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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Richland County
Court of Common Pleas
Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2021–000946

ARTHUR W. MACON,

Petitioner,

vs.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

LILLIAN L. MEADOWS
Assistant Attorney General
S.C. Bar No. 103665

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

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

I. Did the post-conviction relief judge correctly determine trial counsel did not provide constitutionally ineffective assistance during jury deliberations where the trial judge gave an appropriate *Allen* charge when the jurors first announced deadlock; where counsel had no basis to move for a mistrial under section 14-7-1330 because the jurors never announced a second deadlock; and where trial counsel nonetheless made a strategic decision not to move for a mistrial at any point during deliberations because she reasonably believed the lengthy deliberations coupled with the jury's repeated requests to rehear testimony from multiple witnesses and rehear the trial judge's instructions on the law indicated the jury was actively engaged and carefully considering all the evidence?

II. Did the post-conviction relief judge correctly determine Macon failed to establish a conflict of interest existed based on trial counsel's relationship with the deputy solicitor where he had no involvement in the case whatsoever aside from assigning it out to the two assistant solicitors well before trial counsel even became involved in Macon's case?

III. Did the post-conviction relief judge correctly determine trial counsel was not constitutionally ineffective for failing to object the solicitor calling Macon a "liar" during his closing argument in reference to Macon's conflicting statements to law enforcement where trial counsel replied with logical explanations for each of the discrepancies in Macon's statements during her closing argument and where Macon nonetheless failed to establish that the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process?

IV. Did the post-conviction relief judge correctly determine trial counsel was not constitutionally ineffective for failing to object to the solicitor's sympathetic characterization of Macon's co-defendant during his closing argument based on improper vouching where trial vehemently objected to the subject testimony in its entirety at the appropriate time and where Macon neither identified any specific comments made during the solicitor's closing argument that constitute improper vouching given the testimony presented nor provided a basis upon which trial counsel could have objected?

V. Where Macon failed to establish any individual instances of deficient performance by trial counsel, did the post-conviction relief judge properly deny relief because a cumulative error analysis would apply only to the effect of matters actually determined to be constitutional error rather than the cumulative effect of non-errors?

VI. Did the post-conviction relief judge somehow commit a statutory or constitutional violation through the process by which he decided Macon's case when—following an evidentiary hearing—he employed a mine-run practice of asking the prevailing party to prepare a *proposed* order, considered what was presented to him, and then issued a final order that properly addressed every issue raised while also including specific findings of fact and conclusions of law as required by section 17-27-80?

STATEMENT OF THE CASE

On August 30, 2012, Arthur W. Macon (Petitioner) and his cousin, Jason Colon, robbed a TD Bank and absconded with $6,000. Macon was indicted for armed robbery and four counts of kidnapping by the Richland County Grand Jury on January 16, 2013. (App'x 2–3; 869–70). The indictments were subsequently amended on July 16, 2014. (App'x 867–68). On September 29, 2014, Macon proceeded to a jury trial before the Honorable DeAndrea G. Benjamin. (App'x 6–512). Kristy G. Goldberg represented Macon. Assistant Solicitors Richard C.R. Cathcart, Sr., and Jeremiah J. Shellenberg, II, of the Fifth Circuit Solicitor's Office prosecuted the case.

A. Summary of Evidence Adduced at Trial

At trial, Kevin Whaley (Whaley), who worked at the Hilton Garden Inn next to the TD Bank, testified that he pulled into the hotel parking lot between 4:30 and 5:00 pm. (App'x 212–13). As he got out of his car, Whaley noticed a man kneeling between two cars. (App'x 212–13). It appeared the man was trying to take his shirt off. (App'x 212). Noting that previous break-ins of automobiles had occurred in the hotel parking lot, Whaley approached the man—who was later identified as Colon—and asked him what he was doing. (App'x 213). In response, Colon looked up at him and immediately took off running away from the hotel towards the railroad tracks. (App'x 213–14). Whaley testified he never lost sight of Colon at that point and followed him on foot. (App'x 214).

Diana Williams (Diana) testified that she was driving by the TD Bank on Farrow Road when she noticed multiple police vehicles pulling into the TD Bank parking lot. (App'x 220). She stated that she had to pull over into the grass area several times to allow the officers to pass her. (App'x 220). As she was driving by the TD Bank, she observed a man—who was later identified as Colon—running from the bank parking lot and through the wooded area towards the adjacent Hilton Garden Inn parking lot. (App'x 220). She then called 9-1-1 as she continued to follow Colon in her car.

(App'x 221). Once he reached the hotel parking lot, Diana observed Colon conversing with another man—who she later identified as Macon—wearing a yellow t-shirt. (App'x 221–22). She observed Macon gesturing at Colon towards the back of the parking lot, "as if he was telling the [Colin] to go back that way." (App'x 222). Macon then got into the driver's seat of a black truck with a dent on the left side. (App'x 222–24).

As he was backing out, Macon nearly struck the front driver's side tire of Diana's vehicle. (App'x 223). She testified that she was able to get a good look at his face because he turned around and looked at her. (App'x 223–24). Both of their windows were down. (App'x 223). Diana remained on the phone with 9-1-1 as these events took place, relaying the details of what occurred and a description of the truck and its driver. (App'x 224–31). She was only able to give a partial plate number because the truck's tailgate was down. (App'x 225). Per the 9-1-1 operator's instructions, Diana turned down a side street where multiple law enforcement officers and their vehicles were located. (App'x 230–31). She was immediately approached by Sergeant Michael Mazerolle of Richland County Sheriff's Department. (App'x 231, 265–66). Mazerolle quickly got on the phone and relayed the detailed description of the vehicle and partial license plate number to other dispatch officers as Diana was providing him with this information. (App'x 231–32, 265–66).

A BOLO was subsequently issued on the black pickup. (App'x 252). Lieutenant Frieda Wyatt of the Richland County Sheriff's Department initiated a felony traffic stop on the black pickup truck as it was driving down Farrow Road. (App'x 249–53, 257–60). At trial, she identified Macon as the driver. (App'x 252–53). Mazorelle was then notified that a vehicle matching Diana's description was pulled over. (App'x 232, 266–67). He asked Diana, who was still at the scene, if she would be willing to make an ID of the person and vehicle. (App'x 232, 267). She agreed. (App'x 232, 267). Per his instructions, Diana drove behind Mazorelle in his vehicle down Farrow Road, past the area

where the black pickup truck was pulled over. (App'x 232–33, 266–68). She was able to identify Macon as the man in the yellow t-shirt that she had seen speaking with Colon in the parking lot of the Hilton and the black truck as the vehicle he was driving. (App'x 233, 267–68). Macon was subsequently arrested. (App'x 253–54).

Investigator Jason Williams of the Richland County Sheriff's Department testified he first responded to the location where Colon was apprehended, between the bank and the railroad tracks. (App'x 279). Williams testified he spoke briefly with Colon while he was detained in the back seat of another officer's vehicle. (App'x 279). He stated he did not ask Colon any questions at that time; however, Williams told Colon who he was and read his *Miranda* rights. (App'x 279–80). He testified that Colon "was sweating really bad and he was kind of nervous." (App'x 280). He instructed the deputies to transport Colon to headquarters and wait for him there. (App'x 281). Williams then went to the bank, where he spoke with the manager and the tellers that were working at the time of the robbery. (App'x 280). The manager provided him with pictures of the suspect. (App'x 280).

Williams then went to went back to headquarters to interview Colon. (App'x 281). At the beginning of the interview, Williams read Colon his *Miranda* rights again, which he waived. (App'x 281). However, he explained that Colon appeared distressed and testified that the interview "took kind of a while because it seemed like he wasn't all the way there." (App'x 284). Williams noted, in his opinion, that Colon was "a little mentally challenged," but he was comfortable that Colon understood his rights. (App'x 284, 288–89). Colon ultimately confessed to committing the robbery. (App'x 284).

The State then proffered testimony from Rick Woodberry, Colon's father. (App'x 291). At the conclusion of the proffer, Counsel objected to Woodberry's testimony regarding the head injury Colon sustained as a child. (App'x 297). Specially, she argued that Woodberry was not present when

Colon sustained the injury, and therefore any statement regarding the injury was hearsay. (App'x 297). Counsel further objected to the remainder of Woodberry's testimony—that Colon was "easily led" and "passive"—as irrelevant, improper character evidence designed to bolster Colon's testimony by "making it seem more or less likely that [Colon] may be passive, may be cooperative with the police, may be telling the truth." (App'x 297–98, 300–01). She further argued it was irrelevant to Macon's case. (App'x 298). Judge Benjamin ultimately ruled that Woodberry could testify about Colon's head injury and passive demeanor; however, he could not testify that Colon was "easily led" or went along with whatever others wanted to do. (App'x 299–304).

Woodberry then testified before the jury that his son was shot in the head by a stray bullet when they were living in Brooklyn, New York. (App'x 306). Counsel renewed her previous objection, which the court overruled. (App'x 306). Woodberry explained that the bullet entered Colon's temple, penetrated his frontal lobe, and exited through his temple on the other side. (App'x 306–07). He further testified that Colon, who was sixteen years old at the time, was essentially lobotomized by the bullet. (App'x 307). After he was shot, Colon was diagnosed with schizophrenia; began talking to himself; and became passive. (App'x 307). While Colon's condition improved with medication, Woodberry testified that he retained the cognitive ability of a thirteen-year-old. (App'x 307).

Colon then testified. (App'x 309). He explained that he originally went to the TD Bank intending to cash his unemployment check. (App'x 310, 318). However, Colon testified that Macon gave him a toy gun and told him to go into the bank and demand money. (App'x 311). Specifically, he recalled that Macon had colored in the orange tip of the toy gun to make it look real. (App'x 311). Colon testified that Macon instructed him to meet him in the front of the hotel after the robbery and get into the bed of his truck. (App'x 311–13). Colon's testimony waivered as to when Macon gave

him the toy gun. On cross-examination, Colon indicated that they planned the robbery months prior, which is when Macon gave him the gun. (App'x 319). However, on redirect, Colon suggested Macon gave him the gun on the day of the robbery. (App'x 320).

Investigator Kerry Johnson of the Richland County Sheriff's Department testified he interviewed Macon shortly after he was apprehended on the evening of August 30, 2012. (App'x 325). Johnson testified he began Macon's interview by reading his *Miranda* rights. (App'x 325). Macon signed the *Miranda* waiver form and agreed to answer his questions about what occurred that afternoon. (App'x 326–28). Johnson then asked Macon to tell him about his day. (App'x 329). Macon told him that he went to the Hilton Garden Inn to ask how much a room was. (App'x 329). Afterwards, Macon stated he spoke with someone in the parking lot who he identified as an employee of the hotel. (App'x 329). He then went back inside to get a job application and told Macon he was on his way home when he was pulled over. (App'x 329–30). Macon explicitly informed Johnson that no one was with him in the vehicle while he was driving around that day. (App'x 330). Johnson then asked Macon if he knew the other person that was arrested, and Macon responded that he did not have any knowledge of any other person being arrested. (App'x 330).

At that point, Johnson went down to the "D Cell" where Colon was being held and asked him how he knew the individual wearing a yellow shirt. (App'x 330–31). Colon identified the man as his cousin. (App'x 331). When Johnson advised Macon that Colon identified him as his cousin who dropped him off outside the bank, Macon modified his earlier statement. (App'x 331–32). He told Johnson that he was "confused" by Johnson's earlier questions and "forgot" to tell him that Colon had been riding around in the car with him. (App'x 331–32). He also claimed to be confused when Johnson asked him if he knew the other man that was arrested for the robbery. (App'x 332).

Macon went on to tell Johnson that Colon was his cousin, although he did not know if they

were biological cousins. (App'x 332). He claimed Colon was with him earlier in the day because Colon wanted a ride to "his homeboy's house," but Macon instead just dropped him off at a bus stop on Farrow Road. (App'x 332). The bus stop happened to be near the TD Bank and Hilton Garden Inn. (App'x 332). Macon denied knowing Colon robbed the bank; however, he could not offer a reason why he was still in the area right after the robbery. (App'x 332–33).

C. Verdict & Subsequent Proceedings

On October 3, 2014, the jury convicted Macon of armed robbery but acquitted him on all four counts of kidnapping. Judge Benjamin sentenced him to twenty-three years imprisonment.

Following an unsuccessful appeal, Macon submitted a timely application for post-conviction relief.[1] (App'x 612–26). Thereafter, Macon filed an amended application for post-conviction relief. (App'x 644–66). The State submitted its return requesting an evidentiary hearing on June 25, 2020. (App'x 667–80). An evidentiary hearing convened on April 16, 2021, before the Honorable Brooks P. Goldsmith via Cisco WebEx Meetings in accordance with the Chief Justice's administrative memorandum, *Court Operations*, dated September 14, 2020. (App'x 687–850). E. Charles Grose, Jr., represented Macon. Assistant Deputy Attorney General Lindsey A. McCallister and Assistant Attorney General Michael Davidson represented the State.

By order filed July 9, 2021, Judge Goldsmith denied post-conviction relief on all grounds and dismissed the action with prejudice. (App'x 875–907). Macon subsequently filed a timely motion to alter or amend pursuant to Rule 59(e), SCRCP, to which the State filed a return. (App'x 908; 982). Macon filed a reply to the State's return. (App'x 1002). By order filed August 17, 2021, Judge Goldsmith denied Macon's Rule 59(e) motion. (App'x 1007). Macon then timely initiated an appeal.

[1] The Richland County Clerk of Court initially refused to file the application. (App'x 612–26, 641–42). Macon subsequently served a petition for a writ of mandamus on October 7, 2019, requiring the Clerk of Court to file his application. (App'x 627–40). That Clerk of Court filed the application on October 4, 2019, rendering the petition for a writ of mandamus moot. (App'x 612).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, 422 S.C. at 180–81, 810 S.E.2d at 839–40. However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

LAW APPLICABLE TO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In post-conviction relief actions, the reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. *Id.* at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland*, 466 U.S. 668). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696.

The applicant bears the heavy burden of establishing both prongs of the *Strickland* standard by a preponderance of the evidence. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of "fell below an objective standard of reasonableness" as measured by "prevailing professional norms." *Strickland*, 466 U.S. at 688. Reviewing courts should be deferential in this inquiry, and apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

With respect to prejudice, the applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* When evaluating this probability, the reviewing court "should consider the specific impact counsel's error had on the outcome of the trial" coupled with "the strength of the State's case in light of . . . the [totality of the] evidence presented to the jury." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018).

ARGUMENT

I. The post-conviction relief judge correctly determined trial counsel did not provide constitutionally ineffective assistance during jury deliberations where the trial judge gave an appropriate *Allen* charge when the jurors first announced deadlock; where counsel had no basis to move for a mistrial under section 14-7-1330 because the jurors never announced a second deadlock; and where trial counsel nonetheless made a strategic decision not to move for a mistrial at any point during deliberations because she reasonably believed the lengthy deliberations coupled with the jury's repeated requests to rehear testimony from multiple witnesses and rehear the trial judge's instructions on the law indicated the jury was actively engaged and carefully considering all the evidence.

Macon contends the post-conviction relief judge erred by failing to find trial counsel provided constitutionally ineffective assistance during jury deliberations. Specifically, Macon claims trial counsel failed to ask for an *Allen*[2] charge when the jurors first ostensibly announced a deadlock; failed to object to an *Allen* charge that allegedly singled out one individual juror; failed to move for a mistrial under section 14-7-1330; and failed to object to the trial court's purported deference to the majority jurors at the expense of the minority juror. To the contrary, the post-conviction relief judge properly concluded Macon failed to overcome the strong presumption trial counsel provided adequate representation to him during jury deliberations, and further failed to demonstrate her performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. As these findings are supported by probative evidence and do not constitute an error of law, this Court should deny certiorari.

A. Failure to request *Allen* charge after the jury submitted its third note four hours after beginning deliberations

Macon first contends Counsel's performance was constitutionally ineffective in the context of jury deliberations when she failed to request an *Allen* charge after the jury submitted a note to the judge stating, "We are not unanimous on any of the charges yet. How do you want us to proceed?" (App'x 428, 853). Although the jury had been deliberating for only four hours at that point, Macon claims the note coupled with the solicitor's comment in the following exchange supports his position that the jury was deadlocked:

THE COURT:	You want me to -- I don't know if I need to give them the Allen charge until they say --
MR. CATHCART:	They are deadlocked. Most ridiculous. But, no.

(App'x 428–29). The jurors were subsequently brought back into the courtroom, where the trial

[2] *Allen v. United States*, 164 U.S. 492 (1896).

judge instructed them to continue their deliberations. (App'x 429). Macon contends Counsel should have objected to the trial judge's instruction and requested an *Allen* charge.

At the PCR hearing, Counsel testified that the above-referenced exchange between the judge and the solicitor indicated the opposite—that they were in agreement that the jury was *not* deadlocked, and an *Allen* charge was therefore not appropriate at that time. She explained that the solicitor can be sarcastic or tongue-in-cheek, but he agreed with the judge that the jury was not indicating deadlock at that point. (App'x 715–16, 761–62, 764). Specifically, she testified that the solicitor "was kind of agreeing with [the judge] and finishing her sentence that she can't give an *Allen* charge until they are deadlocked." (App'x 715). Counsel further explained that the note's language included a qualifier—that the jury had not reached a decision **yet**—and therefore she agreed with the solicitor and trial judge that the note was not indicating deadlock in any way. (App'x 717, 763–64). The jurors' simultaneous request to rehear testimony of one of the State's witnesses, Diana Williams, further indicates the jury was not deadlocked.

Recognizing the strength and applicability of the presumption that counsel rendered effective assistance in accordance with *Strickland*, the PCR court correctly deferred to Counsel's explanation regarding the solicitor's comment where the record was somewhat unclear. *See Strickland*, 466 U.S. at 689 (instructing reviewing courts to make every effort scrutinize counsel's performance in a highly deferential manner, to make every effort "to eliminate the distorting effects of hindsight," and to "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances). Although this is a factual finding supported by ample probative evidence, Macon ignores Counsel's testimony on this issue by making the conclusory statement that the solicitor's comment—as a matter of law—establishes the jury was deadlocked. Macon fails to identify anything further in the record indicating an *Allen* charge was appropriate at that time.

Because the jury was not deadlocked, the PCR court correctly determined the trial court's instruction to continue their deliberations was appropriate. *Cf. Wiggins v. Boyette*, 635 F.3d 116, 127 (4th Cir. 2011) (finding an instruction that "simply explained to the jurors that they should continue to deliberate" to be non-coercive). Consequently, Counsel had no basis to object or request an *Allen* charge at that time. *See Winkler v. State*, 418 S.C. 643, 651, 795 S.E.2d 686, 691 (2016) ("Because no applicable precedent supported making an objection, we find trial counsel's decision not to object was reasonable.").

B. Failure to move for a mistrial under S.C. Code Ann. § 14-7-1330 after the jury submitted its fourth note

Macon next contends Counsel was constitutionally ineffective for failing to move for a mistrial when, three hours after the judge instructed the jury to continue deliberations, they informed the court they were "[s]till at a stalemate." (App'x 431–32, 854). In its entirety, the note states:

> Please give us a copy of "hand of one is hand of all" or re-explain it.
>
> Update. Still at a stalemate. Progress is really slow. Do we need to come back tomorrow? Suggestion. We feel if we sleep on it we might be clearer in the morning.

(App'x 431–32, 854). The jurors were subsequently brought back into the courtroom, where the trial judge first re-read the instruction on hand of one, hand of all. (App'x 432–34). She then excused them for the evening and instructed them to return at 9:30 the next morning. (App'x 436).

Based solely on the use of the term "stalemate," Macon claims this communication was the second time the jurors announced a deadlock, triggering South Carolina's "two return" statute, section 14-7-1330, which provides that:

> When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law.

At the PCR hearing, Counsel explained that the jury's request for clarification on the "hand of one, hand of all" charge indicated to her that the jury wanted to keep deliberating. (App'x 765–66). She further pointed out that the jury's suggestion to come back in the morning demonstrated their willingness to continue deliberations. (App'x 765–66). Counsel testified she saw no indication the jury was deadlocked at that time; rather, they were simply requesting a break. (App'x 765–66). Since the jury was not deadlocked—nor had they been previously—the PCR court correctly concluded that trial counsel had no basis to move for a mistrial because the requirements of section 14-7-1330 had not been met. Accordingly, trial counsel's decision not to move for a mistrial pursuant to section 14-17-1330 was reasonable under prevailing professional norms.[3]

C. Failure to move for a mistrial under S.C. Code Ann. § 14-7-1330 after the jury submitted its sixth note

Macon next contends Counsel was ineffective for failing to move for a mistrial under section 14-7-1330 after the jurors submitted a note at 1:02 p.m. on the second day of deliberations stating they were divided 11-1 and the holdout had indicated they would not be persuaded to change their vote. In its entirety, the note states:

> Update. We are now at 11 to 1. Same as yesterday at this time. And when we left. The one person is not in agreement with the majority and said that they will not change their mind.

(App'x 442–43, 856).

Macon first claims this communication was the third time the jurors announced a deadlock

[3] Moreover, even if the first and second note could somehow be interpreted as an indication of deadlock, the jury impliedly consented to continue deliberations. When the judge informed the jury they would need to return the next day to continue deliberating, none of the jurors voiced disagreement or indicated that further deliberation would not be fruitful. *See Buff v. S.C. Dep't of Transp.*, 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000) ("Accordingly, when a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial. The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial judge's comments."). As aforementioned, the *jurors* suggested returning the next morning to continue their deliberations.

such that counsel was ineffective for failing to move for a mistrial under section 14-7-1330. In support of this contention, Macon again maintains that the solicitor uttering the word "deadlock" outside the presence of the jury following the first note and the jury's use of the word "stalemate" in the second note conclusively establishes that the jury was deadlocked on both of those occasions. At the PCR hearing, Counsel testified she did not consider moving for a mistrial at that time because it was only the first indication of deadlock and therefore, she believed an *Allen* charge was appropriate at that time. The PCR correctly determined counsel had no basis to move for a mistrial because the requirements of section 14-7-1330 had not been met. *See State v. Robinson*, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004) ("If a jury, *following additional deliberations in the wake of an Allen charge,* remains deadlocked, section 14-7-1330 . . . is triggered." (emphasis added)).

D. Failure to object to *Allen* charge given after the jury submitted its sixth note

Alternatively, Macon contends trial counsel was ineffective for failing to object to the trial judge's purportedly coercive *Allen* charge that was given after the jury indicated the 11-1 split that it was unable to resolve. Upon receiving the note, the trial judge read it out loud to the attorneys and entered it as an exhibit. (App'x 442–43, 856). She stated she would give the jury an *Allen* charge and a brief recess was taken to allow trial counsel to discuss this matter with her client. (App'x 443). At 1:21 p.m., the jury returned to the courtroom and the trial judge gave the following instruction:

> Ladies and gentlemen, you have stated that you have been unable to agree on a verdict in this case. As I instructed you earlier, the verdict of the jury must be unanimous. When a matter is in dispute it isn't always easy for even two people to agree, so when 12 people must agree it becomes even more difficult.
>
> In most cases, absolute certainty cannot be reached or expected. However, you have a duty to make every reasonable effort to reach a unanimous verdict. In doing this, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Tell each other how you feel and why you feel that way. Discuss your differences with open mind.
>
> Although the verdict of the jury must be unanimous, every one of you has the right to your own opinion. The verdict you agree to must be your own verdict, the result of your own conviction, and you should not give up your firmly held belief merely to be in agreement

> with your fellow jurors.
>
> The majority should consider the minority's position and the minority should consider the majority's position.
>
> You should carefully consider and respect the opinions of each other and re-evaluate your position for reasonableness, correctness, and impartiality. You must lay aside all outside matters and re-examine the question before you based on the law and evidence in this case.
>
> If you do not agree on a verdict in this case, I must declare a mistrial. In that case it does not mean that anybody wins or loses, it just means that at some time in the future I will try this case with some other jury sitting where you are sitting now. The same participants will come in and the same lawyers will ask basically the same questions and get basically the same answers. And we will go through the whole process again.
>
> You were selected in the same manner and from the same source as any future jury will be, and there is no reason for me to suppose that the case will ever be submitted to 12 more intelligent, impartial, conscientious, and competent jurors than you, or that more or clearer evidence will be produced on one side or the other.
>
> I therefore ask you to return to your deliberations with the hope you can arrive at a verdict within a reasonable time.

(App'x 444–46). The jury retired to the jury room to continue deliberations at 1:24 p.m. (App'x 446). After the jurors exited the courtroom, the trial judge stated, "If they come back again and say they are deadlocked, I will declare a mistrial." (App'x 446). The solicitor and Counsel agreed. (App'x 446).

Whether an *Allen* charge is unconstitutionally coercive must be judged in its "context and under all the circumstances." *Workman v. State*, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015) (quoting *Tucker v. Catoe*, 346 S.C. 483, 490–91, 552 S.E.2d 712, 716 (2001)). In *Tucker v. Catoe*, this Court adopted the following four factors ("*Tucker* factors") as the appropriate framework for which to assess whether an *Allen* charge is unconstitutionally coercive: (1) whether the charge was specifically directed at minority jurors; (2) whether the charge included any mandatory language about the necessity to return a verdict; (3) whether the trial judge made any inquiries into the jury's numerical division; and (4) whether the time between when the charge was given and when the jury returned a verdict demonstrates coercion. 346 S.C. at 492–95, 552 S.E.2d at 717–18. Like most multi-factor constructs, the *Tucker* test does not tell us the relative weight each factor carries, nor is

the list of factors exclusive. *Id.* at 491, 552 S.E.2d at 716 (emphasizing the coercion inquiry "is very fact intensive").

While admitting the trial judge never inquired into the jury's numerical division nor acknowledged it, Macon maintains that the first and third *Tucker* factors combined establish that the *Allen* charge was impermissibly coercive. In support of that contention, Macon claims his case is analogous *State v. Taylor*, where the Court of Appeals noted in its *Tucker* analysis that the trial judge prefacing his *Allen* charge with an acknowledgment that the jury told him their numerical division was relevant to their "coercion analysis, for a jury laboring under such knowledge might interpret the trial judge's comments as aimed at the minority." 427 S.C. 208, 216, 829 S.E.2d 723, 728 (Ct. App. 2019). In that case, the Court explained that, while [i]t is not coercive to give an *Allen* charge simply because the jury volunteers how it is split, . . . the trial court's knowledge of the split is relevant." *Id*. at 217, 829 S.E.2d at 728. Ultimately, the Court in *Taylor* found "[t]he most troubling thing about the charge . . . is what it did not say: it did not tell the jurors they should not surrender their conscientiously held beliefs simply for the sake of reaching a verdict, an essential message that sometimes saves borderline charges from crossing the line into coercion." *Id*. at 218, 829 S.E.2d at 729; *see also United States v. Burgos*, 55 F.3d 933, 939 (4th Cir. 1995) ("The most egregious mistake that can be made in the context of an Allen charge is for a district court to suggest, in any way, that jurors surrender their conscientious convictions.").

Here, the trial judge specifically stated that the majority should consider the minority's opinion and instructed the jurors not to "give up [their] firmly held belief merely to be in agreement with [their] fellow jurors." (App'x 445). Further, unlike in *Tucker*, the trial judge disclosed the note volunteering the jury's 11-1 split to the attorneys and entered it as an exhibit, although, unlike in *Taylor*, she never acknowledged to the jury she was aware of that information nor did she reference it

in her supplemental instructions. The note additionally did not reveal whether the majority favored conviction or acquittal, and trial counsel confirmed that no one was aware of the jury's alignment. (App'x 767–77). Accordingly, the first and third *Tucker* factors do not support Macon's claim the *Allen* charge was unconstitutionally coercive. *See State v. Jones*, 320 S.C. 555, 466 S.E.2d 733 (Ct. App. 1996) (when viewed as a whole, finding the *Allen* charge given when judge knew division was 11-1 not coercive where judge did not know alignment, urged dissenting jurors to consider whether their positions were unreasonable in light of majority's judgment, but told them the verdict must be juror's own, the result of his convictions, and not mere acquiescence in the others' conclusion).

Regarding the second *Tucker* factor, Macon contends the PCR court erred as a matter of law for overlooking footnote 7 in *State v. Williams*, which "cautioned trial judges against using the following language: with the hope that you can arrive at a verdict." 386 S.C. 503, 515 n.7, 690 S.E.2d 62, 68 n.7 (2010). While this Court in *Williams* stated that this language could "potentially be construed as being coercive," the PCR court correctly found that the trial judge's instruction, when considered as a whole and in the proper context, was even-handedly delivered to both the minority and majority jurors, did not convey to the jury that reaching a verdict was mandatory, and constituted a correct statement of the law.

Finally, Macon improperly applies the fourth *Tucker* factor, claiming that the jury's indication of deadlock almost five hours after receiving the *Allen* charge establishes coerciveness. However, the jury also requested to be charged on reasonable doubt for a second time and to hear Colon's testimony again. (App'x 734–35, 857, 858). The jury ultimately rendered a verdict almost *twenty-four hours* after the *Allen* charge was given. Due to the length of time that passed after the *Allen* charge and the additional information sought by the jury during that time, Macon simply cannot demonstrate a coerced verdict. *See Williams*, 386 S.C. at 515, 690 S.E.2d at 68 (recognizing

"the jury deliberated for approximately three hours and forty-five minutes after being given the *Allen* charge, which was significantly longer than the *Tucker* jury" and "the extended deliberations would appear to weigh against any allegation that the charge was coercive"). Rather, these actions reflect a thoughtful and deliberate jury—not one acting under an impulse of coercion.

E. Failure to move for a mistrial after the jury submitted its ninth note

Finally, Macon contends Counsel was ineffective for failing to move for a mistrial when, approximately five hours after receiving the *Allen* charge, the jury returned with another note stating they were "still in the same position" and "needed freshness" because "fatigue" had set in. (App'x 448, 859). After the court received this note, the trial judge summoned the foreman to clarify what the jury meant by needing "freshness." (App'x 449–50). The foreman informed the court that they were not sure how much longer they could continue to deliberate, but they were "at [the court's] mercy." (App'x 450). The foreman continued to explain the biggest issue was that they "just want to get out of that room." (App'x 450). He then told the court that although two or three jurors wanted to be out of there "forever," the jury was "willing to do what we need to do." (App'x 450). The foreman then consulted with his fellow jurors and ultimately stated, "we'll come back tomorrow." (App'x 452). The judge then assembled the entire jury and relayed her conversations with the foreman. (App'x 452–53). None of the jurors indicated disagreement with returning in the morning to continue deliberating.

Macon nonetheless contends that the "jurors, very literally, had 'no escape' from the jury room" and speculates that "[t]he sole holdout juror must have believed the only way to 'escape' from the jury room was to return a guilty verdict." The PCR court correctly rejected this this conclusory and wholly unsupported contention, noting that the jurors impliedly consented to resume deliberations the following morning. *See Edwards v. Edwards*, 239 S.C. 85, 91, 121 S.E.2d 432, 436

(1961) (finding the jury's consent to continue deliberations may be implied from lack of verbal response to request or failure to indicate unwillingness to resume deliberations). Counsel explained, in her mind, this indicated the jury was continuing to work to reach a verdict, and she did not request a mistrial at that time because she felt the jury was still deliberating. (App'x 768–69). She further testified that if she had known the breakdown of the jury was 11-1 against Applicant, it would have changed her advice about seeking a mistrial, and she would have advised him to do so at the time. (App'x 810–11). However, she had no way of knowing the alignment of the jury at that time. *Cf. Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) ("The widespread use of the tactic of attacking counsel by showing what 'might have been' proves that nothing is clearer than hindsight—except perhaps the rule that we will not judge counsel's performance through hindsight.").

Counsel further explained that she did not request a mistrial because, in her opinion, it would be better to have the judge declare a mistrial based on a hung jury rather than on her motion. (App'x 773–74). She explained that the solicitor would be more likely to make her client a favorable plea offer if he knew he was not able to convince the jury of Macon's guilt. (App'x 774). Ultimately, Counsel felt the jury's decision or lack thereof would ultimately result in a more favorable outcome for her client. (App'x 774). Because Counsel made a strategic decision not to request a mistrial, the PCR court properly denied relief.

II. The post-conviction relief judge correctly determined Macon failed to establish a conflict of interest existed based on trial counsel's relationship with the deputy solicitor where he had no involvement in the case whatsoever aside from assigning it out to the two assistant solicitors well before trial counsel even became involved in Macon's case.

Macon next contends the post-conviction relief judge erred by failing to find a conflict of interest existed based on Counsel's relationship with Fifth Circuit Deputy Solicitor Dan Goldberg. In support of that contention, Macon claims Counsel was required to obtain his written consent and waiver of the purported conflict despite Macon's failure to provide any evidence indicating

Counsel's relationship with Goldberg adversely affected her performance. *See Mickens v. Taylor*, 535 U.S. 162, 171 (2002) (clarifying that an "actual conflict," for Sixth Amendment purposes, is a "conflict that [adversely] affected counsel's performance—as opposed to a mere theoretical division of loyalties); *see State v. Gregory*, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005) ("The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction."). Further, Counsel and Goldberg both testified Goldberg had no involvement in the prosecution of Macon's case, did not have access to Counsel's file, and they did not have any substantive conversations about the case. Because there was no conflict to waive, the PCR court correctly declined to consider whether Counsel disclosed the nonexistent conflict or obtained a written waiver from Macon in denying relief on this issue.[4] As these findings are supported by probative evidence and do not constitute an error of law, certiorari should be denied.

III. The post-conviction relief judge correctly determined trial counsel was not constitutionally ineffective for failing to object the solicitor calling Macon a "liar" during his closing argument in reference to Macon's conflicting statements to law enforcement where trial counsel replied with logical explanations for each of the discrepancies in Macon's statements during her closing argument and where Macon nonetheless failed to establish that the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Macon next contends Counsel's performance was constitutionally ineffective for failing to object to various statements made by the solicitor in his closing argument. First, Macon maintains Counsel's failure to object to the solicitor calling him a "liar" during the State's closing argument cannot be categorized as strategic because Counsel admitted she was unaware of any case law that prohibits a solicitor from calling the defendant a liar. While this Court has previously held it is improper to call a party a liar in closing arguments, improper comments do not automatically require

[4] To the extent Macon relies on alleged violations of various ethics rules on the part of Counsel, this Court has held that the Rules of Professional Conduct, whose purpose is to regulate and guide the legal profession in ethical conduct, "*have no bearing on the constitutionality of a criminal conviction.*" *Langford v. State*, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993) (emphasis added).

reversal. *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). Rather, the "relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). When making this determination, courts "review the 'alleged impropriety of argument in the context of the entire record.'" *State v. Liberte*, 336 S.C. 648, 655–56, 521 S.E.2d 744, 748 (Ct. App. 1999).

Moreover, "considerable latitude is generally allowed in matters of drawing and arguing inferences and deductions from evidence." *Johnson v. Life Ins. Co. of Ga.*, 227 S.C. 351, 369, 88 S.E.2d 260, 269 (1955); *see State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) ("Arguments must be confined to evidence in the record (and reasonable inferences therefrom), although failure to do so will not automatically result in reversal."). While a "solicitor may not rely on statements not in evidence during closing argument," *Huggins*, 325 S.C. at 107, 481 S.E.2d at 116, "a solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Randall*, 356 S.C. at 642, 591 S.E.2d at 610.

Here, the solicitor referring to Macon as a "liar" in his closing argument was made in the context of Macon's multiple conflicting statements to law enforcement, all of which were presented to the jury. Counsel confirmed at the PCR hearing that, in her opinion, the solicitor was merely commenting on his version of the facts and evidence already presented to the jury, and she did not believe moving for a mistrial based solely on the solicitor's use of the word liar at that point would have been successful. (App'x 759–60). Further, while she agreed that his use of the word "liar" was possibly improper, Counsel explained that her general trial strategy is to make the jury like her by appearing more reasonable than the prosecution and making the State appear to be exaggerating and taking an extreme position. (App'x 757–59). In light of that strategy, she felt she could—and did—

offer logical explanations for each of the discrepancies in Macon's statements in her closing argument such that the solicitor calling him a "liar" appeared to be an exaggeration. (App'x 758).

The PCR court ultimately—and correctly—concluded that Macon failed to establish a mistrial would have been granted even had trial counsel objected to the solicitor's remark where it was limited to a single instance in the record; the issue had already been raised to the jury through the testimony and evidence presented regarding Macon's inconsistent statements to law enforcement; and where trial counsel was able to effectively explain the inconsistencies through her own closing argument. As these findings are supported by probative evidence and do not constitute an error of law, certiorari should be denied.

IV. The post-conviction relief judge correctly determined trial counsel was not constitutionally ineffective for failing to object to the solicitor's sympathetic characterization of Macon's co-defendant during his closing argument based on improper vouching where trial vehemently objected to the subject testimony in its entirety at the appropriate time and where Macon neither identified any specific comments made during the solicitor's closing argument that constitute improper vouching given the testimony presented nor provided a basis upon which trial counsel could have objected.

Macon next makes a broad claim that trial counsel's performance was constitutionally ineffective for failing to object to the solicitor's alleged improper vouching of Jason Colon without identifying any specific statements made during the solicitor's closing argument that constitute improper vouching such that trial counsel had a basis to object. *See Strickland*, 466 U.S. at 690 ("A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment."). In fact, Counsel vehemently objected to Woodberry's testimony in its entirety, arguing it was "backdoor character evidence." While she succeeded in keeping parts of his testimony out, the trial court ultimately permitted Woodberry to testify about Colon's head injury and passive demeanor. The PCR court correctly pointed out that Macon failed to identify any specific instances of vouching in the

solicitor's closing argument. While Macon apparently takes issue with what he characterizes as the solicitor portraying Colon as "vulnerable and sympathetic" and Macon as "heinous and despicable," none of these comments suggest to the jury that the solicitor knew any outside information substantiating either Woodberry or Colon's testimony. *See State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) ("Vouching occurs when a prosecutor implies he has facts that are not before the jury for their consideration."). Rather, the solicitor's remark that "Jason Colon was 16 years old and got shot in the head and it changed his life forever" related solely to Woodberry's testimony. Accordingly, Counsel had no basis to object. *See Winkler v. State*, 418 S.C. 643, 651, 795 S.E.2d 686, 691 (2016) ("Because no applicable precedent supported making an objection, we find trial counsel's decision not to object was reasonable.").

V. Where Macon failed to establish any individual instances of deficient performance by trial counsel, the post-conviction relief judge properly denied relief because a cumulative error analysis would apply only to the effect of matters actually determined to be constitutional error rather than the cumulative effect of non-errors.

Macon further contends he is entitled to post-conviction relief based on the cumulative effect of trial counsel's alleged errors. In support of that contention, Macon conflates *Strickland*'s prejudice analysis—wherein both this Court and the United States Supreme Court have instructed reviewing courts to consider the specific impact counsel's error had on the outcome of the trial coupled with the strength of the State's case in light of the totality of the evidence presented to the jury—with the notion that an attorney's acts or omissions that are not unconstitutional individually can somehow be combined to create a constitutional violation.[5] While this Court has recognized that, "[w]hether the

[5] Macon specifically claims the PCR court "overlooks caselaw that incorporates the cumulative error analysis into the *Strickland* analysis by requiring the prejudice must be 'considered collectively, not item-by-item,'" citing *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). However, the issue before the Court in *Kyles* was based on a *Brady* violation. The portion of *Kyles* quoted by Macon refers to actual items of evidence the government failed to disclose. It instructs reviewing courts to consider

cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina . . . . the threshold to asking the cumulative prejudicial question is to first find multiple errors." *Id.* at 197, 569 S.E.2d at 324–25. In *Smalls*, although the issue of cumulative error was not specifically raised, this Court stated, after finding multiple deficiencies on the part of trial counsel, that the "individual claims of deficient performance must be analyzed separately to determine whether either of them gives rise to a reasonable probability the result of the trial would have been different without counsel's error." 422 U.S. at 195, 810 S.E.2d at 847.

Here, where the PCR correctly concluded that Macon failed to establish any individual instances of deficient performance by trial counsel, multiple errors do not exist in this case to form any cumulative prejudicial effect. *See Fisher v. Angelone*, 163 F.3d 835, 852–853 (4th Cir. 1998) (holding that various claims of ineffective assistance of counsel, like claims of trial error, would not entitle petitioner to relief because a cumulative error analysis would apply only to the effect of those matters actually determined to be constitutional error and not the cumulative effect of all matters alleged or deemed deficient); *Lorenzen v. State*, 376 S.C. 521, 535, 657 S.E.2d 771, 779 (2008) (holding that where none of the errors alleged by the PCR applicant were meritorious, the alleged errors did not have the cumulative effect of denying the applicant of effective legal representation to the extent that prejudice was presumed), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836. As these findings are supported by probative evidence and do not constitute an error of law, certiorari should be denied.

VI. The post-conviction relief judge did not commit any conceivable statutory or constitutional violation through the process by which he decided Macon's case when—following an evidentiary hearing—he employed a mine-run practice of asking the prevailing party to prepare a *proposed* order, considered what was presented to him, and then issued a final order that properly addressed every issue raised while also

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the cumulative effect of all suppressed evidence in determining whether the "materiality" requirement of *Brady* violation has been satisfied. *Id.*

including specific findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

Finally, Macon contends the post-conviction relief judge violated both the separation of powers and statutory provisions of the Uniform Post-Conviction Procedure Act by requesting the prevailing party to draft a proposed order for its consideration—a routine practice in not only post-conviction relief cases but the vast majority of cases heard by the circuit court in this state. In support of that contention, Macon misrepresents the quoted portion of this Court's opinion in *Hall v. Catoe* by omitting the second half of the sentence: "Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law *in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency*." 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) (emphasis added). Here, the procedures employed by the PCR court were proper and the final order issued reflects thoughtful and deliberate consideration and review of the record and evidence presented by the Court and comports with statutory and constitutional requirements. Thus, Applicant's claim that he was somehow denied the opportunity to have his claims adjudicated by a judicial officer is baseless.

CONCLUSION

Based on the foregoing argument, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

BY: s/LillianMeadows
LILLIAN L. MEADOWS
Assistant Attorney General
S.C. Bar No. 103665

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ATTORNEYS FOR RESPONDENT