS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	2009-CP-10-1183
	)	
Moses Frasier, #317940,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

FILED
2012 FEB 22 AM 9:03
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 27, 2009 and amended on November 5, 2009. The Respondent made its Return on July 7, 2009. An evidentiary hearing into the matter was convened on January 9, 2012 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Jeffrey Yungman, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Applicant's trial counsel, Beattie Butler, Esquire, also testified at the hearing. This Court had before it the records of the Charleston County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the trial transcript, the Final Brief of Appellant, the Final Brief of Respondent, the Court of Appeals' opinion affirming the conviction and sentence, the Remittitur dated February 2, 2009, the PCR application and amended application, and the State's Return thereto.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was

RMDJ 1

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By
DEPUTY CLERK

indicted at the June 2006 term of the Charleston County Grand Jury for murder (2006-GS-10-4259). Beattie I. Butler, Esquire, and Jason Mikell, Esquire, represented him. On October 2, 2006, Applicant proceeded to trial, after which a jury found him guilty of the lesser-included offense of voluntary manslaughter. The Honorable James C. Williams sentenced him to confinement for thirty (30) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Chief Appellate Defender Joseph L. Savitz, III, represented Applicant on appeal. Following full briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Frasier, Op. No. 2009-UP-052 (S.C. Ct. App. filed January 15, 2009). The Remittitur was issued on February 2, 2009.

ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel
   a. Failed to investigate and present a defense.
   b. Failed to object to the highly prejudicial opinion testimony of a State's witness who had not been qualified as an expert by the trial court.
   c. Failed to object to the prosecution soliciting highly prejudicial opinion testimony from a State's witness who had not been qualified as an expert by the trial court.
   d. Engaged in improper closing argument to the jury that denied Applicant a fair trial.
   e. Failed to object to the prosecution's improper closing argument that violated the Golden Rule and denied Applicant his right to a fair trial.

2. Ineffective assistance of appellate counsel in that appellate counsel failed to raise the issue on appeal as to whether the trial court erred in refusing to charge the jury on the issue of involuntary manslaughter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the hearing. This Court has further had the opportunity to

Rm05/2

observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

The Applicant testified that counsel failed to object to opinion testimony from a State's witness, Sergeant Kevin McGowan, who was not qualified. He asserted that Sergeant McGowan testimony about blood splatter on a pole was highly prejudicial and counsel should have objected.

Trial counsel testified that Sergeant McGowan was a crime scene technician. He did not recall Sergeant McGowan being qualified as an expert. Counsel asserted that the blood on the laundry line pole was the victim's blood, and the question was about why it happened rather than if it happened. He testified that it was not disputed that it was the victim's blood. Counsel testified that the victim's blood was on Applicant's pants. He testified that the trial court charged self-defense and voluntary manslaughter to the jury.

Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel

RM03/3

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry, 386 S.E.2d 624.

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 625 (citing Strickland, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

This Court finds that trial counsel's testimony is credible. This Court finds that counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on several occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant's constitutional rights, and possible defenses or lack thereof.

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. This Court finds that counsel demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds that

RM03/4

counsel's representation did not fall below an objective standard of reasonableness.

This Court finds that Applicant was not prejudiced by counsel's failure to object to Sergeant McGowan's testimony regarding blood splatter. Applicant's defense was self-defense, and there was no dispute that the victim's blood was on the pole. There was also no dispute that Applicant and the victim were in an altercation and the victim died as a result of the altercation. Thus, counsel was not ineffective for failing to object and Applicant was not prejudiced in any manner. This Court finds that counsel's failure to object did not affect the outcome of the trial.

Accordingly, this Court finds the Applicant has failed to prove both prongs of Strickland. Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial or sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty

RMD 5

(30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and

2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 16 day of Feb., 2012.

R. Markley Dennis, Jr.
Presiding Judge
9th Judicial Circuit

Charleston, South Carolina.

RMDJ/6

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By DEPUTY CLERK

Exhibit D

FORM 5

STATE OF SOUTH CAROLINA)
)
County of CHARLESTON)
)
MOSES FRASIER, 317940,)
Full name and prison number (if any) of Applicant)
)
v.)
)
State of South Carolina)
)
)
)

2016-CP-10-359
IN THE COURT OF COMMON PLEAS

FILED
2016 JAN 25 AM 11:09
JULIE J. ARMSTRONG
CLERK OF COURT

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS – READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LEE CORRECTIONAL INSTITUTION
990 WISACKY HWY., BISHOPVILLE, S.C. 29010

2. Name and location of Court which imposed sentence CHARLESTON CO., GEN. SESSION COURT

3. Name(s) of co-defendant(s) (if any) NONE

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) 06-GS-10-4259, MANSLAUGHTER
   (b) _____

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) OCTOBER 5, 2006, THIRTY (30) YEARS

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty XXXXXXX

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

YES

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. COURT OF APPEALS

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. AFFIRMED CONVICTION

ii. _____

iii. _____

(c) the date of each such result:

i. 2009

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. SEE BRIEF 11/05/07 SUBMITTED BY APPELLATE DEFENSE COUNSEL

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) INEFFECTIVE ASSISTANCE OF PCR COUNSEL, etc.

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) SEE ATTACHMENTS ADDENDUMS AND DOCUMENTS AS PROFFERS, etc.

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? _____

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? XXXXX

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. POST CONVICTION, 09-CP-10-1183, CASE MATTERS i.e.

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. CHARLESTON CO. COURT OF COMMON PLEAS

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. DENIED RELIEF

ii.

iii.

iv.

(d) the date of each such disposition:

i. FEBRUARY 16, 2012

ii.

iii.

iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. STRICKLAND, SUPRA, BUTLER, SUPRA. CHERRY SUPRA., etc.

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii.

iii.

iv.

(b) the proceedings in which each ground was raised:

i. N/A

ii.

iii.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) N/A

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? XXXXXX

(c) your sentencing? _____

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
XXXXXX

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. BRATTIE I. BUTLER, Esq. JASON MIKELL, Esq.

ii. JEFFREY JAMES YOUNGMAN, Esq.

iii. _____

(b) the proceedings at which each such attorney represented you:

i. TRIAL, BUTLER & MIKELL

ii. POST CONVICTION RELIEF, YOUNGMAN

iii. _____

Revised 3/2003

19. State clearly the relief you seek in filing this application:

ONE FULL COMPLETE AND FAIR BITE AT THE APPLE AS IS ENTITLED TO BY THE LAW THAT IS WELL SETTLED BY THE S.C. SUPREME COURT

APPLICANT IS NOT WAIVING NO RIGHTS IN THIS STAGES DUE TO THE COMPLIANCES REQUIREMENTS OF THE RULES AND LAWS THAT IS ESTABLISHED FOR THE ONE BITE AT THE APPLE PURSUANT TO §17-27-80 AND 90 , etc.

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of CHARLESTON)

I, [redacted] MOSES FRASIER, 317940, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me at this time for vacating, setting aside or correcting the convictions and sentence attacked in this application; and that the matters and allegations therein set forth are true and correct.

#317940

MOSES FRASIER
LEE C.I.
990 WISACKY HWY.
BISHOPVILLE, S.C 29010
pro se APPLICANT

SWORN to and subscribed before me this 19th day of January 2016

Veretta O Hill (L.S.)
Notary Public

My Commission Expires: 3/29/2016

Revised 3/2003

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, MOSES FRASIER, 317940, hereby apply for leave to proceed in this action without prepayment of fees or costs or security thereof. In support of my application I declare under penalty of perjury that the following fats are true:

(a) I am the applicant in this action and I believe I am entitled to redress.

(b) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

#317940

Applicant

MOSES FRASIER, 317940
Lee Corr., Inst.,
990Wisacky Highway
Bishopville, SC 29010-1775

SWORN or affirmed to and subscribed before me this 19th day of January 2016

Venetta J. Gill

Notary Public

My Commission Expires: 3/29/2016

Revised 3/2003

PCR ADDENDUM #1.

PCR JUSTIFICATIONS:

APPLICANT MOSES FRASIER, 317940, RAISES THE ISSUE OF INEFFECTIVE ASSISTANCE OF PCR COUNSEL FROM THE PCR APPEAL CASE MATTERS, etc., THE APPLICANT FACTUALLY RAISES THE ISSUE OF INEFFECTIVE ASSISTANCE OF PCR COUNSEL BASED UPON THE FACTS THAT THE COUNSEL DID NOT FILE THE PCR APPEAL ACCORDINGLY TO THE APPELLATE COURT RULES AS RULE 243 AND 203, SCACR, etc., WITH-IN THE 30 DAYS THAT HE HAD SUPPOSE TO DO SO BY, THE APPLICANT COULD HAVE RECEIVED AN APPELLATE COURT REVIEWS ACCORDINGLY TO THE PCR RULES, §17-27-90, i.e., AND PURSUANT TO THE CASE WELL SETTLED LAWS IN SEE: LAND V. STATE, 262 S.E. 2d 735 (1980), AS IT STATES AND IN REGARD TO APPLICABLE LAWS THAT ARE APPLICABLE TO APPLICANT'S CASE MATTERS PRESENTLY BEFORE THE COURT.

HERE IN THE APPLICANT'S CASE MATTERS THE FOLLOWING INTERFERENCES OCCURRED IN THE PROCESSES OF THE APPEAL BEING PURSUED, AND THE INFRACTIONS THAT OCCURRED THROUGH THE OUTCOMES TO THE APPLICANT BEING THE PURSUER OF HIS RIGHTS TO AN APPEAL TO HIS PCR CASE TO THE SUPREME COURT BASED ON THE ESTABLISHED LAWS AND RULES OF THE PCR STATUTES, etc. SEE PCR CASE NO. 2009-CP-10-1183, COUNSEL OF THE RECORD DID NOT APPEAL THE CASE TO THE APPELLATE COURT, THE NOTICE OF INTENT TO APPEAL HIS CASE FROM THE DENIED PCR BY THE PCR COURT, SEE THAT THE ORDER OF DISMISSAL WAS ISSUED ON FEBRUARY 16, 2012, THE ORDER EXPLICITLY STATES THE STANCE OF THE PCR COUNSEL AND IT ALSO GIVES THE COURT A CLEAR FINDING TO THE ERRORS COMMITTED IN THE APPEAL NOT BEING FILED ACCORDINGLY TO THE APPELLATE COURT RULES, RULES 243 AND 203, SCACR, etc., THE COUNSEL IS SOLELY RESPONSIBLE FOR THE APPEAL NOTICE BEING FILED AND THE CERTIFICATE OF SERVICE BEING SERVED AND FILED, THE COURTS AND THE RESPONDENT COUNSELS, etc. THIS IS ONLY ONE OF THE STEPS THAT ARE SHOWN THAT WAS VIOLATED BY THE PCR COUNSEL IN APPLICANT'S CASE MATTERS FOR THE APPEAL, HEREAS, THE APPLICANT WILL TAKE POSITIONS BY THE WELL SETTLED LAWS AS THE FOLLOWING; SEE AUSTIN V. STATE, 305 S.C. 453, 409 S.E. 2d 395 (1991); WASHINGTON v. STATE, 324 S.C. 232, 478 S.E. 833 (1996), AND SEE THE APPLICABLE STATUTES OF THE CASE LAWS THAT

IS STATED, AND FOR THE SAKE OF THE RECORDS, APPLICANT IS NOT SKILLED IN THE LAW AND IS NOT EXPECTED TO BE HELD TO THE STANDARDS AS A LAWYER WHO PRACTICES LAW BY A AUTHORIZATION, AND THE COURTS MUST GIVE HIM ALL BENEFITS OF THE LAWS AS TO BE CONSTRUED IN HIS FAVORS WHILE LITIGATING HIS CASE TO THE COURT. THE COURT IS TO PLACE IT ATTENTIONS TO THE FOLLOWING POSITIONS OF THE APPLICANT IN HIS CASE MATTERS PRESENTLY PRESENTED BEFORE THE COURT, THE APPLICANT IS SUBMITTING HIS AUSTIN PETITION AND TAKING THE STANCES AS LIKE AUSTIN, THE LAWS THAT EXECUTE THE PROCEDURES THAT PREVENTS THE DEPRIVATIONS OF A LITIGATE'S RIGHTS BY LAWS AND RENDERS A REMEDIES FOR CORRECTION ERRORS OF LAW SUCH AS THE AUSTIN REVIEW, etc., AGAIN HERE IN THE APPLICANT'S CASE MATTERS THE PCR COUNSEL DID NOT FILE THE APPEAL NOTICE TO THE APPELLATE COURT ACCORDINGLY, etc., AND TO INCLUDE THE DEPRIVATIONS THAT AMOUNTS TO SO MANY, THE LOWER COURT RECORDS ARE VULNERABLE TO BE LOST, DESTROYED AND OR NOT RECOVERABLE TO BE SUBMITTED TO THE APPELLATE COURT FOR THE APPLICANT TO RECEIVE A FAIR AND ENTITLED REVIEWS FROM THE APPELLATE COURT BY, AND IF THE PCR COUNSEL WOULD HAVE FILED THE APPEAL NOTICE WITH-IN THE THIRTY (30) DAYS AS SHOULD HAVE THE RECORDS FROM THE PCR PROCEEDINGS WOULD NOT BE A FACTOR, BECAUSE THE JURISDICTION MATTERS TO THE APPEAL GOING IN THE APPELLATE COURT IS THE ROUTE TO ELIMINATE THE TRANSCRIPT MANDATES BEING IN COMPLIANCE OF TO THE COURT. THE APPLICANT EXPLICITLY STATES THAT THERE EXISTS VIOLATIONS WHERE THE COUNSEL DID NOT FILE THE NOTICE OF INTENT TO APPEAL TO HIS PCR, THE PROCEDURAL IRREGULARITIES AND THE INVOLUNTARILY WAIVER TO HIS APPEAL, AND THE VIOLATION TO APPLICANT'S U.S. CONST. 14th AMENDMENT TO INCLUDE ALL OTHER CONCURRENCES OF LAWS THAT SUPPORTS THE CLAIM STATED EXPLICITLY BY THE APPLICANT IN HIS APPEAL BEING REINSTATED AND HAVING THE AUSTIN HEARING TO ESTABLISH THE LOWER COURT RECORDS WHEREABOUTS, etc., TO ALLOW THE APPELLATE COURT TO CORRECTLY GIVE A COMPLETE APPELLATE REVIEWS TO THE APPLICANT'S CASE MATTERS TO BE REVIEWED ON AN APPEAL TO THE STATE HIGHEST COURT, etc.

IN AUSTIN, supra., THE COURT EXPLAINED THAT EVERY PCR APPLICANT IS ENTITLED TO A FULL ADJUDICATION ON THE MERITS OF THE

PCR ADDENDUM #3.

PCR APPLICATION, OR "ONE BITE AT THE APPLE" WHICH INCLUDES THE RIGHT TO APPEAL THE DENIAL OF A PCR APPLICATION AND THE RIGHT TO ASSISTANCE OF COUNSEL IN THAT APPEAL. THUS IF A APPLICATION DENIAL IS REQUESTED BY THE APPLICANT AND DENIED THE OPPORTUNITY TO SEEK APPELLATE REVIEWS FROM A PCR DENIAL, OR IF THE RIGHT TO APPEAL WAS NOT KNOWINGLY AND INTELLIGENTLY WAIVED, AN APPLICANT CAN PETITION FOR CERTIORARI TO THE S.C. SUPREME COURT FOR A NEW APPEAL. SEE ATTACHED ORDER INCLUDED,®

CONCLUSION

WHEREAS, APPLICANT MOSES FRASIER REQUEST AND MOVES RESPECTFULLY IN THIS HONORABLE COURT TO HAVE HIS APPEAL RIGHTS REINSTATED TO THE HEREIN MENTIONED PCR CASE MATTERS, etc., AND FIND THAT APPLICANT DID NOT WAIVED HIS RIGHTS TO AN APPEAL TO THE PCR APPLICATION DENIAL BY THE PCR COURT.
APPLICANT COMPELS THE COURT TO SEE THE FACTS THAT ERROR OF THE PCR RULES AND STATUTES STANDS PRESENTLY IN HIS CASE AND REQUEST THAT THE COURT RENDER THE CORRECT AND FULL REMEDIES TO CORRECT THIS VIOLATIONS AS THEY AMOUNTS IN SO MANY TO BE RECTIFIED IN HIS CASE MATTERS.

APPLICANT FOREVER PRAYS HIS RELIEF BE GRANTED, ON THIS 19 DAY OF JANUARY 2016.

SUBMITTED ON THIS 19 DAY OF JANUARY 2016

RESPECTFULLY SUBMITTED,

S/ #317940

MOSES FRASIER, 317940
990 WISACKY HWY.
BISHOPVILLE, S.C. 29010

SEE ENCLOSURES: (4)

The Supreme Court of South Carolina

Moses Frasier, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-002609
Lower Court Case No. 2009CP1001183

ORDER

In the post-conviction relief case, the petitioner filed a *pro se* notice of appeal. The proof of service reflects that the notice of appeal was served on counsel for respondent on December 14, 2015. Petitioner's counsel before the circuit court has advised this Court that he received written notice of entry of the order on appeal in February 2012.

Accordingly, based on the failure to timely serve the notice of appeal under Rules 243(a) and 203(b)(1) of the South Carolina Appellate Court Rules, the notice of appeal is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina
January 6, 2016

cc: James Rutledge Johnson, Esquire
Jeffrey James Yungman, Esquire
Mr. Moses Frasier, #317940

Exhibit E

STATE OF SOUTH CAROLINA	
	Court of Common Pleas
COUNTY OF CHARLESTON	Case No. 2016-CP-10-0359
MOSES AKHENATON FRASIER, Applicant,	
vs.	Transcript of Record
STATE OF SOUTH CAROLINA, Respondent.	DATE: February 1, 2018

B E F O R E:

THE HONORABLE MAITE D. MURPHY

A P P E A R A N C E:

JAMES KRISTIAN FALK
Attorney for the Applicant

RASHEEDA CLEVELAND
Attorney for the Respondent

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

INDEX

EXAMINATION

EXHIBITS

MS. CLEVELAND: May it please the Court. Next matter is Moses Frasier vs. The State of South Carolina, Docket No. 2016-CP-10-0359.

In 2006, the Charleston County Grand Jury indicted Mr. Frasier for murder. Beattie Butler, Esq. and Jason Mikell, Esq. represented Mr. Frasier. Assistant Solicitor Nathan Williams and Kim Steele prosecuted the case.

On October 2nd, 2016, the applicant proceeded to a jury trial at the Charleston County Court of General Sessions before the Honorable James Williams. On October 5th, 2000 -- I'm sorry, I said 2016. That is 2006.

On October 5th, 2006, the jury convicted applicant of a lesser-included offense of voluntary manslaughter. Judge Williams sentenced applicant to a term of 30 years. He appealed and Judge -- Jeffrey Bloom (ph), Esq. perfected that appeal.

And the South Carolina Court of Appeals affirmed applicant's conviction in an unpublished opinion on January 15th, 2009. The remittitur was returned on November 16th, 2012. Applicant filed his first post-conviction relief action on February 27th, 2009.

Respondent made its return on July 7, 2009.

An evidentiary hearing into the matter was convened on January 27th, 2011, at the Charleston County Courthouse before the Honorable R. Markley Dennis. Applicant was

present and represented by Jeffrey Yungman. Respondent was represented by Assistant Attorney General Matthew Friedman. Judge Dennis issued an order of dismissal. And that order was filed on February 22nd, 2012.

Nearly four years later, on December 14th, 2015, applicant filed a pro se notice of appeal with the South Carolina Supreme Court challenging Judge Dennis's ruling. The Court issued an order dismissing the appeal for failure to timely serve notice of appeal.

The remittitur from that appeal was sent down on January 22nd, 2016. He then filed this current application before this court on January 25th, 2016, alleging prior PCR counsel as ineffective for failing to file an appeal on his behalf.

The State made its return on June 23rd, 2017, requesting that an evidentiary hearing be held solely on the issue of whether applicant is entitled to a belated appellate review of his first PCR action pursuant to *Austin v. State*. Mr. Frasier is present in the courtroom today and he's represented by Mr. Jim Falk.

THE COURT: Good morning, Mr. Falk.

MR. FALK: Your Honor, we are going forward now on our *Austin* claim. It's my understanding of the law in South Carolina that if Mr. Frasier has any other allegations of ineffective assistance of appellate counsel -- of PCR

counsel, that they are really not anything that this Court can address. So not going forward with those claims, we don't want to seem as a waiver of any kind of subsequent habeas corpus procedure, whatever. It's my understanding we can only pursue the *Austin* claim at this time.

THE COURT: Are you ready to proceed?

MR. FALK: Yes, we are.

THE COURT: Call your first witness.

MR. FALK: I call Mr. Frasier to the stand.

MOSES FRASIER,

having been duly sworn, testifies as follows:

THE CLERK: Spell your last name for the record.

MR. FRASIER: Moses F-r-a-s-i-e-r.

DIRECT EXAMINATION

By MR. FALK:

Q. Mr. Frasier, who represented you at your PCR?

A. Mr. Jeffrey Yungman.

Q. And how much communication did you have with him prior to your PCR hearing?

A. I seen him -- he sent me a letter saying he's my attorney. And then he came to see me like a week before I went to court.

Q. And what happened at the PCR hearing?

A. I substantiated my claim. And then the judge said he was going to deny me. And, so, I was waiting on a

decision so I could go forward with it, but I never got it. I was thinking the way the judge was talking, like, maybe they had a -- like, he had a change of heart or something. And I was just waiting on the decision for three years.

Q. What kind of conversations did you have with your lawyer about, you know, what would happen if the judge ruled against you at your PCR?

A. We didn't have that conversation.

Q. Did you want to appeal the decision if it went the wrong way?

A. Yeah, yeah.

Q. And did your lawyer file timely notice of appeal in this case?

A. Hm-mm. I come to find out three years later that he didn't file it. He actually told the judge when we was in court that I was his first time doing that. He told him that he didn't have any experience in it. And the judge said, that's fine, just go ahead and proceed. So we continued.

Q. Who did you think was going to file the appeal?

A. My lawyer, my lawyer. But the thing is, I never got -- you know, like, when the courts make a decision, you get a receipt of the decision. And I never got that. I didn't get anything.

Q. So you had no copy of any written order from the

court?

A. No. I didn't get it until when Mr. Yungman sent it to me. I asked my mama, because I said, it shouldn't take three years to get a decision on a PCR. And she called them and said that Moses asked him about the decision. And from what she told me, she said that he had a decision. And I said, well, when is he going to send it to me?

MS. CLEVELAND: Objection, Your Honor, this is hearsay.

THE COURT: Sustained.

BY MR. FALK:

Q. When did you get a copy of the decision?

A. December 2015.

Q. December 2015?

A. Yeah. And can I say something else? I didn't go to court --

Q. In other words -- stop. Don't tell me anything that your mother said someone else said.

A. Okay. Okay.

Q. So that is why I'm just trying to lead you. Was it your understanding that your mother contacted Mr. Yungman?

A. I asked her to contact him. And he sent a letter back to me.

Q. And you received the letter from him?

A. Uh-huh. It's right there on the thing.

MR. FALK: May I approach, Your Honor?

THE COURT: You may.

BY MR. FALK:

Q. Is that the letter?

A. Uh-huh.

Q. So --

THE COURT: Mr. Frasier, is that a yes?

THE WITNESS: Yes, ma'am.

BY MR. FALK:

Q. So what did I hand you, because we are trying to make a record here?

A. You want me to read the letter?

Q. Just identify the letter.

A. That is the letter I asked my mama to contact the lawyer, Mr. Yungman. She did. And then when I got the decision, right, I filed myself an appeal, right, for the decision from the PCR. And then they denied it saying that it was untimely. Okay? So she contacted him again. Right? And he -- he said this is what I should do. And he wrote a letter saying that the process wasn't done correctly.

Q. So that letter right there, you received that letter?

A. Yeah.

Q. You received it? Where were you when you received it?

A. I was at Lee Correctional.

Q. What's the date on the letter?

A. December 31st, 2015.

Q. Okay. And what does it appear to be? Who is it addressed to?

A. It's addressed to Mr. Shearouse. I don't know exactly who he is, but he's somebody in court, though.

Q. Okay.

A. I wrote him a few times.

Q. And who signed the letter?

A. Mr. Yungman.

MR. FALK: Okay. And, Your Honor, we will mark this as exhibit one to this hearing.

THE COURT: Any objection?

MS. CLEVELAND: No objection from the State, Your Honor.

BY MR. FALK:

Q. It's going to be part of the record. Why don't you summarize. What did you think after you read the letter?

A. That he wasn't -- the courts told him that he doesn't have to do pro bono work because he's doing stuff at the homeless shelter. So he just was, like, okay. Just didn't follow up on anything. I don't think it was like -- I don't think he did anything, like, to sabotage my appeal, you know, but I don't think he knew what to do.

Q. Okay. But so the first time you realized that Judge Dennis ruled against you was about -- was sometime in the latter part of 2015?

A. Yeah, that was the first time I knew. See, in SCDC, when you get legal mail, right, you have to sign for it. And, I mean, I didn't get any mail from any lawyers or anybody, from the courts or anything until 2015.

Q. And when did you file your PCR application?

A. You are talking about the initial application?

Q. No. I'm sorry.

A. The *Austin* petition?

Q. *Austin*, yes.

A. I can't remember the exact date, but I got it in my thing over there. But it was after this right there. It was after December 31st.

Q. Couple of months after?

A. Yeah. Yeah. I know I immediately filed an appeal. Yeah, when they denied it, that's when I filed the *Austin* petition.

Q. You were going under the assumption that if you lost, your lawyer was going to file an appeal?

A. Yeah. Yeah, that's what I thought.

Q. You were going under the assumption that if you lost, your lawyer was going to send you a copy of the order?

A. Yes.

Q. And first time you've got a copy of the order was in December of 2015?

A. Yes.

MR. FALK: No further questions.

THE COURT: Any cross-examination?

MS. CLEVELAND: Just briefly, Your Honor.

CROSS-EXAMINATION

BY MS. CLEVELAND:

Q. Good morning, Mr. Frasier.

A. Good morning.

Q. Mr. Frasier, you testified that it was three years before you got or thought to inquire about your cases as far as the order. Why is that? Why did you wait three years?

A. Because, you know, when the courts make decisions, they don't do it -- it's not like you get it the next week or nothing. I was figuring, hey, when they did my -- when I had my -- what do you call it? -- my direct appeal, it took months for them to do that. So I'm thinking, okay, maybe this might be a good thing that they are taking so long. You know what I'm saying? And I just never got it.

Q. After year one, you didn't think to contact your attorney to follow up?

A. Hm-mm.

Q. Year two?

A. Hm-mm.

Q. Or year three?

A. Year three, I asked. I said -- when the third year came, right, I asked my mama, can she call the lawyer and find out how long it takes to get a decision. And she told me -- that's when she told me what he said. And then I got the paperwork.

Q. One final question. Why did you wait four years to file your notice of appeal?

A. I didn't wait four years.

Q. It was nearly four years.

A. No. I went to court in January 2012, not December 11th. I don't know where that -- where they get that date from. I think it was January 9th, 2012.

Q. And you filed your notice of appeal on December 14th, 2015. So nearly three years.

A. Yeah. But from my understanding, you can't file -- you can't appeal something that you don't know if they have a decision or not. Right?

MS. CLEVELAND: Nothing further for this witness. Thank you.

THE COURT: Anything further, Mr. Falk?

MR. FALK: No, Your Honor.

(Applicant's Exh. 1, December 31, 2015 letter to Mr. Shearouse from Mr. Yungman, was marked for identification.)

JEFFREY YUNGMAN,

having been duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MR. FALK:

Q. Can you state your name for the record.

A. Jeff Yungman.

Q. And where are you currently working?

A. I work at 180 Place, the homeless shelter here in Charleston.

Q. And did you get appointed to represent Mr. Moses on his PCR?

A. I did.

Q. Was that because of the old system where you are on, like, a civil list?

A. Correct.

Q. And the case would come to you and you are supposed to represent that person because you are supposed to have civil trial experience; is that correct?

A. Yes.

Q. I mean, that is the theory?

A. That's the theory, yes.

Q. How many criminal trials have you done prior to representation Mr. Moses on his PCR?

A. None.

Q. And this was your first venture into PCR court?

A. Yes, sir.

Q. And when did you get a copy of the order, Judge Dennis's order denying PCR relief?

A. I'm not sure. I believe it was February or March of that same year that the PCR hearing was.

Q. Did you send a copy of that to your client?

A. No, I did not.

Q. And you did not file a notice of appeal?

A. Correct, I did not.

MR. FALK: May I approach?

THE COURT: You may.

BY MR. FALK:

Q. I'm going to show you what we marked as Applicant's Exh. No. 1. Do you recall sending that letter to Mr. Frasier?

A. I think I sent it to his mother.

Q. Okay. Are you acknowledging you maybe dropped the ball on the appeal? Maybe that's a bad question.

A. I did not do --

Q. What was your understanding of your responsibility to Mr. Moses at the conclusion of the PCR hearing?

A. Two things; one, it was my understanding that my role was done at that point; and two, it was my understanding that the court would send him a copy of the decision, as well as me.

Q. Okay. All right. So why did you not file a notice of appeal in this case?

A. As I said, I thought my role was done at the end of the PCR hearing. And I thought, apparently wrongly, that Judge Dennis at the end of the hearing said to Mr. Frasier, you can appeal this decision. So I assumed it was Mr. Frasier who was going to appeal that decision, not me.

MR. FALK: I have no further questions.

THE COURT: Any cross-examination?

MS. CLEVELAND: Moment's indulgence.

CROSS-EXAMINATION

BY MS. CLEVELAND:

Q. Mr. Yungman, you testified that Judge Dennis told Mr. Frasier that an appeal could be filed at the conclusion of the hearing?

A. That's my recollection, yes, ma'am.

Q. So would it be your understanding that indicates that the hearing is over and the matter is concluded?

A. I'm sorry. I don't understand what you are asking.

Q. That the application was denied at the conclusion of the hearing, would it be your understanding that by him telling Mr. Frasier that he could appeal, that that indicated the denial of the PCR?

A. Yes, ma'am.

MS. CLEVELAND: Thank you. Nothing further.

THE COURT: Anything else?

MR. FALK: I call one rebuttal witness?

THE COURT: You may step down. Thank you.

MR. FALK: I call Mr. Frasier.

THE COURT: Come back up, Mr. Frasier. You are still under oath. You may proceed.

MOSES FRASIER,

having been previously sworn, testifies as follows:

REDIRECT EXAMINATION

BY MR. FALK:

Q. Mr. Yungman testified it was his recollection that Judge Dennis said that once he ruled from the bench, then he told you you could file an appeal. Did you hear Judge Dennis say that?

A. No, sir.

MR. FALK: No further questions.

THE COURT: Any cross?

MS. CLEVELAND: Nothing further.

THE COURT: You may step down. Thank you.

Anything else, Mr. Falk?

MR. FALK: We will rest.

THE COURT: Anything from the State?

MS. CLEVELAND: Nothing further, Your Honor.

THE COURT: Do the parties care to give a brief

summation?

MR. FALK: Your Honor, I think part of the problem here is that there may be a problem getting a copy of the PCR transcript, but I don't think that should necessarily cut off my client's rights here. I think Mr. Yungman acknowledged that he did not file the appeal. He, I think, was mistaken in his assumption that he no longer had really an obligation to Mr. Moses at the conclusion of the PCR hearing. And he did have an obligation to send him a copy of the decision. And in the event that the decision was wrong, to at least file notice of appeal.

I don't think we can necessarily hold my client to any type of standard that he should have known. And I think he really raises a good point, that when you are waiting for a decision on a -- when he appealed his trial court decision, the general sessions matter, there was a long time delay. So some amount of delay in actually getting a written order maybe is understandable. And at the end, I don't think we could hold my client to knowing that, you know, when that order should have come.

And also, I'm not sure that every judge necessarily, even when they rule from the bench, advises their clients -- excuse me. I'm not sure every circuit court judge -- and, of course, none of us were there when Judge Dennis was saying that, but as a practice -- and I've

done a couple of PCRs, I don't always hear the judge, even when ruling from the bench, to advise the applicant of the appellate rights, not like at the conclusion of a plea in a general sessions matter, at the end of an appeal -- I mean, at the end of a conviction in general sessions trial. So I think maybe he said it. Maybe he didn't say it, but I don't know.

THE COURT: Thank you, Mr. Falk.

Ms. Cleveland.

MS. CLEVELAND: Your Honor, just briefly. The State is going to argue that laches does apply here. Mr. Frasier waited nearly four years to file his appeal. Following Judge Dennis's PCR ruling, trial counsel -- plea counsel testified that Judge Dennis -- PCR counsel, I'm sorry, Judge Dennis did inform him of his right to appeal at the conclusion of the PCR hearing.

Your Honor, we are going to argue that the State is prejudiced by Mr. Frasier's waiting four years to file notice of appeal. At this time, we tried to acquire PCR transcripts from the clerk of court and that has been destroyed. So we don't have any record of the PCR hearing to go on. So we are going to argue that laches applies here and that this claim should be barred under that.

THE COURT: Thank you, Counsel. I'm going to take the time to review the record that we do have, along with

the record submitted. And I will notify you of an opinion.

MR. FALK: Thank you.

MS. CLEVELAND: Thank you.

(Whereupon, the proceedings are adjourned.)

CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter, Certified Realtime Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate and complete Transcript of Record of the proceedings.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter

Exhibit F

3C
AG-mail
AI
GS
SOL

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Moses Frasier, SCDC # 317940 Applicant	)	Case No.: 2016-CP-10-0359
v.	)	**ORDER GRANTING AUSTIN APPEAL**
State of South Carolina Respondent	)	

FILED
2018 APR 18 AM 11:21
JULIE J. ARMSTRONG
CLERK OF COURT

This matter is before the Court by way of an application for post-conviction relief ("PCR) filed on January 25, 2016 by Moses Fraiser ("Applicant"). Respondent submitted its Return on June 23, 2017, requesting an evidentiary hearing be held solely on the issue of whether or not Applicant was entitled to a belated appellate review of his first PCR action pursuant to Austin v. State, 305 S.C. 453 (1991). On February 1, 2018, an evidentiary hearing was convened at the Charleston County Courthouse. Applicant was present and represented by James Falk, Esquire. Rasheeda Cleveland, Esquire of the South Carolina Attorney General's Office, represented the State.

Before the Court were the records the Charleston County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the records from Applicant's prior post-conviction relief action, Applicant's appellate records, and the records from this post-conviction relief action.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. In June 2006, the Charleston County Grand Jury indicted Applicant for murder (2006-GS-10-4259). Beattie Butler, Esquire,

and Jason Mikell, Esquire, represented Applicant. Assistant Solicitors Nathan Williams and Kim Steele prosecuted the case. On October 2, ~~20106,~~ 2006 MM. Applicant proceeded to a jury trial the Charleston County Court of General Sessions before the Honorable James C. Williams, Jr. On October 5, 2006, Applicant elected to forego his jury trial and pled guilty to the lesser included offense of voluntary manslaughter. Judge Williams sentenced Applicant to imprisonment for a term of thirty years.

Applicant appealed and Jeffrey P. Bloom, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion on January 15, 2009. State v. Frasier, Op. No. 2009-UP-052 (S.C. Ct. App. filed January 15, 2009). The remittitur was returned to the circuit court on November 16, 2012.

Applicant filed his first application for PCR on February 27, 2009. Respondent made its return on July 7, 2009. An evidentiary hearing into the matter was convened on January 27, 2011, at the Charleston County Courthouse before the Honorable R. Markley Dennis, Jr. Applicant was present and was represented by Jeffrey J. Yungman, Esquire. Respondent was represented by Assistant Attorney General Matthew J. Friedman of the South Carolina Attorney General's Office. Judge Dennis issued an order of dismissal filed February 22, 2012.

Thereafter, on December 14, 2015, Applicant filed a *pro se* notice of appeal with the South Carolina Supreme Court challenging Judge Dennis's ruling. The Court issued an order dismissing the appeal for failure to timely serve the notice of appeal under Rules 243(a) and 203(b)(1) of the South Carolina Appellate Court Rules. The Remittitur was sent January 22, 2016.

II. ALLEGATIONS

In his application for post-conviction relief, Applicant alleges he is being held in custody

unlawfully for the following reasons:

1. Ineffective assistance of PCR Counsel.
    a. "Counsel did not file the PCR appeal within thirty days."
    b. "Applicant did not knowingly and intelligently waive his right to appellate review of the denial of his PCR."
    c. "Counsel is solely responsible for the appeal notice being filed."
    d. "This is only one of the steps that are shown that was violated by the PCR counsel in Applicant's case matters for the appeal."

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

On direct examination, Applicant testified that prior to his first PCR hearing he had only spoken with former PCR Counsel, Jeff Yungman once. He recalled that Judge Dennis denied his application from the bench but he never received an official order until three years later. Applicant further testified that during the three year wait be thought that maybe the Court had a change of heart and would grant him post-conviction relief. Applicant then testified that he wanted an appeal but PCR Counsel did not file one.

Applicant asserted that he never got a written court order until his mother contacted PCR. Applicant recalled that PCR Counsel attempted to file the notice of appeal after being contacted by Applicant's mother but the Court of Appeals denied the request and said it was untimely. Applicant further testified that he believed PCR Counsel did not know what to do because he had no prior PCR experience. Applicant stated that it was fine with him that PCR Counsel did not have any prior PCR experience. He further recalled that he did not hear that his case was denied until the late 2015, and that is when he filed the current action.

On cross-examination by the State, Applicant testified that it was three years before he inquired about the results of the hearing because he thought courts were just slow.

Former PCR Counsel testified that he was appointed to the case from the civil list. He stated that he thought he did not need to do anything else after the conclusion of the PCR

hearing. Former PCR Counsel further testified that he thought the court would send notice of the decision to Applicant and he did not think that he needed to do anything else in the case.

In closing argument, the State argued that Applicant's current application was barred by the equitable doctrine of laches. Specifically, the State argued that Applicant waited nearly four years to file a pro se notice of appeal and then to file a subsequent post-conviction relief action, and that Applicant's delay in filing prejudiced the because the previous records have been destroyed.

IV. APPLICABLE LAW

State law expressly authorizes the right to seek appellate review of the denial of post-conviction relief. See S.C. Code Ann. § 17-27-100 (1985). In the absence of an intelligent waiver by the applicant, counsel must advise the applicant of his appellate rights or comply with the procedure required by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) and Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petitioner the South Carolina Supreme Court for review of post-conviction relief issues pursuant to Austin v. State. See King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely 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).

Ineffective Assistance of PCR Counsel

The purpose of this hearing was to determine whether Applicant was denied the ability to appeal his PCR denial. The right to seek appellate review of a PCR denial is authorized by S.C. Code Ann. 17-27-100. Therefore, the issue here is whether Mr. Frasier was afforded the opportunity to appeal his first PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), is the leading case on the matter. The Austin Court found that where the petitioner claims that his counsel failed to file an appeal, an evidentiary hearing must be held to determine whether the petitioner requested and was denied an opportunity to seek appellate review.

This Court finds that failure to seek review of the denial of PCR is a sufficient basis for a claim of ineffective assistance of counsel, unless there was a knowing and intelligent waiver. If the court finds that petitioner was denied his right of appeal, petitioner should be grated the ability to seek appellate review. Here, because Applicant was never notified of the order, and never spoke with former PCR Counsel about appealing the ruling, the Court finds that there was no knowing and intelligent waiver and therefore Applicant must be allowed to appeal that finding.

Based upon the foregoing, this Court finds that the granting of an appeal of Applicant's first post-conviction relief action (2009-CP-10-1183) pursuant to Austin v. State is warranted.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be granted pursuant to Austin v. State; and

2. Within thirty days of the service of this Order, counsel for Applicant must file a Notice of Appeal to secure the appropriate appellate review of Applicant's first post-conviction relief action.

3. That Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 10 **day of** April **, 2018.**

MAITE D. MURPHY
Presiding Judge
Ninth Judicial Circuit

S. Gray, South Carolina

Exhibit G

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397
Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

June 21, 2018

Ms. Deborah Garrison
S. C. Court Administration
1220 Senate Street
Columbia, SC 29201

Dear Ms. Garrison:

Please provide us with the following transcript:

Moses Frasier v. The State — Case #: 2009-CP-10-01183
Appellate Case No. 2018-000739
County: Charleston — Date of Trial: January 9, 2012
Presiding Judge: R. Markley Dennis

Pursuant to the SC Court Reporter's Manual, please number the lines on the paper from 1-25 and include any and all recorded motions (pretrial and post-trial). Consecutive numbering of pages must be used throughout all volumes regardless of the number of volumes involved. Additionally, please transcribe the **jury selection** and the State and defense counsel's **opening and closing arguments** and include the **jury strike sheet**. Please be sure to include **headers** and a **complete index** including a **listing of exhibits**.

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

SCCID **prefers** that all transcripts are sent via **certified mail**. If you choose to send transcripts electronically, you must use the SC Department of Technology's file transfer service at **https://scfiledrop.sc.gov**. New users click the register button to sign up for the service. For assistance with registration or passwords, contact the SC Department of Technology Service Center at 803-896-0001, option 2.

To ensure prompt payment, please sign and complete the enclosed form and include the original criminal case number (indictment number) where the space is provided.

Sincerely,

Mary Brooks

cc: Megan H. Jameson, Esquire
S. C. Court Administration

Exhibit H

South Carolina Court Administration

South Carolina Supreme Court

Columbia, South Carolina

TONNYA K. KOHN
INTERIM DIRECTOR

1220 SENATE STREET,
SUITE 200
COLUMBIA, SOUTH
CAROLINA 29201
PHONE: (803) 734-1800
FAX: (803) 734-0269

June 28, 2018

Mary Brooks
Office of Indigent Defense
P.O. Box 11589
Columbia, SC 29211-1589

In re: Moses Frasier v. The State, 2009CP1001183

Dear Ms. Brooks:

This is in response to your letter dated June 21, 2018, addressed to Deborah Garrison, a court reporter previously employed by this office, requesting a transcript from proceedings heard on January 9, 2012. In maintaining court reporter records, we adhere strictly to Rule 607, which requires that court reporter records be kept for five years. Therefore, the records to prepare a transcript from proceedings heard before **June 2013** are no longer available. I am sorry that I cannot assist you further.

Sincerely,

Desiree R. Allen
Court Reporter Manager

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Maite Murphy, Circuit Court Judge

MOSES FRASIER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-000739

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion to Remand to Reconstruct the Record of Petitioner's Post-Conviction Relief Hearing in the above referenced case has been served upon opposing counsel, Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Moses Frasier, #317940, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 6th day of July, 2018.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 6th day of July, 2018.

Mary M (L.S.)

Notary Public for South Carolina
My Commission Expires: May 12, 2027.