VOLUME THREE OF THREE

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Oconee County

J. Cordell Maddox, Jr., Circuit Court Judge

JAMES RANDOLPH FRADY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-207126

APPENDIX

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ATTORNEYS FOR RESPONDENT

INDEX

Ineffective Assistance of Counsel

1. Failure to Adequately Represent Applicant

The Applicant asserts that trial counsel was ineffective for failing to discharge his professional responsibilities while handling Applicant's case; failing to act as Applicant's advocate; failing to pursue plea negotiations that may have proven advantageous to Applicant; failing to properly consult with Applicant and keep Applicant informed of the status of his case; failing to discuss any kind of defense strategy with Applicant; and for failing to explain or discuss with Applicant the tactical choices that were available or that counsel planned on using. This Court finds that these allegations are without merit. This Court finds Applicant's testimony is not credible. Thus Court further finds counsel and Ms. Waldrep to be credible. Counsel testified that he met with Applicant six to seven times and that counsel and Applicant extensively discussed Applicant's case. Counsel testified that he met with Applicant to discuss the state's evidence, Applicant's version of events, the results of Kelly Fite's ballistics investigation, the results of Jody McCurley's investigation, possible defenses, and trial strategy. Ms. Waldrep also testified that she met with Applicant several times to discuss the case as well as Applicant's right to testify or not testify and that Applicant was very informative and helpful in forming his defense. Counsel testified that when he was appointed to represent the Applicant, Applicant did not want to plead guilty and wanted to proceed to trial.

The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from

counsel's alleged lack of time to prepare. United States v. Cronic, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). Here, the Applicant could not point to any specific matters counsel failed to discover or discuss with Applicant which would have likely caused the outcome of Applicant's trial to be different. This Court finds that counsel and Ms. Waldrep met with Applicant multiple times and kept Applicant informed of the status of his and that Applicant was actively involved in preparing his defense. This Court finds that prior to counsel's representation there may have a plea offer on the table, however when counsel began to represent Applicant, Applicant had made the decision to proceed trial and did not want to plead guilty. This Court finds that Applicant has failed to show that counsel's representation was deficient and any resulting prejudice; therefore, this Court finds that these allegations are denied and dismissed.

2. Failure to Investigate

The Applicant alleges that trial counsel was ineffective for failing to prepare and investigate Applicant's case prior to trial; failing to conduct legal research regarding Miranda violations, suppression motion, and motion for change of venue; and for failing to adequately investigate and pursue fingerprint evidence. This Court finds that these allegations are without merit. At the PCR counsel testified that he hired a private investigator, Jody McCurley, to assist with Applicant's case. Counsel testified that he obtained funds for Kelly Fite to review the ballistics in Applicant's case. The results of both investigations were discussed with Applicant by counsel and Ms. Waldrep. Ms. Waldrep testified that she conducted legal research concerning the motion to change venue and counsel testified that he filed a written motion to change venue. Counsel explained that he decided to withdraw the motion to change venue after the trial judge

questioned each individual juror concerning pre-trial publicity. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). The record reflects that the trial judge extensively questioned each juror about the amount of pre-trial publicity they had been exposed to. The trial judge found that the jurors selected could put aside the media and decide the case solely upon the evidence presented at trial. It was after the trial judge's finding that counsel withdrew his motion to change venue. This Court finds that counsel articulated valid strategic reasons for withdrawing the motion. Additionally, this Court finds that even if counsel proceeded with his motion, the motion would have been denied based on the trial judge's findings in the record. Moreover, the record reflects that Applicant agreed with the decision to withdraw the motion. The Applicant has not shown counsel was deficient in that choice of tactics. This Court also finds that Ms. Waldrep adequately researched change of venue. Applicant has not shown counsel's performance was deficient and any resulting prejudice. This Court finds that this allegation is denied and dismissed.

With regard to Applicant's allegation that trial counsel failed to research and argue the motion to suppress based on a Miranda violation, Applicant has failed to meet his burden of proof. Ms. Waldrep testified that she conducted legal research regarding the motion presented at the pre-trial hearing. The record reflects counsel presented the motion to suppress and argued the motion at the pre-trial hearing. Counsel presented case

law in support of his argument; however the trial court overruled counsel's objections and denied the motion to suppress. The Applicant did not present any evidence or testimony concerning a more adequate argument for the motion to suppress, nor did Applicant present any case law to support his allegation. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds and the record reflects that counsel articulated valid strategic reasons for his strategy in arguing the motion to suppress. The Applicant has not shown counsel was deficient in that choice of tactics. This Court finds the necessary legal research was done and the motion properly presented and argued at trial. The Applicant failed to show any resulting prejudice; therefore this allegation is denied and dismissed.

As to Applicant's claim that counsel failed to investigate the fingerprint evidence, Counsel testified that the prints found on the van did not belong to the Applicant. Counsel testified that the absence of Applicant's fingerprints and the presence of a third-party's fingerprints was something that counsel brought out during trial. The record reflects that counsel cross-examined Mr. Steven Curtis regarding the fact that the Applicant's fingerprints were not found and that the van had evidence of someone else's fingerprints. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Applicant did not present a fingerprint analysis or any type of evidence concerning the lack of a fingerprint

investigation at the PCR hearing. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore this allegation is denied and dismissed.

3. Failure to Properly Advise of Right to Testify and Not Testify

Applicant asserts that trial counsel was ineffective for failing to properly advise Applicant of his right to testify or not testify and coerced Applicant to relinquish his right to testify on his own behalf. This Court finds that this allegation is without merit. Counsel testified that he and Applicant discussed Applicant's right to testify or not testify prior to trial and during trial. Counsel testified that he wanted Applicant to testify at trial in order to refute the state's evidence and testimony. Counsel testified that Applicant made the decision not to testify. Ms. Waldrep testified as well that Applicant never informed counsel that he wanted to testify and counsel never told Applicant he could not testify. Ms. Waldrep testified that Applicant was concerned about being cross-examined and did not want to look bad for the jury. The record reflects the trial judge discussed Applicant's right to testify or not testify and the Applicant indicated that he understood his rights. (Tr. p.585). The trial judge asked Applicant if the decision was Applicant's and not anyone else's, and the Applicant indicated that it was has decision alone. (Tr. p.585, lines10-12). Applicant informed the trial court that it was his decision not to testify. (Tr. p.585, lines16-20). This Court finds that Applicant was adequately advised of his right to testify or not testify by both counsel and Ms. Waldrep as well as by the trial judge on the record. Applicant testified under oath that it was his decision not to testify at trial. This Court finds that Applicant has failed to show that counsel's performance was deficient or that counsel coerced Applicant into not testifying. This Court finds that Applicant cannot

show any resulting prejudice as he informed the trial judge that he did not want to testify; therefore, this allegation is denied and dismissed.

4. Failure to Effectively Challenge the State's Case

The Applicant asserts that trial counsel was ineffective for failing to effectively challenge the search and seizure issue; failing to adequately challenge a statement made by a witness for the state; failing to challenge the admission of evidence that had been withheld from the defense in violation of Rule 5; and for failing to challenge the admission of evidence based on a broken chain of custody. This Court finds that these allegations are without merit. This Court has already found that trial counsel was not ineffective in researching and arguing the motion to suppress based on a Miranda violation. The record reflects that counsel filed a motion to suppress the search warrant based on a violation of S.C. Code §17-13-140. (Aug. 28, 2006 Tr. p.24, lines5-13). The record reflects that counsel filed this motion out of an abundance of caution and that counsel discussed this issue with Applicant. (Id. p.31, lines16-22). The record further reflects that counsel explained his reasons for withdrawing the motion to suppress. (Id. p.31, line23 – p. 32, line25).

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds that counsel articulated valid strategic reasons for withdrawing the motion to suppress the search warrants. Applicant did not provide an alternative argument that

counsel should have argued in the motion to suppress, nor did Applicant provide any additional support that counsel failed to present in the motion. This Court finds that Applicant has not shown counsel was deficient in that choice of tactics. This Court also finds that Applicant has not shown resulting prejudice from counsel's alleged deficiency; therefore this allegation is denied and dismissed.

Applicant alleges that trial counsel was ineffective for failing to challenge Mr. Harper's testimony at trial that was sheer speculation. Applicant directs this Court's attention to Mr. Harper's testimony "that due to a defect in the door handle of the van, that he, his son, and Applicant were the only people who knew how to open the doors to get in the van." (Tr. p.473-475). A review of the record reflects that counsel objected to the testimony and a bench conference was held. (Tr. p.473, line25 – p. 474, line3). Additionally, Mr. Harper's testimony at the PCR hearing did not differ from Mr. Harper's testimony at trial. The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. This Court finds that Applicant failed to show counsel's

performance was deficient and any resulting prejudice; therefore this allegation is denied and dismissed.

Next, Applicant alleges trial counsel was ineffective for failing to challenge admission of evidence that was withheld from the defense in violation of Rule 5. At the PCR hearing counsel testified that he filed a discovery motion and received the discovery materials from the state. Applicant does not point any specific evidence that was withheld. Applicant did not present any testimony or introduce into evidence at the PCR hearing the alleged evidence that had been withheld. This Court notes and the record reflects that counsel made a motion to produce certain photographs at the pre-trial motion hearing and that the defense was provided with the photographs. (Aug. 28, 2006 Tr. p.34-36). In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268. This Court finds that Applicant failed to show that any evidence was suppressed. Applicant is unable to show that counsel's performance was deficient and any resulting prejudice. This Court finds that this allegation is denied and dismissed.

As to Applicant's allegation that trial counsel was ineffective for failing to challenge the admission of evidence based on a broken chain of custody, this Court finds

Applicant has failed to meet his burden of proof. Applicant generally asserts counsel failed to make a challenge to the evidence on the basis that the chain of custody was broken. Applicant does not specify what evidence counsel should have directed his objection at, nor does Applicant provide this Court with arguments that counsel should have made. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore this allegation is denied and dismissed.

5. Failure to Adequately Defend

Applicant alleges that trial counsel was ineffective for failing to put forth any argument for a minimum sentence at Applicant's sentencing; failing to adequately object and request a better curative instruction when the solicitor stated in closing argument that Applicant had threatened to kill the victims prior to the actual murders; and for failing to call alibi witnesses that would have proven Applicant's innocence. This Court finds that these allegations are without merit. As to Applicant's claim that trial counsel failed to argue for the minimum sentence, this Court finds that Applicant has not met his burden of proof. This Court notes that Applicant was found guilty of multiple violent and most serious crimes. The record reflects that the trial judge gave Applicant the opportunity to speak during sentencing and the Applicant declined to address the court. (Tr. p.668, lines1-4). The Applicant has failed to show what argument counsel should have made for a minimum sentence. This Court finds that when given the opportunity, Applicant did not request and/or argue for a minimum sentence on his own behalf. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

Applicant alleges that trial counsel was ineffective for failing to object and request a better curative instruction when the solicitor stated in closing argument that Applicant had threatened to kill to the victims prior to the actual murders. The record reflects counsel made an objection to the solicitor's comment regarding a prior threat made by Applicant towards the victims. (Tr. p.614, line24 – p.615, line2; p.628-635). Counsel's objection was sustained by the trial court. (Tr. p.634, lines4-9). The record further reflects that the trial court gave the jury a curative instruction. (Tr. p.635, line16 – p.636, line5). This Court finds that contrary to Applicant's assertion, counsel did object to the solicitor's comment and that this objection was sustained by the trial court. Additionally, this Court finds that Applicant failed to show how the curative instruction was insufficient and what instruction counsel should have requested. Applicant has failed to show counsel's performance was deficient and any resulting prejudice. This Court finds that this allegation is denied and dismissed.

The Applicant further alleges counsel was ineffective for failing to call alibi witnesses that would have proven Applicant's innocence. At the PCR hearing Ms. Waldrep testified that Applicant provided the names of witnesses for his defense and that those witnesses were contacted. This Court finds that Applicant did not present any alibi witnesses at the PCR hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness'

failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Accordingly, Applicant has failed to show resulting prejudice and cannot meet his burden of proof that trial counsel was ineffective. This Court finds that this allegation is denied and dismissed.

Prosecutorial Misconduct

Applicant alleges that the prosecutor's closing remarks to the jury were both inflammatory and erroneous statements of law, and that this amounted to misconduct rendering the proceedings fundamentally unfair. The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Furthermore, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. To be entitled to a new trial for improper closing arguments, the test is whether "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001). After reviewing the entire record, this Court does not find any comments by the solicitor so infected the trial that a new trial is warranted. This Court is not convinced that the solicitor's arguments even reach the level of being improper, but certainly there is no evidence that Applicant was prejudiced. This Court finds that Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

V. CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court

to grant his application for post conviction relief. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

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

2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 4th day of January, 2012

J. Cordell Maddox, Jr.
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JAN 19 PM 2 57

A TRUE COPY
JAN 19 2012
CLERK OF COURT - OCONEE COUNTY

Exhibit E

Renee H. Tollison

Circuit Court Reporter

PO. Box 4321
Anderson, SC 29622

Fax: (864) 934-6279

Loriene French, Legal Assistant
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, S C 29211-1589

March 13, 2012

RE: James Randolph Frady v. State

Dear Ms. French:

Enclosed is the partial transcript in the above referenced case. As stated in my email to you on March 3, 2012, I've run into a problem on this transcript. My recording from my primary recorder has a roar on it and is inaudible, and my backup starts in the middle of the hearing. I had installed new software on my computer at the end of August that was supposed to back up my primary and didn't realize it was causing a problem. I apologize for the inconvenience this may cause.

Sincerely,

Renee H. Tollison

Renee H. Tollison
Circuit Court Reporter

cc: SC Court Administration

Exhibit F

State of South Carolina

County of Oconee

In the Court of Common Pleas

James Randolph Frady,	)	
	)	
Applicant,	)	2009-CP-37-0451
	)	
-vs-	)	
	)	October 3, 2011
State of South Carolina,	)	
	)	
Respondent.	)	Transcript of Record
	)	
	)	

BEFORE:

The Honorable J. Cordell Maddox, Jr., Judge

APPEARANCES:

Rodney W. Richey, Esquire
Attorney for the Applicant

Kaelon E. May, Esquire
Attorney the State

Renee H. Tollison
Circuit Court Reporter

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EXHIBITS

No	DESCRIPTION	ID	EV

No exhibits were presented during the hearing

(WHEREUPON, court convened with all parties present and the following proceedings were had commencing at approximately 10:36 a.m.)

(Due to equipment malfunction, the record of the first 44 minutes of this hearing were not preserved.)

CHUCK ALLEN,

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

CROSS-EXAMINATION

BY MS. MAY:

A. Page 50?

Q. Yes.

A. Okay.

Q. Just do you recall challenging the arrest and seizure of Mr. Frady in those pages?

A. I don't see an objection. You can refer my attention to it maybe.

Q. I'll refer you to page 59.

A. 59?

Q. Yes. It's at the very bottom, line 23 and onwards.

A. Okay. I see.

Q. I just wanted to refresh your recollection. So you recall challenging the arrest and seizure of Mr. Frady?

A. Yeah. I see one objection here to maybe something he said when they were -- seems like that was maybe when

they restrained him when they went to his home and did the search. Maybe that was it. I'm not absolutely certain. But yeah, I see an objection there on the Fifth Amendment, yes. That he had not been Mirandized, yeah, I see that.

MS. MAY: Beg the Court's indulgence, Your Honor.

(Pause)

MS. MAY: Those are all the questions I have.

MR. RICHEY: Just a couple more.

REDIRECT EXAMINATION

BY MR. RICHEY:

Q. Mr. Allen, do you recall if there was DNA found on that shells? Do you recall any DNA evidence?

A. I recall the absence of DNA as far as the investigation. That's what I'm saying. The only forensics was the -- that one shell.

Q. And on the night that the murder was supposed to have happened, do you recall that Mr. Harvey was not at home, that he found out the car -- the van was stolen when he got back home? Do you remember that being the case?

A. Yeah, but I'd be willing to have my recollection refreshed. But yeah, they had been somewhere and then they came home. Maybe so, maybe so.

Q. Thank you.

THE COURT: Thank you, sir. You can step down.

MR. RICHEY: No other witnesses.

Ms. MAY: Your Honor, the State would like to call Ms. Waldrep.

THE COURT: Okay.

THE WITNESS: My name is Caroline Elizabeth Waldrep.

Ms. MAY: May it please the Court.

CAROLINE ELIZABETH WALDREP,

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. MAY:

Q. Ms. Waldrep, do you recall when you became involved with Mr. Frady's case?

A. Yes. Shortly after Mr. Allen was appointed, he was running into problems that I think so many defense attorneys have in trying to get a case together. You know, the defendant is so seriously disadvantaged by the resources that the State has at its disposal. And so Mr. Allen knew that I had previously for a brief period of time worked for Indigent Defense in Columbia and asked me if I could help him with putting this case together. He knew it was going to trial, and he asked me if I could help him secure an investigator and experts that would be

necessary for the trial of this case. And that's when I became involved and began preparing motions for the judge to approve and for Indigent Defense to approve because that's an arduous process in and of itself trying to get any money out of Indigent Defense.

Q. And were you successful in getting money?

A. Yes, we were successful. I believe that the money that we requested was cut somewhat, but we were successful in getting money for Jody McCurley to go out and interview witnesses, to go to the crime scene, to do background checks, to run phone records, and also to hire Kelly Fike from Atlanta to do a ballistics evaluation of the shotgun shell that was recovered from the crime scene.

Q. Okay. And did you help -- did you conduct any research, any case law research, for the case?

A. Yes, I did. There was -- we did some research, and we also -- I helped Chuck with some motions. That was one of the things that we were very concerned about the venue, the change of venue. And I know that Randy was very concerned about that as well because, you know, we did believe that this case had received a fair amount of publicity up here. And Judge Buckner went through one-by-one and interviewed the witness -- pardon me -- the potential jurors and asked them very specifically about

what they had read or heard about this case.

Q. And did you have a chance to meet with Mr. Frady?

A. Yes, on several occasions. He was always very helpful, very involved in the case and very forthcoming, I believed, you know, about his wishes and how it was to be tried. And we talked to people that he wanted us to talk to, and he was always very pleasant to deal with.

Q. And do you recall at the meetings that you were present for, what was discussed or what the meetings were about?

A. The meetings were largely about, you know, trial strategy and going over with Randy the people that we knew were going to testify. For instance, I knew that the issue of the van and the recovery of the van and the possibility that the evidence had been tainted in some way because it was returned to Mr. and Mrs. Harper was a very big issue for Randy, and we were concerned about that. We were concerned about the whole case since it was circumstantial, but we talked about that. And that's why Chuck and Jody actually went out to the -- you know, to talk to the Harpers. And also the time line was something that was discussed a lot about when the van was recovered, when the van burned and that we had put up basically the case that he would not have had time to go on foot, you know, home when -- it was basically a time

line issue that we discussed a lot.

Q. And did -- during those discussions, did Mr. Frady understand, seem to understand, or was he engaged in those discussions?

A. Yes, he was. We were very, you know -- it was a circumstantial case, and I understand that the jury did its job. But you know, we had -- you know, I know that he believed -- it was my opinion that he believed that there was just not enough evidence to convict him. In fact, I believe the State was concerned about that as well because Mindy Hervey, who was the assistant solicitor who prosecuted the case for Chrissy Adams -- I believe in her opening statement she went through the speech that so many prosecutors give at this time about this is not CSI, they're -- you know, we're -- there's -- you know, it's not on videotape. There's not, you know, the blood experts. And I believe they were concerned about that as well as the lack of anything other than circumstantial evidence.

Q. No further questions. Please answer any questions Mr. Richey has.

CROSS-EXAMINATION

BY MR. RICHEY:

Q. Ms. Waldrep, were you there during the time where the discussion was made whether he was going to testify

or not?

A. There were several discussions about that, Mr. Richey. I believe that -- like I said, I believe that he was concerned about cross-examination, and he didn't, I don't believe, want to say anything wrong that would make him look bad to the jury. And you know, it was -- I can tell you with absolute certainty that there was never any sort of discussion where he was saying, I want to testify, and Mr. Allen was saying, no, please don't. That never -- or no, you're not going to. It's going to hurt you. It's in your -- you know, I do not recall that at all. I do not recall a time at which he ever said wanted to testify.

Q. So your testimony is in direct conflict with Mr. Frady's? You understand Mr. Frady testified ---

A. Yes, sir, I'm afraid so.

Q. Okay. So it's your testimony that you all -- he basically said, I don't want to testify?

A. That is what I recall.

Q. No more questions.

THE COURT: Thank you, ma'am.

Anything in rebuttal?

MR. RICHEY: We want to recall one witness real brief, Mr. Frady, for one or two questions.

THE COURT: All right.

Come around. Mr. Frady, you're still under oath.

JAMES RANDOLPH FRADY,

BEING PREVIOUSLY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. RICHEY:

Q. Mr. Frady, you've been in the courtroom and you've heard the testimony surrounding your testifying at trial where Ms. Waldrep has said that you emphatically did not want to testify. Do you understand? I mean ...

A. I understand. The only reason I didn't testify is because they asked me not to.

Q. You did not emphatically tell them you did not want to testify?

A. No.

Q. Did you say anything to make them believe you didn't want to testify?

A. Not to my knowledge, no.

Q. Okay. Do you have any reason why they would come in here to say that, I mean, at all?

A. That's the way I was instructed to conduct myself at this time.

Q. Okay. Thank you, sir.

THE COURT: All right. Thank you, sir. You can step down.

(WHEREUPON, the witness stepped down from the

witness stand.)

THE COURT: Nothing else?

MR. RICHEY: Yes, sir.

THE COURT: All right. I'll take it under advisement and let you know next week.

MR. RICHEY: Thank you, sir.

(WHEREUPON, the hearing ended at approximately 11:32 a.m.)

*** END OF REQUESTED TRANSCRIPT OF RECORD ***

CERTIFICATE OF REPORTER

I, the undersigned Renee H. Tollison, Official Court Reporter for the Tenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Oconee County, South Carolina, on the 3rd day of October 2011.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

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

March 13, 2012

Renee H. Tollison

Circuit Court Reporter

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO OCONEE COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2009-CP-37-0451
Appellate Case No. 2012-207126

JAMES RANDOLPH FRADY, 317328,.....Petitioner,

v.

STATE OF SOUTH CAROLINA,.....Respondent.

RETURN TO MOTION TO REMAND FOR RECORD RECONSTRUCTION

In response to Petitioner's Motion to Remand for a Reconstruction hearing of the October 3, 2011, post-conviction relief hearing in this matter, and for appointment of counsel to represent Petitioner for the reconstruction hearing, the Respondent respectfully submits the following:

1. The Respondent adopts the facts set forth by Petitioner in the Motion to Remand for Record Reconstruction.

2. The Respondent opposes Petitioner's Motion to Remand for Record Reconstruction.

3. The Order of Dismissal (Petitioner's Exhibit D) contains detailed summaries

of the testimony presented by each witness at the post-conviction relief hearing on October 3, 2011.

4. The Petitioner's allegations were extensively addressed and ruled upon in the in the Order of Dismissal.

5. The Respondent submits that the findings of fact in the Order of Dismissal are specific and complete on every issue; evidenced by the fact that Petitioner did not identify or complain of any omissions in the Order of Dismissal prior to or after issuance of the Order of Dismissal by Judge Maddox.

6. The Respondent submits that the Order of Dismissal is the best evidence of the October 3, 2011, post-conviction relief evidentiary hearing.

7. The Petitioner fails to identify any issues that cannot be reviewed absent a full development of the record. See Koon v. State, 358 S.C. 359, 595 S.E.2d 456 (2004), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

8. The Respondent submits that Petitioner fails to show why a meaningful review cannot be given to Petitioner's case in the absence of part of the post-conviction relief hearing transcript, when the Order of Dismissal contains the testimony presented at the hearing and the required findings of fact and conclusions of law.

9. The Respondent submits that a reconstruction of the October 3, 2011, post-conviction relief hearing is not warranted.

10. In the event this Court grants Petitioner's motion to remand for reconstruction, Respondent would submit that only a reconstruction of the missing part of the post-conviction relief hearing transcript is necessary.

CONCLUSION

For the foregoing reasons, the Respondent opposes Petitioner's Motion to Remand for a Reconstruction of the record of Petitioner's October 3, 2011 post-conviction relief hearing and respectfully requests Petitioner's Motion be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

KAELON E. MAY
Bar No. 80469
Assistant Attorney General

By: _____
ATTORNEY FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

July 16, 2012

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Oconee County

J. Cordell Maddox, Jr., Circuit Court Judge

JAMES RANDOLPH FRADY,

PETITIONER,

V.

THE STATE,

RESPONDENT.

REPLY TO RETURN
TO MOTION FOR REMAND
FOR RECORD RECONSTRUCTION

Petitioner James R. Frady respectfully submits that, contrary to the argument advanced by the State, an Order remanding this case to the Oconee County Court of Common Pleas for a reconstruction hearing of the October 3, 2011, post-conviction relief evidentiary (PCR) hearing in this matter is necessary. In support of this motion, Petitioner alleges the following:

(1) The State's assertion that a reconstruction hearing is unnecessary because "the findings of fact in the Order of Dismissal are specific and complete on every issue" is misplaced (Respondent's Return to Motion to Remand for Record Reconstruction, paragraph 5), as it overlooks the standard of review Petitioner will have to meet when challenging the PCR court's

Order of Dismissal: when challenging the findings of the PCR court, Petitioner will have to show that no "evidence of probative value in the record exists to support the findings of the PCR court." See, e.g., Narciso v. State, 397 S.C. 24, 29, 723 S.E.2d 369, 371 (2012).

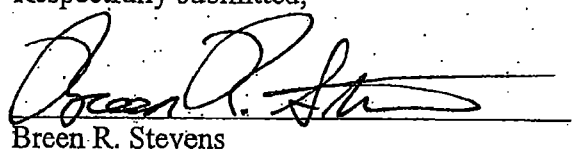
(2) That Petitioner can only show the PCR court's factual findings are without evidentiary support in the record on a given issue if the actual record exists for review.

(3) That the certified court reporter, Ms. Renee H. Tollison, experienced malfunctions in her primary recording system such that it was inaudible, and her backup software only began to function in the middle of the hearing. The index of the partial transcript produced Ms. Tollison indicates testimony from three of six witnesses is completely missing, as well as the direct testimony of a fourth witness. Notably, the missing testimony is from witnesses produced by Petitioner in support of his numerous claims.

(4) That in the interests of fundamental fairness, remand for record reconstruction of the October 3, 2011 PCR evidentiary hearing is necessary in this instance because "the incomplete nature of this transcript prevents the appellate court from conducting a meaningful appellate review." State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 274 (Ct. App. 2007) (internal quotations omitted); see also Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002).

Accordingly, in order to allow meaningful appellate review, Petitioner respectfully requests that this Court remand his case to the Oconee County Court of Common Pleas for reconstruction of the October 3, 2011, post-conviction relief evidentiary hearing.

Respectfully submitted,



Breen R. Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

July 20, 2012

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Oconee County

J. Cordell Maddox, Jr., Circuit Court Judge

JAMES RANDOLPH FRADY,

PETITIONER,

V.

THE STATE,

RESPONDENT.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Motion to Remand for Record Reconstruction in the above case has been served upon Kaelon E. May, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of July, 2012.

Breen R. Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

SWORM TO BEFORE ME this 20th day of July, 2012.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

The Supreme Court of South Carolina

James Randolph Frady, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-207126

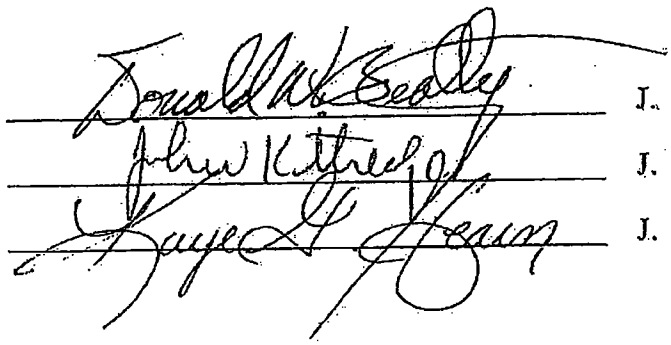
ORDER

This matter is before the Court by way of a notice of appeal from an order denying petitioner's application for post-conviction relief (PCR). Petitioner now moves the Court to remand the matter to the circuit court for reconstruction of the record because a portion of the recording of the PCR hearing is inaudible and cannot be transcribed. Petitioner also requests the Court appoint counsel to represent petitioner at the reconstruction hearing. The State opposes the motion.

We hereby grant the motion and remand this matter to the Honorable J. Cordell Maddox, Jr., to reconstruct the missing portion of the record in this matter. *See Koon v. State*, 358 S.C. 359, 595 S.E.2d 456 (2004), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002); *China v. Parrott*, 251 S.C. 329, 162 S.E.2d 276 (1968); *State v. Ladson*, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007). A hearing to reconstruct the record should be held within 45 days of the date of this order. If Judge Maddox determines reconstruction is not possible, he shall notify this Court and the parties within 15 days of the reconstruction hearing. If the record is reconstructed, the parties shall notify this Court and the matter will proceed upon petitioner's receipt of the transcript from the reconstruction hearing. Rodney Wade Richey is appointed to represent petitioner at the reconstruction hearing.

C.J.

J.



J.

J.

J.

Columbia, South Carolina

August 10, 2012

cc:
Kaelon Elizabeth May
Brian Richard Stevens
James Randolph Frady #317328
Rodney Richey
The Honorable J. Cordell Maddox, Jr.

State of South Carolina
The Circuit Court of the Tenth Judicial Circuit

J. Cordell Maddox, Jr.
Judge

Post Office Box 8002
Anderson, SC 29622
Phone: (864) 260-4636
Fax: (864) 260-6348
cmaddoxj@sccourts.org

February 28, 2013

Re: James Randolph Frady v. State of South Carolina, Appellate Case No. 2012-207126

Dear Chief Justice Jean Hoefer Toal;

This matter came before the court by way of an Order of the Supreme Court of South Carolina dated August 10, 2012, to reconstruct the missing portion of the record from the PCR hearing.

In accord with the order, I held a hearing on February 25, 2013 in Oconee County. Present at the hearing was Karen C. Ratigan of the Attorney General's Office, Rodney Richey, counsel for petitioner, petitioner, and witness Chuck Allen. Upon review of the transcript and consideration of issues presented at the hearing, I have determined that the record could not be reconstructed adequately.

The missing portion of the record contained all or portions the direct and cross examination of the petitioner and two witnesses, as well as the direct examination of witness Chuck Allen. The State presented extensive notes taken by Kaelon E. May, formerly of the Attorney General's Office, at the original hearing. The State asked the court to admit the notes as the best evidence of the record, as a means to reconstruct the record. Mr. Richey objected to this manner of reconstruction as potentially biased.

Although Chuck Allen and the petitioner were present and prepared to re-testify, the two additional witnesses whose testimony was absent from the original record, Michael and Tammy Harper, were not present.

Given these issues, as well as the gravity of the charge and the potential sentence, it is my conclusion that the record could not be sufficiently reconstructed at this hearing.

J. Cordell Maddox, Jr.

Walhalla, South Carolina
February 27, 2013

cc:

Justice Costa M. Pleicones
Justice Donald W. Beatty
Justice John W. Kittredge
Justice Kaye G. Hearn
Beverly Whitfield
Karen C. Ratigan
Rodney Richey
James Randolph Frady #317328

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
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March 18, 2013

Mr. Breen Richard Stevens
Division of Appellate Defense
1330 Lady St., Ste. 401
Columbia SC 29201

Re: James Randolph Frady v. The State
Appellate Case No. 2012-207126

Dear Counsel:

By letter dated February 28, 2013, the Honorable J. Cordell Maddox, Jr., advised this Court that the missing portions of the transcript of the PCR hearing could not be adequately reconstructed. Therefore, since you are already in possession of all of PCR transcript that will be available, the petition for writ of certiorari and appendix must be served and filed within thirty (30) days of the date of this letter.

Very truly yours,

CLERK

cc: John Walter Whitmire, Esquire