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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable Edgar W. Dickson, PCR Judge

Appellate Case No. 2019-001099

RUSSELL MONTGOMERY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

SUPPLEMENTAL APPENDIX

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Deputy Chief Appellate Defender

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Attorney General

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ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RUSSELL MONTGOMERY,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1205 Pendleton Street, Room 306
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(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing appellant to be impeached with his prior robbery conviction where he was on trial for robbery, since the prejudicial effect of that conviction outweighed its probative value under Rule 403, SCRE, and the court failed to conduct the requisite State v. Colf analysis?

STATEMENT OF THE CASE

Appellant was indicted by the Orangeburg County grand jury for the offenses of kidnapping and armed robbery. R. 329. His case was called to trial on July 16, 2003, before the Honorable Edward B. Cottingham and a jury. Margaret Peggy Hinds represented appellant. The solicitor was Angela Garrick Avinger. R. 1.

The jury found appellant guilty of kidnapping and strong armed robbery. R. 309, ll. 4-14. Judge Cottingham sentenced appellant to consecutive sentences of twenty years for kidnapping and fifteen years for strong armed robbery. R. 323, l. 19 – 324, l. 2.

This appeal follows.

ARGUMENT

The court erred by allowing appellant to be impeached with his prior conviction for strong armed robbery where he was on trial for armed robbery and kidnapping. The judge did not conduct a *State v. Colf* analysis, and the prejudicial effect of the prior robbery conviction outweighed its probative value under Rule 403, SCRE.

The alleged victim, Travis Guess, was unemployed at the time he claimed appellant robbed him. Yet Guess had three hundred to five hundred dollars on his person, and drugs were found in his automobile. Petitioner would later testify he had a confrontation with Guess during a drug deal, and that Guess lied about being abducted. R. 99, l. 3 – 102, l. 24.

Guess testified the robber appeared outside his trailer with a T-shirt covering his face. However, Guess claimed he knew appellant was that robber because he recognized appellant's voice. Guess said appellant robbed him and then forced him to drive his car to a location near another trailer park where he ordered him to stop. R. 104, l. 10 – 107, l. 7.

Guess said he jumped out of the car while it was moving and escaped. The car, with appellant still in it, then crashed into a utility pole. R. 107, l. 7 – 109, l. 12.

Crack cocaine and marijuana were found inside Guess' car. However, no one was charged in connection with those drugs. R. 163, l. 5 – 166, l. 23.

Officer Leroy Ravenel testified he saw the car hit the utility pole. He said appellant handed him Guess' wallet and told him that Guess was the driver of the wrecked vehicle. Appellant told Ravenel that Guess had run away from the scene of the wreck. About five hundred dollars and the drugs mentioned above were located inside the car. R. 171, ll. 1-22; R. 201, l. 10 – 203, l. 18.

As stated, appellant testified he was involved in a drug deal with Guess. They had a confrontation over the drugs, and Guess wrecked his car. Appellant denied he kidnapped Guess or that he robbed him. R. 230, l. 2 – 241, l. 10.

An in camera hearing was held on appellant's prior record. The solicitor argued appellant had a 1993 conviction for strong armed robbery that could be used for impeachment purposes. Defense counsel argued the prejudicial effect of this impeachment evidence outweighed its probative value. The judge responded that the Supreme Court had held any conviction involving dishonesty was automatically admissible. R. 223, ll. 1-11.

Appellant was consequently impeached with his prior conviction for strong armed robbery. R. 242, ll. 6-8. The solicitor then went beyond the fact of the conviction itself to inquire of appellant -- "so, you're a thief?" R. 242, ll. 10-14.

Discussion

In State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003), this Court held that armed robbery is a crime of dishonesty. This Court then reasoned that a crime involving dishonesty is automatically admissible under Rule 609(a)(2).

In Al-Amin, this Court rejected the defendant's argument that a Rule 403, SCRE, analysis still had to be conducted where the conviction involved dishonesty. State v. Al-Amin is presently pending before the Supreme Court upon a petition for writ of certiorari.

Thus, the trial judge incorrectly reasoned that the Supreme Court had held that a Rule 403, SCRE, balancing test was not required where the crime involved dishonesty.

If a Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000), and State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000), analysis had been conducted, it would have been clear that appellant's prior strong armed robbery conviction should not have been admitted.

Appellant was on trial for robbery, and he had been convicted of same crime in the past. This impeachment evidence therefore had the very real possibility of having the jury impermissibly conclude appellant was yet again committing another robbery.

It was obvious that drugs were involved somehow in this case. Appellant's credibility as to whether this was a drug transaction gone bad, rather than a kidnapping and robbery, was crucial. See Green v. State, supra. Appellant's conviction should be reversed.

Respectfully submitted,


Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of October, 2004.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RUSSELL MONTGOMERY,

APPELLANT

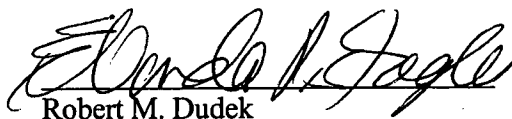
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Russell Montgomery states:

1. He is Assistant Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Edward B. Cottingham, which was held on July 16, 2003, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Russell Montgomery.

Respectfully submitted,



Robert M. Dudek
Assistant Appellate Defender

Attorney for Appellant.

This 5th day of October, 2004.

CERTIFICATE OF COUNSEL

I hereby certify that this final brief complies with Rule 211(b) of the South Carolina
Appellate Court Rules.


ROBERT M. DUDEK
Assistant Appellate Defender

1201 Pendleton Street, Room 306
Columbia, SC 29201

(803) 734-1330

Attorney for Appellant.

October 5, 2004

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

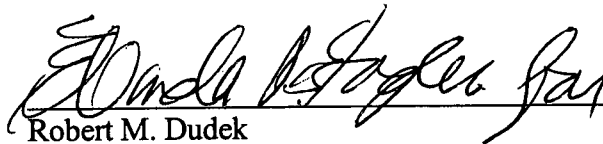
V.

RUSSELL MONTGOMERY,

APPELLANT

CERTIFICATE OF SERVICE

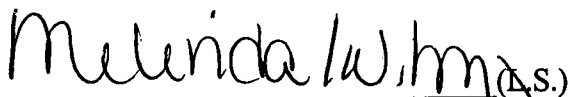
The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire; and a true copy of the Record on Appeal and Final Anders Brief of Appellant has been served upon Russell Montgomery, #294838 at Lieber Correctional Institution this 5th day of October, 2004.



Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of October, 2004.



Notary Public for South Carolina
My Commission Expires: November 16, 2008

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT
BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Russell Montgomery,

Appellant.

Appeal From Orangeburg County
Edward B. Cottingham, Circuit Court Judge

Unpublished Opinion No. 2005-UP-285
Submitted April 1, 2005 – Filed April 20, 2005

APPEAL DISMISSED

Assistant Appellate Defender Robert M. Dudek, of
Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy
Attorney General John W. McIntosh, and Assistant
Deputy Attorney General Salley W. Elliott, all of
Columbia; and Solicitor Robert Douglas Robbins, of
Summerville, for Respondent.

PER CURIAM: Russell Montgomery (Appellant) was convicted of kidnapping and strong-arm robbery. The trial court sentenced Appellant to consecutive terms of twenty years in prison for kidnapping and fifteen years in prison for strong-arm robbery.

On appeal, counsel for Appellant has filed a final brief along with a petition to be relieved as counsel. Appellant has not filed a pro se response. After a thorough review of the record pursuant to Anders v. California, 386 U.S. 738 (1967) and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss the appeal and grant counsel's petition to be relieved.

APPEAL DISMISSED.¹

GOOSLBY, HUFF, and STILWELL, JJ., concur.

¹ This case is decided without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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ATTORNEY GENERALS
OFFICE

APPEAL FROM ORANGEBURG COUNTY
Court of Appeals

Edward B. Cottingham, Circuit Court Judge

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APR 29 2005

The State, ... Respondent, SC Court of Appeals

v.

Russell Montgomery, ... Appellant.

PETITION FOR REHEARING

Appellant was indicted by the Orangeburg County grand jury for the offenses of kidnapping and armed robbery. On July 16, 2003, his case was called to trial before the Honorable Edward B. Cottingham, judge, and a jury. Appellant was represented by Margaret Peggy Hinds. The solicitor was one Angela Garrick Avinger. Tr. 1.

The jury found appellant guilty of kidnapping and strong armed robbery. Tr. 309, 4-14. Judge Cottingham sentenced appellant to consecutive sentences of twenty years for kidnapping and fifteen years for strong armed robbery. Tr. 323, 14-324, 2. Subsequently, a timely Notice of Appeal was filed.

On appeal, appellant was represented by Assistant Appellate Defender Robert M. Dudek of the South Carolina Office of Appellate Defense. Mr. Dudek raised one issue in an Anders brief and simultaneously petitioned to be relieved as counsel pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Appellant did not file any issues pro se and appellant's appointed counsels sole issue of whether the court erred in allowing appellant to be impeached with his prior conviction for strong armed robbery, while not conducting a State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000), analysis to determine if the prejudicial effect of the prior strong armed robbery conviction outweighed its probative value under Rule 403, SCRE, was submitted to this court on April 1, 2005. On April 20, 2005, appellants appeal was dismissed in a decision issued per curiam. Unpublished Opinion, No. 2005-UP-285.

Appellant now moves before this court in a Petition for Rehearing so that this court may consider points and prospectives in law not previously argued. Since this courts decision was issued per curiam, the reasoning behind this decision is not clear. However, appellant now respectfully asks that the Court consider the following.

In the Initial Anders Brief of Appellant, Mr. Dudek argued that the trial judge incorrectly reasoned that the Supreme Court had held that a Rule 403, SCRE, balancing test was not required were the crime involved dishonesty. In State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003), this court held that armed robbery is a crime of dishonesty. This Court then reasoned that a crime involving dishonesty is automatically admissible under Rule 609(a)(2).

In Al-Amin, this court declined to accept defendants argument that a Rule 403, SCRE, analysis still had to be conducted where the conviction involved dishonesty. Since State v. Al-Amin is currently pending before the Supreme Court upon

a petition for writ of certiorari, Mr. Dudek argued on behalf of appellant that the trial judge erred in incorrectly reasoning that the Supreme Court was already in conclusion in this matter and that if a Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000), and State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000), analysis had been conducted, it would have been evident that appellants prior strong armed robbery conviction should not have been admitted due to the dangers of having the jury impermissibly conclude appellant was yet again committing another robbery.

Appellant now respectfully request this Court to consider the additional and supportive argument of whether or not the actus reus element of a robbery charge is consistent enough, on a case-by-case basis, to place a robbery charge in the same context as those crimes involving per se crimen falsi and thereby rendering a Rule 403, SCRE, balancing test inapplicable.

Actus reus has been defined as "the wrongful deed that compromises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability ; a forbidden act ". Black's Law Dictionary, page 39 (eight edition). Appellant contends that it is the various nature of this element that requires a Rule 403, SCRE, balancing test to determine whether said robbery involves crimen falsi.

Crimen falsi has been defined as "[a] crime in the nature of perjury ". State v. Al-Amin, supra at 38. In doing as this court did in Al-Amin, appellant turns to the federal circuit courts for guidance in support of his position.

After reviewing the history of Rule 609 in United States v. Smith, 551 F.2d 348, 361-365 (D.C. Cir. 1976), the D.C. circuit held that robbery is not a crime of dishonesty per se under Rule 609(a)(2). In reaching its conclusion the court

noted the clear expression of intent found in the Congressional Conference Committee Report, which stated:

By the phrase "dishonesty and false statement " the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accuses propensity to testify truthfully.

H.R.Conf.Rep.No. 93-1597, 93d Cong., 2d Sess. 9, reprinted

in [1974] U.S. Code Cong. & Admin.News, pp. 7098,7103. In this case, according to the victim, appellant did not deceive the victim into believing he was anything other than an armed robber and did not indicate he was under any other pretense that appellant was anything but. Tr. 101, 3-12. The alleged act was one of brute force and intimidation, but not deceit or untruthfulness. There are no facts in this case suggesting that the prior strong armed robbery conviction was perpetrated by deceitful or fraudulent means. The actus reus element varies on a case-by-case basis and so appellant contends that a State v. Colf balancing test should be used to determine the if the probative value outweighs the prejudicial effect on a case-by-case basis for a robbery charge if a prior conviction is attempting to be introduced.

Although the this court declined to follow the federal courts' restrictive interpretation of the phrase "dishonesty or false statements " in Rule 609(a)(2) in Al-Amin, supra at 38, the appellant contends this was error and ask for consideration in this matter.

Russell Montgomery

Russell Montgomery #294838
Lieber CI, Wando C-261
P.O. Box 205
Ridgeville, SC 29472

April 28, 2005

OPPOSING COUNSEL:

Attorney General Office
Henry D. McMaster
P.O. Box 11549
Columbia, SC 29211

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 28 DAY OF April,

Yvette R. Brown

NOTARY PUBLIC
STATE OF SOUTH CAROLINA

MY COMMISSION EXPIRES

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court Of Appeals

Edward B. Cottingham, Circuit Court Judge

The State Respondent,

v.

Russell Montgomery Appellant.

PROOF OF SERVICE

I, Russell Montgomery, certify that I have served a Petition for Rehearing in the above-captioned case on Kenneth A. Richstad by depositing a copy of it in the United States Mail, via the South Carolina Department of Corrections Department of Mailroom Services personnel, postage prepaid, on April 28, 2005, addressed to the following address: SC Court Of Appeals Clerk of Court, Kenneth Richstad, 1015 Sumter Street, Post Office Box 11629, Columbia, South Carolina 29211.

April 27, 2005

Russell Montgomery

Russell Montgomery
Lieber CI / WC-261
P.O. Box 205
Ridgeville, SC 29472

Sworn To Before Me This

28 day of April

2005
[Signature]

NOTARY PUBLIC

My Commission Expires

8/20/06

The South Carolina Court of Appeals

The State,

Respondent,

v.

Russell Montgomery,

Appellant.

The Honorable Edward B. Cottingham
Orangeburg County
Trial Court Case No. 2002-GS-38-01573
2002-GS-38-01574

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

C. Vincent Groves J.

Thomas E. Huff J.

H. Kenneth Stith J.

Columbia, South Carolina

June 22, 2005



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JUL 28 2005 *close*
ATTORNEY GENERALS
OFFICE

The South Carolina Court of Appeals

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CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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July 27, 2005

REMITTITUR

The Honorable Lisa Mizell
190 Gibson Street
PO Box 9000
Orangeburg, SC 29116-9000

Re: The State v. Montgomery, Russell
2002-GS-38-01573
2002-GS-38-01574

Dear Ms. Mizell:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kenneth A. Richstad".

Kenneth A. Richstad
Clerk of Court

KAR/mc

cc: Assistant Appellate Defender Robert M. Dudek
Mr. Russell Montgomery, #294838
Assistant Deputy Attorney General Salley W. Elliott
Robert Douglas Robbins, Esquire

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Russell Montgomery # 294838)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

06-CP38-209

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 Correctional Institution
2. Name and location of Court which imposed sentence Orangeburg County General Sessions
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) 2002GS381573
 - (b) 2002GS381574
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) July 16, 2003

(b) Terms of Sentence: 20 years on kidnapping, consecutive to 15 years on strong arm robbery

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty X

(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. South Carolina Court of Appeals

ii. _____

iii. _____

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

i. Appeal Dismissed (unpublished opinion 2005UP-285)

ii. _____

iii. _____

(c) the date of each such result:

i. Submitted April 1, 2005 - Filed April 20, 2005

ii. _____

iii. _____

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

i. Unpublised Opinion 2005UP-285 (attached hereto and made a part hereof)

ii. _____

iii. _____

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

(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 Counsel

(b) _____

(c) _____

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

(a) Petitioner alleges that trial counsel failed to properly prepare for the trial of this case; failed to request continuance based on untimely receipt of discovery; failed to move to suppress evidence; failed to object to evidence and witnesses not timely revealed in response to discovery request; failed to object to impeachment evidence; failed to request exclusion of impeachment evidence; failed to object to improper questions by Solicitor; and such other grounds as may become apparent after a complete review of the record.

(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? 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. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

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?

No

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

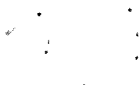
(b) the proceedings in which each ground was raised:

i. _____

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) _____
 - (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? yes
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. Margaret Peggy Hinds, Orangeburg County Public Defenders Office, Post Office Box 1112, Orangeburg, South Carolina 29116
 - ii. Robert Dudek, South Carolina Office of Appellant Defense, 1205 Pendleton Street, Room 306, Columbia, South Carolina 29209
 - iii. C. Bradley Hutto, P.O. Box 1084, Orangeburg, South Carolina 29116
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial and Sentencing
 - ii. Direct Appeal
 - iii. Preparation of PCR Application
19. State clearly the relief you seek in filing this application:
New Trial
20. Are you now under sentence from any other court that you have not challenged?
No



STATE OF SOUTH CAROLINA)

VERIFICATION

County of ORANGEBURG)

I, Russell Montgomery, 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.

Russell Montgomery

SWORN to and subscribed before me this 7
day of Feb., 2006.

Yvette Blume (L.S.)
Notary Public

My Commission Expires: 8/20/06

2006 FEB 21 PM 2:46

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

I, Russell Montgomery, 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.

Russell Montgomery
Applicant

SWORN or affirmed to and subscribed before me this
17 day of Feb., 2006

Yvette Blome
Notary Public

My Commission Expires: 8/20/06

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
	)	
	)	06-CP-38-209
	)	
Russell Montgomery, # 294838,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

The Respondent (the State), making its Return to the application for Post-Conviction Relief (PCR) filed February 21, 2006, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. The Applicant was indicted at the August 26, 2002 term of the Grand Jury for Orangeburg County for Kidnapping (02-GS-38-1573) and Strong Arm Robbery (04-GS-38-1574). He was represented by Margaret Hinds, Esquire. On July 16, 2003, the Applicant proceeded to trial after which he was found guilty of the charges. He was sentenced by the Honorable Edward B. Cottingham to confinement for consecutive periods of twenty (20) years for Kidnapping and fifteen (15) years for Strong Arm Robbery.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Montgomery, Op. No. 2005-UP-285 (S.C. Ct. App. filed April 20, 2005). The remittitur was sent down on July 27, 2005.

Attached herewith and incorporated herein by reference are the records of the Orangeburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the records from the Applicant's direct appeal and the trial transcript. Any of the above not so attached will be forwarded upon receipt.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. "Petitioner alleges that trial counsel failed to properly prepare for the trial of this case."
 - b. "Failed to move to suppress evidence."
 - c. "Failed to request continuance based on untimely receipt of discovery."
 - d. "Failed to move to suppress evidence."
 - e. "Failed to object to evidence and witnesses not timely revealed in response to discovery request."
 - f. "Failed to object to impeachment evidence."
 - e. "Failed to request exclusion of impeachment evidence."
 - g. "Failed to object to improper questions by Solicitor."

III.

The Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. *See Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland, 466 U.S. at 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.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. *See* Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that a hearing be held.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

LANCE S. BOOZER
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

Dec 7, 2006.

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Russell Montgomery, #294838,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

06-CP-38-209

**ORDER OF DISMISSAL
WITH PREJUDICE**

2007 MAR 13 AM 9:16

*C. Bradley Hutto, Esq. appearing for the Applicant.**Lance S. Boozer, Esq., Assistant Attorney General, appearing for the Respondent.*

This is a post-conviction relief (PCR) matter. The Applicant alleges in his PCR application filed February 21, 2006, that he is being held in custody unlawfully due to the ineffective assistance of trial counsel. An evidentiary hearing was convened at the Orangeburg County Courthouse on January 12, 2007.

I. PROCEDURAL BACKGROUND

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. The Applicant was indicted at the August 26, 2002 term of the Grand Jury for Orangeburg County for Kidnapping (02-GS-38-1573) and Strong Arm Robbery (04-GS-38-1574). He was represented by Margaret Hinds, Esquire. On July 16, 2003, the Applicant proceeded to trial after which he was found guilty of the

charges. He was sentenced by the Honorable Edward B. Cottingham to confinement for consecutive periods of twenty (20) years for Kidnapping and fifteen (15) years for Strong Arm Robbery.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Montgomery, Op. No. 2005-UP-285 (S.C. Ct. App. filed April 20, 2005). The remittitur was sent down on July 27, 2005.

II. APPLICABLE LAW

a. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler v. State. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v.

State, 300 S.C. at 117, 385 S.E.2d at 625, *citing Strickland*. Second, counsel's deficient performance must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Cherry v. State; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

III. SUMMARY OF TESTIMONY PRESENTED AT THE PCR EVIDENTIARY HEARING, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant and the Applicant's former trial counsel Margaret Hinds, Esquire testified at the PCR evidentiary hearing. The Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. 17-27-80 (1985), this Court makes the following findings of fact based upon all of the probative evidence presented.

Allegation of ineffective assistance of counsel for failing to investigate and for failing to suppress photos.

The Applicant testified that trial counsel was ineffective for failing to investigate a box containing drugs found in the victim's car and for failing to suppress photos introduced at trial. Applicant further testified that his defense was the incident was a drug deal gone bad and he wanted counsel to get fingerprints off the box containing the drugs. Trial counsel testified she requested a continuance, however, in her experience, she knew the trial judge to be tough on motions for continuance. Trial counsel further testified that because the evidence in this case was so strong, she

03 June

did not feel a continuance would have changed the outcome of the trial. Trial counsel indicated that she had enough time to prepare the case for trial. Trial counsel also testified that she does not remember Applicant asking for a fingerprint test on the box. She further testified that although she may have been able to impeach the victim's testimony based on the box of drugs, she is not sure this would have been valid or successful. Counsel also testified that she did not move to suppress the photos because she did not feel the photos were harmful to Applicant's case.

This Court finds that trial counsel's testimony was credible and the Applicant's testimony was not credible. This was a matter of trial strategy and not ineffective assistance of counsel. Where counsel articulates a valid strategic reason for her action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996). This Court also finds that trial counsel made all proper objections even though some were denied. This Court further finds that even if there were some error, the evidence against the Applicant was very strong and counsel's performance did not prejudice the Applicant. Accordingly, this allegation of ineffective assistance of counsel is denied.

Allegation of ineffective assistance of counsel for failing to request a continuance.

Applicant testified that trial counsel should have requested a continuance. Specifically, Applicant testified that he was told his fingerprints were on a gun found at the crime scene. Applicant further testified that the day before the trial, a fingerprint report was produced that indicated his prints were not on the gun. Applicant testified that he had no knowledge of this report and counsel should have requested a continuance.

Trial counsel testified that she received the fingerprint analysis right before trial. Trial counsel testified that she requested a continuance, however, in her experience, she knew the trial judge to be tough on granting continuances. Counsel further testified because the evidence was so

strong, she did not think more time would have affected the outcome of Applicant's trial. Counsel also indicated she was prepared for trial.

This Court finds that this was a matter of trial strategy and not ineffective assistance of counsel. Where counsel articulates a valid strategic reason for her action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996). This allegation of ineffective assistance of counsel is denied.

Miscellaneous allegations

As to any and all allegations which were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds that the Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that the Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice.

Applicant's Right to Appeal

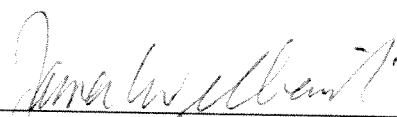
Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Appellate counsel is required to brief arguable issues in order to safeguard the right to appeal. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must file a Notice of Appeal on the Applicant's behalf. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.

IT IS THEREFORE ORDERED THAT:

1. The post-conviction relief application is **DENIED**.

2. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.

3. The Applicant is remanded to the custody of the Respondent for the completion of his sentence.



James C. Williams, Jr.
Presiding Judge,
First Judicial Circuit

Wailbath, South Carolina

Feb 26, 2007



STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
JAMES C. WILLIAMS, JR., CIRCUIT COURT JUDGE

RUSSELL MONTGOMERY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Did the PCR court err in refusing to find trial counsel ineffective for failing to ascertain if the victim's fingerprints could be identified on a box containing narcotics found in the car where the kidnapping and robbery allegedly took place?

STATEMENT

In August 2002, the Orangeburg County Grand Jury indicted Montgomery for armed robbery and kidnapping, indictments # 02-GS-38-1573, 1574. On July 16, 2003, Montgomery proceeded to jury trial before the Honorable Edward B. Cottingham. The jury returned verdicts of guilty of kidnapping and the lesser included offense of strong armed robbery. Judge Cottingham sentenced Montgomery to 20 year for kidnapping and a consecutive 15 years for strong armed robbery. The South Carolina Court of Appeals confirmed the conviction and sentence. State v. Montgomery, Op. No. 2005-UP-285 (S.C.Ct.App. filed April 20, 2005).

On February 21, 2006, Montgomery filed an application for post conviction relief. On January 12, 2007, an evidentiary hearing was held before the Honorable James C. Williams, Jr. In a written order signed February 26, 2007, Judge Williams dismissed the application and denied relief. A timely notice of intent to appeal was filed on March 20, 2007. This petition follows.

ARGUMENT

The PCR court erred in refusing to find trial counsel ineffective for failing to ascertain if the victim's fingerprints could be identified on a box containing narcotics found in the car where the kidnapping and robbery allegedly took place.

At trial Montgomery testified that he was riding with Travis Guess, the victim, when the two men had a dispute over some drugs in a box. (App. pp. 232-233). The driver, Mr. Guess, jumped out of the car and the car wrecked. Officer Ravenell testified that he detained Montgomery at the scene of the accident. (App. p. 173, lines 16-18). Officer Ravenell testified that a cigar box containing a green leafy substance which appeared to be marijuana and white rock like substances that appeared to be crack cocaine was found in the car. (App. p. 201, lines 2-16). Officer Ravenal testified that he did not charge Guess or Montgomery with the drugs. (App. p. 202, lines 1-25). Mr. Guess denied ownership of the drugs found in his car. (App. p. 203, lines 1-25).

During the PCR hearing Montgomery testified that he asked counsel to have the box tested for Guess's finger prints. (App. p. 344, lines 2- p. 345, lines 1-4). Montgomery's defense that this was a dispute over drugs rather than a kidnapping robbery would have been strengthened if Guess's fingerprints were found on the drug box. Additionally, counsel could have impeached Guess with the information had he denied knowledge of the box. Counsel admitted that she did not have the box tested for Guess's fingerprints. (App. p. 363, lines 1-3). The PCR court erred in refusing to find counsel ineffective for failing to ascertain if Guess's fingerprints were on the drug box.

Judge Williams' final order does not specifically address the issue involving trial counsel's failure to test the drug box for Guess's fingerprints. The order states, "As to any and all allegations which were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds that the Applicant failed to present any

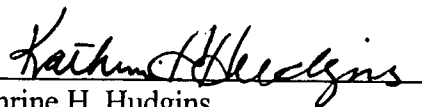
probative evidence regarding such allegations. Accordingly, this court finds that the Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice.” The PCR judge erred in finding that Montgomery failed to present probative evidence regarding counsel’s failure to test the drug box for Guess’s finger prints.

The failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). While fingerprint evidence was not presented at the PCR hearing, it is clear that counsel’s failure to test the drug box for the victim’s fingerprints falls below an objective standard of reasonableness under professional norms. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Montgomery was prejudiced by the deficient performance. As argued at the PCR hearing, Montgomery’s defense would have been strengthened if Guess’s finger prints had been found on the drug box. Additionally, the information could have been used to impeach Guess had he denied knowledge of the box. If the victim’s finger prints had not been found on drug box, Montgomery may have considered entering into plea negotiations that would have resulted in a sentence of less than the 45 years imposed.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kathrine H. Hudgins", is written over a horizontal line.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of January, 2008.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
JAMES C. WILLIAMS, JR., CIRCUIT COURT JUDGE

RUSSELL MONTGOMERY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

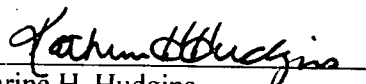
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Russell Montgomery states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on January 12, 2007. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Russell Montgomery.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of January, 2008

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
JAMES C. WILLIAMS, JR., CIRCUIT COURT JUDGE

RUSSELL MONTGOMERY,

PETITIONER,

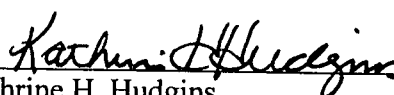
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

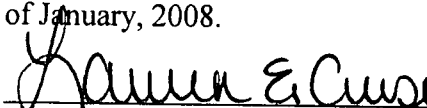
CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Lance Boozer, Esquire, and Russell Montgomery, #294838, Lieber Correctional Institution, this 10th day of January, 2008.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day
of January, 2008.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: August 23, 2014.

The State of South Carolina **ORIGINAL**
In The Supreme Court

APPEAL From ORANGEBURG County
JAMES E. WILLIAMS, Jr Circuit Court Judge

RUSSELL Montgomery,
 #294838

PETITIONER,

v.

STATE of South Carolina,

RESPONDENT,

PETITION For WRIT OF HABEAS

PRO-SE Brief

RUSSELL Montgomery #294838
 Wando-C-260
 Lieber Corn. Inst
 P.O. Box 205
 Ridgely S.C.
 29412

The State of South Carolina
IN THE Supreme Court

APPEAL From ORANBURG County
JAMES C. WILLIAMS, Jr Circuit Court Judge

RUSSELL MONTGOMERY
#294838

PETITIONER,

V

STATE of South Carolina

RESPONDENT.

CERTIFICATE of SERVICE

I certify that I Russell Montgomery have
filed a copy of my pro-se Brief with the Clerk
of Court Daniel E. Shearouse, by depositing a
copy of it in the United States Mail this day
on this date. 1-28-08

The State of South Carolina
IN The Supreme Court

APPEAL From ORANGEBURG County
JAMES C. WILLIAMS, Jr Circuit County Judge

RUSSELL MONTGOMERY,
 #294838

PETITIONER,

V,

State of South Carolina

RESPONDENT.

PETITION For Writ of Certiorari
PRO-SE BRIEF

I request that the Court please forward
 a copy of my Pro-se Brief to the
 Attorney General.

MR. LANCE BOOZER
 ASST. Attorney General
 P.O. BOX 11649
 Columbia, SC 29211

Russell Montgomery #294838
 Wando-C-261
 Lieber Corr. Inst
 P.O. Box 205
 Wando, SC 29492

In August 2002 the Orangeburg County Grand Jury indicted Montgomery for armed robbery and kidnapping, indictments # 02 BS-32-1573, 1574. On July 16, 2003, Montgomery proceeded to jury trial before the Honorable Edward B. Cottingham. The jury returned verdicts of guilty of kidnapping and the lesser included offense of strong armed robbery. Judge Cottingham sentenced Mr. Montgomery to 20 years for kidnapping and a consecutive 15 years for strong armed robbery. The South Carolina Court of Appeals confirmed the conviction and sentence. State v. Montgomery, Op. No 2005-UP-285 (S.C. Ct. App. Filed April 20, 2005.)

On February 21, 2006 Montgomery filed an application for post conviction relief. On January 12, 2007 an evidentiary hearing was held before the honorable James E. Williams Jr. In a written order signed February 26, 2007 Judge Williams dismissed the application and denied motion for attorney's fees.

Was filed on March 20, 2017. This petition ⁵⁴law

Issue PRESENTED

- (I) Did the P.C.R. Court err in refusing to find Trial Counsel ineffective for failing to investigate and for failing to suppress photos.
- (II) Did the P.C.R. Court err in refusing to find Trial Counsel ineffective for failing to request a continuance.
- (III) Counsel was ineffective for failing to request a disclosure of the Brady motion that would have proven that there was no evidence of Gun Power (residue) on the petitioners clothes.

(1) P.C.R. Court even in refusing to find 55
Trial Counsel ineffective for failing to
Investigate, and for failing to suppress photos.

Trial Counsel was ineffective for failing to
Investigate a box containing drugs found in
the victim's car and failing to suppress
photos introduced at trial. This was clearly
a drug deal gone bad. Had Trial Counsel
concentrated on this defense there is a
strong probability that petitioner's trial
would have turned out differently.

According to Rule 7(b) Trial Counsel
failed to file a notice of continuance.
Trial Counsel testified that she requested a
continuance, however in her experience, she
claim she knew the trial judge to be
tough on motion for continuance. Trial
counsel also testified that because the
evidence in this case was so strong, she
did not feel a continuance would have
change the outcome of the trial.
Trial Counsel representation became
deficient when she took it upon herself

to second⁴ guess a decision⁵⁶ that should have been left up to the trial judge to decide. and that is whether the petitioner deserve a continuance to further investigate his case. This matter of trial strategy was ineffective assistance of counsel where trial counsel did not articulated a valid strategy or reason for her action or inaction. Counsel's performance should be found ineffective.

(II) ~~PCR~~ Court err in refusing to find trial counsel ineffective for failing to request a continuance.

Petitioner testified that trial counsel should have requested a continuance. petitioner specifically testified that he was told that his fingerprints were on a gun found at the crime scene. Petitioner further testified that the day before the trial, a fingerprint report was produced that indicated his prints were not on the gun. Petitioner testified that he had no knowledge of this report and counsel

Should have requested a Continuance.
Trial Counsel failed petitioner because
this evidence was the (crux) of the
whole case which would have gone to
the favor of the petitioner.

P.C.R. judge err when he found
that trial counsel was not ineffective
for failing to file a motion for a
Continuance.

(III) Counsel was ineffective for failing to request
a disclosure of the Brady Motion that would
have proven that there was no evidence of
Gun power (residue) on the petitioner's clothes

P.C.R. Transcript (Line 9-25-1) And first of
all they didn't actually notify your Attorney
that the case was going to be tried until
the Friday before. Is that correct? Yes Sir.
And given that, Did you feel like you
had significant time to get ready for
your trial that was going to be three
days later? NO Sir.

Alright. And furthermore, on the Monday Before The trial Started on Tuesday A. Witness Statement that had previously, The Existence of which had previously been denied by the State All of a Sudden Showed up, is that right? (yes Sir) And They didn't Turn that Over until The Monday before Trial? (yes Sir) And photographs That nobody knew about Didn't Appear until The Monday Trial, is that right? (yes Sir) And Then The fingerprints on the Gun That we just talked about also didn't show up until the day before trial is that right? (yes Sir)

According to the Brady motion Rule #3) Any books, paper, documents, photographs tangible objects, building, places, copies or portions thereof which are within the possession, custody or control of the prosecution, and which are material to the preparation of the defense or

are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant must be turned over to the defendant in a timely manner so the defendant can prepare to defend himself.

This did not happen defendant informed Trial Counsel that the in question of the incident that the policeman took from him his cloth and his shoes to check for gun powder. But what was rather strange is that these ~~my~~ clothes and shoes were never produced at the trial. Which would have proven favorable for the defendant.

Defendant was prejudiced by the omission of the trial counsel to request for the Brady Motion. The admission of this evidence was too late.
① The photographs coming in late, and

60

(8)

The witness statement that had been denied by the court coming in late, and the fact that there was no evidence to support the fact that there was no gun powder found on the clothes or the shoes. This prejudices the defendant because the clothes nor the shoes were presented at trial. This supports the defendant claim as it relates to his trial (Counsel's failure to vigorously pursue a continuance

Criminal Law - (Moore 2.1)

Brady material must be disclosed in time for its effective use at trial
Leray v. Port 257 F.3d 89 (2001)
United State v. Payne, 63 F.3d 1200 (2d Cir 1995) under brady and its progeny the government has affirmative duty to disclose favorable evidence known to it, even if no specific disclosure request is made by the defence.

(9)

61

The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government investigation. Where the government suppression of evidence amounts to a denial of due process, The prosecutor's good faith or lack of bad faith is irrelevant.

Counsel was ineffective for failing to request a Brady motion, and in so not doing this, prejudice her client and the defendant ask that the Supreme reverse the P.C.R. Court decision and find that Counsel was ineffective Assistance of Counsel, and by being ineffective that she also prejudiced her client.

We pray that the Court find in favor of the defendant.

S/ Russell Montgomery
RUSSELL MONTGOMERY
#294838

RECEIVED
JAN 29 2008
S.C. SUPREME COURT

Sworn And Subscribed Before me
This — Day of — 20 02

Notary Public

my Commission Expires _____

The South Carolina Court of Appeals

Russell Montgomery,

Petitioner,

V.

State of South Carolina,

Respondent.

ORDER

This matter is before the Court on a petition for a writ of certiorari following the denial of Petitioner's application for post-conviction relief.

Petitioner's counsel asserts that the petition is without merit and requests permission to withdraw from further representation. Petitioner has filed a pro se petition.

After careful consideration of the entire record as required by Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), we deny the petition and grant counsel's request to withdraw.

Thomas E. Huff

16 R 62

U. Ke

Columbia, South Carolina

Jan. 30, 2009

FILED

Jan 30, 2009



The South Carolina Court of Appeals

JEANETTE F. BARBER
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29201
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February 20, 2009

REMITTITUR

The Honorable Winnifa Brown-Clark
190 Gibson Street
PO Box 9000
Orangeburg, SC 29116

Re: Montgomery, Russell v. The State
2006-CP-38-00209

Dear Mrs. Brown-Clark:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

A handwritten signature in cursive script that reads "V. Claire Allen".

V. Claire Allen
Deputy Clerk of Court

VCA/lm

cc: Appellate Defender Kathrine H. Hudgins
Russell Montgomery #294838
Assistant Attorney General Lance S. Boozer

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Russell Montgomery, #294838,

Petitioner,

vs.

McKither Bodison,

Respondent.

) C/A No. 6:09-778-HMH-WMC

) **ATTORNEY GENERAL'S OFFICE**

) RECEIVED 4-17-09

) ADMINISTRATIVE INSTRUCTIONS

) 294838 FILE ✓ OPEN ✓ END

) **ORDER**

) HAVE ✓ COPIES MADE

) ROUTE TO Melody

) ORDER: ✓ TRANSCRIPT

) PEN RECORDS ✓ CLERK RECORDS ✓

This is an action seeking habeas corpus relief under 28 U.S.C. § 2254. The Petitioner is a prisoner. Therefore, in the event that a limitations issue arises, the Petitioner shall have the benefit of the holding in *Houston v. Lack*, 487 U.S. 266 (1988) (prisoner's pleading was filed at the moment of delivery to prison authorities for forwarding to District Court). Under Local Rule 73.02(B)(2), pretrial proceedings in this action have been referred to the assigned United States Magistrate Judge.

By Order filed on April 3, 2009, the Petitioner was given a specific time frame in which to bring this case into proper form. The Petitioner has complied with the Court's Order, and this case is now in proper form.

TO THE CLERK OF COURT:

The Clerk of Court shall serve the 28 U.S.C. § 2254 petition and this Order upon the Respondent. Rule 4 of the Rules Governing Section 2254 Cases also requires service on "the attorney general or other appropriate officer of the state." The Attorney General of the State of South Carolina and the General Counsel of the South Carolina Department of Corrections shall each receive a copy of this Order and a copy of the 28 U.S.C. § 2254 petition through the Electronic Case Filing System.

The Office of the Clerk of Court shall not enter any change of address submitted by the Petitioner which directs that mail be sent to a person other than the Petitioner unless that person is an attorney admitted to practice before this Court who has entered a formal appearance.

TO THE RESPONDENT:

The Respondent shall file an answer or other response to the petition as soon as reasonably possible but no later than fifty (50) days from the date of service. See, e.g., *Kramer v. Jenkins*, 108 F.R.D. 429, 430-33 (N.D. Ill. 1985) (court has discretionary

authority to fix time for response to habeas corpus). The Respondent shall file all dispositive motions no later than forty-five (45) days after the answer is filed. With respect to dispositive motions by the Respondent, this Order shall serve as a scheduling order. See *Forstmann v. Culp*, 114 F.R.D. 83 (M.D.N.C. 1987).

TO THE PETITIONER:

Pursuant to Rule 5 of the Federal Rules of Civil Procedure, any documents filed subsequent to the initial pleading must be served on parties. Unless otherwise ordered, service of subsequently filed documents on a Respondent represented by an attorney is made on the attorney. Service on attorneys who have made an appearance in this Court is effected by the Court's Electronic Case Filing system through a computer generated notice of electronic filing. However, prior to the Respondent's attorney making an appearance in this Court, the Petitioner must serve the Respondent with any documents the Petitioner files subsequent to the initial pleading and file a certificate of service that states who was served, what document was served, and how the document was served.

IT IS SO ORDERED.

s/William M. Catoe
United States Magistrate Judge

April 17, 2009
Greenville, South Carolina

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

RECEIVED
USDC CLERK, COLUMBIA, SC

United States District Court		District	<u>South Carolina</u>
Name (under which you were convicted):		Docket or Case No.:	
<u>Russell Montgomery</u>		<u>02-GS-38-1573, 1574</u>	
Place of Confinement:		Prisoner No.:	
<u>Lieber</u>		<u>294838</u>	
Petitioner (include the name under which you were convicted)		Respondent (authorized person having custody of petitioner)	
<u>Russell Montgomery</u>		<u>Mc Kither Bodison</u>	
The Attorney General of the State of		<u>Henry Mc Master</u>	

PETITION

- (a) Name and location of court that entered the judgment of conviction you are challenging: Orangeburg County General Session

(b) Criminal docket or case number (if you know): 02-GS-38-1573, 1574
- (a) Date of the judgment of conviction (if you know): July 16, 2003

(b) Date of sentencing: July 16, 2003
- Length of sentence: 35 years
- In this case, were you convicted on more than one count or of more than one crime? Yes ☒ No ☐
- Identify all crimes of which you were convicted and sentenced in this case: Strong Arm Robbery, Kidnapping
- (a) What was your plea? (Check one)

(1) Not guilty ☒	(3) Nolo contendere (no contest) ☐
(2) Guilty ☐	(4) Insanity plea ☐

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? _____

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ☒ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court: S.C. Appeal

(b) Docket or case number (if you know): UNKNOWN

(c) Result: AFFIRM

(d) Date of result (if you know): April 30, 2005

(e) Citation to the case (if you know): 2005-UP-285

(f) Grounds raised: Whether the Courts erred by allowing Appellant to be impeached with his prior Robbery Conviction, where he was on trial for Robbery. Since the prejudicial effect of that conviction out weight its probative value under Rule 403, S.C.A.E., And the Court failed to conduct the requisite State-V-Cole Analysis?

(g) Did you seek further review by a higher state court? Yes ☒ No ☐

If yes, answer the following:

(1) Name of court: N/A

(2) Docket or case number (if you know):

(3) Result:

(4) Date of result (if you know): N/A

(5) Citation to the case (if you know): N/A

(6) Grounds raised: N/A

(h) Did you file a petition for certiorari in the United States Supreme Court?

Yes ☐ No ☒

If yes, answer the following:

(1) Docket or case number (if you know): N/A

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☒ No ☐

(7) Result:

(8) Date of result (if you know):

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☐

(7) Result: N/A

(8) Date of result (if you know): N/A

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: South Carolina Supreme Court

(2) Docket or case number (if you know): Unknown

(3) Date of filing (if you know): Jan 10, 2008

(4) Nature of the proceeding: PCR Appeal

(5) Grounds raised: Did the PCR Court err in refusing to find trial Counsel ineffective for failing to ascertain if the victim finger prints could be identified on a box containing narcotics found in the car where the kidnapping and robbery took place.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☐

(7) Result: Conviction, Sentence Confirmed

(8) Date of result (if you know): Jan 30 2009

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ☐ No ☒

(2) Second petition: Yes ☐ No ☒

(3) Third petition: Yes ☒ No ☐

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

N/A

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Ineffective Assistance Counsel

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Counsel failed to: request continuance, failed to suppress evidence, failed to object to evidence and witness not truly revealed in response request; object to impeachment evidence, failed to request exclusion of impeachment evidence, failed to object to improper questions by Solicitor,

(b) If you did not exhaust your state remedies on Ground One, explain why: _____

Exhausted

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

wasn't available until PCR

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: PCR Application

Name and location of the court where the motion or petition was filed: _____

Orangeburg County Court of Common Pleas

Docket or case number (if you know): 2006-CP-38-209

Date of the court's decision: Feb. 26 2007

Result (attach a copy of the court's opinion or order, if available):

UNAVAILABLE

(3) Did you receive a hearing on your motion or petition?

Yes ☒ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

SC Supreme Court, Writ of Cert.

Docket or case number (if you know): UNKNOWN

Date of the court's decision: Jan 30 2009

Result (attach a copy of the court's opinion or order, if available):

UNAVAILABLE

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

NONE

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

whether the Courts erred by allowing Appellant to be impeached with his prior Robbery Conviction. Where he was on trial for Robbery, since the prejudicial effect of that conviction out weighted it's probative value under Rule 403 S.C.R.E, And the Court Failed to Conduct the

Requisite. State-V-Colf Analysis?

(b) If you did not exhaust your state remedies on Ground Two, explain why: _____

EXHAUSTED

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

NA

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☒

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: NA

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): NA

Date of the court's decision: NA

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☒

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

SC Court Appeal Direct Appeal

Docket or case number (if you know): unknown

Date of the court's decision: April 20, 2005

Result (attach a copy of the court's opinion or order, if available):

UNAVAILABLE

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

GROUND THREE: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

(b) If you did not exhaust your state remedies on Ground Three, explain why:

N/A

(c) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: N/A

GROUND FOUR: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Four, explain why: N/A

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

N/A

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

N/A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

N/A

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ☒ No ☐

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: N/A

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: NO

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. _____

N/A

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: N/A

(b) At arraignment and plea: N/A

(c) At trial: Peggy Hinds

(d) At sentencing: Peggy Hinds

(e) On appeal: Robert Duda

(f) In any post-conviction proceeding: Brad Hutto

(g) On appeal from any ruling against you in a post-conviction proceeding: Katharine H. Hudgins

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: NA

(b) Give the date the other sentence was imposed: NA

(c) Give the length of the other sentence: NA

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ☐ No ☒

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.* NA

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(continued...)

Therefore, petitioner asks that the Court grant the following relief: _____

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____ (month, date, year).

Executed (signed) on _____ (date).

Signature of Petitioner

* (...continued)

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. _____

IN FORMA PAUPERIS DECLARATION

[Insert appropriate court]

Page 15

Therefore, petitioner asks that the Court grant the following relief: _____

Grant this Habeas Petition OR in the
Alternative

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct
and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on

4-10-09 (month, date, year).

Executed (signed) on 4-10-09 (date).

Russell Montgomery
Signature of Petitioner

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USDC CLERK, GREENVILLE, SC
2009 APR 13 A 9:03

* (...continued)

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA**

Russell Montgomery, #294838,	)	
	)	C/A No. 6:09-778-HMH-WMC
Petitioner,	)	
vs.	)	RETURN AND MEMORANDUM OF
	)	OF LAW IN SUPPORT OF MOTION
McKither Bodison,	)	FOR SUMMARY JUDGMENT
	)	
Respondent.	)	
	)	

On April 17, 2009, the Honorable William M. Catoe, United States Magistrate Judge, issued an order directing Respondent to file a return or other response to the *pro se* Petition for Writ of Habeas Corpus filed by Petitioner. Respondent now submits this Return and Memorandum of Law in Support of Motion for Summary Judgment, in conjunction with a Motion for Summary Judgment also filed this same day, and asserts the petition should be summarily dismissed as the record conclusively shows Petitioner is not entitled to any relief. In making the return, and in support of the motion for summary judgment, Respondent respectfully submits the following:

PROCEDURAL HISTORY

Petitioner is currently incarcerated in Lieber Correctional Institution pursuant to an order of commitment from Orangeburg County. Petitioner was indicted in August 2001 for Kidnapping and Armed Robbery. (PCR App. pp. 327-330). Margaret Peggy Hinds, Esq., represented Petitioner on the charges. A jury trial was held July 16, 2003, before the Honorable Edward B. Cottingham. The jury convicted Petitioner of kidnapping and the lesser offense of strong arm (i.e. common law) robbery. (PCR App. p. 309). Judge Cottingham sentenced Petitioner to twenty (20) years imprisonment for kidnapping, and fifteen (15) years, consecutive, for robbery. (PCR App. pp. 323-324). Petitioner appealed.

Robert M. Dudek, Assistant Appellate Defender of the South Carolina Office of Appellate Defense, represented Petitioner on appeal. On October 5, 2004, appellate counsel filed a Final *Anders*¹ Brief of Appellant in the South Carolina Court of Appeals, and raised the following issues:

The court erred by allowing appellant to be impeached with his prior conviction for strong armed robbery where he was on trial for armed robbery and kidnapping. The judge did not conduct a *State v. Colf* analysis, and the prejudicial effect of the prior robbery conviction outweighed its probative value under rule 403, SCRE.

(*Anders* Brief, p. 5).

Appellate counsel also moved to be relieved of appointment as “in his opinion, the appeal is without legal merit sufficient to warrant a new trial.” (*Anders* Brief, p. 8). On October 7, 2004, the Clerk of the South Carolina Court of Appeals advised Petitioner of his right to also file a *pro se* brief. Petitioner did not file a *pro se* brief. On April 20, 2005, the South Carolina Court of Appeals issued an unpublished opinion dismissing the appeal. *State v. Montgomery*, Unpublished Opinion No. 2005-UP-285 (S.C.Ct.App. filed April 20, 2005). Petitioner filed a petition for rehearing on April 29, 2005, that was denied on June 22, 2005. The South Carolina Court of Appeals issued the remittitur on July 27, 2005.

On February 21, 2006, Petitioner filed an application for post-conviction relief (“PCR”), in which he alleged ineffective assistance of counsel in the following particulars:

Petitioner alleges that trial counsel failed to properly prepare for the trial of this case; failed to request continuance based on untimely receipt of discovery; failed to move to suppress evidence; failed to object to evidence and witnesses not timely revealed in response to discovery request; failed to object impeachment evidence; failed to

¹ *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

request exclusion of impeachment evidence; failed to object to improper questions by Solicitor; and such other grounds as may become apparent after a complete review of the record.

(PCR App. p. 333).

C. Bradley Hutto, Esq., represented Petitioner in the action. The State made its return on or about December 7, 2006. An evidentiary hearing was held January 12, 2007, before the Honorable James C. Williams, Jr. On February 26, 2007, Judge Williams issued an order denying relief. (PCR App. pp. 374-379). Petitioner appealed the denial of relief.

Kathrine H. Hudgins, Appellate Defender of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Petitioner on appeal. On January 10, 2008, appellate counsel filed a *Johnson*² Petition for Writ of Certiorari in the Supreme Court of South Carolina, and raised the following issue:

Did the PCR court err in refusing to find trial counsel ineffective for failing to ascertain if the victim's fingerprints could be identified on a box containing narcotics found in the car where the kidnapping and robbery allegedly took place?

(*Johnson* Petition, p. 2).

Appellate counsel also moved to be relieved of appointment as “[i]n her opinion seeking certiorari from the order of dismissal is without merit.” (*Johnson* Petition, p. 7). By letter dated January 11, 2008, the Clerk of the Supreme Court of South Carolina advised Petitioner of his right to file a *pro se* response. On January 18, 2008, the State filed a letter in lieu of a formal return. On

² The Supreme Court of South Carolina “has approved the withdrawal of counsel in meritless post-conviction appeals, provided the procedures outlined in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), were followed.” *Johnson v. State*, 294 S.C. 310, 310, 364 S.E.2d 201, 201 (1988). The state court adheres to this requirement even though the United States Supreme Court has held, in *Pennsylvania v. Finley*, 481 U.S. 551(1987), that such a review is not required. *Id.*

January 29, 2008, Petitioner filed a *pro se* brief and raised the following issues:

- (1) Did the PCR court err in refusing to find Trial Counsel Ineffective for failing to investigate and for failing to suppress photos.
- (2) Did the PCR court err in refusing to find trial counsel ineffective for failing to request a continuance.
- (3) Counsel was ineffective for failing to request a disclosure of the Brady Motion that would have proven that there was no evidence of gun power [sic] (residue) on the petitioner's clothes.

(*Pro se* Brief, "Issue Presented").

By Order dated July 11, 2008, the Supreme Court transferred the case to the South Carolina Court of Appeals. On January 30, 2009, the South Carolina Court of Appeals denied the petition granted appellant counsel's request to withdraw. The Court of Appeals issued the remittitur on February 20, 2009.

Attached and incorporated by reference are the following documents:

1. PCR Appendix, containing:
 - a. July 16, 2003 Trial Transcript;
 - b. Indictments;
 - c. 2006 PCR Application;
 - d. January 12, 2007 PCR Hearing Transcript;
 - e. Order of Dismissal With Prejudice;
2. Direct Appeal Documents, including: Final *Anders* Brief of Appellant; October 7, 2004 Letter advising of right to file *pro se* brief; *State v. Montgomery*, Unpublished Opinion; Petition for Rehearing; June 22, 2005 Order (denying Petition for Rehearing); July 27, 2005 Remittitur.
3. 2006 PCR Action Return;

4. 2006 PCR Action Appeal Documents, including: *Johnson* Petition for Writ of Certiorari; January 11, 2008 Letter advising of right to file *pro se* response; January 18, 2008 Letter in lieu of return; *pro se* brief; July 11, 2008 Order (transferring case to Court of Appeals); January 30, 2009 Order (denying petition); February 20, 2009 Remittitur.

GROUND FOR RELIEF

In his *pro se* Petition for Writ of Habeas Corpus, Petitioner makes the following claims of error:

Ground One: Ineffective Assistance of Counsel.

Supporting facts: Counsel failed to: request continuance, failed to suppress evidence, failed to object to evidence and witness not timely revealed in response request; object to impeachment evidence, failed to request exclusion of impeachment evidence, failed to object to improper questions by Solicitor.

Ground Two: [no ground specified].

Supporting facts: Whether the courts erred by allowing Appellant to be impeached with his prior Robbery Conviction. Where he was on trial for Robbery, since the prejudicial effect of that conviction outweighed its probative value under Rule 403 S.C.R.E., And the Court failed to conduct the requisite. State -v-Colf Analysis?

(Habeas Petition, pp. 6-8).

EXHAUSTION OF STATE REMEDIES

It appears Petitioner meets the exhaustion requirement of 28 U.S.C. § 2254 (b)(1)(A). A convicted defendant seeking relief in state court has two basic remedies he may pursue - - direct appeal and post-conviction relief. *See generally Dunlap v. State*, 371 S.C. 585, 585-586, 641 S.E.2d 431, 431 (2007)(recognizing both avenues in discussing the exhaustion of state remedies). *See also*

State v. Miller, 289 S.C. 426, 427, 346 S.E.2d 705, 706 (1986)(“the right to appeal a criminal conviction is conferred by statute”); S.C. Code § 14-3-330 (providing for appellate jurisdiction for correction of errors of law); Rule 201 (a), South Carolina Appellate Court Rule (recognizing right to appeal from final judgment); S.C. Code § 17-27-20 (setting out cognizable claims in PCR and providing, for collateral actions, that PCR “comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them”). Petitioner pursued and received direct appeal review of his conviction and exhausted all of his available PCR remedies. *See* Rule 201(a), *supra*; *Wade v. State*, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002)(“An individual under PCR effectively is granted one chance to argue for relief and must do so within a year of his final appeal”); *Gibson v. State*, 329 S.C. 37,42, 495 S.E.2d 426, 428 (1998)(exhaustion of state PCR remedies requires “filing of an application, the rendering of an order adjudicating the issues, and petitioning for, or knowingly waiving, appellate review”). In sum, this petition should not be dismissed in order to exhaust available state remedies as there are none.

SUMMARY JUDGMENT

Summary judgment is appropriate where the pleadings and exhibits before the Court demonstrate “that there is no genuine issue as to any material fact” and one “party is entitled to judgment as a matter of law.” Rule 56, F.R.C.P. *See also Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir. 1991) (summary judgment appropriate where pleadings demonstrate no genuine issue as to any material fact). Here, the record conclusively shows Petitioner is not entitled to any relief, and Respondents are entitled to judgment as a matter of law.

DISCUSSION

The AEDPA provides for restrictive review of claims presented in a federal habeas action.³ A claim adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was “contrary to, or involved an unreasonable application of” clearly established federal law as decided by the United States Supreme Court, or the decision “was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.” 28 U.S.C. § 2254(d). *See also Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495 (2000). Additionally, the state court factual findings must be presumed to be correct. The petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Moreover, even if constitutional error is identified in the record, the habeas petitioner will not receive relief unless the reviewing court concludes the error “had substantial and injurious effect or influence” on the resulting conviction. *Fry v. Pliler*, 551 U.S. 112, 121, 127 S.Ct. 2321 (2007). *See also Jones v. Polk*, 401 F.3d 257, 265 (4th Cir. 2005), *quoting O’Neal v. McAninch*, 513 U.S. 432, 436 (1995).

Exhaustion and Procedural Bypass

The above standard is only applied to claims that have been properly presented to, and decided by, the state courts:

³ The AEDPA also provides for a one-year statute of limitations. By Respondent’s calculation, Petitioner filed within one year. Petitioner’s direct appeal concluded on June 27, 2005, and he filed his PCR action on February 21, 2006, after the lapse of two hundred and thirty-eight (238) days of time not tolled by the statute. His PCR action concluded on February 20, 2009, and he filed the instant action thirty-three (33) days later, on March 26, 2009, according to the date stamp on the habeas petition provided to Respondent in the Rule to Show Cause. Thus, the petition appears to be timely filed with only a total of two hundred and seventy-one (271) days of time not tolled by the statute having lapsed before filing.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

Thus, to satisfy the statutory requirements, a petitioner first must exhaust his claims by presenting them to the highest state court with jurisdiction to decide them before seeking relief through the federal writ of habeas corpus. *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997). Moreover, such claims must be “fairly presented” to the state court:

The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not suffice. In other words, fair presentation contemplates that both operative facts and the controlling legal principles must be presented to the state court.

Id. See also *Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir.1998)(“The exhaustion requirement is not satisfied if the petitioner presents new legal theories or factual claims for the first time in his federal habeas petition.”)

If a petitioner has not presented certain issues to the state's highest court, the claim “nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if petitioner attempted to raise it at this juncture.” *George v. Angelone*, 100 F.3d 353, 363 (4th Cir.1996). Thus, state barred unexhausted claims are considered technically exhausted in this forum, but such claims are not reviewable on the merits because an adequate and independent

state law ground is sufficient to uphold the petitioner's convictions, i.e. the procedural default.

Where a petitioner fails to comply with a state procedural rule, and that failure provides an adequate and independent ground for the state's denial of relief, federal review will also be barred if the state court has expressly relied on the procedural default. *Harris v. Reed*, 489 U.S. 255, 262, 109 S.Ct. 1038 (1989); *Coleman v. Thompson*, 501 U.S. 722, 735, 111 S.Ct. 2546 (1991). Additionally, if a petitioner fails to present a ground for decision, so the state court has nothing upon which to rule, that is also a default barring review on the merits. *Coleman*, 501 U.S. at 735; *Teague v. Lane*, 489 U.S. 288, 299, 109 S.Ct. 1060 (1989). In other words, where the state court has not had the opportunity to apply its own procedural bar the federal court will nevertheless bar the claim where application of the bar is clear. *Teague*, 489 U.S. at 298; *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir.1990). Nonetheless, a petitioner may overcome the default by showing cause for the default and prejudice therefrom, or that a fundamental miscarriage of justice will occur if the claim is not heard, i.e. an assertion of actual innocence. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 495-96, 106 S.Ct. 2639 (1986). *Harris, supra*. In making a case for “actual innocence,” the proof would need to show “factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623, 118 S.Ct. 1604 (1998).

Petitioner’s claims will be addressed individually in light of the above described standards and requirements.

Ground One: Ineffective Assistance

Petitioner raised the instant ground in his PCR Application. (PCR App. p. 333). However, Petitioner actually claims ineffective assistance of counsel in several particulars. (Habeas Petition,

p. 6). Not all issues were addressed in the Order of Dismissal. In fact, only two issue were addressed:

- (1) Allegation of ineffective assistance of counsel for failing to investigate and for failing to suppress photos;
- (2) Allegation of ineffective assistance of counsel for failing to request a continuance.

(PCR App. pp. 376-377).

Petitioner failed to file a motion to include specific rulings on any of the other issues in the order to preserve the issue for appeal. *Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007)(“Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review”). Respondent notes that in the PCR appeal, counsel argued that the issue on appeal was sufficiently addressed by the “catch-all” language included, (*Johnson* Petition, p. 4), but that argument has been rejected by our state supreme court. *Marlar*, 375 S.C. at 409, 653 S.E.2d at 266-67. Thus, the concession stands. Moreover, neither counsel nor Petitioner raised the remaining issues in regard to impeachment and purportedly improper questions by the solicitor in either of the appellate briefs. These issues have been specifically abandoned. *See State v. Baccus*, 367 S.C. 41, 50 n.1, 625 S.E.2d 216, 221 n.1 (2006)(finding issue abandoned where not argued in the brief thus barred from review on appeal). Respondents further notes that Petitioner failed to answer, in the habeas petition, if the issue was raised in the appeal. (*Habeas* Petition, p. 7). This may well be a concession the issue was not raised. At any rate, the record certainly shows a default on the issues not addressed in the Order of Dismissal, and Petitioner has failed to offer any cause to excuse the

default and none is readily apparent on the record. Petitioner had the assistance of counsel in his PCR action, and had the opportunity to also submit *pro se* filings. Moreover, an assertion of actual innocence would not be credible on this record. Petitioner was convicted of kidnapping and robbing victim Travis Guess. Guess was approached at his home at gunpoint and taken. The victim testified as to the kidnapping and robbery, and identified Petitioner. (PCR App. pp. 104-107). Further, both Kevin Mack and Marcus Guess, who were guest at the home when the incident started, testified that a man with a white covering about his face showed up with a gun and shot in the ground, though each man ran away following the first gunshot. (PCR App. p. 69; pp. 81-82). The victim was forced into his car, and had to escape while the car was in motion, which resulted in the car hitting a utility pole. (PCR App. p. 107; pp.128-129; p. 170). An officer happened to be on patrol in the area and saw the accident. Petitioner was standing by the passenger side of the car with a white shirt around his neck. He wandered away from the car and threw the white shirt down. Officers recovered a white t-shirt and a 9mm gun. Petitioner also had the keys to the car and the victim's wallet. (PCR App. p. 153; pp. 170-173; p. 179; p. 185). Later investigation revealed what appeared to be a bullet hole in the ground at the victim's home. (PCR App. pp. 154). At trial, Petitioner testified that he never had a gun, but admitted taking money and having a white t-shirt tied around his head, even though he essentially denied everything else. (PCR App. pp. 232-241). After the verdict, the trial judge noted that this was an incredibly strong case with overwhelming evidence of guilt, as is well reflected here. (PCR App. pp. 314-315; p. 318). Again, a claim of actual innocence would simply not be credible in light of the overwhelming evidence of guilt. The procedural bar should be applied without exception.

As to the ineffective assistance allegation in investigation and suppression of photographs, this issue was raised to, but rejected by the PCR judge. (PCR App. pp. 376-377). The PCR judge noted that defendant testified at the PCR hearing that what really happened was that he and victim were involved in a drug deal that went bad. He further testified that he wanted counsel to “get finger prints off the box containing the drugs.” (PCR App. 376). Counsel testified that she did not recall such a request. Further, counsel opined that impeachment on this may not have been “valid or successive.” (PCR App. p. 377). Finally, the PCR judge noted counsel testified “she did not move to suppress photos because she did not feel the photographs were harmful to Applicant’s case.” (PCR App. p. 377). Using the proper error and prejudice test from *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984), the PCR judge concluded Petitioner had failed to show he was entitled to any relief. The record fully supports the PCR judge’s decision. Counsel testified that even though she only received notice the Friday before the Tuesday trial in July that the case would be called, that she had ample time to prepare, having had the case since January. (PCR App. pp. 359-61; p. 368). She testified that she did not recall Petitioner asking her to have the drug box tested for fingerprints, nor could she opine on how effective impeachment would have been. (PCR App. pp. 362-363). She also testified that she did not believe the photographs hurt the case, but actually helped to some extent. (PCR App. pp. 368-369). Respondent notes that Petitioner failed to have the box tested, and what, if any, fingerprint evidence was available is unknown. Respondent also notes that Petitioner has the burden of proof. *Strickland*. See also *Williams v. Taylor*, 529 U.S. 362, 394, 120 S.Ct. 1495 (2000)(petitioner bears the burden of establishing actual prejudice). Respondent further notes that the trial transcript before the PCR judge showed that counsel, on cross-examination, repeatedly attacked the investigation, using the photographs to the defense’s benefit

as well as the admitted failure to fingerprint or perform gunshot residue testing. (See PCR App. pp. 159 (bullet hole); pp. 161 and 199 (GSR); pp. 167 and 197 (fingerprints)). She also emphasized the fact that Petitioner's fingerprints were not on the gun, magazine or bullets. (PCR App. p. 217). In short, the record fully supports the PCR judge's factual findings. Having failed to show an unreasonable application of federal law or an unreasonable determination of facts, Petitioner is not entitled to any relief.

As to the allegation of ineffective assistance on the continuance issue, the PCR judge noted that counsel testified that while she did receive the fingerprint analysis "right before trial," she did not believe a continuance would be granted, given the trial judge's preference, and "the evidence was so strong, she did not think more time would have affected the outcome." (PCR App. pp. 377-378).

Again, as stated above, counsel was prepared for trial. Moreover, she testified that she did not believe the outcome would have been different even if a continuance has been granted as the "witnesses and the evidence against him were very, very strong." (PCR App. p. 366, lines 7-9). Again, the record supports that the PCR judge reasonably applied federal law to facts fully and fairly supported by the record. Petitioner is not entitled to any relief.

This issue should be summarily dismissed.

Ground two: Trial Court Error

Though Petitioner fails to set out a proper ground, he argues trial court error in allowing the State to impeach him with two prior robbery convictions without a Rule 403, South Carolina Rules of Evidence analysis (i.e whether the probative value is substantially outweighed by the danger of unfair prejudice"). This issue was raised to the trial judge, and the trial judge found that the Rule

403 analysis was not applicable under state precedent. (PCR App. p. 223). Petitioner then raised the issue on direct appeal. (*Anders* Brief). Petitioner would not have been able to raise the claim again in PCR. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993) (“Under the doctrine enunciated in *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975), errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings.”). Therefore, the issue has been properly exhausted. However, Petitioner fails to state a claim upon which relief may be granted.

Relief in a federal habeas action is only available to petitioners in “custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). Issues of state law are generally not cognizable in habeas review. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions... a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.”). Evidentiary rulings are generally considered state law matters. *Spencer v. Murray*, 5 F.3d 758, 763 (4th Cir. 1993) (“claim about the admissibility of evidence under state law rarely is a claim upon which federal habeas corpus relief can be granted.”). Evidentiary rulings will not be considered in federal habeas ““unless [the] erroneous evidentiary rulings were so extreme as to result in a denial of a constitutionally fair proceeding.”” *Barbe v. McBride*, 521 F.3d 443, 452 (4th Cir.2008), quoting *Burket v. Angelone*, 208 F.3d 172, 186 (4th Cir.2000). Thus, the only proper inquiry, if any, is whether the admission of the evidence itself so infected the entire trial that the resulting conviction violated due process. *Estelle*, 502 U.S. at 72. This record firmly rebuts any contention of same for several reasons. First, the trial judge correctly applied binding state precedent in rejecting the applicability of the test. *State v. Al-Amin*, 353 S.C.

405, 426, 578 S.E.2d 32, 43 (S.C.Ct.App. 2003). Second, when the offenses were used on cross-examination, the trial judge immediately charged the jury that the two prior robbery offense were admitted only for impeachment and could be considered only in assessing credibility. (PCR App. p. 242). Third, as referenced more fully above, there is overwhelming evidence of guilt on this record. Error, if any, does nothing to undermine the correct of the verdict in this case. *Fry v. Pliler*, *supra*.

This issue should be summarily dismissed.

IN THE UNITED STATES DISTRICT COURT
USDC CLERK, COLUMBIA, SC
DISTRICT OF SOUTH CAROLINA
2009 SEP 16 A 11: 29

CA/No. 6:09-778-HMH-WMC

RUSSELL MONTGOMERY #294838.....PETITIONER,

-VS-

MCKITHER BODISON, WARDEN.....RESPONDENT,

OPPOSITION AND REPLY TO THE
RESPONDENT'S MOTION FOR
SUMMARY JUDGEMENT

Respectfully Submitted,
/s/ Russell Montgomery
Russell Montgomery

IN THE UNITED STATES DISTRICT COURT
 RECEIVED
 USDC CLERK, COLUMBIA, SC
 DISTRICT OF SOUTH CAROLINA

2009 SEP 16 A 11:29

RUSSELL MONTGOMERY #294838	)	CA/No. <u>6:09-778-HMH-WMC</u>
PETITIONER,	)	
-v-	)	OPPOSITION AND REPLY TO THE
McKITHER BODISON, WARDEN	)	RESPONDENT'S MOTION FOR
RESPONDENT,	)	SUMMARY JUDGEMENT
_____	)	

COMES NOW, Russell Montgomery, pro-se, herein after, Petitioner, who respectfully lodges his Opposition and Reply to the Respondent's Motion for Summary Judgement that was entered in the above captioned case number on August 10, 2009.

Petitioner will show unto this Honorable Court, through issues presented, facts and citations of authorities relied that the Respondent is not entitled to summary judgement as a matter of law.

Respectfully Submitted,
 /s/ Russell Montgomery
 Russell Montgomery

PROCEDURAL HISTORY

Petitioner is presently incarcerated at the Lieber Correctional Institution, pursuant to commitment orders of the Orangeburg County Clerk of Court.

Petitioner was indicted in August of 2001, for kidnapping and armed robbery. (2002-GS-38-1573, 1574). Petitioner was represented by Margaret Peggy Hinds, Esquire. A jury trial was convened on July 16, 2003 before the Honorable Edward B. Cottingham. The jury convicted Petitioner of kidnapping and the lesser included offense of strong armed robbery. The Honorable Judge Cottingham sentenced Petitioner to twenty-years (20) in prison for the kidnapping and fifteen-years (15) consecutive for the robbery offense. A timely notice of appeal was filed and an appeal was perfected by the South Carolina Appellate Defense. Mr. Robert Dudek, Esquire represented Petitioner on direct appeal. On October 5, 2004, appellate counsel filed a no merit Anders Brief raising one issue. "The court erred by allowing appellant to be impeached with his prior conviction for strong armed robbery where he was on trial for armed robbery and kidnapping. The judge did not conduct a State v. Colf analysis, and the prejudicial effect of the prior robbery conviction outweighed its probative value under rule 403 (SCRE). Dudek also moved the Court to be relieved as counsel. On October 7, 2004 the Clerk of the South Carolina Court of Appeals advised Petitioner of his right to also file a pro-se brief. Petitioner being a layman and unskilled in law, did not file a pro-se brief. The South Carolina Court of

Appeals issued an unpublished opinion dismissing the appeal. State v. Montgomery Unpublished Opinion No. 2005-UP-285 (S.C.Ct.App. filed April 20, 2005). Petitioner filed a timely petition for rehearing on April 29, 2005, that was ultimately denied on June 22, 2005. The South Carolina Court of Appeals issued the remittitur on July 27, 2005.

On February 21, 2006, Petitioner filed an application for post conviction relief (PCR), alleging ineffective assistance of counsel, for failing to properly prepare for the trial of his case, failure to request a continuance based on untimely receipt of discovery, failed to move to suppress evidence, failed to object to evidence and witnesses not time revealed in response to discovery request, failed to object to impeachment evidence, failed to request exclusion of impeachment evidence, failed to object to improper questions by solicitor, and such other grounds as may become apparent after a complete review of the record.

Petitioner was represented by C. Bradley Hutto, Esquire, in the PCR action. The State filed their return approximately December 7, 2006. An evidentiary hearing was held January 12, 2007, before the Honorable James C. Williams, Jr.

On February 26, 2007, Judge Williams issued a written order denying relief. A timely notice of appeal was filed, and a PCR appeal was perfected by Katherine H. Hudgins, South Carolina Appellate Defense Office. On January 10, 2008, appellate counsel filed a Johnson brief, raising only one issue. "Did the PCR Court err in refusing to find trial counsel ineffective for failing to

ascertain if the victim's fingerprints could be identified on a box containing narcotics found in the car where the kidnapping and robbery allegedly took place?".

On January 29, 2008, Petitioner filed a pro-se Johnson Brief raising the following issues: (1) did the pcr court err in refusing to find trial counsel ineffective for failing to investigate and for failing to suppress photos, (2) did the pcr court err in refusing to find trial counsel ineffective for failing to request a continuance, (3) counsel was ineffective for failing to request a disclosure of the Brady Motion that would have proven that there was no evidence of gun powder (sic) residue on Petitioner's clothes."

By Order dated July 11, 2008, the South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals. On January 30, 2009, the South Carolina Court of Appeals denied the petition for writ of certiorari. The remittitur was handed back down on February 20, 2009.

Petitioner filed a timely 28 USCA §2254 Petition as conceded by the Respondent on page 5-7, of the motion for summary judgement. In the habeas petition, Petitioner raised (1) Ineffective Assistance of Counsel, for failing to request a continuance, failing to suppress evidence, failing to object to evidence and witnesses not timely revealed in response to request for discovery, failing to object to impeachment evidence, failing to request exclusion of impeachment evidence, failing to object to improper questions by the Solicitor, (2) The State Court

denied Petitioner his right to fair trial when the State Court allowed appellant to be impeached with his prior armed robbery conviction. Where he was on trial for robbery, since the prejudicial effect of the convictions outweighed their probative value under rule 403, and the Court failed to conduct the requisite State v. Colf analysis.

STANDARD REVIEW OF SUMMARY JUDGEMENT

In ruling on summary judgement, evidence of non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Dufay v. Bank of America 94 F.3d 561. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgement should be denied. Stewart v. State Farms Ins. Co. (S.C.App.2000), 341 S.C. 143, 533 S.E.2d 597 rehearing denied.

Summary judgement should not be granted if there is a dispute as to the conclusions to be drawn from the evidentiary facts, even when there is no dispute as to the facts. Doe v. Batson (S.C.App.1999) 338 S.C. 291, 525 S.E.2d 909, rehearing denied, cert. granted, affirmed in part, reversed in part. 345 S.C. 316, 548 S.E.2d 854.

DISCUSSION AS TO PROCEDURAL BAR**1.**

Exhaustion and procedural bypass are separate theories which operate in a similar manner to require a habeas petitioner to first submit his claims for relief to the State Courts. The two theories rely on the same rational. The general rule is that a petitioner must present his claims to the highest state court with authority to decide the issue before the federal court will consider the claim.

2. Exhaustion

The theory of exhaustion is based on the statute giving the federal court jurisdiction of habeas petitions. Applications for writs of habeas corpus are governed by 28 USCA §2254, which allows relief when a person "is in custody in violation of the Constitution or laws or treaties of the United States." The statute states in part: (b)(1) an application for writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a state court, shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the state, or (B)(1) there is either an absence of available state corrective process, or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant. (2), an applicant for writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state. (3) a state shall not be deemed to have waived the exhaustion requirement or

be estopped from reliance upon the requirement. (c) an applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this Section, if he has the right under the law of the state to raise, by any available procedure, the question presented.

The statute clearly requires that an applicant pursue any and all opportunities in the state courts before seeking relief in the federal court. In South Carolina, a person in custody has two primary means of attacking the validity of his conviction. The first avenue is through direct appeal and, pursuant to state law, he is required to address his available grounds in that appeal. The second avenue of relief is by filing an Application for Post Conviction Relief (PCR). A PCR applicant is also required to state all of his grounds for relief in his application. Strict, deadlines govern direct appeals and the filing of a PCR in South Carolina, this is doubly true because of the AEDPA one-year statute of limitations.

When a petition for habeas relief is filed in the federal court, a petitioner may present only those issues which were presented to the state court through direct appeal or through PCR, whether or not the State Supreme Court reached the merits of the claim.

If any avenue of state relief is still available, the petitioner must proceed through the state courts before requesting a writ of habeas corpus in the federal courts. However, if a petitioner has failed to raise the issue before the

state courts, but still has means to do so, he will be required to return to the state courts to exhaust the claim. Rose 455 U.S. at 515.

3. Procedural Bypass

Procedural bypass is the doctrine when the person seeking relief failed to raise the claim at the appropriate time in state court and has not further means of bringing the issue before the state courts. If this occurs, the person is procedurally barred from raising the issue on his federal habeas petition.

The United States Supreme Court has clearly stated that the procedural bypass of a constitutional claim in earlier state courts forecloses consideration by the federal court. Smith v. Murray 477 U.S. 527, 533 (1986). Bypass can occur at any level of the state proceedings, if a state has procedural rules which bar its courts from considering claims not raised in a timely fashion. The two routes of appeal in South Carolina are described (i.e. direct appeal, appeal from PCR denial). If a prisoner has failed to file a direct appeal or a PCR and the deadlines for filing have passed, he is barred from proceeding in state court.

If the state courts have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. State procedural rules promote...."not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to

litigate all of his claims together, as quickly after trial as the docket will allow and while the attention of the appellate court is focused on his case. Reed v. Ross 468 U.S. 1, 10-11 (1984).

Although the federal courts have the power to consider claims despite a state procedural bar...the exercise of the power ordinarily is inappropriate unless the defendant succeeds in showing both cause and prejudice for noncompliance with the state rule and actual prejudice resulting from the alleged constitutional violation. Smith v. Murray (supra) quoting Wainwright v. Sykes 433 U.S. at 84 (1977), see also Engle v. Isaac 456 U.S. 107, 135 (1982).

Stated simply, if a federal habeas petitioner can show (1) cause for the failure to raise the claim in the state courts, and (2) actual prejudice resulting from the failure, a procedural bar can be ignored and the federal court may consider the claim. Where a petitioner has failed to comply with state procedural requirements and cannot make the required showing(s) of cause and prejudice, the federal courts generally decline to hear the claim. See Murray v. Carrier 477 U.S. 478, 496 (1986)."

4. Inter-relation of Exhaustion and Procedural Bypass

As a procedural matter, if a petitioner before the court has failed to raise a claim in state court, and is precluded by state rules from returning to state court to raise the issue, he has procedurally bypassed his opportunity for relief in the state

courts and in federal court. A federal court is barred from considering the filed claim (absent showing of cause and prejudice). In such an instance, the exhaustion requirement is technically met and the rules of procedural bypass apply. Matthews v. Evatt 105 F.3d 907 (4th.Cir.) cert. denied 118 S.Ct. 102 (1997), citing Coleman v. Thompson 501 U.S. 722, 735 n. (1991); Teague v. Lane 489 U.S. 288, 297-98 (1989), and George v. Angleone 100 F.3d 353, 363 (4th.Cir.1996).

5. Cause and Prejudice

The requirement of exhaustion is not jurisdictional and this court may consider claims which have not been presented to the state court in limited circumstances. Granberry v. Greer 481 U.S. 129, 131 (1987). In order to have such claims considered, a petitioner must show sufficient cause for the failure to raise a claim and actual prejudice resulting from the failure. Coleman v. Thompson 501 U.S. at 750, or that a "fundamental miscarriage of justice has occurred." Murray v. Carrier 477 U.S. 478 (1986). A petitioner may prove cause if he can demonstrate ineffective assistance of counsel relating to the default, or show an external factor which hindered compliance with the state procedural rule, or demonstrate the novelty of a particular claim. Murray v. Carrier 477 U.S. 478 (1986), Clozza v. Murray 913 F.2d 1092 (4th.Cir) cert. denied 499 U.S. 913 (1991) and Clanton v. Muncy 845 F.2d 1238 (4th.Cir.) cert. denied 485 U.S. 1000 (1988).

Absent a showing of cause the court is not required to consider prejudice. Turner v. Jabe 58 F.3d 924 (4th.Cir.1995).

However, if a petitioner demonstrates sufficient cause, he must also show actual prejudice in order to excuse a default. Murray v. Carrier 477 U.S. 492. To show actual prejudice, the petitioner must demonstrate more than plain error. He is required to prove that specific errors infected the trial and were of constitutional dimension. United States v. Prady 456 U.S. 152.

Petitioner asserts that there are issues of material fact in dispute and the Respondent is not entitled to summary judgement, but rather Petitioner is entitled to an evidentiary hearing in federal court.

GROUND ONE

Ineffective Assistance of Counsel

The Respondent claims that Petitioner addressed ineffective assistance of counsel in several particulars and then further alleges that only two issues were addressed in the PCR Order of Dismissal. (1) ineffective assistance of counsel for failing to investigate and for failing to move to suppress the photos, (2) ineffective assistance of counsel for failing to request a continuance based on the State failure to turn over BRADY material.

The Respondent claims that because Petitioner did not file a Rule 59(e)SCRPC motion to alter/amend the judgement that the

remaining ineffective assistance of counsel issues were not preserved for appeal. The Respondent constructively points out that Petitioner was represented by PCR Counsel and neither, Petitioner nor PCR Counsel filed a rule 59(e). The Respondent's contention must fail in two particulars. Yes, Petitioner did have PCR Counsel, and the errors of PCR Counsel cannot be attributable to Petitioner because of the cause and prejudice standard. Furthermore, Petitioner could not file a rule 59(e) as South Carolina does [not] acknowledge hybrid representation in the PCR setting and by the time any Joshnson briefs were filed the allotted (10) ten days as set forth in the SCRCF, had passed and Petitioner was could not file a pro-se rule 59(e). The Court in Foster v. State 379 S.E.2d 907 sheds appropriate discussion on the subject. In Foster, the petitioner was represented by pcr counsel and had attempted to file a substantial document relating to the case. But since the document was not submitted by counsel the Clerk of Court was ordered to return the document to the petitioner. The only pro-se motions a petitioner is allowed to file is motions to relieve counsel, and any Anders of Johnson pro-se briefs. Id.

The Respondent candidly points out that Petitioner's appellate counsel argued the issue was sufficiently preserved for appeal by the catch-all language used. The Respondent motion for summary judgement should be denied as there are sufficiently material issues of fact in dispute.

The alleged victim Travis Guess (Guess) testified that he ran

to a trailer for help, and then he sees a police officer outside and ultimately goes over to the officer, yet, when he gets to the police officer he doesn't immediately tell the officer that Petitioner had supposedly been the one who was to have kidnapped and robbed him. [Tr.p.138-139. Ls. 1-25].

The police further said that there was a bullet hole in the ground, but when questions if they knew for sure whether or not that it was in fact a bullet hole, they couldn't be sure. While there was an indent in the ground, nothing in the record conclusively proved it to be a hole from a bullet. [Tr.p.270, L.1-25].(emphasis supplied).

Counsel in closing argued that no GSR test was ever done and counsel did argue that had a GSR test been done it would have proved the truth of the matter asserted as to whether or not Petitioner actually had a gun and fired into the ground as Guess stated. [Tr.p.271]. During the PCR hearing trial counsel testified that she didn't find out that a report was done regarding Petitioner's finger prints until right before the trial. [PCR App.p.359, L.13-17]. Trial Counsel also testified that her office was very busy that year and to her knowledge it was one of the worst years. [PCR App.p.357, L.24-25]. Counsel told the court that she handled 500 cases that year. [PCR App.p.358, L.2-3].

As to the State withholding discovery Counsel testified that the State did not turn over witness Marcus Guess statement, nor did the State turn over the fingerprint analysis. [PCR App.p.360,

L.1-8]. Counsel told the Court that she would have liked to have known the documents and pictures existed "before" the day of trial. [PCR App.p.361, L.22-24]. Counsel also admitted that she didn't "remember" Petitioner asking her to finger print the box containing the illegal drugs, but further admitted that "Petitioner may have." [PCR App.p.362, L.21-24]. Counsel also testified that although she did not request a finger print analysis, the box became very significant in the courtroom. [PCR App.p.363, 1-7].

Counsel admitted that "had" the box been finger printed, and had the box revealed Guess' prints, Counsel could have impeached Guess since he denied ever seeing the box with the drugs in it. [PCR App.p.363, L.8-17]. Counsel acknowledged that it was a common occurrence under the Solicitors in the case to [hold back evidence]. (emphasis supplied). In the instant case it was not just one piece of evidence, but also several photographs, a finger print report and a witness' statement. [PCR App.p.363, L.18-24]. This was all the more damaging because Petitioner's claim that it was a drug deal gone bad would have been corroborated had counsel of investigate the box.

DISCUSSION

At the heart of effective representation is the independent duty to investigate and prepare. Goddwin v. Balcom 684 F.2d 794, 805 (11th.Cir.) Therefore, premissible trial strategy can never

include the failure to conduct a reasonably substantial investigation into a defendant's one plausible line of defense. Washington 693 F.2d at 1252.

Preparation and investigation must be more than perfunctory. Counsel has an obligation and affirmative duty to conduct appropriate investigation, both factual and legal. Coles v. Peyton 389 F.2d 224, 226 (4th.Cir.) cert. denied 393 U.S. 849 (1968). The failure to ascertain and investigate possible defenses has often resulted in finding that the defendant was denied adequate representation. See Goodwin v. Swenson 287 F.Supp. 166, 176-86 (W.D.Mo.1968).

As Strickland v. Washington 466 U.S. 668 explains, the range of reasonable professional judgements is wide and courts must take care to avoid illegitimate second-guessing of counsel's strategic decisions from the superior vantage point of hind sight. 466 U.S. at 689.

It is therefore, only the rare claim of ineffective assistance of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance. 466 U.S. at 689-90.

However, the Supreme Court certainly did not intend the Strickland analysis to be a total barrier to relief. See Sullivan v. Fairman 819 F.2d 1382 at 1391. Where the deficiencies in counsel's performance are severe and cannot be characterized as the product of strategic judgement, ineffectiveness may be clear. Thus, the Court of Appeals are in agreement, the failure to

conduct pretrial investigation generally constitutes a clear instance of ineffectiveness. See e.g. Sullivan v. Fairman (supra) at 1391-92.

Furthermore, the State's failure to turn over critical BRADY material denied Petitioner due process of law. In Brady v. Maryland 373 U.S. 83 the United States Supreme Court agreed that the suppression of a confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court relied on two decisions from the Third Circuit. United States ex rel Almedia v. Baldi 195 F.2d 815, and United States ex rel Thompson v. Dye 221 F.2d 763. This ruling was an extension of Mooney v. Holohan 294 U.S. 103, 112, 55 S.Ct. 340, 342. The Third Circuit in Baldi (supra) construed a statement in Pyle v. Kansa 317 U.S. 213, 215-216 to mean that the suppression of evidence favorable to the accused was sufficient to amount to a denial of due process. In the instant matter there are clearly issues of material fact in dispute and the Respondent is not entitled to summary judgement.

GROUND TWO**Fourteenth Amendment violation of a denial of a fair trial**

Petitioner further alleges that he was denied a fair trial when the Solicitor impeached Petitioner with his (2) two prior strong armed robbery convictions. When questioned about Petitioner being impeached with his two prior robberies counsel could give no strategic, testimony as to why she did not object. Counsel's own omissions stated that...."unfortunately that was the most prejudicial of all" [PCR App.p.365, L.1-20].

DISCUSSION

The Respondent claims that Petitioner cannot rely on state evidentiary rulings in federal habeas corpus. Yet, in Spencer v. Murray 5 F.3d 758, 762 (4th.Cir.1993) the Court stated that in federal habeas actions, the court does not review the admissibility of evidence under state law, unless the erroneous evidentiary rulings were so extreme as to result in a denial of a constitutionally fair proceeding.

In the instant case Petitioner was on trial for armed robbery and the jury was instructed on the lesser included offense of "strong armed robbery." Clearly, the fact that trial court allowed Petitioner to be impeached with (2) two prior strong armed robbery offense was highly prejudicial that resulted in the denial of a fair trial that is protected under the Fourteenth Amendment of the United States Constitution.

Counsel's own omissions reveals that yes, it was the most prejudicial aspect of the entire trial, and the trial court clearly abused discretion in allowing such. Especially since the two priors were not of necessity i.e. elements of an offense.

The State Court Rule 403 and Federal Rule 403 parrot one another. Even if particular evidence is admissible under 403, Rule 403 provides for discretionary exclusion; although the trial judge has broad discretion in assessing balance of factors enumerated in Rule 403 in determining whether to admit evidence of other crimes, it is incumbent upon the reviewing court to reverse if there has been an abuse of discretion. United States v. Calhoun 604 F.2d 1216.

Under Rule 609, admission of a defendant's prior felony convictions are normally admissible, "except that in cases of possible prejudice", prejudice is to be weighed against probative value regardless. Diggs v. Lyons 741 F.2d 577 (internal citations omitted).

In the instant case, the error complained of is balantly prejudicial. There was absolutely no way to unring the bell once the State was allowed to impeach Petitioner with two prior unrelated strong armed robbery offenses.

Petitioner was clearly prejudiced by the admission of the two prior convictions that resulted in a Fourteenth Amendment violation denying Petitioner his constitutional right to a fair trial. The Respondent is not entitled to summary judgement. Petitioner respectfully requests an evidentiary hearing.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Court will deny the Respondent's motion for summary judgement and hold a plenary hearing at this Court's earliest convenience.

For the requested relief, Petitioner will forever pray.

Respectfully Submitted,

/s/ Russell Montgomery

Russell Montgomery

CERTIFICATE OF SERVICE

I, Russell Montgomery, do hereby swear under the penalty of perjury that I have mailed the Original and (1) copy of the enclosed to the District Clerk of Court 901 Richland St. Columbia, 29201.

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

This was done by way of the U.S. Mail here at Lieber Correctional Institution in Ridgeville, SC. 29472.

Respectfully Submitted,

/s/ Russell Montgomery

Russell Montgomery

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 15 DAY OF September, 2009

Angela B. Burt

NOTARY PUBLIC

MY COMM. EXPIRES 5/1/2018

IN THE DISTRICT COURT OF THE UNITED STATES
 FOR THE DISTRICT OF SOUTH CAROLINA
 GREENVILLE DIVISION

Russell Montgomery, #294838,

Petitioner,

vs.

McKithier Bodison,

Respondent.

Civil Action No. 6:09-778-HMH-WMC

REPORT OF MAGISTRATE JUDGE

The petitioner, a state prisoner proceeding *pro se*, seeks habeas corpus relief pursuant to Title 28, United States Code, Section 2254.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Local Rule 73.02(B)(2)(c), D.S.C., this magistrate judge is authorized to review posttrial petitions for relief and submit findings and recommendations to the District Court.

BACKGROUND OF THE CASE

The record reveals that the petitioner is currently incarcerated in Lieber Correctional Institution pursuant to an order of commitment from Orangeburg County. The petitioner was indicted in August 2001 for kidnaping and armed robbery. Attorney Margaret Peggy Hinds represented the petitioner on the charges. A jury trial was held July 16, 2003, before the Honorable Edward B. Cottingham. The jury convicted the petitioner of kidnaping and the lesser offense of strong arm (i.e. common law) robbery. Judge Cottingham sentenced the petitioner to 20 years imprisonment for kidnaping, and 15 years, consecutive, for robbery. The petitioner appealed.

Robert M. Dudek, Assistant Appellate Defender of the South Carolina Office of Appellate Defense, represented the petitioner on appeal. On October 5, 2004, appellate counsel filed a final *Anders*¹ brief of appellant in the South Carolina Court of Appeals, and raised the following issue:

The court erred by allowing appellant to be impeached with his prior conviction for strong armed robbery where he was on trial for armed robbery and kidnaping. The judge did not conduct a *State v. Colf* analysis, and the prejudicial effect of the prior robbery conviction outweighed its probative value under rule 403, SCRE.

Appellate counsel also moved to be relieved of appointment as "in his opinion, the appeal is without legal merit sufficient to warrant a new trial." On October 7, 2004, the Clerk of the South Carolina Court of Appeals advised the petitioner of his right to also file a *pro se* brief. The petitioner did not file a *pro se* brief. On April 20, 2005, the South Carolina Court of Appeals issued an unpublished opinion dismissing the appeal. *State v. Montgomery*, Unpublished Opinion No. 2005-UP-285 (S.C.Ct.App. filed April 20, 2005). On April 29, 2005, the petitioner filed a petition for rehearing, which was denied on June 22, 2005. The South Carolina Court of Appeals issued the remittitur on July 27, 2005.

On February 21, 2006, the petitioner filed an application for post-conviction relief ("PCR"), in which he alleged ineffective assistance of counsel in the following particulars:

Petitioner alleges that trial counsel failed to properly prepare for the trial of this case; failed to request continuance based on untimely receipt of discovery; failed to move to suppress evidence; failed to object to evidence and witnesses not timely revealed in response to discovery request; failed to object to impeachment evidence; failed to request exclusion of impeachment evidence; failed to object to improper questions by Solicitor; and such other grounds as may become apparent after a complete review of the record.

¹*Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Attorney C. Bradley Hutto represented the petitioner in the action. The State made its return on or about December 7, 2006. An evidentiary hearing was held January 12, 2007, before the Honorable James C. Williams, Jr. On February 26, 2007, Judge Williams issued an order denying relief. The petitioner appealed the denial of relief.

Kathrine H. Hudgins, Appellate Defender of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented the petitioner on appeal. On January 10, 2008, appellate counsel filed a *Johnson*² petition for writ of certiorari in the Supreme Court of South Carolina, and raised the following issue:

Did the PCR court err in refusing to find trial counsel ineffective for failing to ascertain if the victim's fingerprints could be identified on a box containing narcotics found in the car where the kidnapping and robbery allegedly took place?

Appellate counsel also moved to be relieved of appointment as "[i]n her opinion seeking certiorari from the order of dismissal is without merit." (*Johnson* petition, p. 7). By letter dated January 11, 2008, the Clerk of the Supreme Court of South Carolina advised the petitioner of his right to file a *pro se* response. On January 18, 2008, the State filed a letter in lieu of a formal return. On January 29, 2008, the petitioner filed a *pro se* brief and raised the following issues:

- (1) Did the PCR court err in refusing to find Trial Counsel Ineffective for failing to investigate and for failing to suppress photos.
- (2) Did the PCR court err in refusing to find trial counsel ineffective for failing to request a continuance.
- (3) Counsel was ineffective for failing to request a disclosure of the Brady Motion that would have proven that there was no evidence of gun power [sic] (residue) on the petitioner's clothes.

By order dated July 11, 2008, the Supreme Court transferred the case to the South Carolina Court of Appeals. On January 30, 2009, the South Carolina Court of

²*Johnson v. State*, 294 S.C. 310, 310, 364 S.E.2d 201, 201 (1988).

Appeals denied the petition and granted appellant counsel's request to withdraw. The Court of Appeals issued the remittitur on February 20, 2009.

In his *pro se* petition now before this court, the petitioner makes the following claims of error (verbatim):

Ground One: Ineffective Assistance of Counsel.

Supporting facts: Counsel failed to: request continuance, failed to suppress evidence, failed to object to evidence and witness not timely revealed in response request; object to impeachment evidence, failed to request exclusion of impeachment evidence, failed to object to improper questions by Solicitor.

Ground Two: [no ground specified].

Supporting facts: Whether the courts erred by allowing Appellant to be impeached with his prior Robbery Conviction. Where he was on trial for Robbery, since the prejudicial effect of that conviction out weighted its provation [sic] value under Rule 403 S.C.R.E., And the Court failed to conduct the requisite. State -v-Colf Analysis?

On August 10, 2009, the respondent filed a motion for summary judgment. By order filed August 11, 2009, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the petitioner was advised of the summary judgment dismissal procedure and the possible consequences if he failed to adequately respond to the motion. The petitioner filed his opposition to the motion on September 16, 2009.

APPLICABLE LAW

Title 28, United States Code, Section 2254(d) and (e) provides in pertinent part as follows:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

The Fourth Circuit Court of Appeals has stated as follows regarding the standard of review in cases, like the instant case, that are governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

For a claim that was adjudicated on the merits in state court proceedings, this Court will not issue a writ of habeas corpus under the AEDPA unless (a) the state court decision is in "square conflict" with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, "the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts." *Green v. French*, 143 F.3d 865, 870 (4th Cir.1998). "In other words, habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." *Id.* When a petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the merits, however, our review of questions of law and mixed questions of law and fact is de novo. See *Jones v. Jones*, 163 F.3d 285, 299-300 (5th Cir.1998) (applying pre-AEDPA de novo standard of review to claims of ineffective assistance of counsel that were properly raised, but not adjudicated on merits in state court).

Weeks v. Angelone, 176 F.3d 249, 257-58 (4th Cir. 1999).

ANALYSIS

Ground One

In this ground, the petitioner alleges ineffective assistance of counsel in the following particulars: counsel failed to request a continuance; failed to suppress evidence; failed to object to evidence and witness not timely revealed in response request; failed to object to impeachment evidence; failed to request exclusion of impeachment evidence; and failed to object to improper questions by Solicitor. Only two of these issues were addressed by the PCR court in the order of dismissal: the alleged failure to investigate and to suppress photographs and the failure to request a continuance.

The respondent argues that the issues that were not addressed by the PCR court are procedurally barred. This court agrees. If a petitioner before a federal district court fails to raise a claim in state court and is precluded by state rules from returning to state court to raise the issue, he has procedurally bypassed his opportunity for relief in state courts. In such a case, a federal district court is barred from considering the habeas claim absent a showing of cause and actual prejudice or that failure to consider the claim will result in a fundamental miscarriage of justice, as the exhaustion requirement is technically met and the rules of procedural bar apply. *Matthews v. Evatt*, 105 F.3d 907, 916 (4th Cir. 1997) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). A petitioner may establish a fundamental miscarriage of justice by showing that a constitutional error probably resulted in the conviction of one who is actually innocent. In order to raise a claim of actual innocence, a prisoner "must present evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Schlup v. Delo*, 513 U.S. 298, 316 (1995).

The petitioner did not file a South Carolina Rule of Civil Procedure 59(e) motion to alter or amend asking the PCR judge to make specific findings on these issues. Since the issue was not ruled upon by the PCR court, it would not have been preserved for

PCR appeal. *Plyler v. State*, 424 S.E.2d 477, 478 (S.C. 1992) (issue must be both raised to and ruled upon by PCR judge to be preserved for appellate review); Rule 59(e), SCRPC (providing avenue for any party to move to alter or amend a judgment). In the PCR appeal, counsel argued that the issue on appeal was sufficiently addressed by the "catch-all" language included (Johnson petition, p. 4), but that argument has been rejected by the South Carolina Supreme Court. *Marlar v. State*, 653 S.E.2d 266, 266-67 (S.C. 2007).

Further, as argued by the respondent, an assertion of actual innocence would not be credible on this record. The petitioner was convicted of kidnaping and robbing victim Travis Guess. Guess was approached at his home at gunpoint. The victim testified as to the kidnaping and robbery and identified the petitioner (App.104-107). Further, both Kevin Mack and Marcus Guess, who were guests at the home when the incident started, testified that a man with a white covering about his face showed up with a gun and shot in the ground, though each man ran away following the first gunshot (App. 69, 81-82). The victim was forced into his car and escaped while the car was in motion, which resulted in the car hitting a utility pole (App. 107, 128-29, 170). An officer happened to be on patrol in the area and saw the accident. The petitioner was standing by the passenger side of the car with a white shirt around his neck. He wandered away from the car and threw the white shirt down. Officers recovered a white t-shirt and a 9mm gun. The petitioner also had the keys to the car and the victim's wallet (App. 153, 170-73, 179, 185). Subsequent investigation revealed what appeared to be a bullet hole in the ground at the victim's home (App. 154). At trial, the petitioner testified that he never had a gun, but he admitted taking money and having a white t-shirt tied around his head, even though he essentially denied everything else (App. 232-41). After the verdict, the trial judge noted that this was an incredibly strong case with overwhelming evidence of guilt (App. 314-15, 318).

With the exception fo the investigation and suppression of photographs and failure to request a continuance claims, the claims in ground one are procedurally barred. Accordingly, those claims should be dismissed.

As to the ineffective assistance of counsel allegation with regard to the investigation and suppression of photographs, this issue was raised to and rejected by the PCR judge (App. 376-77). Claims of ineffective assistance of counsel are governed by the two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner "must show that counsel's performance was deficient." *Id.* at 687. To prove deficiency, the petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, the petitioner must show that the deficient performance actually prejudiced him, *i.e.* "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Finally, the Court in *Strickland* held that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.* at 697. Review of counsel's performance is "highly deferential." *Id.* at 689.

The PCR judge noted that the defendant testified at the PCR hearing that what really happened was that he and the victim were involved in a drug deal that went bad. He further testified that he wanted counsel to "get finger prints off the box containing the drugs" (App. 376). Counsel testified that she did not recall such a request. Further, counsel opined that impeachment on this may not have been "valid or successful" (App. 377). Finally, the PCR judge noted counsel testified "she did not move to suppress photos because she did not feel the photographs were harmful to Applicant's case" (App. 377).

Using the proper error and prejudice test from *Strickland*, 466 U.S. at 694, the PCR judge concluded the petitioner had failed to show he was entitled to any relief.

As argued by the respondent, the record fully supports the PCR judge's decision. Counsel testified that even though she received notice only the Friday before the Tuesday trial in July that the case would be called, she had ample time to prepare, having had the case since January (App. 359-61, 368). She testified that she did not recall the petitioner asking her to have the drug box tested for fingerprints, nor could she opine on how effective impeachment would have been (App. 362-63). She also testified that she did not believe the photographs hurt the case, but actually helped to some extent (App. 368-69). The respondent notes that the petitioner has the burden of establishing actual prejudice. However, the petitioner failed to have the box tested, and what, if any, fingerprint evidence was available is unknown. The respondent further notes that the trial transcript before the PCR judge showed that counsel, on cross examination, repeatedly attacked the investigation, using the photographs to the defense's benefit as well as the admitted failure to fingerprint or perform gunshot residue testing (see App. 159 [bullet hole]; 161, 199 [GSR]; 167, 197 [fingerprints]). She also emphasized the fact that the petitioner's fingerprints were not on the gun, magazine, or bullets (App. 217). In short, the record fully supports the PCR judge's factual findings. Having failed to show an unreasonable application of federal law or an unreasonable determination of facts, the petitioner is not entitled to any relief.

As to the allegation of ineffective assistance on the continuance issue, the PCR judge noted that counsel testified that she received the fingerprint analysis "right before trial," and she requested a continuance. However, trial counsel did not believe a continuance would be granted, given the trial judge's preference, and "the evidence was so strong, she did not think more time would have affected the outcome" (App. 377-78; see App. 361). Again, as stated above, counsel was prepared for trial. Moreover, she testified

that she did not believe the outcome would have been different even if a continuance has been granted as the “witnesses and the evidence against him were very, very strong” (App. 366). Again, the record supports that the PCR judge reasonably applied federal law to facts fully and fairly supported by the record. Accordingly, the petitioner is not entitled to any relief.

Ground Two

The petitioner argues in ground two that the trial court erred in allowing the State to impeach him with two prior robbery convictions without an analysis under South Carolina Rule of Evidence 403 (i.e whether the probative value is substantially outweighed by the danger of unfair prejudice”). This issue was raised to the trial judge, who found that the Rule 403 analysis was not applicable under state precedent (App. 223). The petitioner then raised the issue on direct appeal (*see Anders* brief).

Relief in a federal habeas action is only available to petitioners in “custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). Issues of state law are generally not cognizable in habeas review. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions... a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.”). Evidentiary rulings are generally considered state law matters. *Spencer v. Murray*, 5 F.3d 758, 762 (4th Cir. 1993) (“claim about the admissibility of evidence under state law rarely is a claim upon which federal habeas corpus relief can be granted.”). Evidentiary rulings will not be considered in federal habeas “unless [the] erroneous evidentiary rulings were so extreme as to result in a denial of a constitutionally fair proceeding.” *Barbe v. McBride*, 521 F.3d 443, 452 (4th Cir. 2008) (quoting *Burket v. Angelone*, 208 F.3d 172, 186 (4th Cir. 2000)). Thus, the only proper inquiry, if any, is whether the admission of the evidence itself

so infected the entire trial that the resulting conviction violated due process. *Estelle*, 502 U.S. at 72. This record firmly rebuts any contention of same for several reasons. First, the trial judge correctly applied binding state precedent in rejecting the applicability of the test. *State v. Al-Amin*, 578 S.E.2d 32, 43 (S.C. Ct. App. 2003) (holding that armed robbery is a crime of dishonesty, and the balancing test of Rule 403 was thus not required). Second, when the offenses were used on cross-examination, the trial judge immediately charged the jury that the two prior robbery offense were admitted only for impeachment and could be considered only in assessing credibility (App. 242). Third, as referenced more fully above, there is overwhelming evidence of guilt on this record. Based upon the foregoing, this allegation of error fails.

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, it is recommended that the respondent's motion for summary judgment (doc. 26) be granted.

s/William M. Catoe
United States Magistrate Judge

December 21, 2009

Greenville, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
Post Office Box 10768
Greenville, South Carolina 29603

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
DIVISION OF GREENVILLE

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2009 JAN 14 A 9 42

CA/No. 6:09-778-HMH-WMC

RUSSELL MONTGOMERY #294838.....PETITIONER,

-VS-

McKITHER BODISON.....RESPONDENT,

OPPOSITION AND REPLY TO THE
MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

Respectfully Submitted,

/s/ Russell Montgomery

Russell Montgomery

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
DIVISION OF GREENVILLE

RUSSELL MONTGOMERY #294838,	) CA/No. <u>6:09-778-HMH-WMC</u>
PETITIONER,	)
-v-	)
McKITHER BODISON,	) OPPOSITION AND REPLY TO THE
RESPONDENT,	) MAGISTRATE JUDGE'S REPORT
	) AND RECOMMENDATION

COMES NOW, Russell Montgomery, pro-se, herein after, Petitioner who respectfully lodges his Opposition and Reply to the Magistrate Judge's Report and Recommendation that was entered on December 21, 2009 in the above captioned case number.

PROCEDURAL HISTORY

Petitioner is presently incarcerated in the South Carolina Department of Corrections pursuant to commitment orders of the Orangeburg County Clerk of Court. Petitioner was indicted in August 2001 for kidnapping and armed robbery. Petitioner was represented by Margaret Peggy Hinds, Esq..

A jury trial was convened before the Honorable Edward B. Cottingham. The jury convicted Petitioner of kidnapping and the

lesser included offense of strong armed robbery (common law). Judge Cottingham sentenced Petitioner to 20 years confinement for the kidnapping and 15 years consecutive for the strong armed robbery. A timely notice of appeal was filed and the appeal was perfected by the South Carolina Office of Appellate Defense. Petitioner was represented by Robert Dudek, Esq. on appeal. On October 5, 2004, Dudek filed an Anders Brief in the South Carolina Court of Appeals raising one issue: The court erred by allowing appellant to be impeached with his prior conviction for strong armed robbery where he was on trial for armed robbery and kidnapping. The judge did not conduct a State v. Colf analysis, and the prejudicial effect of the prior robbery conviction outweighed its probative value under rule 403 SCRE."

On April 20, 2005, the South Carolina Court of Appeals issued an unpublished opinion dismissing the appeal. State v. Montgomery, unpublished opinion no. 2005-UP-285 (S.C.Ct.App. filed April 20, 2005). On April 29, 2005, Petitioner filed a petition for rehearing, which was ultimately denied on June 22, 2005. The remittitur was issued on July 27, 2005.

Petitioner filed an application for post conviction relief on February 21, 2006, raising numerous issues of ineffective assistance of counsel claims in the follow: "Petitioner alleges that trial counsel failed to properly prepare for trial of the case; failed to request continuance based on untimely receipt of discovery; failed to move to suppress evidence; failed to object to evidence and witnesses not timely revealed in response to

discovery request; failed to object to impeachment evidence; failed to request exclusion of impeachment evidence; failed to object to improper questions by the Solicitor, and such other grounds as may become apparent after a complete review of the record." The State filed a return on or about December 7, 2006. An evidentiary hearing was convened on January 12, 2007 before the Honorable James C. Williams, Jr.. On February 26, 2007, Judge Williams issued an order denying relief. A timely notice of appeal was filed and an appeal was perfected by the South Carolina Office of Appellate Defense. Petitioner was represented by Kathrine H. Hudgins, Esq.. On January 10, 2008, Hudgins filed a Johnson petition for writ of certiorari in the South Carolina Supreme Court of South Carolina raising the following issue: "Did the PCR court err in refusing to find trial counsel ineffective for failing to ascertain if the victim's fingerprints could be identified on the box containing narcotics found in the car where the kidnapping and robbery allegedly took place?"

On January 18, 2008, Petitioner filed a pro-se brief raising the following issues: (1) Did the PCR Court err in refusing to find trial counsel ineffective for failing to investigate and for failing to suppress photos; (2) Did the PCR court err in refusing to find trial counsel ineffective for failing to request a continuance; (3) Counsel was ineffective for failing to request a disclosure of the Brady Motion that would have proven that there was no evidence of gun powder (residue) on the petitioner's clothes."

By order dated July 11, 2008, the South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals. On January 30, 2009, the South Carolina Court of Appeals denied the petition and the remittitur was sent back down on February 20, 2009. Petitioner subsequently timely filed a 28 USC §2254 habeas corpus petition in the District Court of South Carolina raising (2) two grounds. (1) Ineffective assistance of trial counsel, alleging numerous claims of ineffective assistance counsel; and (2) due process violation, denial of a right to a fair trial. On August 10, 2009, the Respondent filed a motion for summary judgement. On September 16, 2009, Petitioner lodged his timely opposition and reply to the Respondents motion for summary judgement. On December 21, 2009, the Magistrate Judge issue a Report and Recommendation ("R&R") recommending the Respondent's motion be granted.

This Opposition and Reply is as follows:

GROUND ONE

Petitioner asserts that he was denied his constitutional right to the effective assistance of trial counsel for the following numerous grounds: "counsel failed to request a continuance; failed to suppress evidence; failed to object to evidence and witnesses not timely revealed in response to Brady request; failed to object to impeachment evidence; failed to request exclusion of impeachment evidence and failed to object to improper questioning of the Solicitor."

The Magistrate Judge alleges that only two (2) of these issues were addressed by the PCR court in the order of dismissal, to wit: "the alleged failure to investigate and suppress photographs and the failure to request a continuance." The Magistrate Judge assumes the remaining issues are procedurally barred. In reliance the Magistrate Judge relies on Matthews v. Evatt, 105 F.3d 907, 916 (1997). The Magistrate has erroneously applied Matthews supra. In Matthews, the Court cited George v. Angelone, 100 F.3d 353, 363 (4th Cir.1996) wherein the court held: "a claim that has not been presented to the states highest court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it at this juncture."). Petitioner objects to the Magistrate's finding that the additional claims are defaulted. The Magistrate Judge asserts that because Petitioner did not file a Rule 59(e) motion to

alter/amend asking the PCR judge to make specific findings. The Magistrate further asserts that because the issue was not ruled upon by the PCR court, the issue would not have been preserved for PCR appeal. The Magistrate Judge correctly points out that PCR appeal counsel argued that the issues presented on appeal were sufficiently addressed by the "catch-all" language included (Johnson petition p.4).

Yet, the Magistrate Judge asserts that the South Carolina Supreme Court rejected that argument in Marlar v. State, 653 S.E.2d 266, 266-67 (S.C.2007) as cited by the Magistrate Judge (R&R p.7). Petitioner objects to the Magistrate's reliance on Marlar 653 S.E.2d 266-67, the Marlar case relied on by the Magistrate has [no] weight bearing on the issues at hand. To the contrary in reviewing another case Marlar v. State, 373 S.C. 275, 644 S.E.2d 769 (App.2007), the Court held the defendant preserved the issues for appeal of whether trial court's order dismissing his petition for post conviction relief (PCR) was insufficient due to court's failure to rule on every issue presented in the PCR application, though he failed to file a motion requesting the court to specifically address each issue raised in the petition, as court's order specifically addressed its failure to delineate each issue and gave reasons for the ruling, such that issue had not been finally ruled upon. In the case relied on by Petitioner, Marlar 373 S.C. 275, 644 S.E.2d 769 (App.2007), addressed the fact that in the past the South Carolina Supreme Court has overlooked the failure to file a Rule 59(e), SCRPC motion in

order to attend to the pervasive problem of inadequate orders. McCullough 320 S.C. at 272 (remanding to PCR court, despite the fact no Rule 59(e) had been filed, an admonishing all those involved to carefully prepare and review PCR orders to ensure they specifically address the issues raised and make conclusions of law. In the instant case, Petitioner's claims were fairly presented to the State highest court in the PCR appeal, writ of certiorari, thus satisfying the fair presentation rule for exhaustion. Section 28 USC §2254(c) requires only that state prisoners give state courts a fair opportunity to act on their claims. See Castille v. Peoples, 489 U.S. 346, 349-350, 109 S.Ct. 1056 (1989). Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims in a federal habeas petition. The exhaustion doctrine, first announced in Ex parte Royall, 117 U.S. 241, 6 S.Ct. 724 (1886), is now codified at 28 USC §2254(b)(1)(1994 ed. Supp.III). This doctrine however, raises recurring question: What state remedies must a habeas petitioner invoke to satisfy the federal exhaustion requirement? See Castille v. Peoples 489 U.S. 346, 349-350 (1989).

The Magistrate Judge asserts that Petitioner did not file a Rule 59(e) SCRCF, motion to alter/amend therefore the issues were not preserved for the pcr appeal. Petitioner objects to this assertion for (2) two reasons. (1) Petitioner was represented by

counsel during the PCR hearing and South Carolina has constantly held, that South Carolina does [not] recognize hybrid representation in the PCR setting. State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989). The rationale behind those decisions applies equally to situations where a litigant who is represented by counsel before the Court of Appeals seeks review of actions taken by the Court of Appeals pending a final decision on the matter by that court. See Aiken Speir Inc. v. Henry, 326 S.C. 268, 486 S.E.2d 492 (1997), also see Koon v. Clare, 338 S.C. 423 (2000); and (2) the Magistrate's assertion that "Petitioner" could have filed a Rule 59(e) would have been in direct conflict with Rule 11(a), SCRCP, which states in pertinent part: "Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is an active member of the South Carolina Bar."

The Magistrate's R&R p.7 correctly states that Petitioner was convicted of kidnapping and strong armed robbery. The victim did testify as to the kidnapping and robbery and the victim did identify Petitioner as the perpetrator. Yet, the victim testified that a man with a "white covering about his face showed up with a gun and "shot into the ground". The victim testified that he was forced into his car and escaped while the car was in motion, which ultimately resulted in the car hitting a utility pole. An officer happened to be on patrol in the area and saw the accident. Petitioner was standing by the passenger side of the

car with a white shirt around his neck. Officers recovered a white shirt and 9mm gun, although it should be noted that the gun was [not] retrieved from Petitioner's possession, nor were Petitioner's finger prints found on the gun. A subsequent investigation revealed what "appeared" to be a bullet hole in the ground at the victim's home. (App.154). During trial Petitioner testified that he [never] had a gun. Petitioner asserts that the critical issue was presented in Petitioner pro se Johnson petition issue III. "Counsel was ineffective for failing to request a disclosure of the Brady motion that "would have proven" that there was [no] evidence of gun powder residue on petitioner's clothes: (emphasis supplied). This issue went straight to the heart of the State's case, and had this evidence been placed before the jury, it would have clearly rebutted the State's case. The Magistrate states that with the exception of the investigation and suppression of photographs and failure to request a continuance claims, the additional claims in ground one are procedurally barred, and should be dismissed. Petitioner specifically objects to this assertion. Petitioner's issues in ground one were presented to the State's highest court during the PCR appeal, thus satisfying the exhaustion rule.

As to the ineffective assistance of counsel allegation with regard to investigation the United States Supreme Court addressed the Fourth Circuit's erroneous prejudice standard:

Take, for example, our decision in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the petitioner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different", "opposite in character or nature", and "mutually opposed" to our clearly established precedent because we held in Strickland, that the prisoner [need only] demonstrate a "reasonable probability that, ...the result of the proceeding would have been different."

(Terry), Williams v. Taylor, 529 U.S. at 405-406 (concurring opinion of O'Connor, J.). The "Strickland" standard for judging effective assistance of counsel claims is "reasonable probability", which is less than a preponderance. Id.

The PCR Court noted that Petitioner testified during the PCR hearing that what really had happened was that he and the victim were involved in a drug deal that went bad. Petitioner further testified that he wanted counsel to "get finger prints off the box containing the drugs." Counsel testified that she did [not] recall such a request. Counsel also testified that impeachment may not have been valid or successful. This assertion supports Petitioner claim because due to the fact that counsel did not get the box finger printed it cannot be said that the impeachment would or would not have been successful. (emphasis supplied). The failure to investigate, research and prepare is equivilant to [no] representation at all. See Brubaker v. Dickson, 310 F.2d 30;

Williams v. Beto, 354 F.2d 698, Brooks v. Texas, 381 F.2d 619.

The PCR Court noted that counsel testified that she did not move to suppress photos because she did not feel the photographs were harmful to Petitioner's case. The Magistrate's R&R, p.9 asserts using the error and prejudice standard from Strickland supra, the PCR judge concluded that Petitioner failed to show that he was entitled to any relief. To the contrary, Petitioner objects to this assertion. Noting, that the prejudicial component of the Strickland analysis may be presumed if the nature of the deficient performance is that of a structural error. Becton v. Barnett, 920 F.2d 1190-92. In the instant situation the error complained of deprived Petitioner of presenting an adequate defense that resulted in being denied a fair trial. The Magistrate's R&R p.9, states that the Respondent notes that Petitioner has the burden of establishing actual prejudice, and that "Petitioner" failed to have the box tested for finger prints and what if any fingerprint evidence was available is unknown. Petitioner objects to this assertion in such that the Sixth Amendment guarantees the effective "assistance" of counsel and to put the burden on Petitioner of getting the box finger printed would be contrary to what the Sixth Amendment prescribes. Therefore, the PCR Court unreasonably applied clearly established federal law to the facts of the case.

GROUND TWO

Petitioner asserts that he was denied his constitutional right to a fair trial when the trial court allowed the State to impeach Petitioner with (2) two prior robbery convictions without an analysis under Rule 403, SCRE, "whether the probative value is substantially out weighed by danger of unfair prejudice. This issue was raised to the trial court, who ultimately found that the Rule 403 analysis was not applicable under state precedent. This issue was presented to the South Carolina Court of Appeals in an Anders Brief. Petitioner asserts that the trial court erred in not doing the analysis and regardless of State precedent the right to a fair trial is encompassed in the Fourteenth Amendment of the United States Constitution.

Rule 403, SCRE, is succinctly the same underlying principle as that of the 403, Federal Rules of Evidence. The admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Morris, 376 S.C. 189 (2008). As well, the scope of cross-examination is within the discretion of the trial court, and will not be reversed absent a showing of prejudice. State v. Colf, 337 S.C. 622, 625 (2000). Any error in the trial court's failure to conduct the [proper] balancing test is in determining whether remote convictions are admissible may be harmless. State v. Johnson, 363 S.C. 53, 60 (2005). To constitute error, the trial court's ruling to admit or exclude evidence must

affect a substantial right. Id; Rule 103(a) SCRE. An error is considered harmless [only] where it could not have affected the outcome of the trial. State v. Bryant, 369 S.C. 511, 518 (2006). In the instant case the error complained of is not harmless beyond any meaning of the word, for Petitioner was on trial for armed robbery and the State was allowed to impeach Petitioner with (2) two prior robbery convictions. Clearly this was the skunk in the box theory that affected Petitioner's substantial rights to a fair trial that is protected under the Fourteenth Amendment of the United States Constitution.

Evidentiary rulings, while a matter of state law can be considered on federal habeas corpus if the error complained was so extreme as to result in the denial of a constitutionally fair proceeding. Barbe v. McBride, 512 F.3d 443, 452 (4th. Cir. 2008). Clearly, the admission of Petitioner's (2) two prior robbery convictions infected the entire trial so that the resulting conviction violated due process. Petitioner objects to the Magistrate Judge's findings on this issue as one of overwhelming evidence. The admission of the prior robbery convictions prematurely directed a verdict for the State. Once the State rung the bell, the trial judges instructions had little if no effect. Petitioner is entitled to habeas relief on this issue.

As to the remaining issues the Magistrate Judge "failed" to address, Petitioner requests an evidentiary hearing on the matter. Petitioner asserts that he has a right to an evidentiary hearing under 28 USC §2254(e)(2) and Rule 8 of the Rules

governing §2254 cases. Under the AEDPA, a habeas petitioner's entitlement to an evidentiary hearing when he fails to develop a factual basis for a claim is restricted to the narrow exception of 28 USC §2254(e)(2) which provides: (2) if the applicant has failed to develop the factual basis of a claim in state court proceedings the court shall not hold an evidentiary hearing on the claim unless the applicant shows that....(A) the claim relies on---; (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found applicant guilty of the underlying offense. A constitutional claim invariably turns on the underlying historical facts. In order to adjudicate claims in habeas petitions, the courts ascertain facts by argumenting the factual record, via discovery or expansion of the record. Otherwise, an independent federal evidentiary hearing [is required]. (emphasis supplied).

The AEDPA, contains provisions touching fact finding in federal habeas corpus proceedings. At the same time, courts must take account of other statutory provisions governing federal collateral litigation-- both provisions that were added by the 1996 Act and provisions that have been on the books for years and were not disturbed by the new law.

Three issues are paramount (1) when a federal court must or can hold its own evidentiary hearing; (2) the significance to be

attached to previous state court findings of fact; and (3) the consequences of the petitioner's procedural default with respect to fact finding in state court.

Both the previous controlling statutes and the United States Supreme Court's decisions in Townsend v. Sain, 372 U.S. 293 (1963); to Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) are affected. (emphasis supplied). Previously, statutory language in point was located in 28 USC §2254(d). The 1996 Act repeals that language. The new §2254(d) governs the treatment the federal habeas court [must] give to previous state court adjudication on the merits on its face, paragraph (2) of §2254(d) invites a federal court to [re-open] a state court's adjudication of the facts underlying a federal claim in order to determine whether the state court reasonably assessed the evidence. The precise fit between §2254(d) and Townsend supra has not yet been made perfectly clear. The prevailing view was that the former §2554(d) neither displaced nor codified Townsend's holding on the threshold question of whether a court must conduct a hearing. Rather, the former §2254(d) assumes that a federal evidentiary hearing was to be held and addressed only the bearing previous state court findings should have in that federal proceeding. Keeney 504 U.S. at 21 (O'Connor, J, dissenting). The key to that interpretation lays in the text of the former §2254(d) itself, which provided that the presumption in favor of state court findings would apply in a federal habeas corpus proceeding and the the applicant could rebut that presumption..."in an evidentiary hearing in federal

court proceedings" by adducing convincing evidence that the state finding was erroneous. The new provision in the 1996 Act §2254(e) employs essentially the same basic structure and some of the same language. The most straightforward interpretation of the new provision is that it simply substitutes for the former §2254(d) and is addressed, as was its precursor, only to the treatment of state court factual findings in a hearing that a federal court has decided it must or can conduct in light of Townsend supra.

If the new statute addresses the threshold question in Townsend, it certainly does not do so with any clarity regarding any changes it might make in the Townsend analysis. The 1996 Act does not disturb prior doctrine regarding the circumstances in which a federal habeas court must or can conduct a federal evidentiary hearing into the facts underlying Petitioner's claims. That part of Townsend governing that question remains intact. Therefore, Petitioner requests and evidentiary hearing in the instant matter.

CONCLUSION

Petitioner objects to the Magistrate Judge's recommendation granting the Respondent's summary judgement. In ruling on a motion for summary judgement evidence of the non-moving party is to be believes, and all justifiable inferences are to drawn in his favor. Dufay v. Bank of America, 94 F.3d 561. Even when there is no dispute as to the evidentiary facts, but as to the conclusions or inferences to be drawn from them, summary judgement should be denied. Stewart v. State Farms Ins. Co., (S.C.App.2000), 341 S.C. 143, 533 S.E.2d 597. rehearing denied.

Summary judgement should not be granted if there is a dispute as to the conclusion to be drawn from the facts, even when there is no dispute as to the facts. Doe v. Batson, (S.C.App.1999), 338 S.C. 291, 525 S.E.2d 909, rehearing denied, cert. granted, affirmed in part, reversed in part. 345 S.C. 316, 548 S.E.2d 854.

Petitioner is entitled to an evidentiary hearing in the instant matter. For the requested Petitioner will respectfully pray.

Respectfully Submitted,

/s/ Russell Montgomery

Russell Montgomery

CERTIFICATE OF SERVICE

I, Russell Montgomery, do hereby swear and declare that I have mailed the enclosed Opposition and Reply to the District Court Clerk, P.O. 10768, Greenville, SC. 29603.

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

This was done by placing the aforesaid documents in properly addressed, sufficient postage affixed envelopes and placed in the United States Mail here at Lieber Correctional Institution in Ridgeville, SC. 29472.

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 12th DAY OF January 2010

Syana Jones
NOTARY PUBLIC

MY COMM. EXPIRES 1/24/2018

Respectfully Submitted,

/s/ Russell Montgomery
Russell Montgomery

RECEIVED
USDC CLERK, GREENVILLE, SC
Russell Montgomery #294838
Lieber Corr. Inst.
P.O. Box 205
Ridgeville, SC. 29472
2009 JAN 14 A 9:42

RE: CA/No. 6:09-778-HMH-WMC

Dear Mr. McMaster,

Enclosed please find your copy of the Opposition and Reply that I have filed in the above captioned case number with the District Court Clerk.

I thank you for your time and consideration in this matter.

cc/file
cc/Dist.Ct.Clerk

Kindest Regards,
Russell Montgomery

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Russell Montgomery, #294838,	)	
	)	
Petitioner,	)	C.A. No. 6:09-778-HMH-WMC
	)	
vs.	)	OPINION & ORDER
	)	
McKither Bodison,	)	
	)	
Respondent.	)	

This matter is before the court with the Report and Recommendation of United States Magistrate Judge William M. Catoe made in accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 of the District of South Carolina.¹ Russell Montgomery ("Montgomery") is a pro se state prisoner seeking habeas corpus relief pursuant to 28 U.S.C. § 2254. Magistrate Judge Catoe recommends granting Respondent's motion for summary judgment. Montgomery filed objections to the Report and Recommendation. For the reasons stated below, the court grants Respondent's motion for summary judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Montgomery is currently incarcerated at Lieber Correctional Institution, a South Carolina Department of Corrections ("SCDC") facility. In August 2001, Montgomery was indicted for armed robbery and kidnaping. On July 16, 2003, after a jury trial, Montgomery was found guilty

¹ The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the United States District Court. See Mathews v. Weber, 423 U.S. 261, 270 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the magistrate judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

of kidnaping and strong arm robbery, a lesser offense. Montgomery was sentenced to twenty years' imprisonment for kidnaping and fifteen years' imprisonment for strong arm robbery, all such terms to be served consecutively. Montgomery filed a timely direct appeal. On appeal, Montgomery was represented by Robert M. Dudek ("Dudek"). On October 5, 2004, Dudek filed an Anders brief and petition to be relieved as counsel, raising the following issue:

Whether the court erred by allowing appellant to be impeached with his prior robbery conviction where he was on trial for robbery, since the prejudicial effect of that conviction outweighed its probative value under Rule 403, SCRE, and the court failed to conduct the requisite *State v. Colf* analysis?

(Resp't Mem. Supp. Summ. J. Exs. (Anders Brief 3).) The South Carolina Court of Appeals dismissed the appeal after Anders review on April 20, 2005. (Id. Exs. (State v. Montgomery, Op. No. 2005-UP-285).)

On February 21, 2006, Montgomery filed an application for post-conviction relief ("PCR") raising the following grounds in his application:

Petitioner alleges that trial counsel failed to properly prepare for the trial of this case; failed to request continuance based on untimely receipt of discovery; failed to move to suppress evidence; failed to object to evidence and witnesses not timely revealed in response to discovery request; failed to object to impeachment evidence; failed to request exclusion of impeachment evidence; failed to object to improper questions by Solicitor; and such other grounds as may become apparent after a complete review of the record.

(Id. Exs. (App. at 333).) On January 12, 2007, the PCR court held an evidentiary hearing at which Montgomery was represented by C. Bradley Hutto ("Hutto"). The PCR court denied Montgomery's application by order dated February 26, 2007. (Id. Exs. (App. at 374-79).)

Montgomery filed a timely appeal. On appeal, Montgomery was represented by Katherine H. Hudgins ("Hudgins").

On January 10, 2008, Hudgins filed a Johnson petition and a request to be relieved as counsel, raising one issue: "Did the PCR court err in refusing to find trial counsel ineffective for failing to ascertain if the victim's fingerprints could be identified on a box containing narcotics found in the car where the kidnapping and robbery allegedly took place?" (Id. Exs. (Johnson Petition 2).) In addition, Montgomery submitted a pro se brief asserting the following additional issues:

- (1) Did the PCR court err in refusing to find Trial Counsel Ineffective for failing to investigate and for failing to suppress photos.
- (2) Did the PCR court err in refusing to find trial counsel ineffective for failing to request a continuance.
- (3) Counsel was ineffective for failing to request a disclosure of the Brady Motion that would have proven that there was no evidence of gun power [sic] (residue) on the petitioner's clothes.

(Resp't Mem. Supp. Summ. J. Exs. (Pro Se Response to Johnson Petition).) The South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals which denied Montgomery's petition for writ of certiorari on January 30, 2009. (Id. Exs. (Montgomery v. State, 2006-CP-38-00209 (Jan. 30, 2009)).)

Montgomery filed the instant § 2254 petition on March 25, 2009,² raising the following grounds for relief:

Ground One: Ineffective Assistance of Counsel.

Supporting facts: Counsel failed to: request continuance, failed to suppress evidence, failed to object to evidence and witness not timely revealed in response request; object to impeachment evidence, failed to request exclusion of impeachment evidence, failed to object to improper questions by Solicitor.

Ground Two: [no ground specified].

Supporting facts: Whether the courts erred by allowing Appellant to be impeached with his prior Robbery Conviction. Where he was on trial for Robbery, since the

² Houston v. Lack, 487 U.S. 266 (1988).

prejudicial effect of that conviction out weighted [sic] its provation [sic] value under Rule 403 S.C.R.E., And the Court failed to conduct the requisite. State -v-Colf Analysis?

(Montgomery § 2254 Pet. 6-8.) Respondent filed a motion for summary judgment on August 10, 2009. Montgomery filed a memorandum in opposition to Respondent's motion for summary judgment on September 16, 2009. Magistrate Judge Catoe recommends granting Respondent's motion for summary judgment because the claims raised in Montgomery's petition are procedurally defaulted, fail on the merits, or are not cognizable in a habeas action. (Report and Recommendation, generally.)

II. DISCUSSION OF THE LAW

A. Summary Judgment Standard

Summary judgment is appropriate only "if the pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Rule 56(c) mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Moreover, “[w]hen a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial.” Fed. R. Civ. P. 56(e)(2).

B. Standard of Review in a § 2254 Petition

In addition to the standard that the court must employ in considering motions for summary judgment, the court must also consider the petition under the requirements set forth in 28 U.S.C. § 2254. Under § 2254(d),

[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the State court proceeding.

As “a determination of a factual issue made by a State court shall be presumed to be correct,” Montgomery has “the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). With respect to reviewing the state court’s application of federal law, “a federal habeas court may grant the writ if the state court identifies the correct governing principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” Humphries v. Ozmint, 397 F.3d 206, 216 (4th Cir. 2005) (quoting Williams v. Taylor, 529 U.S. 362, 413 (2000)). Further, “an ‘unreasonable application of federal law is different from an incorrect application of federal law,’ because an incorrect application of federal law is not, in all instances, objectively unreasonable.” Humphries, 397

F.3d at 216 (quoting Williams, 529 U.S. at 410). “Thus, to grant [Montgomery’s] habeas petition, [the court] must conclude that the state court’s adjudication of his claims was not only incorrect, but that it was objectively unreasonable.” McHone v. Polk, 392 F.3d 691, 719 (4th Cir. 2004).

C. Objections

Objections to the Report and Recommendation must be specific. Failure to file specific objections constitutes a waiver of a party’s right to further judicial review, including appellate review, if the recommendation is accepted by the district judge. See United States v. Schronce, 727 F.2d 91, 94 & n.4 (4th Cir. 1984). In the absence of *specific* objections to the Report and Recommendation of the magistrate judge, this court is not required to give any explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983).

The magistrate judge recommends granting Respondent’s motion for summary judgment because the claims raised in Montgomery’s petition are procedurally defaulted or without merit. (Report and Recommendation, generally.) Further, the magistrate judge submits that Montgomery has failed to show cause or prejudice to excuse his procedural default.

Montgomery filed objections to the Report and Recommendation. After review, the court finds that many of Montgomery’s objections are non-specific, unrelated to the dispositive portions of the magistrate judge’s Report, or merely restate his claims. However, the court was able to glean three specific objections. Montgomery objects to the magistrate judge’s conclusion that (1) all except two of his ineffective assistance of counsel claims are procedurally barred; (2) that his ineffective assistance of counsel claims for failure to investigate and to suppress the photographs fail on the merits; and (3) that the trial court did not violate his constitutional right

to a fair trial by allowing the prosecution to impeach Montgomery with two prior robbery convictions. (Objections, generally.)

The magistrate judge concluded that all except two of Montgomery's ineffective assistance of counsel claims raised in his § 2254 petition are procedurally barred. (Report and Recommendation 6.) Montgomery objects arguing that these claims are not procedurally barred. (Objections 5.)

Montgomery alleges that his trial counsel was constitutionally ineffective because he failed to: (1) request a continuance, (2) suppress evidence, (3) object to evidence and witnesses not timely revealed in response request, (4) object to impeachment evidence, (5) request exclusion of impeachment evidence, and (6) object to improper questions by the Solicitor. (Montgomery § 2254 Pet. 6.) Montgomery raised these ineffective assistance claims in his PCR application; however, the PCR court did not rule on all of the claims. Of the ineffective assistance of counsel claims raised in Montgomery's § 2254 petition, the PCR court only directly ruled on the ineffective assistance of counsel for failure to investigate and suppress photographs and to request a continuance. (Resp't Mem. Supp. Summ. J. Exs. (App. at 374-79).)

Because the PCR court failed to make specific findings on all of his ineffective assistance of counsel claims, Montgomery was required to file a timely Rule 59(e) motion requesting that the PCR court make specific findings on all of his claims raised in his PCR application in order to preserve the issues for appeal. Marlar v. State, 653 S.E.2d 266, 267 (S.C. 2007) ("Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review. . . .").

Following the denial of his PCR application, Montgomery did not file a timely Rule 59(e) motion to preserve his remaining claims for review. Montgomery alleges that he was not required to file a Rule 59(e) motion because he was represented by counsel and could not file a pro se Rule 59(e) motion without violating Rule 11(a) of the South Carolina Rules of Civil Procedure, which provides in pertinent part that “[e]very pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is an active member of the South Carolina Bar, and whose address and telephone number shall be stated.” This argument is without merit. “Rule 11 of the South Carolina Rules of Civil Procedure does not apply in PCR proceedings.” Hiott v. State, 381 S.C. 622, 629 (S.C. 2009). Montgomery’s counsel could have filed a Rule 59(e) motion. Likewise, Montgomery could have filed a pro se Rule 59(e) motion. Based on the foregoing, Montgomery’s claims for constitutionally ineffective assistance of counsel are procedurally defaulted from habeas corpus review. See Al-Shabazz v. State, 527 S.E.2d 742, 747 (S.C. 2000) (“After a hearing, the PCR court grants or denies relief by issuing a written order containing findings of fact and conclusions of law. Either party must timely file a Rule 59(e), SCRCP, motion to preserve for review any issues not ruled upon by the court in its order.” (internal citation omitted)). As such, all except two of Montgomery’s ineffective assistance of counsel claims are procedurally barred.

Montgomery’s procedural bar may be excused only if he “can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” Coleman v. Thompson, 501 U.S. 722, 750 (1991). Montgomery has not established any cause for the default

or that failure to consider his claims will result in a fundamental miscarriage of justice. Hence, his objection that these claims are not procedurally defaulted is without merit.

Next, Montgomery objects to the magistrate judge's finding that Montgomery's trial counsel was not constitutionally ineffective for failing to suppress certain photographs and investigate fingerprints on a box containing narcotics. (Objections 9-10.) In order to successfully challenge a conviction or sentence on the basis of ineffective assistance of counsel, Montgomery must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that he was prejudiced by his counsel's deficient performance. See Strickland v. Washington, 466 U.S. 668, 687 (1984). With respect to the first prong, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. In order to prove prejudice, Montgomery must "show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Id. at 694.

Montgomery argues that trial counsel's failure to suppress the photographs and investigate the box containing drugs "deprived [him] of presenting an adequate defense that resulted in being denied a fair trial." (Objections 11.) During his PCR hearing, Montgomery testified that he and the victim were involved in a drug deal that went bad. (Resp't Mem. Supp. Summ. J. Exs. (App. at 376).) Montgomery submits that prejudice should be presumed because placing the burden on him to get "the box finger printed would be contrary to what the Sixth Amendment prescribes." (Objections 11.) The PCR court found that trial counsel was not

constitutionally ineffective for failing to investigate and suppress photographs. The PCR court explained:

Trial counsel . . . testified that she does not remember Applicant asking for a fingerprint test on the box. She further testified that although she may have been able to impeach the victim's testimony based on the box of drugs, she is not sure this would have been valid, or successful. Counsel also testified that she did not move to suppress the photos because she did not feel the photos were harmful to Applicant's case.

This Court finds that trial counsel's testimony was credible and the Applicant's testimony was not credible. This was a matter of trial strategy and not ineffective assistance of counsel. Where counsel articulates a valid strategic reason for her action or inaction, counsel's performance should not be found ineffective. . . . This Court further finds that even if there were some error, the evidence against the Applicant was very strong and counsel's performance did not prejudice the Applicant.

(Resp't Mem. Supp. Summ. J. (App. at 377).) In addition, during the trial, counsel vigorously challenged the investigation and utilized the photographs. (*Id.* Exs. (App. at 159, 161, 167, 197, 199, 217).) Montgomery has failed to show how the photographs were harmful to his case or that the fingerprint evidence from the box would have aided his defense. Based on the foregoing, Montgomery has failed to produce any evidence to demonstrate that the PCR court unreasonably applied federal law or unreasonably evaluated the facts in finding that trial counsel was not constitutionally ineffective for failing to move to suppress the photographs or investigate the box containing drugs. Further, Montgomery has failed to establish any prejudice. Therefore, Montgomery's objection is without merit.

Lastly, Montgomery objects to the magistrate judge's conclusion that the trial court's admission of two prior robbery convictions did not "so infect[] the entire trial that the resulting conviction violated due process." (Report and Recommendation 11.) Montgomery argues that

"he was denied his constitutional right to a fair trial when the trial court allowed the State to impeach [him] with (2) two prior robbery convictions without an analysis under Rule 403" of the South Carolina Rules of Civil Procedure. (Objections 12-13.) As noted by the magistrate judge, the trial court was not required to conduct an analysis under Rule 403. (Report and Recommendation 11.)

In State v. Al-Amin, the South Carolina Court of Appeals held that armed robbery is a crime of dishonesty and that "evidence of a prior crime of dishonesty" is automatically admissible "without the balancing of probative value against prejudicial effect." 578 S.E.2d 32, 43 (S.C. Ct. App. 2003). In addition, the trial court charged the jury with a limiting instruction that the prior convictions were for impeachment purposes only. (Resp't Mem. Supp. Summ. J. Exs. (App. 242).) Further, even if the trial court committed error, this error did not deprive Montgomery of a "constitutionally fair proceeding" in light of the overwhelming evidence of Montgomery's guilt as outlined by the magistrate judge. Barbe v. McBride, 521 F.3d 443, 452 (4th Cir. 2008); (Report & Recommendation 7.) Based on the foregoing, after a thorough review of the record and the magistrate judge's Report and Recommendation, the court adopts the Report and Recommendation.

Therefore, it is

ORDERED that Respondent's motion for summary judgment, docket number 26, is granted, and Montgomery's § 2254 petition is dismissed. It is further

ORDERED that a certificate of appealability is denied because Montgomery has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C.

§ 2253(c)(2).

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
January 20, 2010

NOTICE OF RIGHT TO APPEAL

The Petitioner is hereby notified that he has the right to appeal this order within thirty (30) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

FORM 5

2011-CP38-00857

STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

County of ORANGEBURG)Russell Montgomery #294838)

Full name and prison number (if any) of Applicant)

v.)

APPLICATION FOR

State of South Carolina)

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 Correctional Institution, P.O. Box
205, 136 Wilborn Ave., Ridgeville, SC. 29472
2. Name and location of Court which imposed sentence Orangeburg County Court of General Sessions
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) 2002-GS-38-1573
 - (b) 2002-GS-38-1574

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) kidnapping (20 years) July 16, 2003
- (b) strong armed robbery (15 years) July 16, 2003
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty trial by jury
- (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. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. denied relief
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. Submitted April 1, 2005 filed April 20, 2005
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Up.No. 2005-UP-285
- 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) See attached memorandum in support
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) see attached memorandum in support
- (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? yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? yes
- (d) any other petitions, motions or applications in this or any other Court? yes
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. Federal Habeas Corpus
- ii. Certiorari to US Sup.Ct.
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. District Court of South Carolina
- ii. United States Supreme Court
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. denied
- ii. cert. denied
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. unknown
- ii. unknown
- iii. _____
- iv. _____

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

- i. none
- ii. none
- 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?

first filing

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) facts just became available, first filing
- (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?
yes
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. Margrett Peggy Hinds,
Orangeburg Court Public Defender
- ii. XXXXXXXXXXXXXXXXXXXX Robert Dudek, Esq
XXXXXXXXXXXXXXXXXXXX, SC. Appellate Defense
- iii. C. Bradley Hutto, esq
P.O. Box 1084, Orangeburg, SC. 29116
- (b) the proceedings at which each such attorney represented you:
- i. trial and sentencing
- ii. direct appeal
- iii. preparation and pcr proceedings

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

Russel Montgomery -- Petitioner,

-Vs-

State of South Carolina -- Respondent,

MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR POST CONVICTION RELIEF
PURSUANT TO: S.C. CODE ANN.
§§17-27-20 THROUGH §160

Russell Montgomery
SCDC# 294838
Lieber Corr. Inst.
P.O. Box 205
136 Wilborn Ave.
Ridgeville, SC. 29472

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STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

Russell Montgomery)
Petitioner,) MEMORANDUM OF LAW IN SUPPORT OF
-V-) APPLICATION FOR POST CONVICTION
State of South Carolina) RELIEF PURSUANT TO S.C.CODE ANN.
Respondent,) §§17-27-20 THROUGH §160
_____)

201 JUL 26 P 3:31
CLERK OF COURT
JUL 26 2011

COMES NOW, Russell Montgomery, seeking relief in this court pursuant to S.C. Code Ann §17-27-20 through §160, due to the extraordinary circumstances that have denied Petitioner his right to due process of law and equal protection.

Petitioner is informed and believes through the issues presented, citations of authorities relied on and statement of facts, he will show unto this Honorable Court his entitlement to the requested relief sought herein.

Respectfully Submitted,

/s/ Russell Montgomery

Russell Montgomery

ISSUE (A) DOES THE EXTRAORDINARY CIRCUMSTANCES IN THE INSTANT CASE ENTITLE PETITIONER TO A SECOND APPLICATION TO ADDRESS THE REMAINING ISSUES THE PCR COURT FAILED TO ADDRESS IN THE ORIGINAL APPLICATION, SINCE PCR COUNSEL FAILED TO FILE A TIMELY RULE 59(e) MOTION TO ADDRESS ALL OF PETITIONER'S CLAIMS THAT WERE PRESENTED IN HIS ORIGINAL APPLICATION AND THIS COURT'S BARRING OF HYRYD REPRESENTATION THAT PRECLUDED PETITIONER FROM FILING A PRO-SE RULE 59(e), MOTION, THAT RESULTED A DENIAL OF DUE PROCESS AND EQUAL PROTECTION?

FACTS

Petitioner was indicted in August 2001 for armed robbery and kidnapping. A jury trial was convened July 16, 2003, wherein Petitioner was found guilty of kidnapping and the lesser included offense, of strong armed robbery. Petitioner was sentence to twenty years for the kidnapping and fifteen years for the strong arm robbery. The sentences were ordered consecutively.

A timely notice of appeal was filed and the appeal was perfected by the South Carolina Office of Indigent defense. Petitioner was represented by Robert Dudek, esq. On October 5, 2004, Dudek filed an Anders brief raising one issue: "Whether the court erred by allowing appellant to be impeached with his prior robbery conviction where he was on trial for robbery, since the prejudicial effect of that conviction outweighed it's probative value under Rule 403, SCRE, and the court failed to conduct the

requisite State v. Colf analysis? Ultimately the South Carolina Court of Appeals dismissed the appeal after an Anders review on April 20, 2005. (State v. Montgomery, Op.No.2005-UP-285).

Petitioner subsequently filed a timely application for post conviction relief raising the following grounds: (a). Trial counsel was ineffective for failing to properly investigate for trial; (b). counsel failed to request a continuance based on untimely receipt of discovery; (c). counsel failed to object move to suppress evidence; (d). counsel failed to object to evidence and witnesses not timely revealed in response to discovery request; (e). counsel failed to impeach evidence; (f). failed to request exclusion of impeachment evidence; (g). failed to object to improper questions by the solicitor; (h). and such other grounds as may become apparent after a complete review of the record.

On January 12, 2007, an evidentiary hearing was convened and Petitioner was represented by C. Bradley Hutto ("Hutto"). The PCR Court denied relief February 26, 2007. A timely notice of appeal was filed and perfected by the South Carolina Office of Indigent Defense, Petitioner was represented by Katherine H. Hudgins.

On January 10, 2008, Hudgins filed a Johnson petition and request to be relieved as counsel, while raising only one issue: "Did the PCR court err in refusing to find trial counsel ineffective for failing to ascertain if the victim's fingerprints could be identified on the box containing narcotics found in the car where the robbery and kidnapping allegedly took place?

Petitioner also filed a pro-se Johnson petition raising (3) three grounds. (1). Did the PCR court err in refusing to find counsel ineffective for failing to investigate and failing to suppress photos; (2). Did the PCR court err in refusing to find trial counsel ineffective for failing to request a continuance; (3). Was counsel ineffective for failing to request a disclosure of the Brady Motion that would have proven that there was no evidence of gun powder residue on Petitioner's clothes.

The South Carolina Supreme Court transferred the case to the Court of Appeals which denied Petitioner's petition for certiorari January 30, 2009. (Montgomery v. State, 2006-Cp-38-00209).

Petitioner filed for federal habeas relief pursuant to 28 USC §2254 on March 25, 2009 (CA/No.6:09-cv-00778-HMH), raising the following grounds: (1) Ineffective assistance of counsel, :Supporting facts: Counsel failed to request a continuance, failed to suppress evidence; failed to object to evidence and witnesses not timely revealed in response to request; object to impeachment evidence; failed to request exclusion of impeachment evidence; failed to object to improper questions by the solicitor; (2) Denial of a fair trial, Supporting facts: Whether the trial court erred by allowing appellant to be impeached with his prior robbery conviction, where he was on trial for robbery, since the prejudicial effect of that conviction out weighed it probative value under Rule 403, SCRE and the court failed to conduct a State v. Colf analysis?

The State filed a motion for summary judgement on August 10, 2009. Petitioner filed a timely opposition in response to the State's dispositive motion on September 16, 2009.

Subsequently, on January 20, 2010 the U.S. Magistrate Judge issued a Report and Recommendation ("R&R") granting the State's motion for summary judgement because the claims raised in the Petition were either procedurally defaulted, fail on the merits or are not cognizable in federal habeas corpus. R&R Entry Number 42, p.4). The Magistrate Judge ruled that (1). all except for two of Petitioner's ineffective assistance of counsel claims were procedurally barred, (2). ineffective assistance of counsel for failing to investigate and to suppress the photographs fail on the merits. The ineffective assistance of counsel claims ruled procedurally defaulted by the Magistrate is the basis for the instant application.

The Magistrate Judge's R&R admits Petitioner raised (6) separate and distinct grounds of ineffective assistance of counsel claims. (R&R p.7). Yet, the Magistrate addressed two (2) of the six (6) ineffective assistance of counsel claims but ruled the remaining four (4) grounds of ineffective assistance of counsel were procedurally defaulted because the PCR court [failed] to rule on [all] the claims.

The Magistrate Judge ruled that because the PCR failed to make specific findings on [all] of the ineffective assistance of counsel claims, Petitioner was required to file a timely Rule 59(e) motion requesting that the PCR court make specific findings

on all the claims raised in his PCR application in order to preserve the issues. Petitioner lodged a timely objection to the Magistrate's R&R claiming he (Petitioner) could not have filed a Rule 59(e) because he was represented by counsel and South Carolina Courts do [not] recognize nor allow hybrid representation and therefore Petitioner could not file a pro-se Rule 59(e) motion. (emphasis supplied). And ultimately the Magistrate Judge ruled the issues were procedurally defaulted and wouldn't accept PCR counsel's failure to file a Rule 59(e) as grounds to to overcome the procedural default based on the analogy that Petitioner was required to file a pro-se Rule 59(e) motion.

Petitioner was represented by counsel during his PCR hearing and as this Court knows there is a wealth of cases dealing with, disapproving and barring hybrid representation, and therefore the PCR Judge would not have allowed or considered a Rule 59(e) filed by Petitioner as a pro-se Rule 59(e) motion. Accordingly, it is now the remaining (4) four grounds of ineffective assistance of counsel as the grounds for the instant application. Petitioner is entitled to "one bite at the apple". This includes the right to present [all] his available issues in one PCR application. Petitioner now respectfully asks this Court to allow Petitioner to obtain a ruling on the issues that the PCR Court [failed] to address, while at the same time, Petitioner is challenging the denial of equal protection from the inadequate corrective process employed by the State as deficient.

DISCUSSION

Although successive applications are disfavored, successive applications are permitted in certain instances. Wilson v. State, 559 S.E.2d 581. For example, the South Carolina Supreme Court has permitted successive pcr applications upon showing that the applicant can establish sufficient reasons that any grounds raised in the application could not have been raised in the first application. Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999).

Accordingly the issues raised in the instant application were raised in the original application in compliance with S.C. Code Ann. §17-27-90. All applicants are entitled to a full and fair opportunity to present their claims in one PCR application. In order to be entitled to a successive application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application. Cf. Tilley, supra. Additionally, successive applications are permitted in **rare procedural** circumstances. See e.g. Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982) also see Carter v. State, 293 S.C. 528, 362 S.E.2d 20 (1987). In the instant case Petitioner complied with the statutory requirements in raising all his available claims in the original application, yet due to procedural irregularities that have transpired precluded Petitioner from raising his claims in federal court. Petitioner could not have filed a pro-se Rule 59(e) motion as this Court is well aware that hybrid representation is prohibited in this state, therefore it was the PCR Judge's responsibility to

comply with this State's statutory requirements S.C. Code Ann. §17-27-80, and address all issues presented. This coupled with PCR counsel's failure to file Rule 59(e) motion on Petitioner's behalf thwarted Petitioner from raising his claims in federal court that resulted in the denial of equal protection.

I.: the inadequate choices made by PCR counsel in the instant matter fail the objective standard of reasonableness requirement. "The federal court imposes one general requirement.... ..that counsel make objective reasonable choices." Bobby v. Hook, U.S._____, 130 S.Ct. 13 (2009), citing Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000).

The duty is on the plaintiff to sho[w] that a duty of care was owed [to] him. Rayfield v. S.C. Dept. of Corrections, 297 S.C. 95, 105-06, 374 S.E.2d 910, 916 (Ct.App.1988), cert. denied 298 S.C. 204, 379 S.E.2d 133 (1989). An affirmative legal duty [may] be created by a statute, contract relationship, status, property interest, or some other special circumstances. Arthurs v. Aiken County, 338 S.C. 253, 525 S.E.2d 542, 547 (S.C.App.1999).

The affirmative legal duty here is created by the South Carolina Constitution Article I, Section §3; South Carolina Code AN.. §17-27-60 (2003), and Rule 71.1(d), South Carolina Rules of Civil Procedure.

The South Carolina provisions here create a liberty interest in the Sixth Amendment right to the effective assistance of counsel as created and determined by reference to South Carolina State Law.

These laws make it clear that counsel in first PCR is [not] discretionary.

Further, South Carolina Courts have recognized the "right to counsel" at PCR. See Wood v. State, 310 S.C. 532, 426 S.E.2d 315 (1992)(right to counsel at PCR absent waiver where merits are addressed); and has clearly held, despite the ill-interpreted holdings of Pennsylvania v. Finley, 481 U.S. 551 (1987), PCR applicants enjoy a right to counsel. See Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395 (per curiam).

In support of the relationship between South Carolina Post Conviction Relief and federal habeas corpus, South Carolina has held the PCR "Act is designed to incorporate [all] rights available under federal habeas corpus." See Finklea v. State, 255 S.E.2d 447 (1979).

The United States Fourth Circuit Court of Appeals has similarly recognized a South Carolina PCR applicant's right to the effective assistance of counsel. Ivey v. Catoe, 36 Fed.Appex. 718 (4th Cir.2002), citing Mackall v. Angelone, 131 F.3d 442, 448 (4th Circ. 1997)(en banc).

The Sixth Amendment right to the effective assistance of counsel clearly "attaches" where the right is created and intended as such. Petitioner had the burden of proof at the initial pcr hearing. See Rule 71.1(e), SCRPC. This clearly encompasses securing and presenting [all] tangible evidence to carry the burden. PCR Counsel had an obligation to his client and insuring all available grounds for relief are not only included

in the Original PCR application, but also that Petitioner not be hindered by the procedural Rules throughout the PCR process.

Without the constitutional duty of effective assistance, the PCR procedure itself is ineffective and runs afoul of the United States Supreme Court's Fourteenth Amendment directive that the States employ adequate post conviction remedies to present federal constitutional claims. See Case v. Nebraska, 381 U.S. 336 (1965).

The United States Supreme Court incorporates into the Fourteenth Amendment "any guarantees which is fundamental in the context of the judicial process maintained by the American States". Ducan v. Louisiana, 391 U.S. 145 (1968)(emphasis supplied). To not apply the Sixth Amendment guarantee of effective assistance, via the Fourteenth Amendment, where it is a fundamental guarantee constitutionally and statutorily created and maintained by the State of South Carolina for first-time post conviction applicants, especially in the context of Post Conviction Relief.

Petitioner's ability to present claims of constitutional violations in both South Carolina State and Federal Courts should not be abridged merely because he has unwittingly fallen into a procedural trap created by the inadequacies of PCR Counsel's failures and unfamiliarities with the Rules governing PCR.

II. The PCR Judge's failure to comply with the statutory requirements of S.C. Code Ann. §17-27-80 renders the State's PCR Corrective process inadequate for the hearing and determining

federal constitutional claims that violates equal protection.

The Rules of PCR are insufficiently hospitable to the adequate development and litigation of federal constitutional claims. See Case v. Nebraska, 381 U.S. 336, 337-47 (1965). In Case v. Nebraska, the general basis for finding a constitutional right to full and fair state post conviction procedures are the concurring opinions of Justices Clark (381 U.S. at 337-40) and Brennan (id at 340-47 & nn. 5 & 6).

In Case, the United States Supreme Court granted certiorari precisely in order to decide whether the Constitution requires States to provide a post conviction remedy that offers an "adequate corrective process for hearing... "...of federal constitutional guarantees" and if so, what constitutes an "adequate process".

South Carolina Rule S.C. Code Ann. §17-27-80 may be construed as inadequate where it deprives a Petitioner of meaningful access to state post conviction. The United States Supreme Court has held that prisoners have a constitutional right to a meaningful access to State post conviction remedies and access to those remedies should not hinge upon the "failures" of a State PCR Judge to address [all] issues presented during the PCR hearing, that all grounds in the original application be addressed pursuant to §17-27-80.

In Lee v. Kemna, 534 U.S. 362, 394 (2002), the Court held that there are exceptional circumstances in which exorbitant application of a generally sound [State Procedural] Rule renders

the state ground inadequate to stop consideration of a federal question. In the instant case, the PCR Judge failed to comply with procedural rule §17-27-80 that undeniably hindered Petitioner from presenting viable federal constitutional claims. The instant case has suffered the results of a multi-fauceted procedural irregularity.

First, the PCR Judge failed to comply with statutory procedural requirements. Secondly, coupled with PCR counsel's failure to timely file a Rule 59(e) motion, that as the Magistrate Judge stated "procedural default" Petitioner in federal court. Representation by counsel is evitably to make post conviction review a more reliable device for correcting constitutional error. McFarland v. Scott, 512 U.S. 849 (1994). This right extends to complex civil cases brought by indigent prisoners. See Case v. Nebraska, 381 U.S. at 347, which a fortior includes many post conviction proceedings in which the prisoner's liberty is at stake.

The biased nature and inadequate process of §17-27-80 is further amplified as an [exceptional circumstance] where it violat[es] equal protection of Petitioner's claims, available for the first time in state post conviction.

In the instant case the prejudiced incurred is easily seem from the PCR Judge's failure to comply with statutory procedural requirements §17-27-80, that resulted in Petitioner being barred from raising the claims in federal court. The PCR Judge's failure renders the PCR corrective process inadequate and a denial of equal protection.

Petitioner is entitled a second PCR application to fully address the issues that were raised in the Original application, but not addressed in the PCR Judge's Order and address whether the errors of the PCR Judge are imputed to the State.

Petitioner requests a hearing in the instant matter.

CONCLUSION

Wherefore, after reviewing the statement of facts and issues presented, and unique combinations of inactions by both PCR Counsel and the PCR Judge, the instant application presents sufficient questions of law and fact warranting an evidentiary hearing in the instant matter. Sharper v. State, 305 S.E.2d 247 (S.C.1983).

THEREFORE, Petitioner respectfully prays that competent counsel be appointed and an evidentiary hearing convened at the earliest convenience.

Respectfully Submitted,

/s/ Russell Montgomery
Russell Montgomery

19. State clearly the relief you seek in filing this application:
appoint counsel and conduct an evidentiary hearing, or
in the alternative grant the application and remand for new
trial
20. Are you now under sentence from any other court that you have not challenged?
no

STATE OF SOUTH CAROLINA)
)
 County of Dorchester) VERIFICATION

I, Russell Montgomery, 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.

Russell Montgomery

SWORN to and subscribed before me this _____
 day of _____, _____.

Notary Public (L.S.)

My Commission Expires: _____

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

I, Russell Montgomery, 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.

Russell Montgomery
Applicant

SWORN or affirmed to and subscribed before me this
18th day of July, 2011.

Luduan Bryant
Notary Public

My Commission Expires: May 26, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FOR THE FIRST JUDICIAL CIRCUIT
	)	
Russell Montgomery, 294838,	)	2011-CP-38-0857
	)	
Applicant,	)	
	)	
v.	)	RETURN AND MOTION TO DISMISS
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed July 20, 2011,¹ the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. The Applicant was indicted during the August 2002 term of the Orangeburg County Grand Jury for Kidnapping (2002-GS-38-1573) and Armed Robbery (2002-GS-38-1574). He was represented by Margaret Hinds, Esquire. On July 16, 2003, the Applicant proceeded to trial after which he was found guilty of the charges. He was sentenced by the Honorable Edward B. Cottingham to twenty years confinement for Kidnapping and to a consecutive term of fifteen years for Strong Armed Robbery.

A timely Notice of Appeal was filed and an appeal perfected. Following the submission of an Anders brief, the South Carolina Court of Appeals dismissed the appeal. State v. Montgomery, Op. No. 2005-UP-285 (S.C. Ct. App. filed April 20, 2005). A *pro se* Petition for Rehearing was filed on April 29, 2005. In a written order, dated and filed June 22, 2005, the

¹ The Application was received by the Respondent on July 16, 2012.

South Carolina Court of Appeals denied the Petition for Rehearing. The Remittitur was sent on July 27, 2005.

Applicant filed his first application for post-conviction relief on February 21, 2006 (2006-CP-38-209). In his application, Applicant alleged he was being held in custody unlawfully based on the following:

1. Ineffective assistance of trial counsel.
 - a. "Petitioner alleges that trial counsel failed to properly prepare for the trial of this case."
 - b. "Failed to request continuance based on untimely receipt of discovery."
 - c. "Failed to move to suppress evidence."
 - d. Failed to object to evidence and witnesses not timely revealed in response to discovery request."
 - e. "Failed to object to impeachment evidence."
 - f. "Failed to request exclusion of impeachment evidence."
 - g. "Failed to object to improper questions by Solicitor."

An evidentiary hearing was convened on January 12, 2007, at which Applicant was present and represented by C. Bradley Hutto, Esquire. In an order dated February 26, 2007, the Honorable James C. Williams, Jr., denied and dismissed the application with prejudice. A timely Notice of Appeal was filed with the South Carolina Supreme Court. The South Carolina Court of Appeals denied the petition on January 30, 2009. The Remittitur was sent on February 20, 2009.

Attached herewith and incorporated herein are the records of the Orangeburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the prior PCR records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. “Does the extraordinary circumstances in the instant case entitle Petitioner to a second application to address the remaining issues the PCR court failed to address in the original application, since PCR counsel failed to file a timely Rule 59(e) Motion to address all of Petitioner’s claims that were presented in his original application and this Court’s barring of hyryd (sic) representation that precluded Petitioner from filing a pro-se Rule 59(e) motion, that resulted a denial of due process and equal protection.”

III.

The Court should summarily dismiss the current Application because it is successive to the previous applications for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised . . . in the previous application.” [Emphasis in original]. Id., 305 S.C. at 450,

409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant could have raised any new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, Respondent moves for a summary dismissal of the application because it is successive.

IV.

The Respondent submits that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on July 16, 2003. This Application was filed on July 20, 2011, which was eight years after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638

(1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

V.

The Applicant has filed this application eight years after he was convicted. The Respondent submits that the doctrine of laches bars the Applicant from raising these allegations in a post-conviction relief application. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002).

To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. This requirement "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." McElrath, 276 S.C. at 283. Rule 9(a) of the Federal Habeas Corpus Act recognizes the doctrine of laches. The Rule states in pertinent part:

A petition may be dismissed if it appears that the state of which the Respondent is an officer has been prejudiced in its ability to respond to the Petition by delay in its filing unless the Petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Furthermore the South Carolina legislature has recognized this problem and instituted a one-year statute of limitations. See S.C. Code Ann. §17-27-45(a).

The Applicant's delay has greatly prejudiced the Respondent. It is unlikely that the attorneys' files will be available or that those involved in the case would have great memory of the case due to the lapse of time. Records of the proceedings (i.e. transcripts) may be unavailable. If the Applicant had sought post-conviction relief within a reasonable time after his plea, none of these problems would exist. Therefore, the Court should summarily dismiss the Application based on the Applicant's lack of diligence in processing his claim for relief.

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

WHEREFORE, Respondent moves to summarily dismiss the application because it is successive to the Applicant's prior PCR action, it was filed after the statute of limitations had expired, and has prejudiced the Respondent by making it difficult to call witnesses, therefore being barred under the doctrine of laches.

[Signatures to follow.]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Senior Assistant Deputy Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

By: Megan E. Harrigan
Attorneys for the Respondents

October 9, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
	)	
	)	2011-CP-38-0857
	)	
RUSSELL MONTGOMERY, 294838,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Russell Montgomery, #294838
Lieber Correctional Institution
Post Office Box 205
Ridgeville, SC 29472

DATED this 9th day of October, 2012.


 Lauren Meara, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG) IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Russell Montgomery, 294838,)
Applicant,) Case No. 2011-CP-38-0857
v.) **CONDITIONAL ORDER OF DISMISSAL**
State of South Carolina,)
Respondent.)
_____)

2012 DEC -5 11:54
FILED FOR RECORD
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 20, 2011.¹

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. The Applicant was indicted during the August 2002 term of the Orangeburg County Grand Jury for Kidnapping (2002-GS-38-1573) and Armed Robbery (2002-GS-38-1574). He was represented by Margaret Hinds, Esquire. On July 16, 2003, the Applicant proceeded to trial after which he was found guilty of the charges. He was sentenced by the Honorable Edward B. Cottingham to twenty years confinement for Kidnapping and to a consecutive term of fifteen years for Strong Armed Robbery.

A timely Notice of Appeal was filed and an appeal perfected. Following the submission of an Anders brief, the South Carolina Court of Appeals dismissed the appeal. State v. Montgomery, Op. No. 2005-UP-285 (S.C. Ct. App. filed April 20, 2005). A *pro se* Petition for Rehearing was filed on April 29, 2005. In a written order, dated and filed June 22, 2005, the

¹ The Application was received by the Respondent on July 16, 2012.

ATTEST: TRUE COPY
Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

South Carolina Court of Appeals denied the Petition for Rehearing. The Remittitur was sent on July 27, 2005.

Applicant filed his first application for post-conviction relief on February 21, 2006 (2006-CP-38-209). In his application, Applicant alleged he was being held in custody unlawfully based on the following:

1. Ineffective assistance of trial counsel.
 - a. "Petitioner alleges that trial counsel failed to properly prepare for the trial of this case."
 - b. "Failed to request continuance based on untimely receipt of discovery."
 - c. "Failed to move to suppress evidence."
 - d. Failed to object to evidence and witnesses not timely revealed in response to discovery request."
 - e. "Failed to object to impeachment evidence."
 - f. "Failed to request exclusion of impeachment evidence."
 - g. "Failed to object to improper questions by Solicitor."

An evidentiary hearing was convened on January 12, 2007, at which Applicant was present and represented by C. Bradley Hutto, Esquire. In an order dated February 26, 2007, the Honorable James C. Williams, Jr., denied and dismissed the application with prejudice. A timely Notice of Appeal was filed with the South Carolina Supreme Court. The South Carolina Court of Appeals denied the petition on January 30, 2009. The Remittitur was sent on February 20, 2009.

ALLEGATIONS

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Does the extraordinary circumstances in the instant case entitle Petitioner to a second application to address the remaining issues the PCR court failed to address in the original application, since PCR counsel failed to file a timely Rule 59(e) Motion to address all of Petitioner's claims that were presented in his original application and this Court's barring of

hyrd (sic) representation that precluded Petitioner from filing a pro-se Rule 59(e) motion, that resulted a denial of due process and equal protection.”

FINDINGS OF FACT AND CONCLUSION OF LAW

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding Applicant has taken to secure relief, may not be the basis for a subsequent Application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended Application.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief; therefore, he has failed to meet the burden imposed upon

him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice, 305 S.C. 448, 409 S.E.2d 392; Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834.

Further, this Court finds that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on July 16, 2003. This Application was filed on July 20, 2011, which was eight years after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

Additionally, this Court finds this application is barred under the doctrine of *laches*. The Applicant has filed this application eight years after he was convicted. The doctrine of *laches* bars the Applicant from raising these allegations in a post-conviction relief application. Absent some explanation or justification for the delay in seeking post-conviction relief, *laches* will prevent an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002).

To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. This requirement "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." McElrath, 276 S.C. at 283. Rule 9(a) of the Federal Habeas Corpus Act recognizes the doctrine of *laches*. The Rule states in pertinent part:

A petition may be dismissed if it appears that the state of which the Respondent is an officer has been prejudiced in its ability to respond to the Petition by delay in its filing unless the Petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Furthermore the South Carolina legislature has recognized this problem and instituted a one-year statute of limitations. See S.C. Code Ann. §17-27-45(a).

The Applicant's delay has greatly prejudiced the Respondent. It is questionable whether the attorneys will remember the case and whether their files will be available. If the Applicant had sought post-conviction relief within a reasonable time after his plea, neither of these

problems would exist. Therefore, the Court intends to summarily dismiss the Application based on the Applicant's lack of diligence in processing his claim for relief.

CONCLUSION

S.C. Code Ann. § 17-27-70(b) states in pertinent part:

When a court is satisfied, on the basis of the application, the answer or motion, and on the record, that Applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and give its reasons for so doing. Applicant shall be given an opportunity to reply to the proposed dismissal.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Orangeburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Megan E. Harrigan, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 13 day of Nov, 2012.



DIANE SCHAFER GOODSTEIN
Chief Administrative Judge
First Judicial Circuit Court

Orangeburg, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG

FIRST JUDICIAL CIRCUIT

Russell Montgomery, 294838,
Applicant,

Case No. 2011-CP-38-0857

V.

APPLICANT'S RESPONSE TO
CONDITIONAL ORDER OF
DISMISSAL

State of South Carolina,
Respondent.

On November 13, 2012, the Court issued a "Conditional Order of Dismissal", dismissing Applicants' post-conviction relief petition. The Applicant was served with the Court's order on December 27, 2012 and advised that he had twenty (20) days to provide this Court with sufficient reason why this order should not become final, therefore, the Applicant now submits the reasons he feels are sufficient.

On page five (5) of the Court's order it states: "the Applicant's delay has greatly prejudiced the Respondent" and that "it is questionable whether the attorneys will remember the case and whether the files will be available." The Court make this assessment based on the belief that the Applicants' PCR filing is a delayed filing. This is apparent based on the Courts finding on page five (5) of its order which states: "If the Applicant had sought post-conviction relief within a reasonable time after his plea, neither of these problems would exist. Therefore, the Court intends to summarily dismiss the Application based on the Applicant's lack of diligence in processing his claim for relief."

In the "Findings of Facts and Conclusion of Law" on page three (3) of the Court's order, the Court finds Applicants' filing to be a successive application for post-conviction relief, and because of this, determines that it must be dismissed by

ATTEST: TRUE COPY
Wingja B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

adjudicated, this Court should reverse its "Order of Dismissal" and allow Applicant's "left-over" issues to be decided in accordance with law. "Successive applications are permitted in rare procedural circumstances." Carter v. State, 293 S.C. 528, 362 S.E.2d 20(1987); Case v. State, 277 S.C. 474, 289 S.E.2d 413(1982).

Denial of due process occurs when a criminal defendant is denied fundamental fairness essential to the concept of justice. State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869(1997).(emphasis added) "A judge has a responsibility for safeguarding the rights of the accused." State v. Stanley, 365 S.C. 24. 615 S.E.2d 455(2005). "the Court has a duty to protect a defendant's Constitutional right to a fair trial." State v. White, 371 S.C. 439, 639 S.E.2d 160(2006).

C O N C L U S I O N

When viewed in its entirety, considering all the essential facts, issues and matters of law contained herein, the Applicant respectfully ask that this Honorable Court reverse its Order of Dismissal and afford the Applicant an immediate hearing to decide the remaining issues from his original PCR in an effort to finally bring this matter to full adjudication in the interest of justice.

s/ Russell Montgomery

Dated: 1-2-2013, 2013.

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Russell Montgomery, #294838,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Case No.: 2011-CP-38-0857

FINAL ORDER OF DISMISSAL

FILED FOR RECORD
WITH CLERK OF COURT
JAN 10 PM 2:44

2013 JAN 10 PM 2:44

This matter comes before the Court pursuant to an application for post-conviction relief filed July 20, 2011. The Respondent made its Return and Motion to Dismiss on or about October 9, 2012, requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated November 13, 2012, provisionally denying and dismissing this action, while giving the Applicant twenty days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated December 27, 2012, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

Applicant responded to the Conditional Order of Dismissal by way of a document captioned "Answer to Respondents Motion for Dismissal" filed October 18, 2012. In his response, Applicant alleged that he is not raising any new factual allegations in his second post-conviction relief application. Applicant stated that "the issues raised in the current application are not new issues, there the issues which were raised and argued in the original application, but the merits were never decided or addressed by the court in its final order." However, the Order of Dismissal from Applicant's prior post-conviction relief action specifically stated that "any and all allegations which were or could have been raised in the application or at the hearing in this

matter, but were not specifically addressed in this Order, this Court finds that the Applicant failed to present any probative evidence regarding such allegations.” Applicant further alleged that he received ineffective assistance of counsel on his prior post-conviction relief application, because post-conviction relief counsel failed to file a timely Rule 59(e) motion to address all of his claims. However, Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, “the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under § 17-27-90.” Aice, 305 S.C. at 451, 409 S.E.2d at 394.

Additionally, on April 2, 2013, Applicant filed another objection to the summary dismissal of this action, in which he contends that his application is proper pursuant to Marlar v. State, 375 S.C. 407, 653 S.E. 2d 266 (2007). Specifically, Applicant contends that a subsequent application or post-conviction relief is the proper remedy for issues raised in a prior application which were not expressly ruled upon in the court's initial Order of Dismissal. However, Applicant's interpretation of Marlar is mistaken, as the Marlar holding only applies to circumstances here allegations raised in a ~~post~~ conviction relief action and litigated therein but not specifically addressed in the trial court's order are preserved for appellate review absent a 59(e), SCRCP, motion. Furthermore, the South Carolina Rules of Civil Procedure state: “[a]motion to alter or amend a judgment shall be served *not later than 10 days* after receipt of written notice of entry of the Order.” SCRCP Rule 59(e). To this Court's knowledge, Applicant

did not file a 59(e), SCRCP, motion upon receipt of the order dismissing his initial post-conviction relief action.

Based on the foregoing, this Court has reviewed Applicant's responses to the Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds that no sufficient reason has been shown why the Conditional Order of Dismissal should not become final. The Court finds that the Final Order issued by the post-conviction relief judge addressed and dismissed with prejudice all allegations and claims asserted by the Applicant. Furthermore, the Court finds that the Applicant's assertion that his successive post-conviction relief application should be granted due to post-conviction relief counsel's failure to file a timely 59(e) motion is not valid.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for post-conviction relief is hereby denied and dismissed with prejudice.

AND IT IS SO ORDERED this 16th day of May, 2013.



EDGAR W. DICKSON
Chief Administrative Judge
First Judicial Circuit

St. George, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Russell Montgomery, 294838
Appellant,

V.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Case No. 2011-CP-38-0857

NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Russell Montgomery,

Petitioner,

-VS-

THE STATE OF SOUTH CARLOINA

Respondent.

**PETITION FOR WRIT OF CERI
OF THE SOUTH CARLOINA SUPREME COURT**

Russell Montgomery, 294838
Lieber C.I. Wando C-261
P.O. Box 205
Ridgeville Sc. 29472
Petitioner ,
pro se.

Alan Wilson
Attorney General for the
STATE OF SOUTH CARLOINA
P.O. Box 11549
Columbia, Sc 29211
Respondent.

Procedural History

On 2-21-2006, the Appellant filed his first post-Conviction relief Application alleging numerous issues of ineffective assistance of counsel and errors of law of which he is currently being held in custody unlawfully. After filing his original Post-Conviction Relief Application, Appellant was appointed Counsel and afforded an evidentiary hearing to determine the validity of the Allegation raised by him. Appellant's original evidentiary hearing was presided over by the honorable James C. Williams, on 1-12-2007. After presenting the facts regarding the merits of his Allegations the court stated that it would take the matter under consideration and issue its decision at a later date.

On 2-26-2007, Appellant's first (PCR) court issued it's order denying him relief. However, the order issued by the court failed to address every issue raised in his application and argued before the court as is required by law appellant there after filed on appeal of his Post-Conviction Relief proceeding. On 1-30-2009, Unfortunately, Appellant's efforts were in vain as his petition for certiori review was denied and the merits of his appeal were never heard.

Subsequently, the appellant filed a second Post-Conviction Relief application on 7-20-2011, Arguing that he was denied his right to due process during his first filing because all of his issues raised in the Application and argued before the original (PCR) court were never ruled upon. Appellant argues that his second filing was not a successive Application but rather an attempt to have his first proceeding fully adjudicated. However, the respondent, moved for dismissal and submitted a "conditional order of Dismissal" on 11-13-2012, Arguing that Appellant was attempting to file a second or successive application for Post-Conviction Relief for

the purpose of arguing issue appellant Failed to raise in his First (PCR) proceeding.

Facts

On 4-1-2013, Appellant filed a response to the Respondent's "Conditional order of Dismissal" explaining to the court that this was not attempt to file a second or successive Application, but Rather an effort to correct a gross miscarriage of justice.

Issue on Appeal

On November 13, 2012 the courts issued a conditional order of Dismissal, dismissing Applicants post-conviction relief petition. The applicant was served with the court's order on December 27, 2012 and advised that he had twenty (20) days to provide this court with sufficient reason why this order should not become final, therefore the applicant now submits the reason as well as law he feels are sufficient.

On page five (5) of the courts order it state that: "the Applicants delay has greatly prejudiced the respondent" and that "it is questionable whether the attorney's will remember the case and whether the files will be available." the court made this assessment based on the belief that the applicants(PCR) filing is a delayed filing this is apparent Based on the courts finding on page five (5) of its order which states : "If the applicant had sought Post-Conviction Relief within a reasonable time after his trial neither of these problems would exist.

Therefore, the court intends to summarily dismiss the Application based on the Applicants Lack of diligence in processing his claim for relief. In the finding of facts, and conclusion of Law on" on page three(3) of the courts order, the court finds the applicant's filing to be a successive application for Post-Conviction Relief, and because of this , determines that it must be dismissed by Law, S.C Code Ann.§17-27-90. However, the court makes this finding on the assumption that the issues raised by the applicant are new issues that could have or should have been raised in his first application for Post-Conviction Relief.

What the court has failed to understand is that these are not new issues or issues that have been waived. The issues Applicant has argued in this second filing, were in fact raised and argued at his original evidentiary hearing . Unfortunately,

the Judge presiding over that hearing failed to address several of the issues argued and failed to make “specific finding of facts” Concerning those issues.

Applicant's Counsel during his original Post-Conviction Relief evidentiary hearing failed to file a timely rule 59(E) Motion regarding the issues that had not been ruled upon, thereby denying the applicant a “Full bite at the Apple.” This denied him the fundamental protection of due process of Law under Both the South Carolina Constitution and the Constitution of the United States.

The Applicant's position is not that he should be granted a second Post-Conviction Relief hearing to argue new issues, but rather to decide the issues raised and argued to the court in his original evidentiary hearing, but which were never ruled upon. The Applicant's original evidentiary hearing record is completely intact and available to resolve this matter, the original PCR court failed to address each and every issue raised and argued before it as is required by S.C. Supreme Court precedence. See Marlar Vs. State.

Argument

Because the issues raised in the original Application were properly raised in compliance with S.C Code Ann. § 17-27-90. And because all applicant's are entitled to a “full and fair opportunity to present their claims” and to have them fully Adjudicated, this court should reverse its “Order of Dismissal” and allow Applicant's “Left-over issues to be decided in accordance with law. “Successive Application are permitted in rare procedural circumstances, “Carter V. State, 293 S.C. 528, 362 S.E 2d 20(1987) Case V. State, 277 S.C. 274, 289 S.E. 2D 413 (1982).

Denial of due process occurs when a criminal defendant is denied

fundamental Fairness essential to the concept of justice State V. Hornsby, 326 S.C 121, 484 S.E. 2D 869 (1997). (Emphasis Added) "A judge has a responsibility for safe guarding the rights of the accused. "State V. Stanley, 365 S.C 24. 615 S.E 2d 455 (2005)." the court has a duty to protect a defendant's Constitutional Right to a fair Trial. "State V. White, 371 S.C 439,639 S.E. 2D 160 (2006).

In Response to Applicant's brief against why he feels the Conditional order of dismissal should not be granted. The Honorable Edgar W. Conditional stated that in the above- Referenced action and the Applicant's response stated that in the above- Referenced action and the Applicant's response there to dated April 1, 2013. The Applicant's objection to the final order of dismissal rest primarily on the Application of Marlar V. State, 357 S.C 407, 653 S.E 2d 266 (2007). While the court understands the Applicant's argument regarding the case reads it, the Marlar holding only Applies to the question of whether Allegations raised in a PCR action and Litigated therein but not addressed specifically by trial Court's ruling are preserved for Appeal Absent A Rule 59(E) motion. The Supreme Court therein held that they are not. The Marlar Case does not suggest , as the applicant Alleges, that a second PCR Application is the proper remedy for issues raised in a first application which were not expressly ruled upon in the trial courts order of dismissal. On the contrary, the case suggests that the only remedy there is a Rule59(E) Motion to alter or amend the Judgment.

Additionally, The South Carolina Rules of Civil Procedure state: "[A] Motion to Alter or Amend the Judgment shall be served not later than ten (10) days after receipt of written notice of entry of the order. "S.C.R. Civ.P. 59(E). To the courts knowledge, NO 59(E) Motion was ever filed by the Applicant upon receipt of the

court's order dismissing his initial PCR Application.

Therefore, because Applicant has filed a previous Application for Post-Conviction Relief and he Filed no Rule59(E) motion therein, the court finds that all assertions I n the Applicant second PCR Application are procedurally barred pursuant to Rule59(E) time Limitation or pursuant to S.C. Code Ann.§ 17-27-90.

In the Honorable Judge Edgar W. Dickson Ruling he stated that he understands the Applicant's argument regarding the case, but he disagrees with the case Applicant rest his Application on which was Marlar V. State, 375 S.C. 407, 653 S.E 2d 266 (2007).

However being that Applicant was a Layman with Limited Knowledge of the Law at that time, Application upon. But After receiving the Judge order. The Applicant in preparing for his Appeal of the Judge order has founded the proper Rules of procedure to base his case upon.

First Applicant would like for this court to understand that respondent as well as the PCR Judge is trying to hold Applicant responsible for Lawyer Negligence. When this should not be because the Law asserts that Applicant has a liberty interest in statutorily Appointed PCR Counsel, and therefore, his Rights were violated when PCR Counsel failed to ensure that all grounds for relief were included for review. Applicant was also denied a full and fair bite at the Apple when his Appointed Counsel Failed to ensure that all of his issues were address as well as ruled upon and specific finding were made concerning each issue.

Because of the fact that Applicant was appointed counsel pursuant to statutory law, Applicant's Counsel was required to provide effective assistance in compliance with the Sixth amendment of the United States Constitution.

Applicant would also like to show the court that the South Carolina Rules of Civil Procedure also stated that “Counsel preparing proposed orders should be meticulous in doing so, opposing Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omission to the attention of the PCR judge prior to the issuance of the order, and the PCR judge should carefully review the order prior to signing it. Moreover, after an order is filed, counsel has an obligation to review the order and file a Rule 59(E), SCRCP, motion to alter or amend if the order fails to set forth the findings as required by §17-27-80 and Rule 52(A), SCRCP “McCullough V. State,-S.C-, 464 S.E. 2D 340, 341 (1995).

Also, In McCoy V. State (opinion No. 27214, Feb 6, 2013), the S.C Supreme Court reversed and remanded for hearing the dismissal of the petitioner's PCR Application. The Supreme Court held that summary dismissal of the petitioner's second PCR application was error because genuine issues of material fact existed as to whether his claim was successive or barred by the statute of limitations.

When considering the State's Motion for summary dismissal, where no Evidentiary hearing has been held, the PCR judge must assume facts presented by the Applicant are true and view those facts in the light most favorable to the Applicant. Leamon V. State, 363 S.C. 432,434,611 S.E 2d 494,495 (2005) (Citing S.C Code Ann.§ 17-27-80)

Where and Applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against Successive PCR Applications and those facts are not conclusively refuted by the record before the PCR court, A question of fact is raised which can only be resolved by a hearing. CF. DeLaney V. State, 269 S.C. 555, 556, 238, S.E 2d 679, 679 (1977).

Conclusion

Wherefore after reviewing the statement of facts and issues Presented, and unique Combinations of inaction by both PCR Counsel and the PCR Judge, the instant Application presents sufficient questions of Law and fact warranting an evidentiary hearing in the instant matter. Sharper V. State, 305 S.E. 2D 247 (S.C.1983) also see, McCoy V. State (opinion No. 27214, Feb. 6, 2013)

Therefore, Petitioner respectfully prays the competent counsel be appointed and an Evidentiary hearing convened at the earliest Convenience.

Respectfully Submitted,

IS/ Russell Montgomery
Russell Montgomery

The Supreme Court of South Carolina

Russell Montgomery, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2013-001887

The Honorable Edgar W. Dickson
Orangeburg County
Trial Court Case No. 2011CP3800857

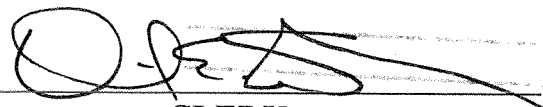
ORDER

Petitioner has failed to provide this Court with (1) a proof of service showing that the notice of appeal has been timely served on opposing counsel as required by Rule 203(d)(1)(B)(i) of the South Carolina Appellate Court Rules (SCACR); (2) a copy of the order(s) on appeal as required by Rules 203(d)(1)(B)(ii), SCACR; and (3) a notice of appeal that contains the information required by Rule 203(e)(1), SCACR. *See also* Rule 243(b), SCACR (the notice of appeal in a post-conviction relief case must be served and filed in the same manner as appeals from the court of common pleas under Rule 203, SCACR).

Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

FOR THE COURT

BY

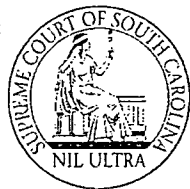


CLERK

Columbia, South Carolina
September 10, 2013

cc: Mr. Russell Montgomery, #294838
Salley Elliot, Esquire

RECEIVED
CLERK OF COURT
SOUTH CAROLINA
SEP 10 2013
ORANGEBURG COUNTY
TRIAL COURT
CASE NO. 2011CP3800857
RUSSELL MONTGOMERY
V. STATE OF SOUTH CAROLINA
APPELLATE CASE NO. 2013-001887



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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September 27, 2013

The Honorable Winnifa Brown-Clark
PO Box 9000
Orangeburg SC 29115-9000

REMITTITUR

Re: Russell Montgomery v. State
Lower Court Case No. 2011CP3800857
Appellate Case No. 2013-001887

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CLERK

cc: Russell Montgomery, #294838