VOLUME II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
NOV 08 2019
S.C. SUPREME COURT

Certiorari to Charleston County

Honorable Maite Murphy, Circuit Court Judge

MOSES FRASIER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000739

APPENDIX

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

Pages 501-748

INDEX

INDEX i

TRIAL TRANSCRIPT DATED OCTOBER 2, 2006 1

FINAL BRIEF OF APPELLANT 577

FINAL BRIEF OF RESPONDENT 588

UNPUBLISHED OPINION NO. 2009-UP-052 605

REMITTITUR 606

APPLICATION FOR POST-CONVICTION RELIEF 607

RETURN AND REQUEST FOR APPOINTMENT OF COUNSEL 614

AMENDED APPLICATION FOR POST CONVICTION RELIEF 621

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED JANUARY 9, 2012 654

ORDER OF DISMISSAL 687

NOTICE OF APPEAL 693

LETTER TO JEFFREY YUNGMAN FROM THE SUPREME COURT DATED DECEMBER 23, 2015 696

LETTER FROM JEFFREY YUNGMAN TO SUPREME COURT DECEMBER 31, 2015 698

ORDER DISMISSING APPEAL 700

REMITTITUR 701

SECOND APPLICATION FOR POST CONVICTION RELIEF 702

RETURN 713

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED FEBRUARY 1, 2018 718

APPLICANT'S EXHIBIT NO. 1 738

ORDER GRANTING AUSTIN APPEAL 740

INDICTMENT AND SENTENCE SHEET 746

1 do it, but if he did, then it was self-defense.
2 And those two things are certainly not consistent.
3 Because you can't defend yourself and kill somebody in
4 self-defense if you didn't kill them. I'm not quite sure
5 how that's supposed to pan out, but it simply doesn't. So
6 in the self-defense context, the defendant did kill him.
7 And we had the evidence on the stand.
8 Finally, the whole concept of self-defense. Now,
9 self-defense is important. It's a huge concept. What
10 self-defense says is that you can intentionally kill
11 somebody and we'll say it's okay. If you act in lawful
12 self-defense, it's telling somebody: Killing someone,
13 taking their life intentionally, is allowed.
14 You don't get to kill people and get away with it
15 except in wars, in self-defense, and in situations where
16 nobody catches you. In this case, there's no war, there's
17 no self-defense, and the defendant got caught.
18 Now, I'm going to explain the legality of this,
19 that the law does not make it easy for you to get
20 self-defense. There's three requirements.
21 And getting -- earning self-defense or being
22 entitled to defend yourself, the law says these three
23 things, and it's kind of like jumping over a hurdle where
24 you have to jump over each one. If you knock down one
25 hurdle, you don't get it, you don't get self-defense. Or

1 it's like getting your driver's license. You need to be a
2 certain age, you need to pass a written test, and you have
3 to pass a seeing test. And if you fail any of those tests,
4 then you don't get your driver's license.
5 So just like a driver's license, if the defendant
6 doesn't achieve all three tests, if it's not proven, if
7 we've proven beyond a reasonable doubt that he doesn't pass
8 those tests, then he doesn't get self-defense.
9 And those three tests are the burden. He must be
10 without fault in bringing on the difficulty; second, he
11 must have an actual and a reasonable belief that he was in
12 danger of death or serious bodily injury; and, third, that
13 the defendant had no other way to avoid the danger, and
14 then he can then use force until the threat is ended. And,
15 again, when the threat ends, you don't get to defend
16 yourself anymore. I'm going to go through these quickly,
17 but they are important.
18 First, the defendant must be without fault in
19 bringing on the difficulty. Now, I think we certainly have
20 evidence in this case that beyond any reasonable doubt the
21 defendant had something to do with the situation. He was
22 over there earlier. He'd had contact with the victim
23 within his own front yard.
24 And how is it if he's so scared of this Kenneth
25 aggressor, how is it that the defendant and the victim both

1 end up at the same place, let alone twice in the same
2 night? That's not fear, and that's certainly not -- and,
3 again, that's not to say that there was fault on the part
4 of the defendant for that, but it certainly goes towards
5 the idea that there wasn't any kind of being scared of
6 Kenneth Boston in this case.
7 Now, most importantly, and this kind of relates to
8 being over at his house twice, was the defendant reasonably
9 afraid of death or serious bodily injury from
10 Kenneth Boston? That's just absurd. There is no way this
11 defendant, with his size, his build, was afraid of
12 Kenneth Boston. It's a big man versus a very small man.
13 He had no reason to be afraid of him.
14 What would he be afraid of? That he was on drugs?
15 According to Jaz, he was running around totally harmless,
16 batting at him. Look at the extent of the injuries. Was
17 he so afraid that he had to beat him to death? Of course
18 not. He was over at his house earlier. Why would he go
19 over to his house if he were afraid of him? He wasn't
20 afraid of him.
21 What he told his brother, his trusted brother, he
22 never told him that he was afraid. He told him that the
23 guy tried to play him so he kicked his ass. Not scared.
24 Not afraid.
25 Look at the defendant's injuries. What did

1 Kenneth Boston do to that face that justifies the response?
2 That's not an act of intended self-defense.
3 That's not a beating that comes out of being afraid of
4 someone. You can tell by these injuries that he wasn't
5 afraid of him. It was something more than that.
6 And, finally, the focus, if it was something more
7 and he was afraid of death or serious bodily injury that he
8 thought the victim was going to do, he certainly would not
9 have just pummeled him in the face repeatedly. He did not
10 have to go to that extent. And he certainly couldn't have
11 been afraid of Kenneth Boston, given the evidence in this
12 case.
13 Finally, self-defense ends when the danger ends.
14 When there's no other way to avoid the danger, you can
15 defend yourself.
16 And Jaz said this the best. He could have walked
17 away. He did walk away earlier. There were several times
18 he could have walked away.
19 And if you don't walk away, if you decide to
20 fight, which he wasn't entitled to do, you can defend
21 yourself until the danger ends. And that's not what
22 happened in this case either.
23 These injuries are not injuries that ended when
24 the danger ended. This is a beating.
25 This case is about somebody who got mad, who got

1 upset, who got humiliated, for whatever reason, got upset,
2 got played, and he had some consequences for
3 Kenneth Boston. And that's what you see in this picture,
4 and the extent of the injuries and the focus shows that
5 this beating was not something that was done in response to
6 a danger.
7 I want to talk for a second about the defendant
8 and his statements, and these are important because the
9 defendant is saying several things. First, jumped by five
10 people; second, and this happened in the emergency room, he
11 says that -- he's sitting there and talking about a girl;
12 finally, to his brother, he kicked some guy's ass on Huger
13 Street, a guy played him; and now his defense attorney is
14 saying that he didn't even do it.
15 MR. BUTLER: Judge, I have to object again. Can
16 we approach?
17 THE COURT: Yes, sir.
18 (There was an off-the-record bench conference in
19 the presence of the jury but out of the hearing of the
20 jury.)
21 (Said bench conference being concluded, the
22 following proceedings were had:)
23 MR. WILLIAMS: And, finally, his attorney argues
24 that it was something that somebody else did or if it did
25 happen it was in self-defense. Now, why is it important?

1 Why are these different statements something we need to pay
2 attention to? Well, they indicate something. Just like
3 the other witnesses in this case said they had a reason for
4 why they were saying a different name, maybe child support
5 warrants out, I believe the other cousin said it was
6 because he was concerned about getting involved, but he
7 wanted to do right by his cousin, well, this defendant said
8 these different things because he's trying to hide
9 something.
10 He said he was jumped by five people, but he's
11 trying to hide the fact that he just killed somebody. He
12 told his brother the truth because he trusted him. But the
13 inconsistent statements are not there because people just
14 make up lies all the time if you live on Huger Street. The
15 truth is he made up a story to conceal what he did.
16 When you think of self-defense in this case, think
17 about what the defendant did and what he said and whether
18 that's consistent. What did he say and to who? Did he
19 tell the truth to his brother who he trusts or to the
20 hospital personnel who he doesn't know? He told his
21 brother the truth.
22 Again, I just talked about this, why would he make
23 those things up? The same reason other people do. People
24 talking to the police are a lot different than people
25 talking to his own family and finally to his brother. What

1 would he have to fear from his brother? Nothing. And
2 that's who he told the truth to.
3 And, finally, why would he say those things if it
4 was just self-defense? Self-defense is a claim of
5 righteousness. You say, "You know what? I had to defend
6 myself. I wish I didn't have to, but I was put in a
7 situation where I had no other choice, and I had to do
8 that."
9 This defendant didn't do that. He said he got
10 jumped by five guys which is why it was his hand was so
11 beat up at the hospital and why somebody bit him on his
12 right knuckle.
13 The case is about evidence. If you look at this
14 case, the evidence only supports one thing. No injuries to
15 the defendant except to his hand. That's not about getting
16 jumped. That's about teaching somebody a lesson.
17 The extent of the victim's injuries we focused.
18 That shows essentially that he was teaching a lesson to
19 Kenneth Boston, that he was at the home of the -- that the
20 victim was alone. He didn't bring his friends outside to
21 go jump people. That's not consistent with what the
22 defendant's attorney is arguing happened; the story of the
23 defendant to conceal what was his guilt; and, finally, when
24 confronted with the evidence, hiding it.
25 What happened in this case is not complicated.

1 It's unfortunate. Kenneth Boston was murdered in a brutal
2 and a violent way.
3 But you heard from Jaz essentially what did
4 happen. The defendant was over at the victim's house. He
5 knew him. They had some association. Later on that night,
6 over on Huger street, there's some kind of playing around,
7 and Kenneth was boxing him, poking at his head, making fun
8 of him because he went into the store and bought a cigar
9 for Jaz.
10 And Jaz said that, you know, nobody makes fun of
11 her, but I suspect Kenneth probably was giving the
12 defendant a hard time, giving the defendant -- over what
13 had just happened. And as they go down Huger Street, he
14 continued to do that same thing, gives him a hard time.
15 At one point the defendant is actually urinating,
16 and Kenneth goes up behind him and pushes him, and he gets
17 urine on him. And he turned around, and at that point he's
18 had enough, tired of the defendant -- the victim trying to
19 play him, and at that point he beats him.
20 Now, he hits him. We don't know if it happened
21 right there where Jaz saw them or a little bit further
22 down, but we know that the victim struggled.
23 As Kenneth was being beaten, the defendant's left
24 hand hits him in the face. His hands and his teeth leave a
25 mark on the defendant.

1 And as the defendant is beating Kenneth, his hand
2 is coming back, and that blood is coming off his hand that
3 was on Kenneth's mouth and going on that pole. That's
4 where that blood spatter comes from.
5 And Kenneth is struggling. He loses a shoe. He
6 loses another shoe. In that little area, as the defendant
7 is beating him, he's struggling.
8 The defendant is hitting him quickly, heartily, in
9 a hard way, and often, hitting him in such an aggressive
10 way that he actually hits himself in the right arm. That's
11 where you see that swelling the defendant complained of.
12 He actually hits Kenneth in the neck. That's
13 where you see the bruise on the neck. And he hits him in
14 the side of the head so hard that it moves his brain inside
15 of his skull and causes bruising.
16 When the defendant is done hitting him, he leaves
17 him there, and he leaves him there to die. Kenneth lays
18 out there until his family finds him, but what did the
19 defendant do? He goes home, perhaps cleans up.
20 And I want to go back one second. Just because a
21 person is not covered in blood doesn't mean that he didn't
22 cause those injuries. All the evidence is that he had him
23 in a headlock and was hitting him in the face. And as he
24 did that, the blood spatter is certainly getting on his
25 shorts, but there doesn't have to be blood totally all over

1 from these injuries to have a defendant go in a courtroom
2 or that couldn't be the case. But there's definitely been
3 evidence that the defendant had the victim in a headlock
4 and was pounding him: the injury to the hand, the spatter
5 on the pants, the blood on the pole.
6 The defendant goes to the hospital because his
7 hand is hurting. Does he know that the victim is going to
8 be brought there? How would the defendant know that the
9 victim ends up at the same hospital he does? That was a
10 mistake he made because he didn't know.
11 And when he gets to the hospital, he goes there
12 and he tells the nurse that he got jumped by four or five
13 people, five guys, they jumped him. That's how he
14 explained that injury to his hand, but what he doesn't
15 realize is the police are soon going to be there.
16 The victim shows up. The police are there. And
17 the next thing you know, Detective Goldstein is asking him,
18 "What did you do to your hand?" Well, he's already said he
19 got jumped by five guys, and he says again, "I got jumped
20 by five guys."
21 In itself, you know, it's not a very good story.
22 Because if he got jumped by five guys, you'd think he'd
23 have some injuries. But this defendant figures he'll say
24 he got jumped by five guys and nobody is going to expect
25 that.

1 Well, Detective Goldstein sees the blood on his
2 pants, and he tells the defendant, "I'm going to get that
3 blood and compare it to the victim."
4 When the defendant hears that, what did he do? He
5 tried to hide that evidence. Well, he doesn't succeed in
6 that. He tries to change pants with his brother, and it
7 failed, and he starts fighting with the police.
8 It's quite simple in this case what happened.
9 There's a story here about the defense attorney
10 saying that he couldn't have done it, somebody else might
11 have done it. That's absurd. That is pure speculation.
12 And the speculation is, again, how the defendant
13 had an injury on his hand that would have been busting in
14 the lips of this victim, and the victim would have hung
15 around in the backyard and waited for somebody else to come
16 along? That makes absolutely no sense whatsoever. And
17 what it shows is that that theory, that speculative theory,
18 isn't what happened.
19 The evidence in this case shows one thing. The
20 defendant beat Kenneth Boston to death with his bare hands,
21 he didn't think he would get caught, and he got caught.
22 Y'all gave an oath in this case at the start to
23 base your verdict on the evidence. You raised your hand
24 and said you'd find a true verdict. And the truth in this
25 case is simple.

1 You can't go back, you can't go see what happened,
2 you can't tell Kenneth that he shouldn't be out there, that
3 he shouldn't be messing with Moses Frasier, that it might
4 get him killed.
5 What you can do is what you took an oath to do;
6 and that is, find the truth. And the truth in this case,
7 based on the evidence, is that the defendant beat
8 Kenneth Boston and left him to die.
9 The truth in this case is that the defendant is
10 guilty of murder. We'd ask that you let your verdict
11 reflect that truth and find the defendant guilty of murder.
12 THE COURT: Thank you, sir.
13 Ladies and gentlemen, as you know, the state has
14 charged the defendant, Moses Frasier, in this indictment
15 with the crime of murder.
16 I'm sorry, y'all can't leave. Y'all have to stay
17 and hear what I've got to say. But we'll let them get out
18 now.
19 (The Court refers to law students and other
20 persons in the audience.)
21 THE COURT: You will have this indictment with you
22 in the jury room; but as I told you earlier, this
23 indictment is not evidence. This indictment is simply a
24 document drawn up by the state to advise the defendant of
25 the charges he's facing so he can prepare a proper defense

1 to these charges.
2 To the charges contained in this indictment, he
3 has pled not guilty. That places the burden on the state
4 to prove him guilty beyond a reasonable doubt.
5 A person charged with committing a criminal
6 offense in South Carolina is never required to prove
7 himself innocent. It is a vital, important rule of law
8 that the defendant in a criminal case, no matter how
9 serious or how great may be the offense with which he's
10 been charged, must always be presumed innocent until his
11 guilt has been proven beyond a reasonable doubt.
12 This presumption of innocence remains with the
13 defendant at all times, from the moment he comes into this
14 courtroom and until you, the jury, have upon the proper
15 evidence presented in this courtroom reached a verdict of
16 guilty beyond a reasonable doubt; because it is your duty,
17 ladies and gentlemen, if you are not so convinced, to find
18 him not guilty. By the same token, it is your duty if you
19 are so convinced to find him guilty.
20 So the burden on the state is to prove him guilty
21 beyond a reasonable doubt, but what do we mean by beyond a
22 reasonable doubt? Well, some of you may have served as
23 jurors in a civil case, and you would have been told that
24 it is only necessary to prove that a matter is more likely
25 than not true. We call that the preponderance of the

1 evidence; but in a criminal case, the state's burden is
2 greater than that. Proof beyond a reasonable doubt is
3 proof that leaves you firmly convinced of the defendant's
4 guilt.
5 There are very few things in this world that we
6 know with absolute certainty, and in criminal cases the law
7 does not require proof that overcomes every possible doubt.
8 If based on your consideration of the evidence you
9 are firmly convinced that the defendant is guilty, then you
10 must find him guilty. On the other hand, if you think
11 there's a reasonable possibility that he is not guilty, you
12 must give him the benefit of that reasonable doubt and find
13 him not guilty.
14 Now, ladies and gentlemen, as I told you earlier,
15 you are the judges of the facts in the case. You determine
16 what is the truth in this case. I don't have a right to
17 pass on the facts of the case or to express an opinion that
18 I might have about the facts of the case or what I might
19 think about the guilt or the innocence of the defendant in
20 this case. Those are simply matters for you and you alone
21 to determine. To do that, you are the judges of the
22 credibility or the believability of the witnesses who've
23 testified in this case.
24 And, again, you're the only ones who can judge and
25 determine the believability or the credibility of these

1 witnesses; and in doing that, you should consider several
2 things:
3 Number one, the demeanor or the manner of
4 testifying. Was the witness forthright, or was the witness
5 hesitant in their testimony? Did the witness have reason
6 to be biased or prejudiced in their testimony? Was the
7 witness's testimony contradicted on the one hand, or was it
8 supported or corroborated on the other hand? What was the
9 witness's opportunity for observation and knowledge of the
10 matters about which they have testified? How reasonable
11 was the witness's testimony when considered in the light of
12 the other evidence which you choose to believe?
13 You don't determine credibility or believability
14 by counting the number of witnesses for either side. You
15 may believe one witness against many or many against one.
16 You can believe all of a witness's testimony, none of a
17 witness's testimony, or part of a witness's testimony.
18 All of these things you will consider, using your
19 good common sense and remembering that you should give the
20 benefit of any reasonable doubt in this case to the
21 defendant.
22 Ladies and gentlemen, I told you earlier that we
23 had, I think, at least one witness qualified as an expert
24 witness in this case. Well, you determine the credibility
25 of that expert witness, too. That testimony was not given

1 for the purpose of controlling your judgment but helping
2 you understand the evidence that you've heard in this case,
3 and so you should weigh the credibility of an expert
4 witness just as you do any other witness.
5 There are two types of evidence, ladies and
6 gentlemen, from which you can determine the truth of the
7 matters in this case. One is by direct evidence, and the
8 other is by indirect or what we call circumstantial
9 evidence.
10 Well, direct evidence is the evidence that comes
11 from the testimony of people who have perceived the
12 existence of that evidence by one or more of their five
13 senses. They've heard it, seen it, smelled it, tasted it,
14 or felt it, and they come in and testify. That's direct
15 evidence. It comes without the use of any inferences at
16 all.
17 Well, indirect or circumstantial evidence can
18 arise when certain facts have been testified to by direct
19 testimony and those facts give rise to inferences that
20 certain other facts do exist.
21 It sounds complicated, but it isn't. I don't
22 think y'all have a window in your jury room, do you? Just
23 imagine you had a window. If you go back there in a few
24 minutes, the sun might be shining; but if the window is wet
25 and there's water on the windowsill and you look out and

1 there's water coming down the street and on the cars, you
2 can say, well, it might have rained. Well, you didn't use
3 any of your five senses to determine that it rained while
4 you were in this courtroom, but you did use those five
5 senses to determine other facts from which you could
6 conclude that it rained. That's simply circumstantial
7 evidence. That's all we mean.
8 And the law -- the law does not make any
9 distinction between direct and indirect circumstances. We
10 don't -- nor is a greater degree of certainty required.
11 There's not a greater degree of certainty required for
12 circumstantial evidence as opposed to direct evidence.
13 You should consider all of the evidence in the
14 case. And after considering all of the evidence in the
15 case, direct and circumstantial, if you are not convinced
16 of the guilt of the defendant by beyond a reasonable doubt,
17 then you must find him not guilty; but after considering
18 all of that evidence, both direct and circumstantial, if
19 you are convinced of the guilt of the defendant by beyond a
20 reasonable doubt, then you must find him guilty.
21 Now, ladies and gentlemen, the same law and the
22 constitution that makes you the judges of the facts in the
23 case and the sole or only judges of the facts in this case
24 make me the sole and only instructor and judge of the law
25 in this case. And if you find that what I tell you the law

1 is doesn't agree with what you thought the law was or even
2 if it doesn't agree with what you think the law ought to
3 be, you must put aside your opinion or your position on the
4 law and accept the law as I give it to you and apply that
5 to the facts as you find them to be in order to reach your
6 verdict in this case.
7 Now, ladies and gentlemen, I will define for you
8 the charge of murder. And I will tell you that in
9 South Carolina the charge of murder includes within it as
10 what we call a lesser included offense, under these
11 circumstances in this case, the charge of involuntary
12 manslaughter, and so -- I mean, I'm sorry -- voluntary
13 manslaughter. So I'm going to charge you and explain to
14 you and define for you what we mean by murder, and I'm
15 going to define for you what we mean by voluntary
16 manslaughter.
17 The definition for murder in South Carolina is the
18 willful, felonious killing of a human being by a human
19 being with malice aforethought, that malice being either
20 express malice or implied malice.
21 It's a relatively simple definition. The willful:
22 Willful means intentional, it means voluntary, it means
23 conscious, it means knowing, as opposed to accidental or
24 involuntary or inadvertently.
25 The willful, felonious: Felonious simply means

1 wrongful. It simply means without justification or excuse.
2 The willful, felonious killing of a human being by
3 another human being with malice aforethought, the malice is
4 either express or implied. So malice, ladies and
5 gentlemen, is an essential element for the crime of murder.
6 Malice is a term of art, a technical term
7 importing wickedness and excluding just cause or legal
8 excuse.
9 Malice in any form, whether it arises from hatred,
10 ill will, or otherwise, is still malice. Malice springs
11 from a depravity, from a heart devoid of social duty and
12 fatally bent on mischief.
13 Malice must be aforethought. The law does not
14 require that malice should exist for any particular or
15 specific time before the commission of the act, but malice
16 must exist in the mind of the accused just before and at
17 the time of the commission of the -- of the act. There
18 must be a combination of the previous evil intent and the
19 act produced as a result.
20 As I said, malice aforethought may be express or
21 inferred. These words "express" or "inferred" do not mean
22 different kinds of malice, but they are the manner in which
23 the only kind of malice known to the law may be shown to
24 exist; that is, either by direct evidence or by necessary
25 inference from the facts and circumstances which are proved

1 in the case.

2 Express malice is shown when one by word of mouth
3 expresses his hatred or ill will for another or where the
4 state showed that he made preparation beforehand to do the
5 deed which was later accomplished. Lying in wait for a
6 person or any act or acts of preparation going to show that
7 the deed was within his mind would be express malice.

8 What is inferred malice? Even though no express
9 intent to kill is proved by direct malice, malice may by
10 inferred from the facts and circumstances which are proven.
11 Malice may be inferred from the willful, deliberate, and
12 intentional doing of an unlawful act without just cause or
13 legal excuse.

14 In other words, in its general signification,
15 malice means the doing of a wrongful act intentionally,
16 without justification or legal excuse. Malice may be
17 inferred from conduct showing a total disregard for human
18 life.

19 Malice does not necessarily import ill will toward
20 the individual injured but signifies, rather, a general
21 malignant recklessness for the lives and safety of others
22 or a condition of the mind which shows a heart devoid of
23 social duty and fatally bent on mischief. It is the
24 wrongful intent to injure another and indicates a wicked or
25 depraved spirit intent on doing wrong.

1 So if facts are proven beyond a reasonable doubt
2 sufficient to raise an inference of malice, this inference
3 would be simply an evidentiary fact to be taken into
4 consideration by you, along with the other evidence in the
5 case, and you can give it such weight as you determine that
6 inference should receive.
7 So, in repeating, murder is the willful, felonious
8 killing of a human being by a human being with malice
9 aforethought, that malice being either express malice or
10 implied malice.
11 Now, ladies and gentlemen, as I told you, included
12 within that charge of murder is the lesser included charge
13 of voluntary manslaughter. So if you find that the state
14 has failed to prove beyond a reasonable doubt that the
15 defendant committed murder, then you should consider
16 whether the state has proven beyond a reasonable doubt that
17 the defendant committed voluntary manslaughter.
18 To prove voluntary manslaughter, the state must
19 prove beyond a reasonable doubt that the defendant took the
20 life of another in the sudden heat of passion based on
21 sufficient legal provocation. Both heat of passion and
22 sufficient legal provocation must be present at the time of
23 the killing to constitute voluntary manslaughter.
24 Sudden heat of passion for a time -- may for a
25 time affect a person's self-control and temporarily disturb

1 a person's reason. Sudden heat of passion must be the type
2 that would make an ordinary person unable to cooly reflect
3 on his actions and would produce an uncontrollable impulse
4 to do violence.
5 Sufficient legal provocation, ladies and
6 gentlemen, must be the type that would make a person of
7 ordinary reason and caution become enraged and to lose
8 control temporarily. The provocation needed for voluntary
9 manslaughter must come from some act of or be related to
10 the victim. Words alone, however, vulgar or insulting, are
11 not enough to be legal provocation.
12 If the heat of passion, ladies and gentlemen, has
13 cooled or if there was enough time between the provocation
14 and the killing for the passion of a reasonable person to
15 cool, the killing would not be excused as voluntary
16 manslaughter.
17 In deciding whether a reasonable person would have
18 had enough time to cool off, you should consider all of the
19 circumstances surrounding the killing. You may consider
20 the nature of the provocation, if any, the defendant's
21 mental and physical state, and the circumstances and
22 relationship between the parties.
23 So voluntary manslaughter, ladies and gentlemen,
24 is proof beyond a reasonable doubt that the defendant took
25 the life of another in sudden heat of passion based on

1 sufficient legal provocation, using the ordinary reasonably
2 prudent man as your standard.
3 Ladies and gentlemen, in this case, the issue of
4 self-defense has been raised. I tell you that self-defense
5 is a complete defense and if established by the evidence in
6 this case you must find the defendant not guilty.
7 The state has the burden of disproving
8 self-defense by proof beyond a reasonable doubt. If you
9 have a reasonable doubt of the defendant's guilt after
10 considering all of the evidence, including the evidence of
11 self-defense, then you must find the defendant not guilty.
12 On the other hand, if you have no reasonable doubt of the
13 defendant's guilt after considering all of the evidence,
14 including the evidence of self-defense, then you must find
15 the defendant guilty.
16 These are the elements of self-defense:
17 Number one, the defendant must be without fault in
18 bringing on the difficulty. If the defendant's conduct was
19 the type which was reasonably calculated to and did provoke
20 a deadly assault, the defendant would be at fault in
21 bringing on the difficulty and would not be entitled to an
22 acquittal based on self-defense.
23 Number two, the second element of self-defense is
24 that the defendant -- and this is an either/or -- that he
25 was in actual -- was actually in imminent danger of death

1 or serious bodily injury or that he actually believed he
2 was in imminent danger of death or serious bodily injury.
3 Now, let me explain to you what I mean. If I have
4 a pistol over here and I point it at that deputy over there
5 and it's loaded, he is certainly in imminent danger. If I
6 point it at him and it's not loaded, but he does not know
7 it's not loaded and he does not know I don't have any
8 bullets, he is not in any danger at all, but the jury might
9 conclude that he reasonably believed that he's in imminent
10 danger. So that's the difference in those two.
11 The second element is that the defendant was
12 actually in imminent danger of death or serious bodily
13 injury or that the defendant actually believed he was in
14 imminent danger of death or serious bodily injury.
15 Now, ladies and gentlemen, if the defendant was
16 actually in imminent danger, it must be shown that the
17 circumstances would have warranted a person of ordinary
18 firmness and courage to strike the fatal blow to prevent
19 death or serious bodily injury, a person of ordinary
20 firmness and courage.
21 If the defendant believed that he was in imminent
22 danger of death or serious bodily injury, it must be shown
23 that a reasonably prudent person of ordinary firmness and
24 courage would have entertained the same belief.
25 In order words, if I'm sitting here with a

1 slingshot and he shoots me and kills me, you may find he's
2 not entitled to raise self-defense since he was not
3 reasonably in danger, that a reasonable person would not
4 have believed that he was in reasonable danger of losing
5 his life when I'm sitting over here with a slingshot.
6 In deciding whether the defendant actually was or
7 believed he was in imminent danger or death -- of death or
8 serious bodily injury, you should consider all of the facts
9 and circumstances surrounding the crime, including the
10 physical condition and the characteristics of the defendant
11 and the victim.
12 The defendant does not have to show that he was
13 actually in danger. It is enough if the defendant believed
14 he was in imminent danger and a reasonably prudent person
15 of ordinary firmness and courage would have had the same
16 belief. The defendant has a right to act on appearances
17 even though the defendant's belief may have been mistaken.
18 It is for you to decide whether the defendant's
19 fear of immediate danger of death or serious bodily injury
20 was reasonable and would have been felt by an ordinary
21 person in the same position.
22 Evidence of prior difficulties between the
23 defendant and the victim maybe be considered in deciding
24 whether a threat existed, whether the defendant had a
25 reason to believe a threat existed and how serious that

1 threat was.

2 The relative ages, sizes, and weights of the
3 defendant and the victim may be considered in deciding the
4 apparent or actual need for force in self-defense and the
5 amount of force needed.

6 The intoxication of the victim may be considered
7 in deciding whether the defendant's fear of death or bodily
8 harm was reasonable.

9 Ladies and gentlemen, if the defendant is in
10 imminent danger or if the defendant's belief that he is in
11 imminent danger of death or receiving bodily harm is
12 reasonable, then the defendant need not wait until actual
13 attack or injury or until force is used by the aggressor
14 before exercising the right to use deadly force in
15 self-defense.

16 In other words, the defendant is entitled to act
17 on appearances. He need not wait until the assailant gets
18 the drop on him in order to be entitled to use force in
19 self-defense.

20 Ladies and gentlemen, the third element of
21 self-defense is this: That the defendant had no other
22 probable way to avoid the danger of death or serious bodily
23 injury than to act as the defendant did in this particular
24 instance.

25 Ladies and gentlemen, one has a duty to avoid

1 taking human life or inflicting serious bodily harm if it
2 is possible to do so, even to the extent of retreating from
3 his adversary unless by so doing the danger of being killed
4 or suffering serious bodily harm is increased or it is
5 reasonably apparent that such danger would be increased.
6 So the defendant has no duty to retreat if by
7 doing so the danger of being killed or suffering serious
8 bodily injury would increase, but he does have a duty to
9 retreat unless that danger would be increased.
10 Ladies and gentlemen, a person cannot be required
11 to make an exact calculation as to the degree or the amount
12 of force which may be needed to avoid death or serious
13 bodily harm. Therefore, in self-defense, the defendant has
14 the right to use the force needed to avoid death or serious
15 bodily harm.
16 The force used in self-defense does not have to be
17 limited to the degree or the amount of force used by the
18 victim. The defendant has the right to use so much force
19 as appears to be necessary reasonably for complete
20 self-protection and which a person of ordinary reason and
21 firmness would have believed to be needed to prevent death
22 or serious bodily harm.
23 Since in the heat of conflict or in the face of
24 impending peril a person cannot be expected to measure
25 accurately the exact amount of force necessary to repel an

1 attack, the person will not be deemed to have exceeded his
2 rights with respect to self-defense unless the force used
3 was so excessive as clearly to be vindictive under the
4 circumstances.
5 The right of self-defense is not limited by
6 actualities but by the reasonableness of belief. The force
7 which a person may use in self-defense is that which under
8 all circumstances reasonably appears necessary to that
9 person in order to prevent an impending serious injury or
10 death.
11 The infliction of serious bodily injury or death
12 is not justifiable or excusable on the ground of
13 self-defense by reason of danger or apprehension of danger
14 of slight bodily injury or of a mere indignity or of a
15 slight or moderate injury such as that to be apprehended
16 from a simple or ordinary assault or battery, without --
17 with or without some type of weapon, unless the assault is
18 accompanied by acts indicating imminent danger of serious
19 bodily harm or death and produces in the mind of the
20 accused a reasonable belief of such danger.
21 In determining whether a particular means or
22 method used in self-defense is or is not excessive, the
23 amount of force exerted, the means or instrument by which
24 it is applied, the manner or method of applying it, and the
25 circumstances under which the force was applied are factors

1 to be considered.
2 The privilege of self-defense rests upon the
3 necessity of permitting a person who is attacked to take
4 reasonable steps to prevent harm to himself or herself
5 where there is no time to resort to the law. The privilege
6 extends to the use of all reasonable force to prevent any
7 threat of harm or offensive bodily contact or confinement
8 whether intended or negligent.
9 So, ladies and gentlemen, the three elements of
10 self-defense are, number one, that the defendant must be
11 without fault in bringing on the difficulty; number two,
12 that the defendant was actually in imminent danger of death
13 or serious bodily injury or that he reasonably believed he
14 was in imminent danger of death or serious bodily injury;
15 and if he was in actual imminent danger, it must be shown
16 that the circumstances would have warranted a person of
17 ordinary firmness and courage to strike the fatal blow to
18 prevent death or serious injury.
19 If the defendant's conduct was based on a belief
20 that he was in imminent danger of death or serious bodily
21 injury, that belief must be shown that a reasonably prudent
22 person of ordinary firmness and courage would have had the
23 same belief.
24 And the third element, ladies and gentlemen, is
25 that the defendant had no other reasonable way to avoid the

1 danger of death or serious bodily injury than to act as he
2 did in these particular circumstances.
3 Ladies and gentlemen, because the defendant in a
4 criminal trial is presumed innocent, the law never imposes
5 upon a defendant the burden or the duty of testifying. The
6 defendant in a criminal trial has an absolute right under
7 the constitution of the United States and the State of
8 South Carolina not to take the stand and testify.
9 The exercise by the defendant of this right not to
10 testify must not be considered by you in any way against
11 the defendant and should play no role whatsoever in your
12 decision or deliberations. No inference of any kind may be
13 drawn by his exercise of his constitutional right not to
14 testify. I would ask that you not even discuss that fact
15 when you begin your deliberations.
16 Now, ladies and gentlemen, I'm required to charge
17 you on the law which might apply to this case. Some of the
18 things that I've charged you may not even apply, depending
19 upon what you find the facts to be in this case; and the
20 fact that I've charged you on certain things shouldn't
21 indicate that I have an opinion that they apply. That's up
22 to you. I've tried to give you everything you need based
23 on any determination of the facts that you consider proper
24 in this particular case.
25 If I seem to you that I have overly emphasized or

1 repeated some of my instructions, it's not because they're
2 more important. It's simply because some of these are
3 legal concepts which are difficult for attorneys to
4 understand and much more difficult for those of you who I
5 don't think have any knowledge in the law.
6 Nothing that I have said or done during the course
7 of this trial has been in any way intended to express or
8 suggest a view of the case or an opinion as to the facts of
9 the case or the weight of the evidence or the credibility
10 of the witnesses or what your verdict should be. And if
11 anything I have said or done seems to you to indicate that
12 I have an opinion on any of those matters, please disregard
13 that, put that aside, and make -- form your own opinion as
14 to each of these matters.
15 You have been selected as fair and impartial
16 jurors. You're sworn to impartially try and determine the
17 facts of this case; and when you comply with your oath to
18 do so, then no one will have a right to criticize your
19 verdict, and you will have fully discharged your duty as
20 jurors.
21 You are to decide this case according to the
22 testimony that you've heard from the lips of the witnesses,
23 the other evidence, and my instructions to you on the law.
24 You must decide the issues without bias and
25 without prejudice to any party. You cannot allow yourself

1 to be governed by sympathy, by prejudice, by passion, or
2 public opinion, or any other arbitrary factor.
3 Both the state and the defendant have the right to
4 expect that each of you will carefully and impartially
5 consider all of the evidence in this case and that you will
6 follow my instructions on the law in reaching your verdict.
7 Mrs. Baker, you were an alternate. You are now on
8 the jury. I excused one of our jurors for reasons which
9 don't concern you at all. That's why we have alternates.
10 We still have twelve of our jurors with us. So you will be
11 sitting on the jury.
12 Sir, I believe it's Mr. Gipe?
13 THE FOREMAN: Yes.
14 THE COURT: And I think the jury elected you as
15 foreperson?
16 THE FOREMAN: Yes, sir.
17 THE COURT: All right. I didn't know why you were
18 sitting over there by yourself. I just thought maybe they
19 didn't want to sit by you. But that's fine.
20 Your duty will be to preside as the jury begins
21 your deliberations. You will see that everybody has -- who
22 wishes to speak has an opportunity to speak, with everybody
23 trying to speak all at one time.
24 When the jury has reached a unanimous verdict, and
25 any jury must be unanimous, all twelve of you must agree on

1 a verdict, it will be your duty to report that on behalf of
2 the entire jury.
3 Now, ladies and gentlemen, you will have with you
4 in the jury room this indictment. And on one side, it just
5 gives the elements of murder which I read to you earlier
6 when the trial started. On the other side, it's got the
7 title of the case and that kind of thing.
8 And down on this bottom corner down here, it's got
9 a little block that says "verdict." And in this case,
10 there are three possible verdicts, and I have them written
11 down on here.
12 Now, there is no significance in the order in
13 which I have written them. I have to write one before the
14 other if I'm going to write down three possible verdicts.
15 He's charged with murder. So one of the possible
16 verdicts is guilty of murder. As I told you, in
17 South Carolina that charge carries within it the lesser
18 included offense of voluntary manslaughter. So one
19 possible verdict is guilty of voluntary manslaughter. And,
20 of course, the third possible verdict is not guilty.
21 If you find the state has proven beyond a
22 reasonable doubt the elements of murder, as I defined them
23 for you, considering the testimony and the evidence of
24 self-defense, then your verdict would be guilty. If you
25 find the state has failed in that proof, your verdict would

1 be not guilty.

2 If you find that the state has not proven murder

3 but the state has proven the elements of voluntary

4 manslaughter, after you've considered the elements of

5 self-defense and they have proven voluntary manslaughter by

6 a reasonable -- beyond a reasonable doubt, then your

7 verdict would be guilty of voluntary manslaughter.

8 Of course, if you find that the state has not

9 proven the elements of either, your verdict would be not

10 guilty. It's just that simple.

11 When you've reached a verdict, you simply knock on

12 the door and tell the bailiff you've reached a verdict, but

13 you do not give him the verdict form and do not tell him

14 the verdict. We will bring you back in the courtroom and

15 receive the verdict here.

16 If you have any questions, write those down on a

17 piece of paper, please, sir. The bailiff will be sure that

18 you have paper and pencil. Give them to the bailiff, tell

19 him you have a question, and I'll take whatever action I

20 need to take under the circumstances and get back to you as

21 quickly as I can. We're going to start another trial at

22 three o'clock, but I'll get to you. I won't leave you back

23 there very long, but it might not be instantaneous. I'll

24 do the best I can.

25 If you have any smokers and you need to take a

1 break, there's someplace I'm sure the bailiff can take you.
2 Now, you can't smoke in that jury room, but they'll take
3 you out somewhere to smoke. If the smokers have to leave,
4 the rest of you have to stop your deliberations until the
5 smokers get back. All twelve of you need to be there to
6 begin your deliberations.
7 Now, I'm about to ask you to retire to the jury
8 room, and I'm going to ask you one more time not to talk
9 about the case for this reason: I must discuss my charge
10 to you with the attorneys. Sometimes I make a mistake and
11 I don't tell you everything I need to tell you, and
12 sometimes I just state something wrong or in -- in my
13 effort to explain the law to you.
14 If I need to correct any error that I have made in
15 my instructions, I'll bring you right back out and do that.
16 If I don't need to do that, I will send in to you,
17 Mr. Foreman, this indictment and verdict form and all of
18 the exhibits. When you get the indictment and all the
19 exhibits, then you can begin your deliberations but not
20 until that time.
21 So please follow the bailiff to the jury room, but
22 do not begin your deliberations quite yet. Once you get
23 these other documents, you can begin.
24 Thank you, sir.
25 (Whereupon, the jury goes to the jury room at

1 approximately 2:45 p.m.)

2 THE COURT: Any exception from the state?

3 MR. WILLIAMS: No, Your Honor.

4 THE COURT: From the defense?

5 MR. BUTLER: No.

6 THE COURT: Other than you've already raised?

7 MR. BUTLER: Other than the objections previously

8 noted.

9 THE COURT: All right. Thank you, sir.

10 All right. How many exhibits do we have, Madam

11 Court Reporter, for the state and how many for the defense?

12 THE COURT REPORTER: For the state, twenty-two;

13 for the defense, three.

14 THE COURT: Twenty-six and three?

15 THE COURT REPORTER: Twenty-two for the state,

16 three for the defendant.

17 THE COURT: All right. Counsel, be sure you

18 gather all the exhibits. It's y'all's responsibility.

19 Once you've gathered them all, please take the indictment,

20 and you can see that I've written the verdicts on the

21 bottom, the possible verdicts, and give them to the

22 bailiff.

23 Mr. Bailiff, when you receive that, then you can

24 deliver them to the jury and tell them to begin their

25 deliberations, please, sir.

1 Ms. Steele, would you let the lawyers in the three
2 o'clock case know that I need to see them in the back in my
3 chambers.
4 And let me see all the 403's back there, too.
5 We'll be at ease for a few minutes.
6 (Whereupon, the jury begins deliberations at
7 approximately 2:45 p.m.)
8 (A note is received from the jury, and there was
9 off-the-record discussion by the Court, the solicitor, and
10 defense counsel.)
11 (Court's Exhibit No. 6, note from the jury, is
12 marked for identification.)
13 (The trial reconvenes at approximately 6:50 p.m.,
14 the defendant being present with counsel, and the following
15 proceedings were had:)
16 (Court's Exhibit No. 7, note from the jury, is
17 marked for identification.)
18 THE COURT: All right. The jury has requested
19 they be allowed to hear the testimony of Mr. Kwame Frasier,
20 Mr. Gibbs, L.J. Gibbs, and Jaz, and so the court reporter
21 is ready to play that testimony. We'll bring the jury out
22 now.
23 Any objection from the state?
24 MR. WILLIAMS: No, Your Honor.
25 THE COURT: From the defense?

1 MR. BUTLER: No, sir.

2 THE COURT: All right. Bring the jury.

3 (Whereupon, the jury returns to the courtroom at

4 approximately 6:50 p.m.)

5 THE BAILIFF: All jurors are seated, Your Honor.

6 THE FOREMAN: Can I ask a question?

7 THE COURT: Yes, sir.

8 THE FOREMAN: Due to the witnesses, I think it

9 might take a while the way we have to do this. We have

10 some confusion on a couple of questions. If maybe during

11 the first tape the question is answered, then can we say,

12 okay, those were -- our questions are answered?

13 THE COURT: I was going to tell you that. Yes,

14 sir. We'll start the witnesses in the order you gave them,

15 and we'll start at the beginning of the testimony. And at

16 some point if you've heard all you want to hear of that

17 testimony, you just signal to me, and we'll stop and move

18 on to the next one.

19 Go ahead.

20 THE FOREMAN: Thank you, Your Honor.

21 THE COURT: All right, sir. And as I said, we

22 don't have the best equipment. Sometimes witnesses don't

23 speak into the mike and all of that; but if you can't hear,

24 let me know and we'll see what else we can do.

25 And since she has to change tapes, she can't play

1 one while she's taking dication. And when she gets to a
2 place where you were excused, she'll have to cut the volume
3 down, fast forward, and get back to that. So bear with us.
4 Who is the first one?
5 THE COURT REPORTER: They asked for Kwame Frasier.
6 THE COURT: All right.
7 (The requested testimony was unable to be played
8 back due to malfunction of both primary and backup
9 equipment.)
10 (There was off-the-record discussion.)
11 THE COURT: All right. Ladies and gentlemen, I'll
12 let you retire to your jury room for a few minutes. Please
13 do not talk about the case. Thank you very much.
14 (Whereupon, the jury goes to the jury room at
15 approximately 7:05 p.m.)
16 (Whereupon, the jury returns to the courtroom at
17 approximately at 7:15 p.m.)
18 THE COURT: All right.
19 THE BAILIFF: All jurors are seated, Your Honor.
20 THE COURT: Thank you, sir.
21 Mr. Foreman, sorry we're having difficulties with
22 the tape. We can have a transcript in the morning -- and
23 we can read these three witnesses -- which will be 100
24 percent legible. After discussing with you in the jury
25 room that's what you want to do, we'll start back at 9:30

1 in the morning.
2 Now, it's important not to talk about the case
3 with anyone, not among yourselves if you see each other,
4 not with anybody at home. Keep that in mind. Please
5 remember don't discuss it with anyone.
6 We'll have the three transcripts in the morning to
7 read to you in the morning, and you can continue your
8 deliberations. Thank you very much. We can excuse you at
9 this time.
10 Do we have somebody to escort these ladies to
11 their cars? I don't know where you're parking, but...
12 THE FOREPERSON: Cumberland Street Garage.
13 THE COURT: We can handle that, can't we?
14 THE DEPUTY: Yes.
15 THE COURT: So just hang around there just a few
16 minutes. I want to be sure to get you, especially the
17 ladies, but gentlemen also -- get you an escort to your
18 car. And we'll see you at 9:30 in the morning. Thank you
19 very much. You're excused.
20 (Whereupon, the jury leaves the courtroom at
21 approximately 7:20 p.m.)
22 THE COURT: All right. I've spoken with the jury
23 twice in the jury room related to these requests to hear
24 the tape and problems we had playing the tape, with both
25 the prosecution and the defense attorneys standing in the

1 door so they can hear every word that was said.

2 Any objection to anything from the state at this

3 time?

4 MR. WILLIAMS: No, Your Honor.

5 THE COURT: From the defense?

6 MR. BUTLER: No, sir.

7 THE COURT: All right. We'll be in recess until

8 9:30 tomorrow morning.

9 (Whereupon, at approximately 7:20 p.m., the trial

10 is recessed to the following day, Thursday, October 5,

11 2006, at 9:30 a.m.)

12

13

14

15

16

17

18

19

20

21

22

23

24

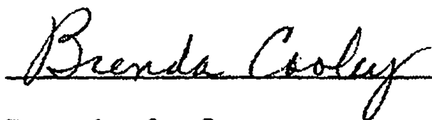
25

CERTIFICATE OF THE COURT REPORTER

I, the undersigned, Brenda Cooley, Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true and accurate transcript of record of the proceedings had and the evidence introduced in the hearing of the captioned case, Volume III of IV, pages 364 through 529, inclusive, relative to appeal, in the Court of General Sessions for Charleston County, Charleston, South Carolina, on the 4th day of October 2006.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 24, 2006



Brenda Cooley

Circuit Court Reporter

Defendant's Request to Charge No. 2

APPEARANCES TO DEFENDANT

A defendant need not prove that he actually was in danger of loss of life or serious bodily injury, but only that he believed he was in imminent danger, because the defendant has the right to act on appearances. If under the circumstances as they appeared to him, he believed he was in such danger and a reasonable prudent man of ordinary firmness and courage would have entertained the same belief then he has acted in self defense and you should find him not guilty. In considering whether the defendant properly acted upon appearances, you may consider whether the deceased had threatened either the defendant or others during the evening, whether the deceased had engaged other fights during the evening and whether the deceased appeared to be under the influence of either alcohol or drugs. In the final analysis, you are not to decide whether the defendant made the wisest or best choice, but whether he made a reasonable choice under the circumstances as they appeared to him.

State v. Jackson, 277 S.C. 271, 87 S.E.2d 681, 684-685 (1955)

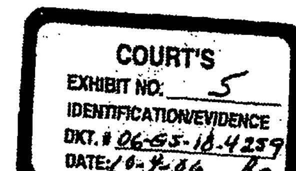
COURT'S
EXHIBIT NO. 4
IDENTIFICATION/EVIDENCE
DKT. #06-GS-10-4259
DATE: 10-4-06 BC

Defendant's Request to Charge No. 3

CONTINUED USE OF FORCE

When a person is justified in striking a person once, he is justified in continuing to strike until it is apparent that the danger to his life and body has ceased.

State v. Hendrix, 244 S.E.2d 503, 270 S.C. 653 (1978)



State of South Carolina) The Court of General Sessions
County of Charleston) The Ninth Judicial Circuit

State of South Carolina,)
vs.) Case No. 06-GS-10-4259
Moses Frasier,)
Defendant.)

VOLUME IV of IV

Transcript of Record

October 5, 2006

Charleston, South Carolina

B E F O R E:

The Hon. James C. Williams, Judge, and a Jury

A P P E A R A N C E S:

Nathan Williams, Esq.
Kim Steele, Esq.
Attorneys for the State

Beattie I. Butler, Esq.
Jason Mikell, Esq.
Attorneys for the Defendant

Pages 531-558

Brenda Cooley
Circuit Court Reporter

I N D E X

THURSDAY, OCTOBER 5, 2006

	PAGE
Exhibits	2.11
Proceedings	531
Court's Recharge to the Jury	533
Defense Further Request to Charge	544
Court's Ruling	545
Verdict	546
Polling of the Jury	547
Defense Renewed Motion for Directed Verdict And Defense Motion for New Trial	550
Court's Ruling	550
Statements by Mr. Williams	551
Statements on Behalf of the Victim	552
Statements by Mr. Butler	553
Sentencing	556
Court's Instructions to the Jury	556
Jury Excused	557
Certificate of the Court Reporter	558

E X H I B I T S

COURT'S	DESCRIPTION	ID	REC'D
8	Note from the Jury	532	

(The exhibit was retained by the clerk of court.)

1 (On Thursday, October 5, 2006, the defendant being
2 present with counsel, the trial reconvenes at approximately
3 9:00 a.m., and the following proceedings were had:)
4 (There was an off-the-record chambers
5 conference.)
6 (At approximately 9:45 a.m., said chambers
7 conference being concluded, the following proceedings were
8 had:)
9 THE COURT: All right. In the matter *The State*
10 *vs. Moses Frasier*, the court reporter worked diligently all
11 nightlong last night and brought us accurate transcripts of
12 the testimony of the three witnesses that the jury wanted
13 to hear: Mr. Gibbs, Kwame Frasier, and Jamol Seabrook.
14 After conferring in chambers with the prosecutor,
15 Mr. Williams, and the defense attorney, Mr. Butler, we
16 removed from those transcripts the conferences that were
17 held outside the presence of the jury, and by agreement we
18 delivered to the jury those three transcripts with those
19 conferences deleted.
20 Do you agree with that, Mr. Williams?
21 MR. WILLIAMS: Yes, Your Honor.
22 THE COURT: Mr. Butler?
23 MR. BUTLER: Yes, sir.
24 THE COURT: All right. The jury has sent out a
25 note saying they'd like to hear the points of law again.

1 So as soon as I finish this sentencing that I'm fixing to
2 do in another case, I'll bring them out and I'll confirm
3 that what they want is a recharge on murder, manslaughter,
4 and self-defense, and I'll give them those charges in full.
5 Any objection from the state?
6 MR. WILLIAMS: No, Your Honor.
7 THE COURT: Any objection, Mr. Butler?
8 MR. BUTLER: No, sir.
9 THE COURT: All right. We'll be at ease in this
10 case until I finish the resentencing in the other case --
11 the sentencing in the other case, and then we'll bring the
12 jury back and I'll recharge them. Thank you, sir.
13 (Court's Exhibit No. 8, note from the jury, is
14 marked for identification.)
15 (The trial is in recess at approximately
16 9:45 a.m., and another matter is heard before the Court.)
17 (The trial reconvenes at approximately
18 10:00 a.m., the defendant being present with counsel, and
19 the following proceedings were had:)
20 THE COURT: All right, sir. You can bring us our
21 jury in, please, sir.
22 (Whereupon, the jury returns to the courtroom at
23 approximately 10:00 a.m.)
24 THE BAILIFF: The jurors are present, Your Honor.
25 THE COURT: Thank you, sir.

1 Good morning, ladies and gentlemen.
2 The court reporter worked all night last night to
3 get those transcripts up for you, and so we just figured
4 the easiest thing was to give them to you and let you look
5 through them. That would be a lot quicker than us having
6 somebody read them.
7 Now, you requested that I go over the points of
8 the law. So what I'm thinking, Mr. Foreman, is that you
9 want me to charge you again on murder, manslaughter, and
10 self-defense.
11 THE FOREMAN: Correct.
12 THE COURT: All right.
13 Ladies and gentlemen, first, the definition of
14 murder: Murder may be defined as the willful, felonious
15 killing of a human being by a human being with malice
16 aforethought, that malice being either express malice or
17 implied malice.
18 Willful, ladies and gentlemen, means intentional
19 or voluntary, conscious or knowing, as opposed to
20 accidental or involuntary or inadvertently.
21 Felonious means unlawful. It means without
22 justification of excuse -- or excuse.
23 Malice, ladies and gentlemen, is a term of art, a
24 technical term importing wickedness and excluding just
25 cause or legal excuse.

1 Malice in any form, whether it arises from hatred,
2 ill will, or otherwise, is still malice. Malice springs
3 from depravity, from a heart devoid of social duty and
4 fatally bent on mischief.
5 Malice must be aforethought. The law does not
6 require that malice should exist for any particular time
7 before the commission of the act, but malice must exist in
8 the mind of the accused just before and at the time of the
9 commission of the act or acts. There must be a combination
10 of the previous evil intent and the act produced as a
11 result.
12 Malice aforethought may be express or inferred.
13 These words do not mean different kinds of malice but
14 merely the manner in which the only kind of malice known to
15 the law may be shown to exist either by direct evidence or
16 by necessary inference from the facts and circumstances
17 which are proven.
18 Express malice is shown when one by word of mouth
19 expresses his hatred or ill will for another or where the
20 state shows that he made preparation beforehand to do the
21 deed which was later accomplished. Lying in wait for a
22 person or any act of preparation going to show that the
23 deed was in his mind would be express malice.
24 Inferred malice, ladies and gentlemen, even though
25 no express intent to kill is proved by direct evidence, it

1 may be inferred from the facts and circumstances which are
2 proven. Malice may be inferred from the willful,
3 deliberate, and intentional doing of an unlawful act
4 without just cause or legal excuse.
5 In other words, in its general meaning, malice
6 means the doing of a wrongful act intentionally without
7 justification or legal excuse. Malice may be inferred from
8 conduct showing a total disregard for human life.
9 Malice does not necessarily import ill will toward
10 the individual injured but signifies, rather, a general
11 malignant recklessness for the lives and safety of others,
12 a condition of mind which shows a heart devoid of social
13 duty and fatally bent on mischief. It is the wrongful
14 intent to injure another and indicates a wicked or depraved
15 spirit intent on doing wrong.
16 So if facts are proven beyond a reasonable doubt
17 sufficient to raise this inference of malice to your
18 satisfaction, this inference would be an evidentiary fact
19 to be taken into consideration by you the jury along with
20 other evidence in this case. You may give it such weight
21 as you determine it should receive.
22 Now, ladies and gentlemen, as I told you, in
23 South Carolina included within the charge of murder, under
24 some circumstances such as this case, there is a lesser
25 included charge that the state calls voluntary

1 manslaughter.
2 So if you find that the state has not proven the
3 elements of murder that I outlined -- and I want to read
4 that definition again, that murder is the willful,
5 felonious killing of a human being by a human being with
6 malice aforethought and that malice either being express or
7 implied.
8 If you find the state has not proven beyond a
9 reasonable doubt the elements of murder, then you would
10 look and see whether the state has proven the elements of
11 involuntary -- of voluntary, voluntary manslaughter.
12 The state must prove beyond a reasonable doubt
13 that the defendant took the life of another in the sudden
14 heat of passion based on sufficient legal provocation.
15 Both heat of passion and sufficient legal
16 provocation must be present at the time of the killing to
17 constitute voluntary manslaughter.
18 Sudden heat of passion may for a time affect a
19 person's self-control and temporarily disturb a person's
20 reason. Sudden heat of passion must be the type that would
21 make an ordinary person unable to cooly reflect on his
22 actions and would produce an uncontrollable impulse to do
23 violence.
24 Sufficient legal provocation must be the type that
25 would make a person of ordinary reason and caution to

1 become enraged and to lose control temporarily. The
2 provocation needed for voluntary manslaughter must come
3 from some act of or related to the victim.
4 Now, ladies and gentlemen, the best example I
5 could probably give you of a fact situation which has
6 frequently been determined to be sufficient legal
7 provocation is when a man comes home and finds or a woman
8 comes home and finds her husband in the bed with another
9 woman. That is frequently given as an example of
10 sufficient legal provocation, you know. But if you take a
11 man's newspaper and hide it from him and he kills you, you
12 know, it would be hard to find that's sufficient legal
13 provocation.
14 It is what would provoke the ordinary -- a person
15 of ordinary reason and caution to cause that person to
16 become so enraged as to lose control temporarily. That's
17 what we mean by sufficient legal provocation. Again, we
18 look at the objective man standard, what would a reasonable
19 man do under the circumstances.
20 If the heat of passion has cooled or if there was
21 enough time between the provocation, if any, and the
22 killing for the passion of a reasonable person to cool, the
23 killing would not be voluntary manslaughter.
24 In deciding whether a reasonable person would have
25 had enough time to cool off, you should consider all the

1 circumstances surrounding the killing. You may consider
2 the nature of the provocation, if any, the defendant's
3 mental and physical state, and the circumstances and
4 relationship between the parties.
5 In other words, if a man finds his wife in a
6 comprising situation and three weeks later he goes out and
7 kills the other man, he's had plenty of time to cool off.
8 As a matter of law, you know, that would not be reduced to
9 voluntary manslaughter.
10 Now, self-defense has been raised as an issue in
11 this case, ladies and gentlemen. Self-defense is a
12 complete defense; and if it is established by the evidence,
13 you must find the defendant not guilty. The state has the
14 burden of disproving self-defense by proof beyond a
15 reasonable doubt.
16 If you have a reasonable doubt of the defendant's
17 guilt after considering all of the evidence, including the
18 evidence of self-defense, then you must find the defendant
19 not guilty.
20 On the other hand, if you have no reasonable doubt
21 of the defendant's guilt after considering all of the
22 evidence, including the evidence of self-defense, then you
23 must find the defendant guilty.
24 Now, these are the elements required to establish
25 self-defense:

1 First, the defendant must be without fault in
2 bringing on the difficulty. If the defendant's conduct was
3 the type that was reasonably calculated to and did provoke
4 a deadly assault, the defendant would be at fault in
5 bringing on the difficulty and would not be entitled to an
6 acquittal based on self-defense.
7 Secondly, the second element of self-defense is
8 that the defendant was actually in imminent danger of death
9 or serious bodily injury or that he actually believed that
10 he was in imminent danger of death or serious bodily
11 injury.
12 And I explained to you yesterday the difference.
13 If I'm sitting here with a loaded pistol, somebody is
14 really in -- in imminent danger. If I'm sitting here with
15 an unloaded pistol, somebody might reasonably believe that
16 he is in imminent danger.
17 If the defendant was actually in imminent danger,
18 then it must be shown that the circumstances would have
19 warranted a person of ordinary firmness and courage to
20 strike a fatal blow to prevent death or serious bodily
21 injury.
22 If the defendant believed that he was in imminent
23 danger of death or serious bodily injury, it must be shown
24 that a reasonably prudent person of ordinary firmness and
25 courage would have had the same belief.

1 In deciding whether the defendant actually was or
2 believed he was in imminent danger of death or serious
3 bodily injury, you should consider all the facts and
4 circumstances surrounding the crime, including the physical
5 condition and the characteristics of the defendant and the
6 victim.
7 The defendant does not have to show that he was
8 actually in danger. As I said, it is enough that the
9 defendant believed he was in imminent danger and that --
10 that a reasonably prudent person of ordinary firmness and
11 courage would have had the same belief.
12 The defendant has a right to act on appearances
13 even though he might have been mistaken. It is for you to
14 decide whether the defendant's fear of immediate danger of
15 death or serious bodily injury was reasonable and would
16 have been felt by an ordinary person in the same situation.
17 Evidence of prior difficulties between the
18 defendant and the victim may be considered in deciding
19 whether a threat existed, whether the defendant had a
20 reason to believe a threat existed and how serious that
21 threat was.
22 The relative sizes, ages, and weights of the
23 defendant and the victim may be considered in deciding the
24 apparent or actual need for force in self-defense and the
25 amount of force needed.

1 If the defendant is in imminent danger or if he --
2 or if his belief that he is in imminent danger of death or
3 serious bodily harm is reasonable, then the defendant need
4 not wait until actual attack or injury or until force is
5 used by the aggressor before exercising the right to use
6 deadly force in self-defense.
7 In other words, the defendant need not wait until
8 the assailant gets the drop on him in order to be entitled
9 to use force in self-defense.
10 The third element, ladies and gentlemen, is that
11 the defendant had no other probable way to avoid the danger
12 of death or serious bodily injury than to act as the
13 defendant did in this particular circumstance, no other way
14 to avoid the danger.
15 Ladies and gentlemen, a person has a duty to avoid
16 taking a human life or inflicting serious bodily injury if
17 it is possible to do so, even to the extent of retreating
18 from his adversary unless by doing so the danger of being
19 killed or suffering serious bodily harm is increased or it
20 is reasonably apparent that such danger would be increased.
21 The defendant had no duty to retreat if by doing so the
22 danger of being killed or suffering serious bodily injury
23 was increased.
24 Ladies and gentlemen, a person cannot be required
25 to make an exact calculation as to the degree or the amount

1 of force which may be needed to avoid death or serious
2 bodily harm. Therefore, in self-defense the defendant has
3 the right to use the force needed to avoid death or serious
4 bodily harm.
5 The force used in the self-defense does not have
6 to be limited to the degree or amount of force used by the
7 victim. The defendant has a right to use so much force as
8 appears to be necessary for complete self-protection and
9 which a person of ordinary reason and firmness would have
10 believed to be needed to prevent death or serious bodily
11 harm.
12 Since in the heat of conflict or in the face of
13 impending peril a person cannot be expected to measure
14 accurately the exact amount of force necessary to repel an
15 attack, a person will not be deemed to have exceeded his
16 right with respect to self-defense unless the force used is
17 so excessive as clearly to be vindictive under the
18 circumstances.
19 The right of self-defense is limited -- not
20 limited by actuality but by the reasonableness of belief.
21 The force which a person may use in self-defense is that
22 which under all circumstances reasonably appears necessary
23 to that person in order to prevent an impending injury.
24 The infliction of serious bodily injury is not
25 justifiable or excusable on the ground of self-defense by

1 reason of a danger or apprehension of danger of a slight
2 bodily injury or of a mere indignity or of a slight or
3 moderate injury such as that to be apprehended from simple
4 or ordinary assault and battery with or without some type
5 of weapon unless that assault is accompanied by acts
6 indicating the imminent danger of serious bodily harm or
7 death and produces in the mind of the accused a reasonable
8 belief of such danger.
9 In determining whether a particular means or
10 method used in self-defense is or is not excessive, the
11 amount of force exerted, the means or instrument by which
12 it is applied, the manner or method of applying it, and the
13 circumstances under which the force was applied are among
14 the factors which should be considered.
15 The privilege of self-defense rests upon the
16 necessity of permitting a person who is attacked to take
17 reasonable steps to prevent harm to himself or herself
18 where there is no time to resort to the law. The privilege
19 extends to the use of all reasonable force to prevent any
20 threat of harm or offensive bodily conduct or any
21 confinement whether intended or negligent.
22 I will ask you to continue your deliberations.
23 If you have any other questions, write me a note. Thank
24 you very much. Please retire to the jury room and continue
25 your deliberations.

1 (Whereupon, the jury goes to the jury room at
2 approximately 10:20 a.m.)
3 THE COURT: Any objection from the state to my
4 recharge?
5 MR. WILLIAMS: No, Your Honor.
6 THE COURT: Any exception to anything else that's
7 been going on since the jury started deliberation?
8 MR. WILLIAMS: No, Your Honor.
9 THE COURT: Any exception from the defense to my
10 recharge?
11 MR. BUTLER: I just have to ask a couple
12 questions. I didn't hear -- and maybe I missed it. You
13 charged self-defense is a complete defense?
14 THE COURT: Yes, sir. If shown by the facts,
15 entitled to a verdict of not guilty. I did charge that.
16 MR. BUTLER: And the state's -- it's the state's
17 burden to disprove self-defense?
18 THE COURT: Yes, sir, I charged that.
19 MR. BUTLER: I have to request an additional
20 charge in light of the questions and in light of hearing it
21 again. You know, sometimes we -- I don't realize the need
22 for a charge until I hear the charge.
23 And in light of some of the questions, I'm not
24 sure that it would be clear to them that in both the case
25 of murder and manslaughter that the state must prove the

1 defendant's conduct killed the victim, in other words,
2 proximate cause.
3 I haven't asked for that before. I understand
4 that. In light of the recent questions that they submitted
5 concerning the timing and asking for a time line they may
6 not be able to establish, I have to ask the Court to charge
7 on causation or proximate cause.
8 THE COURT: All right, sir. I decline that. I
9 think it's perfectly clear under the circumstances that he
10 had to have caused the death of the victim in the case or
11 he's not responsible. I don't know how they could think
12 anything else.
13 MR. BUTLER: Yes, sir.
14 THE COURT: All right. I note your exception.
15 MR. BUTLER: Thank you.
16 THE COURT: All right. We'll be at ease.
17 And, again, thank you, Madam Court Reporter, for
18 preparing those transcripts.
19 (The trial is in recess at approximately
20 10:20 a.m.)
21 (The trial reconvenes at approximately 12:00
22 noon, the defendant being present with counsel, and the
23 following proceedings were had:)
24 THE COURT: Thank you very much. I understand we
25 have a verdict. Is the state ready to receive the verdict?

1 MR. WILLIAMS: Yes, sir.

2 THE COURT: Is the defense ready?

3 MR. BUTLER: Yes, sir.

4 THE COURT: All right. Ladies and gentlemen, we

5 don't allow any emotional outburst in the court when the

6 verdict is announced. If you think you might have

7 difficulty controlling your emotions, I will ask you to

8 step outside the door. It won't be just a few minutes

9 until somebody can tell you what the verdict is.

10 All right. Bring the jury in, please.

11 (Whereupon, the jury returns to the courtroom at

12 approximately 12:02 p.m.)

13 THE BAILIFF: The jurors are present, Your Honor.

14 THE COURT: Thank you, sir.

15 Madam Clerk.

16 THE CLERK: Case number 2006-GS---

17 THE COURT: Let me see it, please.

18 THE CLERK: I'm sorry.

19 (The clerk tenders verdict to the Court.)

20 THE COURT: All right. The verdict is in the

21 proper form. You may publish the verdict.

22 THE CLERK: Thank you.

23 Case 2006-GS-10-4259, *State of South Carolina vs.*

24 *Moses Akhenaton Frasier*, indictment for murder, the verdict

25 of the jury is guilty of voluntary manslaughter. Signed

1 Timm W. Gipe, October 5th, 2006.

2 Mr. Foreperson and ladies and gentlemen of the
3 jury, if this is your verdict, please raise your right
4 hand.

5 (Whereupon, each member of the jury raises their
6 right hand.)

7 THE COURT: Thank you, ma'am.

8 Any request to poll the jury from the state?

9 MR. WILLIAMS: No, Your Honor.

10 THE COURT: From the defense?

11 MR. BUTLER: Yes, sir.

12 THE COURT: All right. Ladies and gentlemen, I
13 have two questions that I'm going to ask each of you. The
14 first question is: Was this your verdict? And you just
15 answer appropriately. The second question is: Is it still
16 your verdict? And you just answer that question
17 appropriately.

18 We'll start with the foreperson and go right
19 across each row.

20 Mr. Foreman, was this your verdict?

21 THE FOREMAN: Yes.

22 THE COURT: Is it still your verdict?

23 THE FOREMAN: Yes.

24 THE COURT: Sir, was this your verdict?

25 A JUROR: Yes.

1 THE COURT: Is it still your verdict?

2 A JUROR: Yes.

3 THE COURT: Ma'am, was this your verdict?

4 A JUROR: Yes.

5 THE COURT: Is it still your verdict?

6 A JUROR: Yes.

7 THE COURT: Sir, was this your verdict?

8 A JUROR: Yes.

9 THE COURT: Is it still your verdict?

10 A JUROR: Yes.

11 THE COURT: Ma'am, was this your verdict?

12 A JUROR: Yes.

13 THE COURT: Is it still your verdict?

14 A JUROR: Yes.

15 THE COURT: Ma'am, was this your verdict?

16 A JUROR: Yes.

17 THE COURT: Is it still your verdict?

18 A JUROR: Yes.

19 THE COURT: Ma'am, was this your verdict?

20 A JUROR: Yes.

21 THE COURT: Is it still your verdict?

22 A JUROR: Yes.

23 THE COURT: Ma'am, was this your verdict?

24 A JUROR: Yes.

25 THE COURT: Is it still your verdict?

1 A JUROR: Yes.
2 THE COURT: Ma'am, was this your verdict?
3 A JUROR: Yes.
4 THE COURT: Is it still your verdict?
5 A JUROR: Yes.
6 THE COURT: Ma'am, was this your verdict?
7 A JUROR: Yes, sir.
8 THE COURT: Is it still your verdict?
9 A JUROR: Yes.
10 THE COURT: Ma'am -- sir, was this your verdict?
11 A JUROR: Yes.
12 THE COURT: Is it still your verdict?
13 A JUROR: Yes.
14 THE COURT: Sir, was this your verdict?
15 A JUROR: Yes.
16 THE COURT: Is it still your verdict?
17 A JUROR: Yes.
18 THE COURT: I have polled all twelve jurors, and
19 the verdict stands.
20 Ladies and gentlemen, that concludes your
21 services in this case. That concludes your services for
22 this week.
23 If you want to talk about the case now, you're
24 free to do so, but you don't have to talk about it if you
25 don't want. That's entirely up to you.

1 If someone contacts you and wants you to talk
2 about the case and you don't want to do it and that person
3 persists in trying to get you to talk about it after you
4 make it clear to them that you would rather not discuss it,
5 please report that back to the clerk of court for me. We
6 will not allow any harassment of our jurors.
7 You've been a very patient juror, a very
8 difficult case, and we appreciate your service very much.
9 And I would ask you just to hang around a few
10 more minutes. It won't take but a very few minutes, and
11 we'll be dismissing you for the week.
12 Anything from the state?
13 MR. WILLIAMS: No, Your Honor.
14 THE COURT: From the defense?
15 MR. BUTLER: Yes, sir. I renew my motion for a
16 directed verdict for all the bases that I set forth at
17 those times and move for a new trial on the same basis.
18 THE COURT: All right, sir. I would deny the
19 motion for the grounds previously stated.
20 Mr. Butler, I think you gave your client an
21 excellent defense. I think there was an abundance of
22 evidence that he was guilty of the crime charged, and I
23 would not interfere with the jury's verdict. I think it's
24 a proper verdict.
25 Bring your client around, please.

1 (Mr. Butler and the defendant approach the
2 podium.)
3 THE COURT: Anything else from the state?
4 Anybody want to be heard on behalf of the state?
5 MR. WILLIAMS: Yes, Your Honor. Your Honor, does
6 the Court ---
7 THE COURT: Just fill out the name and you can
8 fill out the rest of it later.
9 Does anybody want to speak from the state?
10 MR. WILLIAMS: Your Honor, I'd like to go on the
11 record.
12 THE COURT: Go ahead, sir.
13 MR. WILLIAMS: Your Honor, obviously the Court's
14 heard the facts of the case. I'm not going to go over
15 those.
16 I'll open that the defendant has a prior strong
17 arm robbery and advise the Court that charges have been
18 picked up while he was in jail, in jail for this case, Your
19 Honor. So he has picked up new offenses after being in
20 there, and I can go over that with the Court.
21 MR. BUTLER: Your Honor, I would object to
22 pending charges.
23 THE COURT: I don't need to hear that. All
24 right.
25 MR. WILL AMS: Beyond what the Court has already

1 heard, I believe the victim's sister would like to speak.

2 THE COURT: I'll be glad to hear from you. Come

3 on up, ma'am. I'll be glad to hear from you. Yes, ma'am.

4 THE VICTIM'S SISTER: Yes. I just want to say

5 that during -- it's a hard feeling when somebody gets their

6 child killed in the street life of Charleston. And during

7 the time that my brother got killed, it took the emotion of

8 -- what he -- you know, take medications and everything

9 from this, all sort of different things.

10 My father would have been here today, but he

11 didn't live six months. He catch a stroke and everything,

12 from being an only son, being an only daughter.

13 And my mom, she just have times where she have

14 difficult times because she never got over her son's death

15 and things like that.

16 And the daughter my brother used to always -- my

17 brother used to tend to, she comes over to my mother's

18 house. She always just cries, my uncle's not -- not coming

19 home.

20 And it hurts me, because I'll be looking for my

21 brother and he never comes back to see us, and things like

22 that. And it makes me feel different towards people and

23 have different feelings, makes me stop dealing with a lot

24 of people since this kind of thing happened to my brother.

25 THE COURT: All right. Thank you, ma'am.

1 Anything else, Mr. Williams?
2 MR. WILLIAMS: No, Your Honor. Thank you.
3 THE COURT: Mr. Butler.
4 MR. BUTLER: Thank you, Judge.
5 Moses is 25. He has only a sixth-grade
6 education. He comes from a large family, some of whom
7 you've heard from, many of whom you may have noticed in the
8 courtroom.
9 THE COURT: Yes, sir.
10 MR. BUTLER: I think he has a strong support
11 base. They've been involved in this case intimately since
12 the beginning.
13 You know, I'm used to standing up here and
14 presenting mitigation after a guilty plea. It's a little
15 difficult for me to do after a trial. I have maintained
16 that my client is not only not guilty but innocent.
17 As far as on the details, I should point out that
18 there was no weapon involved in this case. I stand by the
19 sentiment expressed in my closing that it would be nice if
20 we could preach passivism in all circumstances, but it
21 becomes increasingly difficult to do that. I ask the Court
22 to consider there was no weapon involved in this case.
23 Regarding some of the matters that we discussed
24 at pretrial, Moses does have a history of mental illness,
25 and my psychiatrist had opined that were he to plead guilty

1 it would be appropriate to plead guilty but mentally ill,
2 which is not to say that he was guilty; but given his
3 history, at the time of the event, he would have been
4 unable to control his actions, and he has since been
5 medicated and has been medicated both in the state hospital
6 and at the jail. I think he's done remarkably well on his
7 medication.
8 He's been in jail for three years. You know, any
9 time, obviously, a homicide means somebody is dead, and it
10 was a tragedy for all the reasons I stated in my closing
11 argument, and I stand by those.
12 I know the Frasier family sends out their
13 sympathies, and the Bostons are in their prayers.
14 I have asked Moses, as I advise all my clients --
15 this is not at all a reflection on any of Your Honor's
16 rulings -- but with any conviction, there is an appeal, and
17 in the event of a reversal there's another trial. And I
18 always advise my client at this stage to maintain their
19 silence, in the event of a retrial. Again, that's not to
20 comment on Your Honor's rulings. As a matter of course, I
21 file an appeal. I'd ask you to please not hold that
22 against him.
23 As Your Honor is well aware, manslaughter has a
24 wide range of sentences, anywhere from I believe two to
25 thirty years. In every manslaughter case, obviously,

1 somebody has died. Again, emphasizing the factors that
2 I've -- that I've spoken to, it's clear that there was no
3 weapon. It's clear that there was some aggravation on the
4 part of the victim, which is what the jury has found.
5 And I ask the Court to please consider sentencing
6 him in an appropriate range, which I don't think is closer
7 to the max but closer to somewhere in the middle.
8 And I believe that's all we have.
9 And his family could not be here, but they ask you
10 to please recognize that they were here throughout the
11 trial.
12 THE COURT: All right. Thank you, sir.
13 Well, as I said, Mr. Butler, I compliment you on
14 the defense that you gave your client. I think your
15 defense was directly responsible for him being found guilty
16 of manslaughter rather than murder, because I think the
17 facts in this case would have supported a charge of murder.
18 I don't know that there's much mitigation that he
19 used his hands. In fact, I don't know that's not an
20 aggravated circumstance, because to kill a man like this
21 with your hands you have to hit him over and over.
22 Sometimes when someone hits you in a crucial spot,
23 it's all over right there, and then it's done and you can't
24 stop, but you can stop beating a man, and he didn't stop
25 beating this man. It's obvious to me from the autopsy

1 report that he was hit multiple times. It's just a
2 terrible crime for no legitimate reason that we know of at
3 this point.
4 The sentence of the Court that the defendant be
5 committed to the State Department of Corrections for a
6 period of thirty years. You will get credit for all the
7 time that you've served.
8 MR. BUTLER: Thank you, Judge.
9 (The defendant is escorted from the courtroom.)
10 THE COURT: Ladies and gentlemen, as I told you
11 earlier, you're the judges of the facts. You have a job to
12 do, and you've done your job.
13 I'm the judge of the law. I have to preside. I
14 make evidentiary rulings. One of my jobs is to pass
15 sentence. That's not your province. If you think my
16 sentence was too harsh, I hope you don't think hard of
17 yourself for the conviction. That's my job. You blame me,
18 but not you. You did what you're required to do.
19 I have to do what I think I'm required to do under
20 the circumstances, and I don't want you to feel any guilt
21 or remorse that I sentenced him to the maximum. I think
22 that's what he deserved. You're free to disagree with
23 that, that doesn't bother me at all, but I really don't
24 want you to feel bad based on the sentence I gave. As I
25 said, we separate our jobs. You did yours; I do mine.

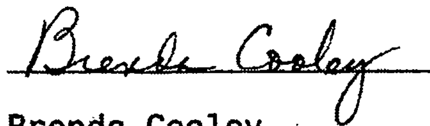
1 We thank you for serving. You'll get a little
2 check in the mail. It's not much. You probably couldn't
3 even go across the street to 82 Queen Street and have
4 dinner tonight. But primarily you get the thanks of the
5 people of Charleston County. We couldn't have court
6 without people like you willing to serve, and I know some
7 of you have served and sacrificed financially, and that's
8 -- that's -- it's admirable. Winston Churchill said the
9 greatest service a man can do in times of peacetime for his
10 country is serve on a jury.
11 I hope you never wind up in court. You might be
12 in an automobile accident or something and wind up in a
13 court, and you'll need a jury, and you would want good,
14 competent people such as yourselves to sit on that jury and
15 render an opinion. So we appreciate very much your coming
16 and being willing to sit.
17 Do any of you have any questions or comments
18 before I excuse you?
19 (There was no response.)
20 THE COURT: Thank you very much. You're excused
21 at this time.
22 The court is in recess until 9:30 in the morning.
23 (Whereupon, the jury is excused and the trial is
24 concluded at approximately 12:15 p.m.)
25

CERTIFICATE OF THE COURT REPORTER

I, the undersigned, Brenda Cooley, Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true and accurate transcript of record of the proceedings had and the evidence introduced in the hearing of the captioned case, Volume IV of IV, pages 531 through 557, inclusive, relative to appeal, in the Court of General Sessions for Charleston County, Charleston, South Carolina, on the 5th day of October 2006.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 24, 2006



Brenda Cooley

Circuit Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

James C. Williams, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MOSES A. FRASIER,

APPELLANT

FINAL BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Chief 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 APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF FACTS 4

ARGUMENT 5

CERTIFICATE OF COUNSEL 9

TABLE OF AUTHORITIES

Cases

Bradly v. State, 316 S.C. 255, 449 S.E.2d 492 (1994)........6

Miranda v. Arizona, 384 U.S. 436 (1966)........5, 6

State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003)........6

State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985)........7

State v. Navy, 370 S.C. 398, 635 S.E.2d 549 (2006)........6

STATEMENT OF ISSUE ON APPEAL

The trial judge committed reversible error by allowing Frasier's inculpatory statement into evidence, as the investigating officers obtained it in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

STATEMENT OF FACTS

On October 2 through 5, 2006, Moses Frasier stood trial in Charleston County, before Judge James C. Williams and a jury, on an indictment charging him with murder. The victim, Kenneth Boston, had been beaten to death. There were no eyewitnesses to the crime. "We don't know why Kenneth Boston was killed," the Assistant Solicitor conceded. SUP. ROA p. 1, lines 7-20. One witness, a transvestite hooker, testified that she saw Frasier and Boston fighting earlier that night but that Boston had provoked the altercation. ROA p. 156, lines 12 and 13. Frasier did not testify. In addition to murder, the judge instructed the jury on voluntary manslaughter and self-defense. The jury found Frasier guilty of manslaughter, and the judge sentenced him to imprisonment for 30 years.

ARGUMENT

The trial judge committed reversible error by allowing Frasier's inculpatory statement into evidence, as the investigating officers obtained it in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

While investigating the death of Moses Frasier, investigators received a report about "an individual who had come to the hospital to be treated for an injury." ROA p. 2, line 22 – p. 3, line 2. Detective Barry Goldstein confronted Frasier in a "treatment room" and began questioning him about "how he had sustained his hand injury." ROA p. 3, line 13 – p. 4, line 12. Frasier told Goldstein that "he had left a female friend's house and he was jumped by … five or six persons, and he was beaten up." ROA p. 4, line 25 – p. 5, line 4. Goldstein went to a telephone to check Frasier's story and determined that no incident such as that described by Frasier had been reported. ROA p. 5, line 23 – p. 6, line 14. Goldstein returned to the treatment room and asked "if Mr. Frasier would consent to giving me blood." ROA p. 6, lines 15-21. Frasier declined. ROA p. 7, lines 1 and 2. Goldstein would not allow Frasier to smoke or even go to the bathroom. ROA p. 7, line 18 – p. 8, line 8. Another officer, Douglas Coates, stood watch in the hallway. ROA p. 7, lines 3-7.

Frasier was formally arrested when the officers discovered him trying to switch pants with his brother behind a curtain. ROA 7, lines 8-13; ROA p. 9, line 14 – p. 10, line 6. Specks of Kenneth Boston's blood were later found on Frasier's jeans. ROA p. 129, line 9 – p. 130, line 5. At this point, Goldstein informed Frasier of his rights pursuant to *Miranda*. ROA p. 10, lines 7-9.

Defense counsel moved to suppress Frasier's statement about the origin of his injuries. ROA p. 21, line 24 – p. 22, line 6. The judge denied the motion. ROA p. 25, lines 14-25.

Detective Goldstein gave the jury the following account of his interrogation of Frasier:

> I asked him how he got the hand injury. He said that he was at a female's house ... and that five or six subjects had jumped him and that's how he had sustained the injury.

ROA p. 103, lines 14-20. Goldstein called headquarters and "asked them if they had any calls ... for a fight anytime after midnight and their answer was 'no'." ROA p. 103, line 21 – p. 104, line 6. The Assistant Solicitor led off his closing argument by exploiting Frasier's statement to Goldstein, using it to discredit his claim of self-defense. ROA p. 176, line 14 – p. 177, line 15. "The truth is," the prosecutor concluded, "he made up a story to conceal what he did." ROA p. 190, line 23 – p. 192, line 8.

A statement obtained is a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights. *Miranda v. Arizona*. The issue in the present case is whether or not Frasier was in custody at the time he responded to Goldstein's questions. "The purpose of the *Miranda* warnings is to apprise the defendant of [his] constitutional privilege not to incriminate [himself] while in the custody of law enforcement." *State v. Evans*, 354 S.C. 579, 582 S.E.2d 407, 409 (2003). "Whether a suspect is in custody for *Miranda* purposes is an objective determination based upon the totality of the circumstances, including the individual's freedom to leave the scene and the purpose, place and length of the questioning." *State v. Navy*, 370 S.C. 398, 635 S.E.2d 549, 553 (2006) (quotation marks and citation omitted). "The relevant inquiry is whether a

reasonable man in the suspect's position would have understood himself to be in custody." *Bradly v. State*, 316 S.C. 255, 449 S.E.2d 492, 493-94 (1994).

Without a doubt, Frasier would have understood himself to be in custody at the time of Goldstein's questioning, under the totality of the circumstances. Goldstein and at least one other officer confronted Frasier in the "treatment room" of the hospital as Frasier was being treated for his injuries. The tenor of this meeting is disclosed by the fact that, even though Goldstein claimed Frasier was not in custody, Frasier felt it necessary to ask Goldstein if he could smoke a cigarette or even go to the bathroom. A reasonable man in Frasier's situation would have understood himself to be custody. Accordingly, his statement to Goldstein about the source of his injuries should have been excluded from evidence.

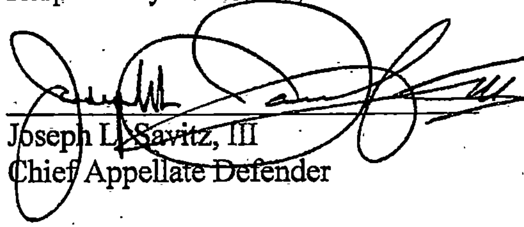
The error could not have been harmless.

> Whether error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.

State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150, 151 (1985) (quotation marks and citation omitted). There were no eyewitnesses to the incident. Frasier's defense was self-defense. In his closing argument, the Assistant Solicitor employed the improper statement to disparage Frasier's defense. Finally, the State's evidence of guilt was not overwhelming, as the jury indicated by finding Frasier guilty of voluntary manslaughter instead of murder.

For this reason, the Court should reverse Moses Frasier's conviction and remand for a new trial.

Respectfully submitted,



Joseph L. Savitz, III
Chief Appellate Defender

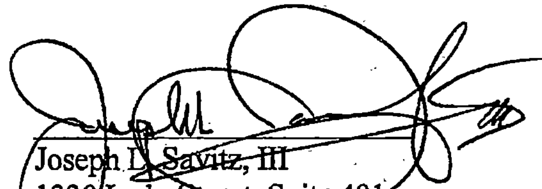
ATTORNEY FOR APPELLANT

This 21st day of April, 2008.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

April 21, 2008



Joseph L. Savitz, III
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, SC 29211-1589
803) 734-1343
Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

James C. Williams, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

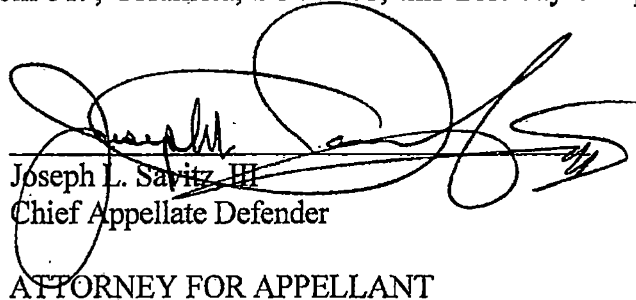
V.

MOSES A. FRASIER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of April, 2008.



Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of April, 2008.

Karen D. Elliott (L.S.)
Notary Public for South Carolina
My Commission Expires: March 19, 2017 .

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

FINAL BRIEF OF RESPONDENT

Assistant Deputy Attorney General

Assistant Attorney General

Columbia, SC

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENT 7

I. The trial court properly allowed Appellant's statement into evidence because he was not in custody at the time it was given, and therefore, the statement was not obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). 7

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) 9

Bradley v. State, 316 S.C. 255, 449 S.E.2d 492 (1994) 8

Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) 3

Minnesota v. Murphy, 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984) 8

Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602 (1966) 7, 8

ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238,
489 S.E.2d 470 (1997) 10

State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996) 7, 8

State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997) 8

State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003) 7

State v. Haselden, 353 S.C. 190, 577 S.E.2d 445(2003) 9

State v. Kirby, 325 S.C. 390, 481 S.E.2d 150 (Ct. App. 1996) 9

State v. Navy, 370 S.C. 398, 635 S.E.2d 549(Ct. App. 2006) 7

State v. Primus, 312 S.C. 256, 440 S.E.2d 128 (1994) 7

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001) 7

Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (1993) 9

STATEMENT OF ISSUES ON APPEAL

The trial court properly allowed Appellant's statement into evidence because he was not in custody at the time it was given, and therefore, the statement was not obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966).

STATEMENT OF THE CASE

Moses Frasier (Appellant) was indicted for the murder of Kenneth Boston in Charleston County. He was tried before the Honorable James C. Williams and a jury on October 3-5, 2006. Appellant was convicted of the lesser included charge of voluntary manslaughter and was sentenced to thirty years imprisonment. This appeal followed.

STATEMENT OF FACTS

Prior to trial, the court conducted a Jackson v. Denno[1] hearing to determine whether Appellant's statement to Detective Goldstein regarding how Appellant sustained an injury to his hand was admissible. (R. 1). Detective Goldstein testified he was investigating the death of Kenneth Boston on Huger Street in Charleston. (R. 2). Detective Goldstein received a dispatch indicating an individual was at the Medical University of South Carolina stating. He had sustained the injury on Huger Street in North Charleston. (R. 3).

Upon arriving at the hospital, Detective Goldstein talked with hospital personnel regarding Appellant's injuries. (R. 3). He then proceeded to where Appellant was awaiting treatment. Detective Goldstein first asked Appellant his name and then asked how he had sustained the injury to his hand. Appellant stated he injured his hand at a female friend's house on Huger Street in North Charleston. (R. 4). Appellant told Detective Goldstein he was "jumped" by five or six persons and was "beaten up." (R. 4-5). Detective Goldstein left Appellant to make phone calls to the North Charleston Police Department and the Charleston County Sheriff's Office to determine if either had a Huger Street within their jurisdiction. (R. 5-6). Upon learning neither had a Huger Street in their jurisdiction, Detective Goldstein returned to Appellant's treatment room.

While talking with Appellant, Detective Goldstein had noticed some blood spots on Appellant's pants. Detective Goldstein asked if Appellant would consent to giving blood to test against the spots on his pants and against Boston's blood. Appellant refused consent. (R. 6-7). Subsequently, Appellant asked to use the restroom and Detective Goldstein

[1] Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

directed a nurse to give him a bedpan to use instead of allowing him to leave the room. (R. 7-8). Detective Goldstein acknowledged he did not want Appellant to use the restroom because he did not want to "lose those pants." (R. 20).

Detective Goldstein testified several minutes passed until another officer got his attention because Appellant and his brother were attempting to swap pants behind the privacy curtain. (R. 7). Appellant was then arrested after putting up a struggle. Detective Goldstein testified Appellant was read his rights pursuant to Miranda after being arrested. (R. 9-10).

Appellant's counsel moved to suppress the statements regarding how Appellant injured his hand. (R. 22-25). The State maintained Appellant was not in custody when Detective Goldstein began his discussion with Appellant, and therefore, the statements should not be excluded. (R. 22-23).

The trial court found Appellant was in custody from the time Detective Goldstein prohibited him from going to the restroom. The trial court concluded: "Anything he said before that is admissible, but anything he said after that is not admissible until [Detective Goldstein] gave [Appellant] the Miranda." (R. 25; 29).

At trial, the State offered several witnesses that were at Boston's house the night he was killed. James Gibbs stated Boston was his cousin and lived next door to him on Huger Street in Charleston. (R. 33). Gibbs was over at Boston's house on the night Boston was killed. Gibbs testified Boston twice opened his front door and the second time Boston went outside to talk. (R.34-35). He testified he left through the back door and found Boston on the ground bleeding. (R.36-39).

Robert Washington testified Appellant was at Boston's door the first time he opened it. (R.47-48; 134). Washington testified that Boston "came back in there real fast." (R. 49). He explained Boston "was acting like something was wrong . . . a little jittery." (R. 51).

Carol Adams, a nurse on duty in the MUSC Emergency Room, testified she treated Appellant. Adams testified the notes left by the triage nurse indicated Appellant told the triage nurse that he injured his hand when he was assaulted by five persons. (R. 67). Adams stated she asked what happened and Appellant's mother, who was in the room with Appellant, indicated it "was about some girl." (R. 73).

Doctor Carl Queener testified he also treated Appellant in the ER. He stated Appellant had a "fight bite" to his hand and explained that the injury would occur when you punch someone in the mouth and they bite down. (R. 93). Dr. Queener also testified Appellant stated his injuries were caused when he was assaulted by five persons. (R. 92).

Doctor Alan Bennett performed the autopsy on Boston. (R. 74). He detailed the injuries Boston sustained. (R. 78-87). Finally, he indicated the cause of death was blunt force trauma, most likely by being hit or kicked and not by being struck with an object. (R. 87-88).

Corporal McBrayer testified he was at the hospital in order to ascertain the status of the victim, Boston. He testified a nurse approached and told him they had a patient from the Huger Street area with a broken hand. Corporal McBrayer testified he passed the information to Detective Goldstein. (R. 97).

In front of the jury, Detective Goldstein testified over Appellant's objection that he spoke with the nursing staff and was told a patient had come into the hospital with a hand injury that was sustained on Huger Street. (R. 102). Detective Goldstein testified he asked

Appellant about his hand injury. Appellant said "he was at a female friend's house on Huger Street in North Charleston and that five or six subjects had jumped him and that's how he had sustained the injury." (R. 103).

Detective Goldstein indicated they were able to take possession of Appellant' pants to compare a blood stain on them to the victim's blood. (R. 106-107). Lilly Gallman, a forensic DNA analyst with SLED testified the blood on Appellant's pants at the hospital matched the victim, Boston. (R. 127; 129-103). She testified the chance of another individual matching the DNA profile was one in 570 quadrillion or 1/570,000,000,000,000,000. (R. 130-131).

Appellant's brother, Kwame Frasier, testified Appellant woke him up and told him Appellant thought he broke his hand. Kwame Frasier testified his brother told him that some guy "played him and he kicked his ass." (R. 119-120).

The jury convicted Appellant of the lesser included charge of voluntary manslaughter. He was sentenced by the court to thirty years imprisonment.

ARGUMENT

I. The trial court properly allowed Appellant's statement into evidence because he was not in custody at the time it was given, and therefore, the statement was not obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966).

Appellant maintains the trial court erred in failing to suppress all statements made by Appellant to Detective Goldstein. Appellant asserts the statements were obtained while he underwent custodial interrogation in violation of Miranda. The statement allowed by the trial court, however, was given by Appellant prior to his being in custody. Therefore, Detective Goldstein was not required to inform Appellant of his Miranda rights. Additionally, the admission of the statement through Detective Goldstein, even if obtained in violation of Miranda, is clearly harmless error.

In criminal cases, the appellate court reviews errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "Appellate review of whether a person is in custody for Miranda purposes is limited to a determination of whether the trial judge's ruling is supported by the record." State v. Navy, 370 S.C. 398, 405, 635 S.E.2d 549, 553 (Ct. App. 2006); see also, State v. Easler, 322 S.C. 333, 342, 471 S.E.2d 745, 751 (Ct. App. 1996) (finding appellate court's review of the issue of custody is limited to a determination of whether the ruling by the trial court is supported by the testimony) (citing State v. Primus, 312 S.C. 256, 440 S.E.2d 128 (1994)).

"The purpose of the Miranda warnings is to apprise the defendant of [his] constitutional privilege to not incriminate [himself] while in the custody of law enforcement." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 - 410 (2003) (citing Miranda, 384 U.S. at 444, 86 S. Ct. at 1612). Custodial interrogation is defined as

"questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). "The totality of the circumstances, including the individual's freedom to leave the scene and the purpose, place and length of the questioning must be considered. The relevant inquiry is whether a reasonable man in the suspect's position would have understood himself to be in custody." Bradley v. State, 316 S.C. 255, 257, 449 S.E.2d 492, 493-94 (1994) (citations omitted). The custodial determination is not based upon the subjective views of the suspect or the interrogating officers. State v. Easler, 327 S.C. 121, 128, 489 S.E.2d 617, 621 (1997). The fact the investigation has focused on the suspect does not trigger the need for Miranda warnings unless he is in custody. Id. at 127-28, 489 S.E.2d at 621 (citing Minnesota v. Murphy, 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984)).

In the instant case, the Appellant's ability to leave was not restricted by Detective Goldstein, and no reasonable person in Appellant's position would believe they were in custody at the time Appellant made the statement to Detective Goldstein regarding being jumped by five or six persons. Even if the court correctly ruled Appellant was in custody as of the time Detective Goldstein prohibited him from using the restroom, the statement Appellant challenged at trial and in his brief was made before he asked to use the restroom.

The testimony reveals that Detective Goldstein arrived at the hospital and discussed Appellant's status with hospital staff. He then found Appellant's room, asked his name and then asked him how he sustained the injury to his hand. The question was the second question asked to Appellant and was prior to any restrictions being placed on Appellant.

While Appellant argued he could not leave because he was receiving treatment, this was not an impediment put in place by the police, but was voluntary on the part of Appellant. As shown by the record, Detective Goldstein asked Appellant about his hand and then left the room in order to attempt to verify the information received. At this time Appellant clearly could have left, albeit without obtaining treatment, and had no reason to believe he was in custody. Based on a totality of the circumstances, including the fact Appellant was in the hospital where he voluntarily stayed, the fact the statement came as a result of the second question asked by Detective Goldstein (the first being Appellant's name), and the fact Detective Goldstein left him alone so the officer could make a phone call after asking the question, no person would reasonably believe they were in custody at the time the Appellant gave the objected to statement.

Even if improper, the admission of the statement was a harmless error because it was merely cumulative to the testimony by Carol Adams and Dr. Queener. The commission of legal error is harmless if it does not result in prejudice to the defendant. For the error to be harmless, the appellate court must determine "beyond a reasonable doubt the error complained of did not contribute to the verdict obtained." Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993) (citing Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). Because Dr. Queener and Carol Adams testified to the same story offered by Appellant to Detective Goldstein, its admission even if improper, would be merely cumulative to other testimony in the record. See State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003) (stating the admission of improper evidence is harmless where the evidence is merely cumulative to other unobjected-to evidence); State v. Kirby, 325 S.C. 390, 396-97, 481 S.E.2d 150, 153 (Ct. App. 1996) (finding even if officer's testimony

regarding information radioed by the police dispatcher constituted hearsay, its admission was harmless given it was cumulative to similar testimony that was admitted without objection).[2]

In addition, there was substantial evidence tying Appellant to Boston's death. Appellant was seen at Boston's house and after talking outside with Appellant briefly, Boston returned inside acting nervous. Additionally, the blood found on Appellant's pants matched Boston with absolutely no possibility of it coming from anyone other than the victim. Finally, Boston was beaten to death and Appellant was obtaining treatment for an injured hand and a fight bite. As a result, the testimony by Detective Goldstein and the solicitor's comments in closing argument regarding Appellant's story about being jumped by five or six persons did not affect the outcome of the trial given the overwhelming evidence of Appellant's guilt.

Accordingly, it was not error for the court to admit the testimony by Detective Goldstein. Even if Appellant was in custody and the admission of the testimony by Detective Goldstein was error, it was merely cumulative to other testimony in the record and, given the overwhelming evidence of Appellant's guilt, the error was harmless. As a result, Appellant's conviction and sentence should be affirmed.

---

[2]While Appellant objected to the testimony by Adams and Dr. Queener at trial, the objections were overruled by the trial court and Appellant has not raised the issue on appeal. As a result, Appellant has waived his right to contest the admission of the testimony through Adams and Dr. Queener. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997)(unappealed ruling, whether correct or not, is law of the case).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

O.T. Wallace Building
101 Meeting Street, Suite 400
Charleston, SC 29401
843-958-1900

BY:
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 21, 2008

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Hon. James C. Williams, Circuit Court Judge

The State,

Respondent,

v.

Moses A. Frasier,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

O.T. Wallace Building
101 Meeting Street, Suite 400
Charleston, SC 29401
843-958-1900

By:
WILLIAM M. BLITCH, JR.

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 21, 2008

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Hon. James C. Williams, Circuit Court Judge

The State,

Respondent,

v.

Moses A. Frasier,

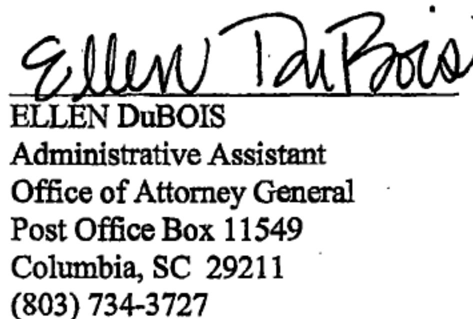
Appellant.

PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Final Brief of Respondent on Appellant by depositing three copies of the same in the United States mail, postage prepaid, addressed to:

Joseph L. Savitz, III, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, S. C. 29211

I further certify that all parties required by Rule to be served have been served.
This 21st day of April, 2008.



ELLEN DuBOIS
Administrative Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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.

Moses A. Frasier, Appellant.

Appeal From Charleston County
James C. Williams, Jr., Circuit Court Judge

Unpublished Opinion No. 2009-UP-052
Submitted January 2, 2009 – Filed January 15, 2009

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney William M. Blitch, Jr., all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: Moses A. Frasier appeals his conviction and sentence for voluntary manslaughter, arguing the trial court erred in refusing to suppress a statement he made to a police officer. We affirm **[1]** pursuant to Rule 220(b), SCACR, and the following authorities: State v. Navy, 370 S.C. 398, 405, 635 S.E.2d 549, 553 (Ct. App. 2006) ("Appellate review of whether a person is in custody for Miranda purposes is limited to a determination of whether the trial judge's ruling is supported by the record."); Bradley v. State, 316 S.C. 255, 257, 449 S.E.2d 492, 493-94 (1994) ("The relevant inquiry is whether a reasonable man in the suspect's position would have understood himself to be in custody.").

AFFIRMED.

HEARN, C.J., SHORT and KONDUROS, JJ., concur.

---

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

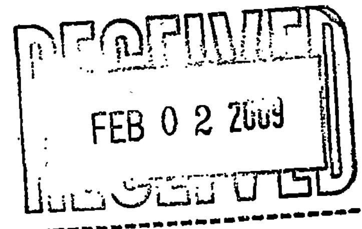
The South Carolina Court of Appeals

JEANETTE F. BARBER
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 2, 2009



REMITTITUR

The Honorable Julie J. Armstrong
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Re: The State v. Frasier, Moses A.
2006-GS-10-04259

Dear Ms. Armstrong:

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

Sincerely,

Jeanette F. Barber
Clerk of Court

JFB/lm

cc: Chief Appellate Defender Joseph L. Savitz, III
Assistant Attorney General William Blitch, Jr.
Scarlett Anne Wilson, Esquire

FORM 5

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

09-CP-10-1183

FILED
2009 FEB 27 AM 11:31
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS – READ CAREFULLY

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

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

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

1. Place of detention Lieber Corr. Inst.
P.O. Box 205, Ridgeville, SC. 29472
2. Name and location of Court which imposed sentence
Charleston County Court of General Sessions
3. Name(s) of co-defendant(s) (if any)
N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2006-GS-10-4259

(b) __________

(c) __________

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

(a) October 5, 2006

(b) 30 years

(c) __________

6. Check whether a finding of guilty was made:

(a) after a plea of guilty __________

(b) after a plea of not guilty yes

(c) after a plea of nolo contendere __________

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

yes

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

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

i. SC Court of Appeals

ii. __________

iii. __________

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

i. Affirmed

ii. __________

iii. __________

(c) the date of each such result:

i. January 2, 2009

ii. __________

iii. __________

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

i. Op No 2009 US-052

ii. __________

iii. __________

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

(a) N/A

(b) ______

(c) ______

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

(a) Ineffective Assistance of trial and Appellate Couns

(b) Failure to investigate and present defense

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

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

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

(b) Same as Above

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

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

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

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

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

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

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

(a) the specific nature thereof:

i. N/A

ii. ______

iii. ______

iv. ______

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

i. N/A

ii. ______

iii. ______

iv. ____________________

(c) the disposition thereof:

i. N/A

ii. ____________________

iii. ____________________

iv. ____________________

(d) the date of each such disposition:

i. N/A

ii. ____________________

iii. ____________________

iv. ____________________

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

i. N/A

ii. ____________________

iii. ____________________

iv. ____________________

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

N/A

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

(a) which grounds have been presented:

i. N/A

ii. ____________________

iii. ____________________

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

i. N/A

ii. ____________________

iii. ____________________

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

(a) First Filings of Post-Conviction Relief

(b) ______

(c) ______

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

(a) your arraignment and plea? ______

(b) your trial, if any? YES

(c) your sentencing? YES

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

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

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

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

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

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

iii. ______

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

i. Beattie I. Butler - AT Trial

ii. Joseph L. Savitz - On Appeal

iii. ______

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

20. Are you now under sentence from any other court that you have not challenged?
NO

Revised 3/2003

STATE OF SOUTH CAROLINA)
County of Charleston) VERIFICATION
)

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

[signature] #317940

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

[signature] (L.S.)
Notary Public

My Commission Expires: 27 June 2017

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

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

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

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

[signature] #317940
Applicant

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

[signature]
Notary Public

My Commission Expires: 27 June 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT 2009-CP-10-1183
COUNTY OF CHARLESTON	)	
Moses Frasier, #317940,	)	
Applicant,	)	**RETURN AND REQUEST FOR APPOINTMENT OF COUNSEL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

Respondent, making its Return to the application for post conviction relief (PCR) filed February 27, 2009, would respectfully show this Court:

I.

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

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

Attached herewith and incorporated herein by reference are the records of the Charleston County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript (four volumes), the appellate briefs, the Court of Appeals' opinion affirming the conviction and sentence, and the Remittitur dated February 2, 2009..

II.

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

1. Ineffective assistance of trial counsel in that counsel failed to investigate and present a defense.

2. Ineffective assistance of appellate counsel.

3. Constitutional rights violations.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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 the record does not conclusively refute. Accordingly, 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.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic

decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent contends that the Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. The Respondent requests an evidentiary hearing on this allegation. Sharper, 279 S.C. 264, 305 S.E.2d 247.

V.

Applicant claims an allegation of infringement upon the Applicant's constitutional rights. However, the Applicant does not explain with any specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. §17-27-50 (2003).

Before the Court will hold an evidentiary hearing, the Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965);

Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). This allegation is so vague that it is impossible for the State to respond. Since the Applicant has not made the minimum *prima facie* showing, the Court should dismiss this ground for failure to comply with the Uniform Post-Conviction Procedure Act.

VI.

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

VII.

WHEREFORE, having made its Return, the State requests that an attorney be appointed to represent the Applicant and that an evidentiary hearing be held.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By:
ATTORNEYS FOR RESPONDENT

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

July 7, 2009.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

2009-CP-10-1183

MOSES FRASIER, #317940
Applicant,
vs
STATE OF SOUTH CAROLINA,
Respondent.

AFFIDAVIT OF SERVICE BY MAIL

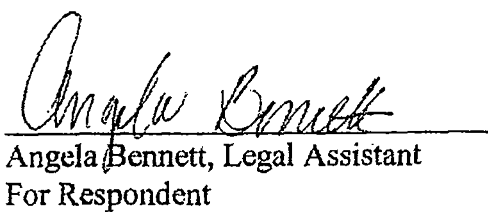
1. I am an employee of the Respondent in the above-captioned action.

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 Request for Appointment of Counsel** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Moses Frasier, #317940
McCormick Correctional Inst.
386 Redemption Way
McCormick, SC 29899

DATED this 7th day of July, 2009



Angela Bennett, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CA/No. 09-CP-10-1183

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

MOSES FRASIER #317940..........................PETITIONER,

-VS-

STATE OF SOUTH CAROLINA.....................RESPONDENT,

AMENDED POST CONVICTION RELIEF

APPLICATION BROUGHT PURSUANT TO:

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

Respectfully Submitted,

/s/ [signature] #317940

Moses Frasier #317940

INDEX

INDEX....................................(i)
MEMORANDUM OF LAW..........................1
ISSUE (A)..................................2
ISSUE (B)..................................8
ISSUE (C)..................................8
ISSUE (D)..................................20
ISSUE (E)..................................25
CERTIFICATE OF SERVICE.....................31

OTHER AUTHORITIES RELIED ON

RULE 15 SCRCP

Sixth Amendment U.S. Constitution

Fourteenth Amendment U.S. Constitution

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

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

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

PETITIONER,)

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

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

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

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

For the requested relief, the Petitioner will forever pray.

Respectfully Submitted,

/s/ [signature] #317940

Moses Frasier #317940

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

FACTS

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

Testimony of Jamol Seabrook on Direct

Q. Where was Kenneth?

A. Behind Moses.

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

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

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

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

A. Boxed him.

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

A. Uh-huh

Q. Where?

A. On the left side of his face.

Q. Okay. And then what happened?

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

Q. What was Kenneth saying to Moses?

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

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

A. I mean **aggressive.**

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

A. Like -- I don't know.

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

A. No.

Q. Did he seem normal?

A. No.

Q. All right. How did he seem?

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

Q. He was high?

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

Q. Who hit who?

A. Kenneth. Kenneth.

Q. Kenneth hit Moses?

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

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

COUNTY OF CHARLESTON

FILED
-5 AM 11:11
J. ARMSTRONG
CLERK OF COURT

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

ATTORNEY GENERAL'S OFFICE
RECEIVED 4/14/10
ADMINISTRATIVE INSTRUCTIONS
MPC FILE
HAVE
ROUTE TO
PEN RECORDS
OTHER:

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

CUSSION

e record to support the defendant's judge may [not] refuse to grant the z v. Commonwealth 11 Va.App. 335, 338, 398 S.E.2d 103, 105 (1990), also see McClung v. Commonwealth 212 S.E.2d 290, 293.

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

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

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

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

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

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

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

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

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

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

For the aforementioned, Petitioner will forever pray.

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

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

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

FACTS

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

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

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

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

TESTIMONY OF SERGEANT McGOWAN

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. If I remember correctly, it was spatter.

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

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

A. Yes, Sir.

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

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

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

CROSS BY MR. BUTLER

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

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

A. Yes, sir.

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

A. Yes, sir.

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

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

A. Yeah. Probably maybe two-foot.

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

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

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

A. No.

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

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

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

A. Yes, sir.

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

A. To a point, yes, sir.

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

A. Yes, sir.

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

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

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

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

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

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

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

REDIRECT WILLIAMS

> A. Basically, if you just -- if you fling something, in this case it would be blood that that was flung on something and that will give you a spatter.
>
> Q. Is that consistent with -- that's one way spatter could get like, say, on a pole, for instance?
>
> A. Yes, sir.
>
> Q. And can you get castoff from a fist?
>
> A. Oh, sure. Any -- any object that creates any kind of force.
>
> Q. How would you get castoff from a fist?
>
> A. Well if you're hitting somebody and you come back, **blood** can go that way.
>
> Q. So when the fist stops, the blood comes off the hand? [Tr,p.316, L.4-17].
>
> Q. And that could have removed a lot of blood [Tr.p.316, L.25].
>
> Q. As far as the significance of the blood spatter on the scene, your understand and your impression in this case from ---[Tr.p.317, L.3-5].
>
> Q. Based on your impression, whose, whose blood was that on the ground?
>
> A. It was the victim because **I was told** that that's where the victim lay before he was transported.

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Additionally the complete failure to lodge an objection later

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

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

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

FACTS

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

FACTS

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

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

> tests, then you don't get your driver's license. [Tr.p.490, L.1-4].
>
> And again, when the threat ends you don't get to defend yourself anymore. [Tr.p.490, L.15-16]
>
> Finally, self-defense ends when the danger ends. When there's no other way to avoid the danger, you can defend yourself. [Tr.p.492, L.13-15].
>
> And if you don't walk away, if you decide to fight, which he wasn't entitled to do, you can defend yourself until the danger ends. [Tr.p.492, L.19-21].
>
> You say, "you know what?? I had to defend myself. I wish I didn't have to, but I was put in a situation where I had no other choice, and I had to do that. [Tr.p.495, L.5-8].
>
> You can't go back, you can't go see what happened, You can't tell Kenneth that he shouldn't be out there, that he shouldn't be messing with Moses Fraiser, that is might get him killed. What you can do is what you took an oath to do, and that is find the truth. [Tr.p.500, L.1-6].

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CA/No, 09-CP-10-1183

CERTIFICATE OF SERVICE

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

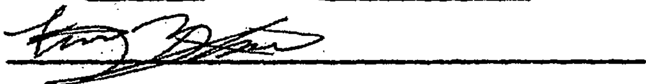
I, Moses Frasier, do hereby swear under the penalty of perjury, that I have mailed the Original and (1) one copy of the enclosed Amended Post Conviction Relief Application to the Charleston County Clerk of Court, 100 Broad Street, Suite 106, Charleston, SC. 29401-2258.

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

This was done by way of the United States Mail.

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 26 DAY OF October, 2009



NOTARY PUBLIC

MY COMM. EXPIRES 7/28/2019

Respectfully Submitted,

/s/ #317940

Moses Frasier

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Moses Frasier,	)	
	)	
Applicant,	)	
	)	
v.	)	Case No. 09-CP-10-1183
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on January 9th, 2012, before The Honorable R. Markley Dennis, Jr. in the Court of Civil Procedures for Charleston County, 100 Meeting Street, Charleston, South Carolina; attended by counsel as follows:

APPEARANCES:

JeffreyYoungman, Esq.

... Appearing for Applicant

Matthew J. Friedman, Assistant Attorney General
OFFICE OF ATTORNEY GENERAL

... Appearing for State of South Carolina

Deborah Garrison
Circuit Court Reporter – 13th Judicial Circuit
P O Box 27145
Greenville, South Carolina 29616
dgarrison@icloud.com

INDEX OF TESTIMONY

Witness	Direct	Cross	Redirect
Moses Frasier	6	15	17
Beattie Butler	18	24	27

CLOSING REMARKS

Mr. Youngman 28

Mr. Friedman 29

RULING OF THE COURT 29

CERTIFICATE OF COURT REPORTER 33

1
2 THE COURT: You are Jeremiah Fraiser --
3 APPLICANT: Moses.
4 THE COURT: I mean Moses Frasier.
5 APPLICANT: Yes, sir.
6 THE COURT: Mr. Fraiser, good morning.
7 You're also here with your attorney. I've
8 got a caption here with two Fraisers,
9 Fraizers.
10 We are here on your application, Mr.
11 Fraiser for post-conviction relief. Is that
12 correct, sir?
13 APPLICANT: Yes, sir.
14 THE COURT: And you've had an
15 opportunity to talk with your lawyer?
16 APPLICANT: Yes, sir.
17 THE COURT: And you are Mr. Youngman?
18 MR. YOUNGMAN: Yes, Your Honor.
19 THE COURT: You've discussed this
20 matter with your client?
21 MR. YOUNGMAN: I have.
22 THE COURT: You understand, Mr.
23 Frasier, that you had a trial, that you were
24 convicted of voluntary manslaughter; is that
25 correct?

1 APPLICANT: Yes, sir.
2 THE COURT: And that the charge
3 originally was murder? Do you understand
4 that?
5 APPLICANT: Yes, sir.
6 THE COURT: And do you understand that
7 if I give you a new trial that you will be
8 returned and go to trial on murder?
9 APPLICANT: Yes, sir.
10 THE COURT: Realizing that, it is your
11 desire to go forward today?
12 APPLICANT: Yes, sir.
13 THE COURT: Very well. Is the State
14 ready?
15 MR. FRIEDMAN, ASSISANT AG: Yes, sir.
16 THE COURT: Okay. You may call your
17 first witness.
18 MR. YOUNGMAN: Thank you, Your Honor.
19 We call Moses Frasier.
20 THE COURT: Come forward, Mr. Frasier.
21 MR. YOUNGMAN: Your Honor, just to let
22 you know, I work at the homeless shelter,
23 Crisis Ministries. I'm supposed to be exempt
24 from these cases but I was assigned this one.
25 I'm ready to go forward with it but, if I

1 make some errors in this forum it is because
2 ---
3 THE COURT: No apologies ---
4 MR. YOUNGMAN: --- I've never done
5 this before.
6 THE COURT: You do not need to
7 apologize for it. Not a problem. The good
8 thing about it is, as you've found out being
9 a lawyer, the -- and, Mr. Frasier, this is
10 not to minimize it but you probably under-
11 stand it too because you've reviewed the PCR
12 statutes as well.
13 APPLICANT: Yes, sir.
14 THE COURT: It is a very well-defined
15 part of our law. It's a statutory procedure
16 and it's -- everything here is provided for
17 by that act. I am very confident that you --
18 we'll work through this together, sir.
19 MR. YOUNGMAN: Thank you.

1 THE COURT: You bet.
2 (WITNESS TAKES STAND)
3 MOSES FRASIER, having been sworn to
4 tell the truth, and nothing but the truth,
5 testified as follows:
6 DIRECT EXAMINATION
7 BY MR. YOUNGMAN:
8 Q. State your name?
9 A. Moses Frasier.
10 Q. Spell your last name?
11 A. F-r-a-s-i-e-r.
12 Q. Mr. Frasier, you filed this PCR
13 based on a claim of ineffective assistance of
14 counsel; is that correct?
15 A. Yes, sir.
16 Q. Can you tell us what was ineffective
17 about your -- what your attorney, Mr. Butler,
18 did or did not do that you believe was not in
19 your best interest?
20 A. I have two issues to present today.
21 The facts of one issue encompasses the other,
22 so I have to address them together.
23 THE COURT: Okay.
24 APPLICANT: May I?
25 THE COURT: Yes, sir.

1 DIRECT EXAMINATION CONTINUED
2 BY MR. YOUNGMAN:
3 Q. Yes, sir?
4 A. The first issue was, was counsel
5 ineffective in failing to object to the
6 highly prejudicial opinion testimony of the
7 State's witness who had not been qualified as
8 an expert by the trial court?
9 The second issue was, was counsel
10 ineffective in failing to object to the
11 prosecution soliciting highly prejudicial
12 opinion testimony from the State's witness
13 who had not been qualified as an expert by
14 the trial court?
15 Q. Let's go back to the first one, Mr.
16 Frasier. The State's witness, who is that
17 that you felt shouldn't have been qualified
18 as an expert?
19 A. Sgt. McGowan with the Charleston
20 Police Department.
21 Q. What was his role in this?
22 A. He was the crime scene technician
23 at, uh, -- that was assigned to collect and
24 document evidence at the crime scene.
25 Q. Why do you believe that he should

1 have been -- what did he testify to that
2 would have required him to be qualified as an
3 expert witness?
4 A. He testified that -- gave opinion
5 testimony. He gave his opinion testimony
6 about scientific evidence. His testimony was
7 the heart of the case.
8 I contend that scientific evidence that
9 was presented by a non-expert witness, that
10 this testimony was inadmissible due to its
11 unreliability due to the fact that the
12 State's witness had not been qualified as an
13 expert by the trial court.
14 During the State's case in chief, from
15 Page 292 through 319, Sgt. McGowan offered
16 testimony. During that testimony the
17 prosecution was allowed to elicit highly-
18 prejudicial opinion testimony from him.
19 Now, in South Carolina opinion testimony
20 by a lay witness, according to Rule 701 of
21 the South Carolina ---
22 THE COURT: Hold on a second. Sir, if
23 you're talking -- you're reading law now.
24 This is an issue that was really part of your
25 appeal, was it not? Because I'm looking at

1 the appeal, I'm looking at the documents from
2 your appeal where the Court reviewed whether
3 or not this evidence should have been
4 suppressed.
5 APPLICANT: No it wasn't, sir.
6 THE COURT: It was not?
7 APPLICANT: No.
8 THE COURT: Then please explain to me
9 before you go any further, since you're
10 quoting me the law, "*Moses Frasier appeals*
11 *his conviction and sentence for voluntary*
12 *manslaughter, arguing the trial court erred*
13 *in refusing to suppress a statement he made*
14 *to a police officer.*" All right, that's
15 fine. That was your statement.
16 APPLICANT: Yes, sir.
17 THE COURT: All right, that's fine.
18 APPLICANT: May I continue?
19 THE COURT: You may.
20 APPLICANT: Thank you. Can I start
21 back over?
22 THE COURT: You may.
23 APPLICANT: Thank you. It says that if
24 a witness is not testifying as an expert, the
25 witness' testimony in the form of an opinion

1 or inference is limited to the opinions or
2 inferences which:
3 (a) are rationally based on perceptions
4 of the witness; or
5 (b) are helpful for a clear understanding
6 of the witness' testimony or determination of
7 the fact at-issue; or
8 (c) not does require special knowledge,
9 skill or training.
10 I contend that my trial counsel should
11 have objected to Sgt. McGowan's testimony on
12 the grounds that it violated the South
13 Carolina Rules of Evidence, 701(c).
14 South Carolina 701(c) specifically
15 provides that a layperson cannot give expert
16 opinions.
17 Also the Supreme Court has held that the
18 trial judge must show that any and all
19 scientific testimony or evidence admitted be
20 not only relevant for reliability but it
21 says, in a case involving scientific
22 evidence, evidentiary reliability is based on
23 the scientific validity.
24 So the error of my trial counsel in not
25 objecting and challenging Sgt. McGowan's

1 testimony was compounded by the Solicitor's
2 closing argument. In his closing argument
3 the Solicitor continually references Sgt.
4 McGowan's testimony.
5 Page 483 Line 23 through 25 to Page 484
6 Line 6, the prosecution said the following,
7 quote, "What's interesting about that is
8 Kevin McGowan said that if he had scanned the
9 whole area, he would have found more drops of
10 blood. He didn't find the stick, he didn't
11 find more blood. What he found was that the
12 person struggled and bled in one area and you
13 were getting cast-off blood coming off the
14 hand. Cast-off blood was on the pole and on
15 the ground and that's where Kenneth Boston
16 was killed."
17 While the State was free to argue the
18 evidence may have supported that, and the
19 jury could have concluded such, he wasn't
20 qualified to give his opinion. An officer's
21 opinion in a case is not harmless (phonetic).
22 My trial counsel's failure to make any
23 objections to either the qualifications of
24 the witness or the liability of the testimony
25 by a non-expert witness -- and, uh, the

1 State's entire case against me consisted of
2 circumstantial evidence in light of the fact
3 that my defense was self-defense. So any
4 expert opinion testimony by a lay witness was
5 a violation of South Carolina Code.
6 And his failure to lodge an objection
7 later foreclosed me from my right of
8 challenging this on direct appeal.
9 So for those reasons, I feel like had my
10 lawyer objected and challenged Sgt. McGowan's
11 testimony that there is a reasonable
12 probability that my trial -- that the
13 outcome of my trial would have been
14 different.
15 DIRECT EXAMINATION CONTINUED
16 BY MR. YOUNGMAN:
17 Q. The testimony that you're talking
18 about specifically, though, is the blood
19 spatters or the cast-off that ---
20 A. Yes.
21 Q. --- was found on the pole. Correct?
22 A. Yes, the blood splatters -- blood
23 spatter. He was making comparisons with
24 smears, transfers, and talking about the
25 direction of travel and the force that it

1 would take to throw a punch and have blood
2 splatter off the hand.
3 Q. And your contention is that he was
4 not qualified?
5 A. No, he was not qualified as an
6 expert to offer that kind of testimony.
7 Q. And did your own attorney, Mr.
8 Butler, did he follow up with a blood spatter
9 expert in rebuttal to ---
10 A. He did not.
11 Q. Regarding what you said that Sgt.
12 McGowan said that the crime scene occurred by
13 this pole, ---
14 A. Yes.
15 Q. --- was it your ---
16 THE COURT: (Noise in courtroom) --
17 excuse me. Take that one out.
18 DIRECT EXAMINATION CONTINUED
19 BY MR. YOUNGMAN:
20 Q. There was testimony in your trial
21 that the victim had a stick or a board?
22 A. Yes.
23 Q. I recall that was mentioned in the
24 trial but they never found that; did they?
25 A. No, sir, they didn't.

1 Q. Could that be because Sgt. McGowan
2 testified that the crime scene -- when in
3 fact it was the jury's contention that the
4 crime scene or where you were struggling was
5 a different spot?
6 A. Yes, sir.
7 Q. So ---
8 A. His testimony in the case, they told
9 the jury that I was punching this guy and it
10 was coming off my hand, going on this
11 specific pole. An eyewitness testified to
12 something totally different.
13 Q. So they testified to blood spatters
14 and, by using his testimony, it ---
15 A. Right, it ---
16 Q. Just to sort of summarize it for
17 you, Mr. Fraiser, in effect Sgt. McGowan
18 testified as an expert when in fact he wasn't
19 qualified as one; was one prejudicial issue.
20 A. Right.
21 Q. And the other was the fact that he
22 testified to where the crime scene was
23 located when in fact he was looking at where
24 you were actually hit by the victim to begin
25 with. Is that correct?

1 A. I am not trying to be difficult but
2 I don't understand the question.
3 Q. Okay.
4 THE COURT: You don't need to summarize
5 it. I understand what he's saying. Thank
6 you.
7 MR. YOUNGMAN: Okay.
8 DIRECT EXAMINATION CONTINUED
9 BY MR. YOUNGMAN:
10 Q. Is there anything else that you wish
11 to say that I didn't ask you about your case?
12 A. No, sir.
13 MR. YOUNGMAN: Nothing further.
14 THE COURT: Thank you, sir. Cross-
15 exam?
16 CROSS EXAMINATION
17 BY MR. FRIEDMAN, ASSISANT AG:
18 Q. Mr. Frasier, do you know where in
19 the transcript that this testimony of Mr.
20 McGowan is located?
21 A. Between Page 292 and 319.
22 Q. Is there anywhere specific that he
23 is giving that testimony?
24 A. Yes, my transcript is over there --
25 I could show you.

1 THE COURT: Okay. Would you provide
2 him his transcript, please, so that he can
3 direct us to it.
4 (TRANSCRIPT TENDERED TO APPLICANT)
5 CROSS EXAMINATION CONTINUED
6 BY MR. FRIEDMAN, ASSISANT AG:
7 Q. Page and line, please.
8 A. (Upon review), tell me what you want
9 again, please, sir.
10 Q. You told us that Mr. McGowan's
11 testimony was between Page 292 and 319. Is
12 there anywhere specific that you can point us
13 to where you think that he was giving expert
14 testimony?
15 A. Okay, (reviewing). Starting at
16 (Page) 300, Line 20, then the whole page of
17 301, 302, 303, 304, 305, 306, 310 -- it's
18 really from, I think, (Page) 300 on.
19 Q. Do you recall if any SLED agents
20 testified during the trial?
21 A. Yes.
22 Q. Were any of them qualified as
23 experts?
24 A. Yes.
25 Q. Did they testify regarding any blood

1 on your pants?

2 A. Yes.

3 MR. FRIEDMAN, ASSISANT AG: I have

4 nothing further.

5 THE COURT: Very well. Redirect?

6 MR. YOUNGMAN: Yes, sir.

7 REDIRECT EXAMINATION

8 BY MR. YOUNGMAN:

9 Q. Mr. Frasier, looking at Page 316 in

10 your transcript, ---

11 A. Yes.

12 Q. This is where Sgt. McGowan talks

13 about cast-off?

14 A. Yes.

15 Q. This is what you are referring to as

16 far as ---

17 A. Yes, sir.

18 Q. --- giving expert testimony?

19 A. Yes.

20 Q. Cast-off blood on the pole from

21 swinging fists and so forth?

22 A. Yes, sir.

23 Q. That goes all the way to Page 318, I

24 believe.

25 A. (Page) 319, 292 to 319.

1 MR. YOUNGMAN: Nothing further, Your
2 Honor.
3 THE COURT: Very well. Recross?
4 MR. FRIEDMAN, ASSISANT AG: Nothing
5 further.
6 THE COURT: Thank you, Mr. Frasier.
7 You may step down, sir.
8 (WITNESS STEPS DOWN)
9 THE COURT: You may call your next
10 witness.
11 MR. YOUNGMAN: Thank you, Your Honor.
12 We call Beattie Butler.
13 (WITNESS TAKES STAND)
14 BEATTIE BUTLER, having been sworn to tell
15 the truth, and nothing but the truth,
16 testified as follows:
17 DIRECT EXAMINATION
18 BY MR. YOUNGMAN:
19 Q. Good morning, Mr. Butler.
20 A. Good morning.
21 Q. Let's talk about the testimony of
22 Sgt. McGowan as you remember it.
23 A. I don't have the transcript. You
24 may have to refresh my recollection some.
25 Q. On Page 316 of the transcript he

1 talks about cast-off blood spatters. He was
2 a, uh, -- what was his role in this trial?
3 What did he testify to? Why did he testify
4 in this trial?
5 A. I only recall what you and I spoke
6 about briefly earlier this morning and what
7 I've heard today.
8 Q. You know that he was a crime scene
9 technician?
10 A. I'll take your word for it.
11 Q. Okay. He testified about cast-off
12 blood and how the blood spatters got on the
13 pole where the crime scene occurred.
14 A. Okay.
15 Q. Do you recall him ever being
16 qualified as a witness by the Solicitor's
17 Office or your objecting to him being a
18 witness for the State?
19 A. I don't. And I think this will help
20 you -- if he -- if a witness gave an opinion
21 as to how blood was transferred from one
22 place to another and that person had not
23 being established -- if the foundation had
24 not been laid by the State that that person
25 was an expert and entitled to give an

1 opinion, then I should have objected.
2 Q. Did you call a blood spatter expert
3 of any kind to say that this could not have
4 happened?
5 A. No, I didn't. I can probably tell
6 you why I didn't do that. Because -- I'm
7 going to assume something, and you can
8 correct me if I am wrong. The blood that
9 we're talking about that was on the laundry
10 line pole -- right? I recall that. DNA
11 testing was done on that to determine that it
12 was Mr. Bostic's (sic). Is that correct?
13 Q. Yes.
14 A. This case, to me, wasn't about what
15 had happened but why it happened. There is
16 no dispute that Moses killed -- I think the
17 victim's name was Bostic (sic). It was just
18 a matter of whether it was self-defense or
19 not. If the blood belonged to -- that was on
20 the pole was Mr. Bostic's (sic), then it
21 really didn't matter to me whose it was or
22 how it got there. The issue was whether or
23 not Moses was entitled to defend himself,
24 which I thought he was and that was the
25 defense that we presented.

1 Q. As to self-defense, it was the
2 testimony of Jazz, him or her, ---
3 A. Jazz.
4 Q. --- that the victim got a stick out
5 of a trash can and had it -- though she
6 testified that she did not see him hit Mr.
7 Frasier with that stick. That stick was
8 never located?
9 A. That's correct.
10 Q. If we take Sgt. McGowan's testimony
11 as it is and he claimed that the crime scene
12 was one spot and the police cordoned off that
13 area, and Mr. Frasier contends that he was
14 struck in another spot behind that same
15 townhouse, would that have made a difference
16 in the trial?
17 A. Yeah, I guess this is the part where
18 I am getting confused. If it is beyond
19 dispute that the blood on the pole was Mr.
20 Bostic's (sic), something happened there that
21 made him bleed there. That would not be
22 inconsistent with Mr. Bostic having -- my
23 recollection is that they were walking down
24 Huger Street -- I think I've got this right
25 -- and that Bostic, who was a known drug

1 addict, was pestering Moses as Moses, minding
2 his own business, was walking down the
3 street. And that at some point there was
4 some kind of a scuffle. I think that the
5 testimony was that it was initiated by Mr.
6 Bostic. Mr. Bostic gets a board or a stick
7 from somewhere and then Moses beats him with
8 his fists, leaves him there and he ends up
9 dying.
10 Whether or not the blood spatters on the
11 clothing line pole were a cast-off from Mr.
12 Bostic or some other -- got there some other
13 way, I'm not sure why that would have meant
14 that a stick or board that Mr. Bostic used
15 would have been found there. I am not
16 following that part of it, so I can't help
17 you with that, I'm afraid.
18 Q. But had they found the stick or
19 board, then that would have bolstered Mr.
20 Frasier's claim that it was self-defense?
21 A. Yes, that would have helped.
22 Q. Rather than based entirely on Sgt.
23 McGowan's testimony that it all happened
24 right there at that pole?
25 A. Yes. Well, I can say that it would

1 have been corroboration of what we said
2 happened, so it would have been better for
3 them to have found the stick or the board.
4 Q. One last item that came up is that
5 the in the solicitor's, Nathan William's,
6 closing he posted a PowerPoint which included
7 Mr. Frasier and -- some suppositions, but Mr.
8 Frasier never testified.
9 A. Yeah, I can speak to that. I
10 remember it like it was yesterday. In his
11 closing argument, Mr. Williams -- let me back
12 up.
13 When Moses was arrested, he gives -- I
14 can't remember whether he tells the police or
15 whether he tells his family but he gives a
16 statement at some point that he was jumped by
17 multiple people and fought them. That came
18 into evidence.
19 Mr. Williams put up a PowerPoint in his
20 closing that said -- had a picture of Moses,
21 Moses' face, and it said, uh:
22 *"Mr. Frasier's version of the event:*
23 *Version 1 or Moses' Story 2 and then,*
24 *"What is it today??"* -- with a question
25 mark.

1 I objected and we approached the bench
2 because I thought that was pretty obviously a
3 comment on Moses exercising his right to
4 remain silent when there is this graphic that
5 the jury has seen 'What would his version be
6 today??' -- question mark, question mark. I
7 objected to that.
8 Q. And over your objection, Judge
9 Williams allowed it?
10 A. He sustained the objection and told
11 Mr. Williams to take the PowerPoint down.
12 But I did not move for a mistrial.
13 MR. YOUNGMAN: Nothing further.
14 THE COURT: Okay. Cross-examination?
15 MR. FRIEDMAN, ASSISANT AG: Thank you.
16 CROSS EXAMINATION
17 BY MR. FRIEDMAN, ASSISANT AG:
18 Q. Mr. Butler, how long have you been
19 practicing law?
20 A. Fifteen years.
21 Q. How much of that time has been in
22 criminal law?
23 A. All of it.
24 Q. Prior to this case, had you ever
25 tried any murder cases?

1 A. Yes.
2 Q. Were you appointed or retained in
3 this case?
4 A. Appointed.
5 Q. Do you recall about how many times
6 that you met with Mr. Frasier prior to the
7 trial?
8 A. I don't -- and I'm embarrassed. Our
9 office, Judge, for some reason did not get
10 notice of these, so I don't have my file.
11 I remember the case well because it was a
12 trial. I don't recall how many times that I
13 met with him. I'm sorry.
14 Q. Do you recall if during your
15 meetings with him that you would have
16 discussed the elements of the charges?
17 A. Well, of course; yes, I would have
18 done that.
19 Q. Did you discuss possible defenses
20 with him?
21 A. Yes, it was always a self-defense
22 case.
23 Q. Did you request a jury charge on
24 self-defense?
25 A. Yes, I did.

1 Q. Do you recall if that was granted?
2 A. Yes, it was.
3 Q. Do you recall a charge on
4 involuntary manslaughter?
5 A. I was thinking about that while I
6 was sitting back there. I don't know. I
7 suspect that I would have opposed it. But I
8 don't recall. I think the State wanted it to
9 be manslaughter for obvious reasons. He was
10 convicted of manslaughter, given the maximum
11 sentence.
12 Q. He was convicted of voluntary
13 manslaughter?
14 A. Yes.
15 Q. Do you recall any SLED experts
16 testifying in this case regarding the blood
17 on his pants?
18 A. I recall that Moses had the victim's
19 blood on his pants. I recall that.
20 Q. Did you feel that you had enough
21 time to prepare for trial?
22 A. Yes.
23 MR. FRIEDMAN, ASSISANT AG: Beg the
24 Court's indulgence.
25 THE COURT: Certainly.

1 MR. FRIEDMAN, ASSISANT AG: Nothing
2 further, Your Honor.
3 THE COURT: Redirect?
4 MR. YOUNGMAN: Just one question,
5 Your Honor.
6 THE COURT: Sure.
7 REDIRECT EXAMINATION
8 BY MR. YOUNGMAN:
9 Q. Mr. Butler, even if there was blood
10 on Moses Frasier's pants that was the
11 victim's, that doesn't preclude self-defense?
12 A. No, it doesn't.
13 MR. YOUNGMAN: Nothing further.
14 THE COURT: Thank you. Recross?
15 MR. FRIEDMAN, ASSISANT AG: Nothing
16 further.
17 THE COURT: Mr. Butler, you may step
18 down. Thank you, sir.
19 (WITNESS STEPS DOWN)
20 THE COURT: Call your next witness.
21 MR. YOUNGMAN: We have no further
22 witnesses.
23 THE COURT: Does the State have any
24 witnesses?
25 MR. FRIEDMAN, ASSISANT AG: No witnesses

1 from the State, Your Honor.
2 THE COURT: Very well. I will be happy
3 to hear from you now, Mr. Youngman.
4 MR. YOUNGMAN: Your Honor, Mr.
5 Frasier makes it clear that there was a
6 witness who testified who was not qualified
7 as an expert, and his testimony spoke to
8 where the crime scene occurred and how the
9 crime occurred. His testimony was enough to
10 convince the jury to come back with a guilty
11 verdict.
12 In addition, I believe the information
13 that Mr. Williams put up about Mr. Frasier,
14 which was then taken down with respect to Mr.
15 Beattie's (sic) objection, also was
16 prejudicial to the jury. They should never
17 have been able to see that.
18 Certainly if they'd found the stick or
19 the board that Mr. Frasier contends that he
20 was struck with prior to the incident with
21 Mr. Boston, that would have bolstered his
22 self-defense testimony and could have caused
23 the jury to come back with a different
24 verdict entirely.
25 THE COURT: Thank you.

1 MR. FRIEDMAN, ASSISANT AG: Briefly,
2 Your Honor, the State would submit that the
3 Applicant has failed to meet both prongs
4 under *Strickland*.
5 Counsel testified that there was no
6 dispute -- that there wasn't a dispute that
7 it was the victim's blood on the pole.
8 There is no dispute that the Applicant
9 killed the victim. It was just a claim of
10 self-defense, they requested a self-defense
11 charge which was granted. The jury came back
12 with voluntary manslaughter as the verdict.
13 So the State's position is that there was no
14 prejudice from the counsel's failure to
15 object to Sgt. McGowan's testimony regarding
16 -- because there is no dispute about what
17 happened, it was just whether it was self-
18 defense or not. We'd ask the court to deny
19 his application.
20 THE COURT: Any reply, Mr. Youngman?
21 MR. YOUNGMAN: No, sir.
22 THE COURT: Thank you. I must agree --
23 I understand -- and, Mr. Frasier, I commend
24 him for articulating very, very precisely the
25 objection which would to be that evidence.

1 No question about that.
2 The problem in this case, just as Mr.
3 Butler articulated as well, and obviously it
4 went to the jury on this basis, that this was
5 a self-defense case. There is nothing about
6 the evidence, in any way, that points to that
7 it was voluntary manslaughter versus self-
8 defense. It just simply confirms that there
9 was an altercation and as a result of the
10 altercation that the victim died. But there
11 was never a dispute that he died as a result
12 of the altercation. The whole purpose of it
13 and the question was what precipitated it and
14 did Mr. Frasier act as a reasonably prudent
15 person in defending himself.
16 And that's the issue here. Nothing about
17 the evidence would have confirmed it, would
18 have made it more or less probable. Clearly
19 from the standpoint of the second prong,
20 would it have affected the outcome, it does
21 not.
22 I don't think it was ineffective
23 assistance of counsel by not objecting
24 because there really was no reason to do that
25 because from the start there was no question

1 that he was there, that was no question that
2 he -- no question he hit him, no question he
3 bled. So the fact that his blood was there,
4 I agree with Mr. Butler, the fact that you
5 have blood on a pole that is his, obviously
6 it came from something. The logical thing is
7 that it came from a fight.
8 Now, the fact that they didn't find the
9 stick, that goes to challenging the
10 believability of the police and their
11 thoroughness in investigating. Again, that's
12 an issue that -- from the standpoint of
13 whether or not that works, that's a call that
14 every lawyer has to make. Some times it
15 works. Some times it doesn't. I tried two
16 cases last week. One time I think it did and
17 one time, I don't think it had any effect on
18 the jury. It's just a question of strategy.
19 In this case it doesn't appear that there
20 was any question about the fact that Mr.
21 Frasier had to do what he had to do. The
22 question was whether or not the jury believed
23 that was legitimately the -- the State had to
24 put in evidence that overcame and disproved
25 self-defense. Obviously the jury found they

1 did that.

2 Therefore, I find that the Applicant's --

3 the application fails for those reasons. I

4 ask Mr. Friedman to please prepare the

5 appropriate Order.

6 Thank you very much, Mr. Frasier. Good

7 luck to you, sir.

8 And, Mr. Youngman, let me say this to

9 you. You -- don't feel that you have to

10 apologize. You did a marvelous job on behalf

11 of your client, sir. It's a pleasure to

12 serve with you. Thank you for what you do,

13 as well.

14 (HEARING CONCLUDED)

15

16

17

18

19

20

21

22

23

24

25

STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF CHARLESTON)

I, the undersigned Deborah Garrison, Circuit Court Reporter (retired) for the 9th Judicial Circuit, hereby certify that the foregoing is a complete and accurate transcript of the hearing held in the within action on January 9th, 2012, before The Honorable R. Markley Dennis, Jr.;

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

____

Deborah Garrison

Greenville, South Carolina

November 13, 2018

cc| AT AG SOL BS

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

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

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

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

PROCEDURAL HISTORY

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

RMDJ|1

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

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

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

ALLEGATIONS

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Rmoo|2

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK C.P. G.S. & F.C.
BY [signature] DEPUTY CLERK

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

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

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

Ineffective Assistance of Counsel

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

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

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

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

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

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

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

Rmo5/4

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

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

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

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

All Other Allegations

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

CONCLUSION

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

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

RMDJ|5

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

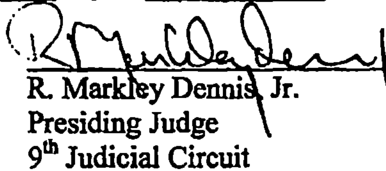
(30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served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

IT IS THEREFORE ORDERED:

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

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

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



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

Charleston, South Carolina.

RMD/b

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

MOSES A. FRAZIER, #317940
LEE CORR. INST./F-6A-2145
990 WISACKY HWY.
BISHOPVILLE, S.C. 29010

RECEIVED
DEC 17 2015
S.C. SUPREME COURT

DECEMBER 14, 2015

HON: DANIEL E. SHEAROUSE
CLERK OF S.C. SUPREME Ct.
PO BOX 11330
COLUMBIA, S.C. 29211

RE: MOSES FRAZIER v. STATE OF S.C., #2009-CP-10-1183, etc.,
NOTICE OF APPEAL, CERTIFICATE OF SERVICE, ENCLOSURES.

DEAR MR. SHEAROUSE:

PLEASE FIND ENCLOSED MY NOTICE OF APPEAL AND THE CERTIFICATE OF SERVICE TO INCLUDE THE ORDER OF DISMISSAL TO THE POST CONVICTION RELIEF THAT I AM APPEALING TO THE SUPREME COURT.

I ALSO PROVIDED TO YOU AN EXTRA COPY TO BE RETURNED TO ME FOR MY FILES ONCE YOU HAVE PLACED YOUR OFFICE SEALS ON THEM AND CLOCK STAMPED IT FOR THE PURPOSES OF THE TIMELY FILING THE APPEAL.

THANKING YOU IN THE ADVANCE FOR YOUR TIME AND HELP GIVEN TO ME IN THIS CRUX MATTERS AND I LOOK FORWARD IN HEARING FROM YOU IN THIS VERY NEAR FUTURE.

AGAIN AGAIN THANK YOU!

RESPECTFULLY SUBMITTED,

DECEMBER 14, 2015

s/ [signature] #317940
MOSES FRAZIER
990 WISACKY HWY.
BISHOPVILLE, S.C. 29010
PETITIONER

ENCLOSURES

MAF/cm

cc: MATTHEW J. FRIEDMAN, Esq.
CIR. CLERK OF Ct.
FILES/maf

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
DEC 17 2015
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

R. MARKLEY DENNIS, Jr., Cir. Ct. JUDGE

CASE NO. 2009-CP-10-1183

MOSES FRAZIER,....................................PETITIONER,

V.

STATE OF S.C,.....................................RESPONDENT.

NOTICE OF APPEAL

MOSES FRAZIER APPEALS THE ORDER OF DISMISSAL OF THE HONORABLE R. MARKLEY DENNIS, Jr. DATED FEBRUARY 16, 2012. PETITIONER RECEIVED WRITTEN NOTICE OF ENTRY OF THIS ORDER ON DECEMBER 07, 2015.

DECEMBER 14, 2015

s/ [signature] #317940
MOSES FRAZIER
990 WISACKY HWY.
BISHOPVILLE, S.C 29010
ATTORNEY FOR APPELLANT

OTHER COUNSEL OF RECORD:

MATTHEW J. FRIEDMAN, Esq.
PO BOX 11549
COLUMBIA, S.C. 29211
ATTORNEY FOR RESPONDENT

CASE COUNSEL J. YUNGMAN, Esq. DID NOT FILED THE NOTICE OF APPEAL, AND THE PETITIONER IS pro se, PLEASE NOTIFY THE SC INDIGENT DEFENSE FOR THE APPELLATE DEFENSE ASSIGNMENT OF CASE FOR PROPERLY ORDER TO TRANSCRIPTS, etc. PCR

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

DEC 17 2015

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

R. MARKLEY DENNIS, Jr., Cir. Ct. JUDGE

CASE NO. 2009-CP-10-1183

MOSES FRAZIER,..PETITIONER,

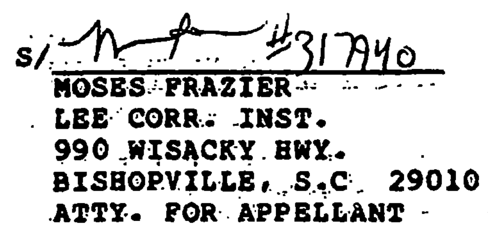
V.

STATE OF S.C,..RESPONDENT.

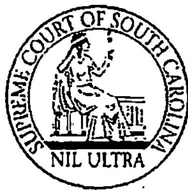
PROOF OF SERVICE

I CERTIFY THAT I HAVE SERVED THE NOTICE OF APPEAL ON MATTHEW J. FRIEDMAN BY DEPOSITING A COPY OF IT IN THE UNITED STATES MAIL, POSTAGE PREPAID, ON DECEMBER 14, 2015, ADDRESSED TO HIS OFFICE AS ATTORNEY FOR THE RESPONDENT, P.O. BOX 11549, COLUMBIA, S.C. 29211 BY PERSONALLY DELIVERING IT TO THE PRISON MAIL ROOM POSTAL DIRECTOR, ON DECEMBER 14, 2015, AS VERIFIED BY DATE STAMPED RECEIVED BY MAIL ROOM.

DECEMBER 14, 2015



S/ #317940
MOSES FRAZIER
LEE CORR. INST.
990 WISACKY HWY.
BISHOPVILLE, S.C 29010
ATTY. FOR APPELLANT



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

December 23, 2015

Jeffrey James Yungman, Esquire
35 Walnut Street
Charleston SC 29403

Re: Moses Frasier v. State[1]
Appellate Case No. 2015-002609
Lower Court Case No. 2009CP1001183

Dear Counsel:

This Court has received a *pro se* notice of appeal from the order dated February 16, 2012. A copy of the notice of appeal and proof of service is enclosed. This case has been assigned the appellate case number that appears above. Please use this number on all future correspondence relating to this matter.

I remind you that under Rule 71.1(g) of the South Carolina Rules of Civil Procedure[2] and Rule 264 of the South Carolina Appellate Court Rules that you

---

[1] The lower court has your client's name as "Frasier" while he spells it "Frazier" in the notice of appeal. The Department of Corrections has the name as "Frasier" with an "s."

[2] "A final decision entered under the [Uniform Post-Conviction Procedure] Act shall be reviewed according to the procedure specified by Rule 243, SCACR. If an applicant represented by counsel desires to appeal, counsel shall serve and file a Notice of Appeal as required by Rule 243, SCACR, and shall continue to represent

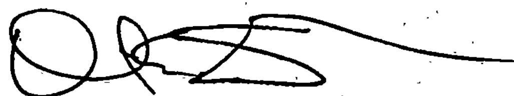
remain his counsel of record before this Court.

All parties to this matter are advised that all filings must comply with the requirements of Rule 267 of the South Carolina Appellate Court Rules (SCACR). The SCACR are available online at www.sccourts.org/courtreg. Additionally, any filings submitted by counsel admitted in South Carolina must include counsel's bar number.

The attention of the parties is directed to the order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. The order can be found at www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2014-04-15-02. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

To determine the timeliness of the service of the notice of appeal, it will be necessary for you to advise this office of the date on which your received written notice of entry of the order of February 16, 2012. This order was apparently filed with the clerk of the circuit court on February 22, 2012. This requested information should be provided within fifteen (15) days of the date of this letter.

Very truly yours,



CLERK

Enclosures

cc: James Rutledge Johnson, Esquire
Mr. Moses Frazier, #317940

---

the applicant on appeal unless automatically relieved under Rule 602, SCACR, or allowed to withdraw under Rule 264, SCACR. If the applicant is indigent, counsel shall assist the applicant in obtaining representation by the Division of Appellate Defense of the Office of Indigent Defense."

CRISIS MINISTRIES IS NOW

PLACE

RECEIVED

JAN 04 2016

S.C. SUPREME COURT

December 31, 2015

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

Re: Moses Frasier v. State
Appellate Case No. 2015-002609
Lower Court Case No. 2009CP1001183

Dear Mr. Shearouse:

I am writing in response to your letter dated December 23, 2015 regarding the above-named matter. By way of an explanation, in January 2012 I represented Moses Frasier at his PCR hearing in what was my first and only court-appointed case. Shortly after the completion of the case I received notice from the South Carolina Bar that I was exempt from any future appointed cases due to my position at One80 Place, the homeless shelter in Charleston. In that position I provide free civil legal representation to individuals who are homeless.

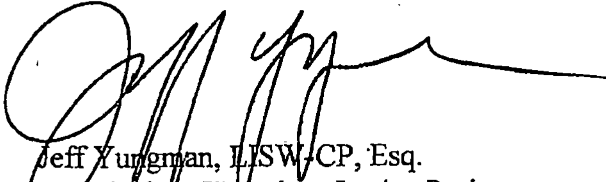
Being a relatively new attorney and having no criminal law experience, I apparently made some incorrect assumptions at the close of this case: 1) that the court would send a copy of the order to both me and my client, 2) that my representation ended with the PCR hearing, and 3) that my client would file an appeal upon receipt of the order as he was instructed to do by Judge Dennis, who presided at the hearing.

In October 2015 I received a phone call from my client's mother. She told me that my client wanted a copy of the order from the January 2012 PCR hearing. I mailed a copy to the address given to me by his mother. Approximately six weeks letter the order was returned to me marked "undeliverable." I contacted my client's mother. Apparently there was an error in the address she had given me. I then again mailed a copy of the order to my client and according to his mother, he finally received a copy on December 8, 2015.

As a result, it would appear that while I received written notice of entry of the order in February 2012, Moses Frasier did not receive a copy of the order until December 2015.

If you require any additional information please feel free to contact me. As an aside, your letter stated that "a copy of the notice of appeal and proof of services is enclosed." Neither of those items were enclosed with your letter.

Sincerely,



Jeff Yungman, LISW-CP, Esq.
One80 Place Homeless Justice Project
35 Walnut Street
Charleston, SC 29403
(843) 737-8361

The Supreme Court of South Carolina

Moses Frasier, Petitioner,

v.

State of South Carolina, Respondent.

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

ORDER

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

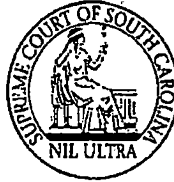
Accordingly, based on the failure to timely serve the notice of appeal under Rules 243(a) and 203(b)(1) of the South Carolina Appellate Court Rules, the notice of appeal is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

FOR THE COURT

BY
CLERK

Columbia, South Carolina
January 6, 2016

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



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

January 22, 2016

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Moses Frasier v. State
Lower Court Case No. 2009CP1001183
Appellate Case No. 2015-002609

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

FORM 5

2016-CP-10-359

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
County of CHARLESTON	)	
MOSES FRASIER, 317940,	)	
Full name and prison number (if any) of Applicant	)	
v.	)	APPLICATION FOR
State of South Carolina	)	POST-CONVICTION RELIEF

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

INSTRUCTIONS – READ CAREFULLY

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

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

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

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

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

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

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

(c) ______________________________

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

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

(b) ______________________________

(c) ______________________________

6. Check whether a finding of guilty was made:

(a) after a plea of guilty______________________________

(b) after a plea of not guilty XXXXXXX

(c) after a plea of nolo contendere______________________________

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

YES

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

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

i. COURT OF APPEALS

ii. ______________________________

iii. ______________________________

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

i. AFFIRMED CONVICTION

ii. ______________________________

iii. ______________________________

(c) the date of each such result:

i. 2009

ii. ______________________________

iii. ______________________________

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

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

ii. ______________________________

iii. ______________________________

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

(a) N/A

(b) ______________________________

(c) ______________________________

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

(a) INEFFECTIVE ASSISTANCE OF PCR COUNSEL, etc.

(b) ______________________________

(c) ______________________________

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

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

(b) ______________________________

(c) ______________________________

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

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

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

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

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

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

(a) the specific nature thereof:

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

ii. ______________________________

iii. ______________________________

iv. ______________________________

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

i. CHARLESTON CO. COURT OF COMMON PLEAS

ii. ______________________________

iii. ______________________________

iv. ______________________________

(c) the disposition thereof:

i. DENIED RELIEF

ii.

iii.

iv.

(d) the date of each such disposition:

i. FEBRUARY 16, 2012

ii.

iii.

iv.

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

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

ii.

iii.

iv.

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

N/A

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

(a) which grounds have been presented:

i. N/A

ii.

iii.

iv.

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

i. N/A

ii.

iii.

Revised 3/2003

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

(a) N/A

(b) ______

(c) ______

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

(a) your arraignment and plea? ______

(b) your trial, if any? XXXXXX

(c) your sentencing? ______

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

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

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

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

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

ii. JEFFREY JAMES YOUNGMAN, Esq.

iii. ______

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

i. TRIAL, BUTLER & MIKELL

ii. POST CONVICTION RELIEF, YOUNGMAN

iii. ______

Revised 3/2003

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

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

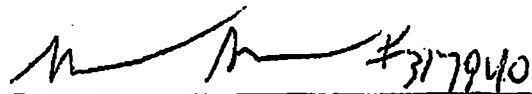
APPLICANT IS NOT WAIVING NO RIGHTS IN THIS STAGES DUE TO THE COMPLIANCES REQUIREMENTS OF THE RULES AND LAWS THAT IS ESTABLISHED FOR THE ONE BITE AT THE APPLE PURSUANT TO §17-27-80 AND 90 , etc.

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

NO

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of CHARLESTON)

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



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

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

(L.S.)
Notary Public

My Commission Expires: 3/29/2016

Revised 3/2003

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

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

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

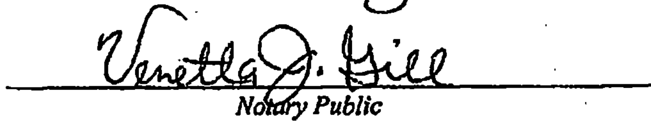
(b) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Applicant

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

SWORN or affirmed to and subscribed before me this

19th day of January 2016



Notary Public

My Commission Expires: 3/29/2016

Revised 3/2003

FILED
2016 JAN 25 AM 11:10
JULIE J. ARMSTRONG
CLERK OF COURT

PCR ADDENDUM #1.

PCR JUSTIFICATIONS:

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

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

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

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

PCR ADDENDUM #3.

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

CONCLUSION

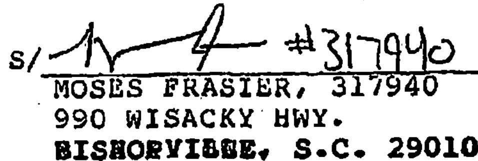
WHEREAS, APPLICANT MOSES FRASIER REQUEST AND MOVES RESPECTFULLY IN THIS HONORABLE COURT TO HAVE HIS APPEAL RIGHTS REINSTATED TO THE HEREIN MENTIONED PCR CASE MATTERS, etc., AND FIND THAT APPLICANT DID NOT WAIVED HIS RIGHTS TO AN APPEAL TO THE PCR APPLICATION DENIAL BY THE PCR COURT.

APPLICANT COMPELS THE COURT TO SEE THE FACTS THAT ERROR OF THE PCR RULES AND STATUTES STANDS PRESENTLY IN HIS CASE AND REQUEST THAT THE COURT RENDER THE CORRECT AND FULL REMEDIES TO CORRECT THIS VIOLATIONS AS THEY AMOUNTS IN SO MANY TO BE RECTIFIED IN HIS CASE MATTERS.

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

SUBMITTED ON THIS 19 DAY OF JANUARY 2016

RESPECTFULLY SUBMITTED,



s/ #317940

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

SEE ENCLOSURES: (4)

The Supreme Court of South Carolina

Moses Frasier, Petitioner,

v.

State of South Carolina, Respondent.

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

ORDER

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

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

FOR THE COURT

BY
CLERK

Columbia, South Carolina
January 6, 2016

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

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT

Moses Frasier, #317940,) Case No.: 2016-CP-10-0359

Applicant,

v.

State of South Carolina,

Respondent.

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief filed on January 25, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. In June 2006, the Charleston County Grand Jury indicted Applicant for murder (2006-GS-10-4259). Beattie Butler, Esquire, and Jason Mikell, Esquire, represented Applicant. Assistant Solicitors Nathan Williams and Kim Steele prosecuted the case. On October 2, 20106, Applicant proceeded to a jury trial the Charleston Counrt Court of General Sessions before the Honorable James C. Williams, Jr. On October 5, 2006, Applicant elected to forego his jury trial and pled guilty to the lesser included offense of voluntary manslaughter. Judge Williams sentenced Applicant to imprisonment for a term of thirty years.

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

First Post-Conviction Relief Action (2009-CP-10-1183)

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

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

II.

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

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

Attached and incorporated herein are the records of the Charleston County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the records from Applicant's prior post-conviction relief action, Applicant's appellate records, and the records from this post-conviction relief action. Respondent reserves the right to amend this Return upon receipt of any relevant documents.

III.

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (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.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin, 305 S.C. 453, 409 S.E.2d 395, which recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation..." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Respondent lacks sufficient information to admit or deny this allegation. Respondent requests an evidentiary hearing on this ground for relief. Sharper, Id.; Austin, 305 S.C. 453, 409 S.E.2d 395.

IV.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file

amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

V.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegation that Applicant's PCR counsel failed to file an appeal from the denial of his prior PCR application.

VI.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

IX.

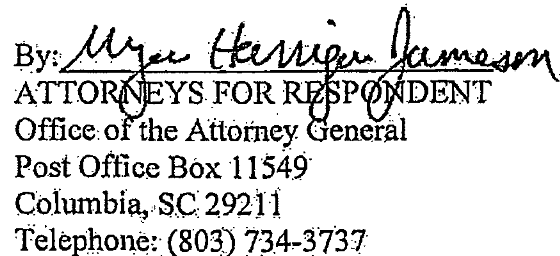
WHEREFORE, Respondent requests an evidentiary hearing be held solely on the Austin claim.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General



By: [signature]
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

June 23, 2017

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS 2016-CP-10-0359
MOSES FRASIER, S.C.D.C. No. 317940, Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	AFFIDAVIT OF SERVICE BY MAIL

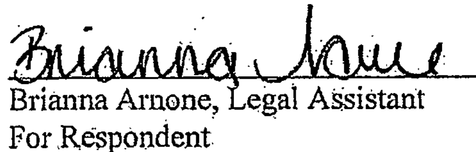
1. I am an employee of the Respondent in the above-captioned action.

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** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James Falk, Esquire
Falk Law Firm
PO Box 1058
Charleston, SC 29402

DATED this 23rd day of June, 2017.



Brianna Arnone, Legal Assistant
For Respondent

1 STATE OF SOUTH CAROLINA) Court of Common Pleas
2 COUNTY OF CHARLESTON) Case No. 2016-CP-10-0359
3 MOSES AKHENATON FRASIER,)
4 Applicant,)
5 vs.) Transcript of Record
6 STATE OF SOUTH CAROLINA,)
7 Respondent.) DATE: February 1, 2018
8
9
10
11 B E F O R E:
12 THE HONORABLE MAITE D. MURPHY
13
14 A P P E A R A N C E:
15 JAMES KRISTIAN FALK
Attorney for the Applicant
16
RASHEEDA CLEVELAND
17 Attorney for the Respondent
18
19 Karen V. Andersen, RMR, CRR
Circuit Court Reporter
20
21
22
23
24
25

1 **INDEX**

2 **EXAMINATION**

3 **Witness Name** **Page**

4 MOSES FRASIER

5 Direct By Mr. Falk.. 5

6 Cross By Ms. Cleveland................................ 11

7 JEFFREY YUNGMAN

8 Cross By Ms. Cleveland................................ 15

9 Re-Direct By Mr. Falk.................................. 16

10

11 **EXHIBITS**

12

Exhibit	Description	Identification	Evidence
Applicant's Exh. 1	December 31, 2015 letter to Mr. Shearouse from Mr. Yungman	12	

13

14

15

16

17

18

19

20

21

22

23

24

25

1 MS. CLEVELAND: May it please the Court. Next
2 matter is Moses Frasier vs. The State of South Carolina,
3 Docket No. 2016-CP-10-0359.
4 In 2006, the Charleston County Grand Jury indicted
5 Mr. Frasier for murder. Beattie Butler, Esq. and Jason
6 Mikell, Esq. represented Mr. Frasier. Assistant Solicitor
7 Nathan Williams and Kim Steele prosecuted the case.
8 On October 2nd, 2016, the applicant proceeded to a
9 jury trial at the Charleston County Court of General
10 Sessions before the Honorable James Williams. On October
11 5th, 2000 -- I'm sorry, I said 2016. That is 2006.
12 On October 5th, 2006, the jury convicted applicant
13 of a lesser-included offense of voluntary manslaughter.
14 Judge Williams sentenced applicant to a term of 30 years.
15 He appealed and Judge -- Jeffrey Bloom (ph), Esq. perfected
16 that appeal.
17 And the South Carolina Court of Appeals affirmed
18 applicant's conviction in an unpublished opinion on January
19 15th, 2009. The remittitur was returned on November 16th,
20 2012. Applicant filed his first post-conviction relief
21 action on February 27th, 2009.
22 Respondent made its return on July 7, 2009.
23 An evidentiary hearing into the matter was convened
24 on January 27th, 2011, at the Charleston County Courthouse
25 before the Honorable R. Markley Dennis. Applicant was

1 present and represented by Jeffrey Yungman. Respondent was
2 represented by Assistant Attorney General Matthew Friedman.
3 Judge Dennis issued an order of dismissal. And that order
4 was filed on February 22nd, 2012.
5 Nearly four years later, on December 14th, 2015,
6 applicant filed a pro se notice of appeal with the South
7 Carolina Supreme Court challenging Judge Dennis's ruling.
8 The Court issued an order dismissing the appeal for failure
9 to timely serve notice of appeal.
10 The remittitur from that appeal was sent down on
11 January 22nd, 2016. He then filed this current application
12 before this court on January 25th, 2016, alleging prior PCR
13 counsel as ineffective for failing to file an appeal on his
14 behalf.
15 The State made its return on June 23rd, 2017,
16 requesting that an evidentiary hearing be held solely on the
17 issue of whether applicant is entitled to a belated
18 appellate review of his first PCR action pursuant to *Austin*
19 *v. State*. Mr. Frasier is present in the courtroom today and
20 he's represented by Mr. Jim Falk.
21 THE COURT: Good morning, Mr. Falk.
22 MR. FALK: Your Honor, we are going forward now on
23 our *Austin* claim. It's my understanding of the law in South
24 Carolina that if Mr. Frasier has any other allegations of
25 ineffective assistance of appellate counsel -- of PCR

1 counsel, that they are really not anything that this Court
2 can address. So not going forward with those claims, we
3 don't want to seem as a waiver of any kind of subsequent
4 habeas corpus procedure, whatever. It's my understanding we
5 can only pursue the *Austin* claim at this time.
6 THE COURT: Are you ready to proceed?
7 MR. FALK: Yes, we are.
8 THE COURT: Call your first witness.
9 MR. FALK: I call Mr. Frasier to the stand.
10 MOSES FRASIER,
11 having been duly sworn, testifies as follows:
12 THE CLERK: Spell your last name for the record.
13 MR. FRASIER: Moses F-r-a-s-i-e-r.
14 DIRECT EXAMINATION
15 By MR. FALK:
16 Q. Mr. Frasier, who represented you at your PCR?
17 A. Mr. Jeffrey Yungman.
18 Q. And how much communication did you have with him
19 prior to your PCR hearing?
20 A. I seen him -- he sent me a letter saying he's my
21 attorney. And then he came to see me like a week before I
22 went to court.
23 Q. And what happened at the PCR hearing?
24 A. I substantiated my claim. And then the judge said
25 he was going to deny me. And, so, I was waiting on a

1 decision so I could go forward with it, but I never got it.
2 I was thinking the way the judge was talking, like, maybe
3 they had a -- like, he had a change of heart or something.
4 And I was just waiting on the decision for three years.
5 Q. What kind of conversations did you have with your
6 lawyer about, you know, what would happen if the judge ruled
7 against you at your PCR?
8 A. We didn't have that conversation.
9 Q. Did you want to appeal the decision if it went the
10 wrong way?
11 A. Yeah, yeah.
12 Q. And did your lawyer file timely notice of appeal in
13 this case?
14 A. Hm-mm. I come to find out three years later that
15 he didn't file it. He actually told the judge when we was
16 in court that I was his first time doing that. He told him
17 that he didn't have any experience in it. And the judge
18 said, that's fine, just go ahead and proceed. So we
19 continued.
20 Q. Who did you think was going to file the appeal?
21 A. My lawyer, my lawyer. But the thing is, I never
22 got -- you know, like, when the courts make a decision, you
23 get a receipt of the decision. And I never got that. I
24 didn't get anything.
25 Q. So you had no copy of any written order from the

1 court?
2 A. No. I didn't get it until when Mr. Yungman sent it
3 to me. I asked my mama, because I said, it shouldn't take
4 three years to get a decision on a PCR. And she called them
5 and said that Moses asked him about the decision. And from
6 what she told me, she said that he had a decision. And I
7 said, well, when is he going to send it to me?
8 MS. CLEVELAND: Objection, Your Honor, this is
9 hearsay.
10 THE COURT: Sustained.
11 BY MR. FALK:
12 Q. When did you get a copy of the decision?
13 A. December 2015.
14 Q. December 2015?
15 A. Yeah. And can I say something else? I didn't go
16 to court --
17 Q. In other words -- stop. Don't tell me anything
18 that your mother said someone else said.
19 A. Okay. Okay.
20 Q. So that is why I'm just trying to lead you. Was it
21 your understanding that your mother contacted Mr. Yungman?
22 A. I asked her to contact him. And he sent a letter
23 back to me.
24 Q. And you received the letter from him?
25 A. Uh-huh. It's right there on the thing.

1 MR. FALK: May I approach, Your Honor?
2 THE COURT: You may.
3 BY MR. FALK:
4 Q. Is that the letter?
5 A. Uh-huh.
6 Q. So --
7 THE COURT: Mr. Frasier, is that a yes?
8 THE WITNESS: Yes, ma'am.
9 BY MR. FALK:
10 Q. So what did I hand you, because we are trying to
11 make a record here?
12 A. You want me to read the letter?
13 Q. Just identify the letter.
14 A. That is the letter I asked my mama to contact the
15 lawyer, Mr. Yungman. She did. And then when I got the
16 decision, right, I filed myself an appeal, right, for the
17 decision from the PCR. And then they denied it saying that
18 it was untimely. Okay? So she contacted him again. Right?
19 And he -- he said this is what I should do. And he wrote a
20 letter saying that the process wasn't done correctly.
21 Q. So that letter right there, you received that
22 letter?
23 A. Yeah.
24 Q. You received it? Where were you when you received
25 it?

1 A. I was at Lee Correctional.

2 Q. What's the date on the letter?

3 A. December 31st, 2015.

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

5 addressed to?

6 A. It's addressed to Mr. Shearouse. I don't know

7 exactly who he is, but he's somebody in court, though.

8 Q. Okay.

9 A. I wrote him a few times.

10 Q. And who signed the letter?

11 A. Mr. Yungman.

12 MR. FALK: Okay. And, Your Honor, we will mark

13 this as exhibit one to this hearing.

14 THE COURT: Any objection?

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

16 Honor.

17 BY MR. FALK:

18 Q. It's going to be part of the record. Why don't you

19 summarize. What did you think after you read the letter?

20 A. That he wasn't -- the courts told him that he

21 doesn't have to do pro bono work because he's doing stuff at

22 the homeless shelter. So he just was, like, okay. Just

23 didn't follow up on anything. I don't think it was like --

24 I don't think he did anything, like, to sabotage my appeal,

25 you know, but I don't think he knew what to do.

1 Q. Okay. But so the first time you realized that
2 Judge Dennis ruled against you was about -- was sometime in
3 the latter part of 2015?
4 A. Yeah, that was the first time I knew. See, in
5 SCDC, when you get legal mail, right, you have to sign for
6 it. And, I mean, I didn't get any mail from any lawyers or
7 anybody, from the courts or anything until 2015.
8 Q. And when did you file your PCR application?
9 A. You are talking about the initial application?
10 Q. No. I'm sorry.
11 A. The *Austin* petition?
12 Q. *Austin*, yes.
13 A. I can't remember the exact date, but I got it in my
14 thing over there. But it was after this right there. It
15 was after December 31st.
16 Q. Couple of months after?
17 A. Yeah. Yeah. I know I immediately filed an appeal.
18 Yeah, when they denied it, that's when I filed the *Austin*
19 petition.
20 Q. You were going under the assumption that if you
21 lost, your lawyer was going to file an appeal?
22 A. Yeah. Yeah, that's what I thought.
23 Q. You were going under the assumption that if you
24 lost, your lawyer was going to send you a copy of the order?
25 A. Yes.

1 Q. And first time you've got a copy of the order was
2 in December of 2015?
3 A. Yes.
4 MR. FALK: No further questions.
5 THE COURT: Any cross-examination?
6 MS. CLEVELAND: Just briefly, Your Honor.
7 CROSS-EXAMINATION
8 BY MS. CLEVELAND:
9 Q. Good morning, Mr. Frasier.
10 A. Good morning.
11 Q. Mr. Frasier, you testified that it was three years
12 before you got or thought to inquire about your cases as far
13 as the order. Why is that? Why did you wait three years?
14 A. Because, you know, when the courts make decisions,
15 they don't do it -- it's not like you get it the next week
16 or nothing. I was figuring, hey, when they did my -- when I
17 had my -- what do you call it? -- my direct appeal, it took
18 months for them to do that. So I'm thinking, okay, maybe
19 this might be a good thing that they are taking so long.
20 You know what I'm saying? And I just never got it.
21 Q. After year one, you didn't think to contact your
22 attorney to follow up?
23 A. Hm-mm.
24 Q. Year two?
25 A. Hm-mm.

1 Q. Or year three?

2 A. Year three, I asked. I said -- when the third year

3 came, right, I asked my mama, can she call the lawyer and

4 find out how long it takes to get a decision. And she told

5 me -- that's when she told me what he said. And then I got

6 the paperwork.

7 Q. One final question. Why did you wait four years to

8 file your notice of appeal?

9 A. I didn't wait four years.

10 Q. It was nearly four years.

11 A. No. I went to court in January 2012, not December

12 11th. I don't know where that -- where they get that date

13 from. I think it was January 9th, 2012.

14 Q. And you filed your notice of appeal on December

15 14th, 2015. So nearly three years.

16 A. Yeah. But from my understanding, you can't file --

17 you can't appeal something that you don't know if they have

18 a decision or not. Right?

19 MS. CLEVELAND: Nothing further for this witness.

20 Thank you.

21 THE COURT: Anything further, Mr. Falk?

22 MR. FALK: No, Your Honor.

23 (Applicant's Exh. 1, December 31, 2015 letter to

24 Mr. Shearouse from Mr. Yungman, was marked for

25 identification.)

1 JEFFREY YUNGMAN,
2 having been duly sworn, testifies as follows:
3 DIRECT EXAMINATION
4 BY MR. FALK:
5 Q. Can you state your name for the record.
6 A. Jeff Yungman.
7 Q. And where are you currently working?
8 A. I work at 180 Place, the homeless shelter here in
9 Charleston.
10 Q. And did you get appointed to represent Mr. Moses on
11 his PCR?
12 A. I did.
13 Q. Was that because of the old system where you are
14 on, like, a civil list?
15 A. Correct.
16 Q. And the case would come to you and you are supposed
17 to represent that person because you are supposed to have
18 civil trial experience; is that correct?
19 A. Yes.
20 Q. I mean, that is the theory?
21 A. That's the theory, yes.
22 Q. How many criminal trials have you done prior to
23 representation Mr. Moses on his PCR?
24 A. None.
25 Q. And this was your first venture into PCR court?

1 A. Yes, sir.
2 Q. And when did you get a copy of the order, Judge
3 Dennis's order denying PCR relief?
4 A. I'm not sure. I believe it was February or March
5 of that same year that the PCR hearing was.
6 Q. Did you send a copy of that to your client?
7 A. No, I did not.
8 Q. And you did not file a notice of appeal?
9 A. Correct, I did not.
10 MR. FALK: May I approach?
11 THE COURT: You may.
12 BY MR. FALK:
13 Q. I'm going to show you what we marked as Applicant's
14 Exh. No. 1. Do you recall sending that letter to
15 Mr. Frasier?
16 A. I think I sent it to his mother.
17 Q. Okay. Are you acknowledging you maybe dropped the
18 ball on the appeal? Maybe that's a bad question.
19 A. I did not do --
20 Q. What was your understanding of your responsibility
21 to Mr. Moses at the conclusion of the PCR hearing?
22 A. Two things; one, it was my understanding that my
23 role was done at that point; and two, it was my
24 understanding that the court would send him a copy of the
25 decision, as well as me.

1 Q. Okay. All right. So why did you not file a notice
2 of appeal in this case?
3 A. As I said, I thought my role was done at the end of
4 the PCR hearing. And I thought, apparently wrongly, that
5 Judge Dennis at the end of the hearing said to Mr. Frasier,
6 you can appeal this decision. So I assumed it was
7 Mr. Frasier who was going to appeal that decision, not me.
8 MR. FALK: I have no further questions.
9 THE COURT: Any cross-examination?
10 MS. CLEVELAND: Moment's indulgence.
11 CROSS-EXAMINATION
12 BY MS. CLEVELAND:
13 Q. Mr. Yungman, you testified that Judge Dennis told
14 Mr. Frasier that an appeal could be filed at the conclusion
15 of the hearing?
16 A. That's my recollection, yes, ma'am.
17 Q. So would it be your understanding that indicates
18 that the hearing is over and the matter is concluded?
19 A. I'm sorry. I don't understand what you are
20 asking.
21 Q. That the application was denied at the conclusion
22 of the hearing, would it be your understanding that by him
23 telling Mr. Frasier that he could appeal, that that
24 indicated the denial of the PCR?
25 A. Yes, ma'am.

1 MS. CLEVELAND: Thank you. Nothing further.
2 THE COURT: Anything else?
3 MR. FALK: I call one rebuttal witness?
4 THE COURT: You may step down. Thank you.
5 MR. FALK: I call Mr. Frasier.
6 THE COURT: Come back up, Mr. Frasier. You are
7 still under oath. You may proceed.
8 MOSES FRASIER,
9 having been previously sworn, testifies as follows:
10 REDIRECT EXAMINATION
11 BY MR. FALK:
12 Q. Mr. Yungman testified it was his recollection that
13 Judge Dennis said that once he ruled from the bench, then he
14 told you you could file an appeal. Did you hear Judge
15 Dennis say that?
16 A. No, sir.
17 MR. FALK: No further questions.
18 THE COURT: Any cross?
19 MS. CLEVELAND: Nothing further.
20 THE COURT: You may step down. Thank you.
21 Anything else, Mr. Falk?
22 MR. FALK: We will rest.
23 THE COURT: Anything from the State?
24 MS. CLEVELAND: Nothing further, Your Honor.
25 THE COURT: Do the parties care to give a brief

1 summation?

2 MR. FALK: Your Honor, I think part of the problem

3 here is that there may be a problem getting a copy of the

4 PCR transcript, but I don't think that should necessarily

5 cut off my client's rights here. I think Mr. Yungman

6 acknowledged that he did not file the appeal. He, I think,

7 was mistaken in his assumption that he no longer had really

8 an obligation to Mr. Moses at the conclusion of the PCR

9 hearing. And he did have an obligation to send him a copy

10 of the decision. And in the event that the decision was

11 wrong, to at least file notice of appeal.

12 I don't think we can necessarily hold my client to

13 any type of standard that he should have known. And I think

14 he really raises a good point, that when you are waiting for

15 a decision on a -- when he appealed his trial court

16 decision, the general sessions matter, there was a long time

17 delay. So some amount of delay in actually getting a

18 written order maybe is understandable. And at the end, I

19 don't think we could hold my client to knowing that, you

20 know, when that order should have come.

21 And also, I'm not sure that every judge

22 necessarily, even when they rule from the bench, advises

23 their clients -- excuse me. I'm not sure every circuit

24 court judge -- and, of course, none of us were there when

25 Judge Dennis was saying that, but as a practice -- and I've

1 done a couple of PCRs, I don't always hear the judge, even
2 when ruling from the bench, to advise the applicant of the
3 appellate rights, not like at the conclusion of a plea in a
4 general sessions matter, at the end of an appeal -- I mean,
5 at the end of a conviction in general sessions trial. So I
6 think maybe he said it. Maybe he didn't say it, but I don't
7 know.
8 THE COURT: Thank you, Mr. Falk.
9 Ms. Cleveland.
10 MS. CLEVELAND: Your Honor, just briefly. The
11 State is going to argue that laches does apply here.
12 Mr. Frasier waited nearly four years to file his appeal.
13 Following Judge Dennis's PCR ruling, trial counsel -- plea
14 counsel testified that Judge Dennis -- PCR counsel, I'm
15 sorry, Judge Dennis did inform him of his right to appeal at
16 the conclusion of the PCR hearing.
17 Your Honor, we are going to argue that the State is
18 prejudiced by Mr. Frasier's waiting four years to file
19 notice of appeal. At this time, we tried to acquire PCR
20 transcripts from the clerk of court and that has been
21 destroyed. So we don't have any record of the PCR hearing
22 to go on. So we are going to argue that laches applies here
23 and that this claim should be barred under that.
24 THE COURT: Thank you, Counsel. I'm going to take
25 the time to review the record that we do have, along with

1 the record submitted. And I will notify you of an opinion.
2 MR. FALK: Thank you.
3 MS. CLEVELAND: Thank you.
4 (Whereupon, the proceedings are adjourned.)
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER

2

3 I, Karen V. Andersen, Registered Merit Reporter,

4 Certified Realtime Reporter for the State of South Carolina

5 at Large, do hereby certify that the foregoing transcript is

6 a true, accurate and complete Transcript of Record of the

7 proceedings.

8 I further certify that I am neither related to nor

9 counsel for any party to the cause pending or interested in

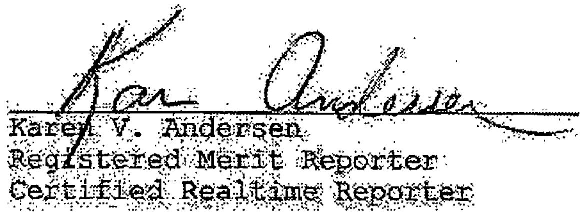
10 the events thereof.

11

12

13

14



15 Karen V. Andersen

16 Registered Merit Reporter
Certified Realtime Reporter

17

18

19

20

21

22

23

24

25

December 31, 2015

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

Re: Moses Frasier v. State
Appellate Case No. 2015-002609
Lower Court Case No. 2009CP1001183

Dear Mr. Shearouse:

I am writing in response to your letter dated December 23, 2015 regarding the above-named matter. By way of an explanation, in January 2012 I represented Moses Frasier at his PCR hearing in what was my first and only court-appointed case. Shortly after the completion of the case I received notice from the South Carolina Bar that I was exempt from any future appointed cases due to my position at One80 Place, the homeless shelter in Charleston. In that position I provide free civil legal representation to individuals who are homeless.

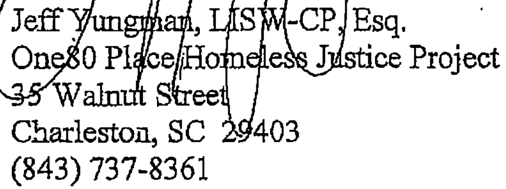
Being a relatively new attorney and having no criminal experience, I apparently made some incorrect assumptions at the close of this case: 1) that the court would send a copy of the order to both me and my client, 2) that my representation ended with the PCR hearing, and 3) that my client would file an appeal upon receipt of the order as he was instructed to do by Judge Dennis, who presided at the hearing.

In October 2015 I received a phone call from my client's mother. She told me that my client wanted a copy of the order from the January 2012 PCR hearing. I mailed a copy to the address given to me by his mother. Approximately six weeks letter the order was returned to me marked "undeliverable." I contacted my client's mother. Apparently there was an error in the address she had given me. I then again mailed a copy of the order to my client and according to his mother, he finally received a copy on December 8, 2015.

As a result, it would appear that while I received written notice of entry of the order in February 2012, Moses Frasier did not receive a copy of the order until December 2015.

If you require any additional information please feel free to contact me. As an aside, your letter stated that "a copy of the notice of appeal and proof of services is enclosed." Neither of those items were enclosed with your letter.

Sincerely,



Jeff Yungman, LISW-CP, Esq.
One80 Place/Homeless Justice Project
35 Walnut Street
Charleston, SC 29403
(843) 737-8361

CE 740
AG-mail
AT
GS
SOC

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

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

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

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

I. PROCEDURAL HISTORY

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

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

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

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

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

II. ALLEGATIONS

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

unlawfully for the following reasons:

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

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

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

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

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

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

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

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

IV. APPLICABLE LAW

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

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Ineffective Assistance of PCR Counsel

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

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

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

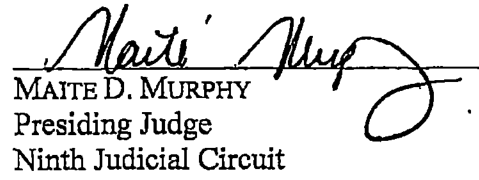
IT IS THEREFORE ORDERED:

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

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

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

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



MAITE D. MURPHY
Presiding Judge
Ninth Judicial Circuit

St. George, South Carolina

DN 2003-08-03560

WITNESSES

KEITH HAIR AND/OR

MATT CASEY

GOLDSTEIN, CPD

0315688

ARREST WARRANT NUMBER

DIRECT INDICTMENT

JULY 30, 2003

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury JUN 12 2006

VERDICT

~~Guilty of Murder~~

Guilty of Voluntary Manslaughter

~~Not Guilty~~

Foreperson of Petit Jury 10-5-06 *Date:*

DOCKET NO. 2006-GS-10-4259

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

JUNE TERM 2006

THE STATE

vs.

MOSES AKHENATON FRAISER A/K/A MOSES AKHENATON FRASIER

Indictment for

MURDER

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR MURDER
	)	
COUNTY OF CHARLESTON	)	

At a Court of General Sessions, convened on June 12, 2006 the Grand Jurors of Charleston County present upon their oath:

That Moses Akhenaton Fraiser a/k/a Moses Akhenaton Frasier did in Charleston County, on or about July 30, 2003, alone or while acting with others, feloniously, willfully and with malice aforethought, kill Kenneth Boston through the affliction of blunt force trauma that proximately caused the death of Kenneth Boston on or about July 30, 2003. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
STATE
VS.
Moses Frasier
AKA:
Race: B Sex: M Age: 25
DOB: [redacted] SS#: [redacted]
Address: [redacted]
CHARLESTON, SC 29403
DL#: SID#:

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2006GS104259
A/W#: 2006GS104259 (DI)
Date of Offense: 00-00-0000
S.C. Code § : 16-03-0010, 0020
CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Voluntary Manslaughter
in violation of § 16-03-0050 of the S.C. Code of Laws, bearing CDR Code # 0217
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [signature]
Solicitor: | Defendant | Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 ~~days/months/~~years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 1161 days
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §7-25-135

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms:
☐ set by SCDPPPS
Recipient:

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$ 25.00
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$ 3.75
TOTAL		$ 128.75

PTUP
_____ days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E begining
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other:

☐ Appointed PD or appointed other counsel §35.13 TP Requires $500 be paid to Clerk during probation.

S Rinehart
Clerk of Court/ Deputy Clerk
Court Reporter: B. Cooley

PRESIDING JUDGE [signature]
Judge Code: 2 1 1 1 4
Sentence Date: 10/5/06