

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable R.. Ferrell Cothran, Jr Circuit Judge

Case No.: 2019-CP-10-3577

Christopher Campbell 361841.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Travis McFadden appeals the Honorable R. Ferrell Cothran’s April 18, 2023 Order of Dismissal. Undersigned counsel received notice of entry of the order on May 1, 2023. A copy of the order on appeal is attached hereto.



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May 4, 2023

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**RECEIVED**

MAY 09 2023

S.C. SUPREME COURT

Att  
SCL  
AG  
GS

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
  
Christopher Campbell, #361841, )  
  
Applicant, )  
  
v. )  
  
State of South Carolina, )  
  
Respondent. )

IN THE COURT OF COMMON PLEAS )  
FOR THE NINTH JUDICIAL CIRCUIT )  
  
CASE NO. 2019-CP-10-3577 )

**ORDER OF DISMISSAL**

FILED  
2023 APR 25 PM 3:14  
CLERK OF COURT

The matter comes before this Court by way of an application for post-conviction relief filed by Applicant Christopher Campbell on July 5, 2019, asserting various allegations of ineffective assistance of counsel. Respondent the State of South Carolina made its return to the application and requested an evidentiary hearing to resolve the issues as set forth in the application.

An evidentiary hearing was convened on April 8, 2022, at the Charleston County Courthouse. Applicant was present and represented by appointed post-conviction relief counsel James K. Falk, Esquire. Assistant Attorney General Lauren T. Mims of the South Carolina Attorney General's Office represented Respondent. Following testimony from Applicant and his two plea counsels, this Court took the matter under advisement to further review the record and applicable law before making a ruling.

After a thorough review of the record in its entirety, along with the arguments presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismissed this action with prejudice. Specific findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 are set forth below:

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**S.C. SUPREME COURT**

## PROCEDURAL HISTORY

The records before this Court <sup>1</sup> establish that Applicant is presently confined pursuant to orders of the Charleston County Clerk of Court. Applicant was arrested following an investigation into the armed robbery of a restaurant located on King Street in downtown Charleston, South Carolina. The evidence introduced at trial established that shortly before opening on May 4, 2011, Applicant entered a Firehouse Subs restaurant, pointed a revolver at two employees (Christopher Riley and Leslie Green), and demanded money. Subsequent investigation revealed that Green was related to Applicant and has assisted in orchestrating the robbery. Green eventually agreed to assist the prosecution with the hope of receiving a more lenient sentence after he was also charged for his involvement in the armed robbery.

In August 2011, the Charleston County Grand Jury indicted Applicant for Armed Robbery (2011-GS-10-04830) and Possession of a Firearm During the Commission of a Violent Crime (2011-GS-10-04831).

Assistant Public Defenders Jason King and Luke Malloy of the Ninth Circuit Public Defender's Office represented Applicant. Assistant Solicitors Alexander Ziegler and Benjamin Simpson of the Ninth Circuit Solicitor's Office prosecuted the case. On October 22, 2014, Applicant proceeded to trial before the Honorable W. Jeffrey Young, then-circuit court judge. At the conclusion of trial, the jury convicted Applicant as indicted. Judge Young sentenced Applicant to concurrent terms of imprisonment of eighteen years for armed robbery and five years for

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<sup>1</sup> The records before this Court include the application for post-conviction relief, the amended applications for post-conviction relief, the return to the application, the Charleston County Clerk of Court general sessions records from the underlying conviction, the trial transcript, the complete appellate record (including the record on appeal, all pleadings before the South Carolina Court of Appeals and South Carolina Supreme Court), and Applicant's records from the South Carolina Department of Correction. This Court has reviewed the record in its entirety.

possession of a firearm during the commission of a violent crime} affirmed Campbell's convictions and sentence.) State v. Campbell, Op. No. 2016- UP-367 (S.C. Ct. App. filed July 20, 2016). Thereafter, Campbell petitioned for rehearing, which was subsequently denied. Campbell then filed a petition for a writ of certiorari to the South Carolina Supreme Court, which granted certiorari. Following briefing, the Supreme Court dismissed the case as improvidently granted on June 12, 2019. The Remittitur was issued to the lower court on June 12, 2019.

### CURRENT PROCEEDING

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

1. Ineffective Assistance of Counsel
  - a. "Counsel was ineffective by not objecting to the jury charge nor filing motions to the judge that the jury charge is defective because he did not charge criminal intent for the jury."
  - b. "Counsel was ineffective during the sentencing phase of the trial by telling the judge that he informed his client not to say anything, causing the judge not to ask me to allocate as required."
  - c. "Counsel was ineffective by failing to of a reasonable investigation of the offense of armed robbery to see if it had the Great Seal of South Carolina affixed to it."

Applicant filed an amended application on March 10, 2020, alleging additional claims of ineffective assistance of counsel.

- d. "Trial counsel was ineffective for not objecting to the composition of the jury panel. Applicant informed and believes that the State exercised its pre-emptory strikes in a racially discriminatory manner and in violation of the U.S. Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986)."
- e. "Trial Counsel was ineffective for not objecting to the Court's comment page 396, line 3-4. During deliberations, the jury asked to see the surveillance tape again (State's exhibit 1). While the tape was plating, the Court stated: 'That's him coming in and then you can play the whole thing.' The identity of the individual on the surveillance video was a significant issue in this case. Applicant is informed and believes that jurors could have understood the Court's

statement as its opinion that Applicant was the individual depicted on the video.”

Applicant filed a second amended application, alleging additional claims of ineffective assistance of counsel.

- f. “Trial counsel was ineffective by failing to object to the Court’s ‘search for the truth’ language in its opening charge. P. 75 lines 12-15.”
- g. “After initially moving to suppress the search warrant for the residence on Champagne Lane in Charleston, Trial counsel provided ineffective assistance by failing to preserve the issue for appellate review. Trial counsel’s opening argument serves as a waiver of the argument (p. 94 lines 7-10), and trial counsel failed to preserve the issue when Detective Williams testified about the Nike shoes. (P. 216 lines 1-7).”
- h. “Trial counsel failed to object to the Solicitor’s speculative questioning. (P. 154 lines 2-5 and P. 249 lines 21-23).”
- i. “The Court’s charge excluded the following language included in the circumstantial evidence charge recommended by Court in Logan<sup>2</sup>.”

Applicant went forward on six of his claims: (1) trial counsel failure to object to composition of jury panel, (2) failure to object to court’s comment on surveillance tape, (3) failing to object to language in Court’s opening charge, (4) failing to preserve issue of admission of search warrant on Champaign Lane and testimony concerning Nike shoes for appeal, (5) failure to object to questioning by solicitor, and (6) failure of trial counsel to request entire Logan instruction on circumstantial evidence. An additional allegation was brought by Applicant at the end of the Evidentiary Hearing of (7) ineffectiveness of Trial Counsel for failure to communicate a plea deal to Applicant.

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<sup>2</sup> Applicant cited to Logan: “Circumstantial evidence is proof of a chain off acts and circumstances indicating the existence of a fact; and to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant’s behavior as suspicious, the proof has failed”. State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013).

## SUMMARY OF TESTIMONY AT THE EVIDENTIARY HEARING

Trial Counsel Jason King testified first. On direct examination, Trial Counsel testified he had juror numbers 83, 121, 393, and 139 as black jurors on his strike sheet. Evid. Hr. Tr. P. 6-7. The State exercised two of their preemptory strikes on the black jurors, and Trial Counsel testified he did not consider a Batson argument because he was focused on striking jurors who had convicted someone in a different trial day before Applicant's trial. Evid. Hr. Tr. 8. Trial Counsel further testified he had a strike for one of the black jurors because of her potential bias for the police, and did not challenge the State striking black juror 393 because he had struck white jurors who were similarly situated to that juror. Evid. Hr. Tr. P. 9-10. Trial Counsel testified it is likely he would have struck Black juror 393 if the State had not, because he had previously struck white jurors that fit in a category with. Evid. Hr. Tr. P. 10. Trial Counsel testified he was afraid he would get caught in a Batson issue if he did not strike black juror 393, and there were other reasons to strike him beside the fact he was in the same category as previously struck jurors. Evid. Hr. Tr. P. 10-11. Trial Counsel testified he believes diversity in juries is good, but it is not the end all, and must be balanced against other issues. Evid. Hr. Tr. P. 11.

Trial Counsel testified he does not know why the State struck juror number 393, or why they struck juror 139, a juror Trial Counsel testified he would have sat. Evid. Hr. Tr. P. 11-12. Trial Counsel summarized why he did not make a Batson argument, stating he had to make a decision if it was worth it to reshuffle the whole jury or if this was the best jury he could get, but he does not recall exactly his thoughts at the time. Evid. Hr. Tr. P. 12.

PCR Counsel then directed Trial Counsel to page 396 of the trial record, where the jury asked to see the video again. Evid. Hr. Tr. P. 13, line 18-20. Trial Counsel testified the jury might have wanted to watch the video again because he had made an argument about fingerprints, that

the robber had touched the inside of the restaurants, but the fingerprints collected were not Applicant's. Evid. Hr. Tr. P. 13-14. Trial Counsel testified the Trial Judge did make a statement in front of the jury identifying a "him" being in the video, but Trial Counsel did not object to this because he was arguing the guy in the video was someone named El. Evid. Hr. Tr. P. 14. Trial Counsel testified the Trial Judge was not identifying Applicant as the person in the video, but just stating it was a "him" in the video, and was not indicating it was Applicant, so Trial Counsel did not object. Evid. Hr. Tr. P. 14-15. Trial Counsel testified he does not believe the jury inferred the robber in the video was applicant based on the trial court's comment. Evid. Hr. Tr. P. 15.

PCR Counsel then directed Trial Counsel to page 75 of the trial transcript, lines 12 through 15, where the trial court used language like "search for the truth" and "ensure justice". Evid. Hr. Tr. P. 15, line 17-20. Trial Counsel testified the Beaty<sup>3</sup> opinion, advising courts to avoid "search for the truth" language, came out in 2016 after Applicant's case. Evid. Hr. Tr. P. 16-17. Trial Counsel testified it was not a concern that "search for the truth" language shifted the burden, and there was no thought to object as the language was read by most trial judges and was included in the bench book given to all circuit judges. Evid. Hr. Tr. P. 16. Additionally, Trial Counsel testified the language might have been problematic in a jury charge, but the trial court used it in opening comments. Evid. Hr. Tr. P. 16.

Trial Counsel testified, regarding the search of Champaign Lane where red shoes were seized, he did not believe his argument for suppression was strong. Evid. Hr. Tr. P. 17. After cross-examining the detective in the pre-trial motion hearing, Trial Counsel testified he did not believe either argument was strong because the search warrant affidavit included the co-defendant's identification of Applicant as the robber. Evid. Hr. Tr. P. 17-18. The co-defendant also stated

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<sup>3</sup> State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018).

Applicant had been living at the residence for a certain period of time. Evid. Hr. Tr. P. 18. Trial Counsel testified he tried to argue the co-defendant had named another person as the robber initially, but after at the end of his argument he did not feel like it was a strong issue and decided to embrace it. Evid. Hr. Tr. P. 18.

Trial Counsel had two witnesses, Applicant's mother and uncle, and his uncle testified the shoes were his. Evid. Hr. Tr. P. 18. Trial Counsel also argued the shoes in the video were a different color than the shoes seized. Evid. Hr. Tr. P. 18. Additionally, Trial Counsel argued in his opening statement the shoes seized were a common pair of shoes. Evid. Hr. Tr. P. 19. Trial Counsel testified he did not make a contemporaneous objection when Detective Williams testified about the sneakers, on page 216 of the trial transcript, seized. Evid. Hr. Tr. P. 19-20. Trial Counsel testified he believes he had decided to abandon the argument of unlawful search and seizure for appeal, as he addressed the search in his opening argument. Evid. Hr. Tr. P. 20.

PCR Counsel then directed Trial Counsel to page 230, lines 19 through 23, where Exhibit 21 (photograph of bedroom where sneakers were located) was admitted. Evid. Hr. Tr. P. 20. Trial Counsel testified he was unsure if he had made a contemporaneous objection concerning the photograph. Evid. Hr. Tr. P. 21.

PCR Counsel then direct Trial Counsel to page 153, line 11, the redirect of Christopher Riley ("Mr. Riley"). Evid. Hr. Tr. P. 21. Trial Counsel testified was one of the victims, an employee of the restaurant robbed. Evid. Hr. Tr. P. 22. The other employee, Leslie Green, was suspected of being involved in the robbery. Evid. Hr. Tr. P. 22. Trial Counsel testified he made arguments implicating Mr. Riley in the robbery, but he did not pursue that line of argument strongly. Evid. Hr. Tr. P. 22. Based of this argument, the solicitor asked Mr. Riley if he would still be working at the restaurant if he was involved, and Mr. Riley responded no. Evid. Hr. Tr. P. 23.

Trial Counsel testified he did not object to the question because he did not want to pursue that argument, since he was not suspected in being involved. Evid. Hr. Tr. P. 23-24. Trial Counsel testified the State was partially relying on Mr. Riley's testimony, but it was Leslie Green's testimony which was the strongest piece of evidence. Evid. Hr. Tr. P. 24. Trial Counsel agreed with PCR Counsel's assessment that the questioning on page 154, line 2 through 4, of the trial transcript was speculative and he could have objected. Evid. Hr. Tr. P. 24. Trial Counsel also agreed it could be bolstering of State's witness, but testified implicating Mr. Riley was not his main argument. Evid. Hr. Tr. P. 24-25.

PCR Counsel then directed Trial Counsel to page 249, line 12 through 25, the direct testimony of Russell Brown. Evid. Hr. Tr. P. 25. Trial Counsel testified there was an issue with key evidence of Applicant's left thumb fingerprint found on doors handles tongue latch at the restaurant. Evid. Hr. Tr. P. 25-26. The State argued that an employee would have known pushing the tongue on the handle was not necessary to open the door, and just to grab and pull the door open, and Trial Counsel testified he was not sure if the State's argument was speculative. Evid. Hr. Tr. P. 26-27. Trial Counsel agreed with PCR Counsel that Applicant's fingerprints on the door were a big part the State's evidence. Evid. Hr. Tr. P. 27.

Trial Counsel testified the State relied heavily on the direct evidence of Green's testimony that he was present at the robbery, buttresses with the circumstantial evidence of Applicant's fingerprints on the door. Evid. Hr. Tr. P. 27. PCR Counsel then directed Trial Counsel to page 383, line 1, where the trial court gave a circumstantial evidence charge. Evid. Hr. Tr. P. 27. Trial Counsel agreed with PCR Counsel that State v. Logan came out before Applicant's case. Evid. Hr. Tr. P. 27-28. Trial Counsel testified he might not have asked for a Logan charge because Applicant's case was not purely circumstantial. Evid. Hr. Tr. P. 28. Trial Counsel testified in

hindsight he would request a Logan charge, but he is not sure why he did not request it then. Evid. Hr. Tr. P. 28.

On cross-examination, Trial Counsel testified he practiced law for twenty-two years, twenty of those years practicing criminal law. Evid. Hr. Tr. P. 29. Trial Counsel testified Martha Dicus was the original attorney appointed to represent Applicant, but he was subsequently appointed in 2012. Evid. Hr. Tr. P. 29-30. Trial Counsel testified he was unsure why Applicant's case was transferred to him, stating Ms. Dicus passed away at some point, but Ms. Dicus was also particularly good at mitigation and negotiating pleas, and when her cases neared trial she would usually transfer the case to another attorney. Evid. Hr. Tr. P. 29-20. Trial Counsel obtained surveillance video of the robbery, statements of Green about Applicant's involvement, and Applicant's fingerprints at the scene. Evid. Hr. Tr. P. 30. Additionally, the statement of Applicant to law enforcement he was at the restaurant the night before, and that's why his fingerprints were there. Evid. Hr. Tr. P. 31. Trial Counsel testified his defense was centered around implicating El, the person Green originally named as robber, as the robber. Evid. Hr. Tr. P. 31-32. Law enforcement put pressure on Leslie Green to name the robber, threatening him with twenty-five years in prison, and Trial Counsel argued this induced Leslie Green to name Applicant as the robber. Evid. Hr. Tr. P. 32.

Trial Counsel testified he did not see the issues surrounding the video as problematic. Evid. Hr. Tr. P. 32. The trial court said "that's him" to stop the video where the robber appears, and not to identify the robber as Applicant. Evid. Hr. Tr. P. 33. Trial Counsel testified he moved to suppress the search of Applicant's residence and seizure of the shoes, but his motion was denied. Evid. Hr. Tr. P. 33. After this denial, Trial Counsel testified he decided to embrace the evidence of the

sneakers, and so did not object to them. Evid. Hr. Tr. P. 33. Trial Counsel testified he is not sure why he did not object to the photograph. Evid. Hr. Tr. P. 34.

Trial Counsel testified he frames voir dire questions in the context of the facts of the case when for jury selection. Evid. Hr. Tr. P. 34. A concern for Trial Counsel was if any potential juror had been the victim of a violent crime, or a close friend or family member be a victim. Evid. Hr. Tr. P. 34. Trial Counsel testified he struck an owner of a restaurant and jurors who had served on the previous trial before Applicant's and convicted the defendant. Evid. Hr. Tr. P. 34. Trial Counsel testified he sometimes does not make any motions regarding a jury composition if it looks "fair enough" because he does not know if a second jury would be any better. Evid. Hr. Tr. P. 35. Trial Counsel testified, referencing his strike sheet, that the State had struck a white male juror. Evid. Hr. Tr. P. 35-36. Trial Counsel testified the "search for the truth" language was not on his mind to object to until State v. Beaty came out in 2019. Evid. Hr. Tr. P. 36. Regarding the speculative questions, Trial Counsel testified he did not believe the questions were prejudicial to Applicant and did not object to them. Evid. Hr. Tr. P. 37. Regarding the Logan charge, Trial Counsel reiterated he did not request the charge because the State's case against Applicant was not purely circumstantial. Evid. Hr. Tr. P. 37.

Applicant next testified. On direct examination, Applicant testified he was out on bond while his case was pending, and he testified he had two or three conversations with Trial Counsel. Evid. Hr. Tr. P. 39-40. Applicant testified Martha Dicus ("Ms. Dicus") was his first attorney, and the solicitor had given Ms. Dicus an eight-year plea deal, and Applicant said he would have to discuss it with his family. Evid. Hr. Tr. P. 40. Ms. Dicus subsequently passed away, and Trial Counsel was assigned to represent him, causing Applicant some concern about because of his experience. Evid. Hr. Tr. P. 40. Applicant testified the trial strategy was focused on refuting

Green's statement identifying Applicant as the robber. Evid. Hr. Tr. P. 41. Applicant testified the State had no evidence linking him to crime beside the fingerprints. Evid. Hr. Tr. P. 41.

Regarding the trial court's comments on the video, Applicant testified the trial court motioned to his table while he made the comment "that's him" about the robber in the video. Evid. Hr. Tr. P, 41-42. Applicant testified he felt like the trial court was identifying him, and he mentioned this to Trial Counsel and Trial Counsel told Applicant it was allowed. Evid. Hr. Tr. P. 42. Applicant testified he somewhat communicated with Trial Counsel about jury selection and picked one juror to strike for connections to law enforcement, but Trial Counsel did not discuss other jury selection decisions with him. Evid. Hr. Tr. P. 43. Applicant testified he wanted to try to get another jury panel. Evid. Hr. Tr. P. 43. Applicant was concerned about the jury because there was only one black woman on the jury and she was not of the same social or economical background as him. Evid. Hr. Tr. P. 43. Applicant testified he would have wished for juror number 83 and the juror the State struck to be on the jury. Evid. Hr. Tr. P. 43-44. Applicant testified he told Trial Counsel he was uncomfortable with the jury panel. Evid. Hr. Tr. P. 44.

Trial counsel was then recalled to testify. Trial Counsel testified there were plea negotiations, but he was not aware of the eight-year plea deal Applicant testified to. Evid. Hr. Tr. P. 46. Trial Counsel testified he got a ten year offer in 2013, which he discussed with Applicant, but Applicant wanted to go to trial. Evid. Hr. Tr. P. 46.

Trial Counsel testified Applicant communicated his like or dislikes for certain potential jurors during jury selection, but Trial Counsel did not choose to strike people based on Applicant's preference. Evid. Hr. Tr. P. 46. Trial Counsel testified he has to be race-neutral in jury selection, and he cannot strike jurors because of a client's preference without legitimate reason. Evid. Hr. Tr. P. 46-47. Trial Counsel testified he was not sure of the specifics of his conversations with

Applicant about jury selection, but he believes though the Applicant can input his opinion he makes the main decisions about jury selection. Evid. Hr. Tr. P. 47. Trial Counsel testified he would not disregard Applicant's input, but he ultimately made the decision who to keep or strike. Evid. Hr. Tr. P. 47. Trial Counsel testified he assumes he did not make a Batson challenge because he was content with the make up of the jury and did not want to risk having a worse jury if the challenge was granted. Evid. Hr. Tr. P. 47-48.

Trial Counsel testified he met with Applicant initially over the phone in 2012, in person on January 2013, over the phone in March 2013, and in person in late March of 2013. Evid. Hr. Tr. P. 48. Additionally, Trial Counsel testified he met with Applicant several times in person in 2014, meeting about five or six time in persona and several times over the phone. Evid. Hr. Tr. P. 48-49.

In final statement to court, Applicant testified he does not recall Trial Counsel communicating a ten-year plea deal to him. Evid. Hr. Tr. P. 49. Applicant also testified he did not recall speaking with Trial Counsel in December 2013, as Applicant was on vacation in Pigeon Forge, and Trial Counsel never communicated an ten-year offer to him. Evid. Hr. Tr. P. 49-50. Applicant testified his grandmother told him after his trial that Trial Counsel had mentioned a plea, but Trial Counsel never communicated the plea deal to him. Evid. Hr. Tr. P. 50.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Applicant has alleged he is entitled to post-conviction relief based on ineffective assistance of plea counsel. Following a thorough review of the entire record in this case (including the trial transcript, the plea transcript, the records from Applicant's underlying general sessions charges and convictions, and the records from this current action (including the PCR application and return

to the application, as well as any other filed documents), this Court finds this claim to be without merit and that Applicant has failed to meet her burden of proof.

### *Standard of Review*

Under the Uniform Post-Conviction Procedures Act, an applicant may seek post-conviction relief upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP.

The grounds for relief upon which Applicant proceeded at the evidentiary hearing pertain to ineffective assistance of counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745

S.E.2d 97, 101 (2013). Ordinarily, post-conviction relief allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in post-conviction relief actions). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). 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 or sentence. 466 U.S. at 687. First, the applicant must show that counsel’s performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is “necessarily linked to the practice and expectations of the legal community.” Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel’s representation fell below an objective standard of “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, “does not guarantee perfect representation[—]only a ‘reasonably competent attorney.’” Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466

U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Harrington, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional

assistance.” Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts “must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed at the time of counsel’s conduct.” Strickland, 466 U.S. at 690. An applicant 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.” Id. The reviewing court must then “determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” Id.

The Strickland standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” **not** whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or “prejudice” prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance prejudiced the applicant such that “there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687 (emphasis added).

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. Id.

### ***Findings as to Specific Claims Raised***

Applicant has alleged six specific claims of ineffective assistance of trial counsel and asserts that as a result of counsel's purported errors, he is entitled to a new trial. This Court has thoroughly reviewed the record, scrutinized the credibility of the witnesses presented, and researched applicable case law. After a thorough review of all records and evidence before this Court, this Court finds has failed to meet his requisite burden of proof as to each allegation.

The issues before the Court is whether Trial Counsel was ineffective for failing to object to admission of evidence, jury composition, and trial court's comments and language; failing to

preserve issues for appeal; failing to request complete Logan charge; and failing to communicate plea to applicant. This Court disagrees and finds the combined record from the trial and evidentiary hearing establishes Applicant received effective assistance of counsel.

#### **ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT**

Applicant alleged Trial Counsel was ineffective for failing to object to composition of the jury, comment of the trial court seemingly identifying Applicant as the robber in surveillance video, the trial court's language in opening statement of "search for truth", and the solicitor's speculative and bolstering questioning. Strickland requires that trial counsel be given leeway to make reasonable strategic decisions. 466 U.S. 668.

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant...representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another...[j]udicial scrutiny of counsel's performance must be highly deferential."

Id. at 688-691. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1993) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Courts take a case-by-case approach to decide what is or is not a valid trial strategy, and counsel's conduct is measured under an objective standard. Solomon v. State, 347 S.C. 635, 557 S.E.2d 666 (2001); Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002).

#### ***Allegation of Failing to Object to Composition of Jury***

Regarding the allegation of ineffectiveness for failing to object composition of a jury panel, jury selection is a process inherently falling within expertise of counsel. Palacio v. State, 333 S.C.

506, 511 S.E.2d 62 (1999). Importantly, “a criminal defendant has no right to any particular jury, but only a right to a trial by a competent and impartial jury.” Palacio, 333 S.C. 506. Trial Counsel testified he chose to keep or strike jurors based on the specifics of the case, doing his best to eliminate any bias against Applicant. Trial Counsel struck jurors who had been victims of a violent crime, had a bias for law enforcement, and jurors who had just convicted a defendant in a previous case; some of these jurors included black jurors. Applicant complains the jury was not representative of him because he is black, but then stated in his testimony that one of the black jurors did not represent him as they were not of the same social and economic status. Applicant’s own statements show race is not the most important factor to him in jury selection, and Trial Counsel had valid reasons for striking the jurors he did. Additionally, Trial Counsel testified he avoided a Batson challenge because he did not believe he had sufficient basis to challenge on Batson and did not want to risk reshuffling a jury he was content would be fair to Applicant.

This Court finds the testimony of Trial Counsel credible, and finds Applicant failed to show Trial Counsel’s failure to challenge composition of jury was deficient and resulted in prejudice to Applicant. Therefore, Applicant’s allegations are **DENIED** and **DISMISSED** with prejudice.

***Allegation of Failing to Object to Court’s Comment on Surveillance Video***

Applicant testified that during his trial the Trial Judge commented, in the hearing of the jury, “that’s him” during the showing of the surveillance video of the robber entering the restaurant. Applicant alleged this prejudiced him because the jury could infer the trial court was referring to Applicant. In trials, the decision of all questions of fact is left exclusively to the jury and must be uninfluenced by any expressions or opinion by the judge. S.C. Const. Art. V, § 21; State v. White, 15 SC 381 (1881). A judge’s comment that is mere explanation and not a comment on the weight, sufficiency, or credibility of evidence is not error warranting reversal. State v. Lewis, 293 S.C. 107, 359 S.E.2d 66 (1987) (judge’s comment concerning written statement which

was redacted to delete reference to codefendant before admission did not constitute charge to jury in respect to matter of fact as prohibited by South Carolina Constitution, because comment was merely explanation of what had been done procedurally to statement, and was not comment on weight, sufficiency, or credibility of evidence).

Applicant's allegation is based on the trial court's comments while the jury watched the surveillance footage from the robbery, as follows:

THE COURT: Please play that. You may be seated. Get wherever is closest for you to watch.

(Video played.)

THE COURT: That's him coming in and then you can play the whole thing.

(Video played)

ROA P. 308, lines 24-25 – P. 309, lines 1-5. Trial Counsel testified he did not object to the trial court's comments because he merely remarked "that's him" which made reference to fact person in video was male and not to fact Applicant was the robber. Trial Counsel testified he does not believe jurors took trial court's remark to mean robber was Applicant but just used the short phrase to refer to the person in the video. While a judge is prohibited from charging a jury in respect to matters of fact, even so, prejudice must be shown in order to require reversal. Litchfield Co. of S.C. v. Sur-Tech, Inc., 289 S.C. 247, 345 S.E.2d 765 (Ct. App. 1986). Applicant did not present evidence, and it is not intuitive from the trial transcript, that there was resulting prejudice from the trial court's comment the person in the video was a "him". There is no evidence indicating the comment has an effect on the outcome on Applicant's case or how the exclusion of the comment would have changed to the outcome.

This Court finds testimony of Trial Counsel credible, and finds Applicant failed to show Trial Counsel was deficient and resulting prejudice. The trial court's comment was not a charge to

the jury that the person in the surveillance video was Applicant, but a mere statement the person was a “him”. There is no evidence indicating the jury took the trial court’s comments to be more than that. Additionally, the comment was harmless, and would not have changed the outcome of Applicant’s case. Therefore, Applicant’s allegation is **DENIED** and **DISMISSED** without prejudice.

*Allegation of Failure to Object to Trial Court’s Language in Opening Statement*

Applicant alleged Trial Counsel was ineffective for failing to object to the trial court’s statement including “search for the truth” language in preliminary remarks to the jury. Applicant relies on Beaty, a case decided in 2018, about four years after Applicant’s case was decided. 423 S.C. 26, 813 S.E.2d 502 (2018). The Court in Beaty established preliminary remarks by trial judge stating jury’s role was to “search for the truth”, determine the “true facts”, and render a “just verdict” had the potential effect of lessening State’s burden of proving offense beyond reasonable doubt, and therefore, were improper. Id. 423 at 33, 813 at 506. However, prior to the decision in Beaty, the general sessions bench book the Court provided to all circuit judges contained the disputed language. Id. 423 at 34 n. 2.

Trial Counsel testified objecting to the Trial Judge’s language in his preliminary remarks did not cross his mind as Beaty had not yet been decided, but if such language had been used in Court’s closing statement, it would have been on his mind to object. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) (jury instructions on reasonable doubt which also charge the jury to “seek the truth” or “search for the truth” run the risk of unconstitutionally shifting the burden of proof to the defendant). Even though the Court in Beaty found error in the trial court’s use of the language, and urged trial judges to avoid such language, the Court found Beaty could not show prejudice warranting reversal. Beaty, 423 at 34, 813 at 506.

The Trial Judge in Applicant's case addressed the jury, stating in part:

This is a real trial, which is a fundamental right of our democracy. It's a search for the truth to ensure that justice is done. And I will remind you that searching for the truth and ensuring that justice is done is often slow, deliberate, repetitive; the exact opposite of what you've seen on TV, movies, or read in books.

ROA P. 5, line 11-17. Later, the Trial Judge expressly informed the jury:

Now, ladies and gentlemen, what I'm going to tell you now is just intended to be — to serve as an introduction to the trial of this case. The remarks that I'm making are not a charge on the law. I will charge you on the law that is applicable to this particular case at the end of the trial. This is merely an explanation so you may better know what procedures that we will follow, so you can understand what is happening.

ROA P. 6, line 16-24. Applicant cannot rely on Beaty to show Trial Counsel was ineffective, not only because the prohibition on using such language had not been established, but using such language was common and recommended. Id. 423 at 34 n. 2. Additionally, regardless of Beaty, the trial court's remarks were a mere statement to the jury and not a charge on the law. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). In Aleksey, the court condemned use of such language where linked to reasonable doubt or circumstantial evidence charges. Id. 343 at 27, 538 at 251. Lastly, the evidence against Applicant—namely the testimony of his cousin implicating him as the robber and fingerprints found at the scene—weighed heavily against Applicant in such way he cannot show prejudice from Trial Judge's use of this language.

This Court finds the testimony of Trial Counsel credible, and finds Applicant cannot establish deficient performance or resulting prejudice from Trial Counsel's failure to object to language Trial Judge used in opening remarks to the jury. Trial Counsel's performance was obviously not ineffective, as he can not be expected to foresee a decision by the Supreme Court years into the future and object to commonly used language by most, if not all, circuit judges. The Trial Judge's use of the now prohibited language was used to broadly explain the trial process, and not to place an obligation on the jury. Moreover, Applicant cannot establish he was prejudiced by

use of the language, especially considering the weight of the evidence against him, both direct and circumstantial. Therefore, Applicant's allegations are **DENIED** and **DISMISSED** with prejudice.

*Allegation of Failure to Object to Solicitor's Speculative Questioning*

Applicant alleged Trial Counsel was ineffective for failing to object to questioning by Solicitor that was speculative. Specifically, Applicant alleged Solicitor's questioning was speculative when he asked Christopher Riley ("Mr. Riley"), an employee of the restaurant robbed:

Q. Do you think you would have been allowed to continue working there if you were involved in this at all?

A. No.

ROA P. 81, lines 2-5. Applicant also alleged questioning of Russell Brown ("Mr. Brown") concerning the restaurant handle was speculative:

A. It is a handle to pull the door open.

Q. And, Mr. Brown, what do — what do the employees of the store generally know about the handle?

A. Well, they know the handle is a dummy. They just grab the main handle. They know the thumb piece is obsolete. So when they grab the door and when I grab the door, we just grab it by the handle and pull it open.

Q. Is it necessary for you or other employees to place your thumb on the latch —

A. No, sir.

ROA P. 169, lines 20-25 – P. 170, lines 1-6.

Regarding the questioning of Mr. Riley, Trial Counsel testified he did not object to this line of questioning because the solicitor's question came after Trial Counsel had somewhat implicated Mr. Riley in the crime. The solicitor's question could be construed as speculative, however the Solicitor was merely trying to counter Trial Counsel's line of questioning, and Trial Counsel decided not to object because he did not want to pursue the argument of implicating Mr.

Riley. Trial Counsel testified it was very unlikely that Mr. Riley was implicated in the crime, and it believed it was an obvious point that Mr. Riley would have been fired if he was suspected of being involved in the robbery. Trial Counsel testified the State was not relying heavily on Mr. Riley's testimony to convict Applicant, but the testimony of Leslie Green which the State primarily relied on. Leslie Green's testimony identifying Applicant and the thumb fingerprint of Applicant was the main evidence the State was relying on.

Regarding the questioning of Mr. Brown, Trial Counsel testified he was not sure if this line of questioning was speculative or not. The State argued employees would know the thumb latch was decorative, and the handle of the door only needed to be pulled to open the door to the restaurant. The witness, Mr. Brown, runs several Firehouse Sub stores, one being the restaurant targeted by Applicant in this crime. Trial Counsel testified he would not characterize this line of questioning as speculative, but maybe as Mr. Brown lacking personal knowledge. Trial Counsel failed to object on either basis, but he testified though the State was relying on evidence of Applicant's thumb print, the State's main and strongest evidence was the direct evidence of Leslie Green testifying Applicant was the robber.

This Court finds the testimony of Trial Counsel credible, and finds Applicant cannot show deficient performance of Trial Counsel or resulting prejudice. Trial Counsel articulated a reasonable and valid trial strategy for failing to object to these lines of questioning by the solicitor. Trial Counsel did not object to these lines of questioning because he did not want to focus on arguments he did not intend to pursue, and draw attention to issues that were ancillary. However, even if Trial Counsel's failure could be construed as deficient, Applicant cannot show he was prejudiced. There was direct evidence from Green, the cousin of Applicant who was present during the robbery and suspected of being involved, that Applicant was the robber. The questioning of

solicitor on these two issues did not substantially add to the strength of the State's case against Applicant, and objecting to the questioning would not have done much to alleviate the strength of the evidence against him. Therefore, Applicant's allegations are **DENIED** and **DIMISSED** with prejudice.

**ALLEGATION OF FAILURE TO PRESERVE ISSUE OF ADMISSION OF EVIDENCE FROM SEARCH FOR APPEAL**

Applicant alleged Trial Counsel was ineffective for failing to preserve issue of Trial Court's admission of search of Applicant's residence and seizure of sneakers. Specifically, Applicant alleges Trial Counsel waived his objection in his opening argument and failed to object when testimony was given concerning the sneakers seized in the search. Trial counsel may be ineffective where they fail to object to admission of excludable or other improper evidence. Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994) (Trial counsel ineffective for failing to move to suppress evidence obtained in violation of Fourth Amendment where counsel explained he did think police were doing anything out of the ordinary when police stopped Applicant because car had paper tags in "high crime" area).

In Milledge, defense counsel made a *motion in limine* to suppress drugs found on defendant when frisked by law enforcement during a traffic stop. Milledge v. State, 422 S.C. 366, 811 S.E.2d 796 (2018). The trial court denied defense counsel's motion, and later on at trial, defense counsel did not contemporaneously object to admission of drugs. Milledge, 422 S.C. at 373, 811 S.E.2d at 800. Milledge later filed a PCR action, alleging like Applicant, defense counsel was deficient for failing to renew his objection when evidence from search was admitted into evidence at trial. Id. The Court in Milledge determined there was no prejudice as an appellate court would likely reaffirm the trial court's denial of motion to suppress. Id. 422 S.C. at 380, 811 S.E.2d at 804.

PCR courts should view a trial court's ruling through the same lens that would be applied on appeal. Id.; see State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459–60 (2002) (explaining that on appeal from a Fourth Amendment motion to suppress, an appellate court will only reverse the trial court if there is clear error, and will affirm if there is any evidence to support the ruling). In Applicant's case, the search was of his residence. Generally, a search warrant is required where a search is conducted by government actors, subject to a few exceptions. Katz v. United States, 389 U.S. 347 (1967); State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011) (Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement). A search warrant may be issued where there is a finding of probable cause, the South Carolina General Assembly has enacted a requirement that search warrants may be issued "only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant." S.C. Code Ann. § 17-13-140; State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999); State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). The standard for probable cause to support a search warrant is "mere probability that a crime is being committed, rather than a prima facie showing of criminal activity". State v. Dean, 282 S.C. 136, 139 317 S.E.2d 744, 745 (1984).

In Applicant's case, Trial Counsel, like defense counsel in Milledge, filed a motion to suppress the search of Applicant's residence, but his motion was denied by the trial court. Trial Counsel testified his argument to suppress the evidence was not great because the warrant contained an affidavit from a co-defendant identifying Applicant as the robber and statement from Applicant confirming he lived at the residence for some time. Because the motion had been denied and Trial Counsel felt his argument was weak for suppression, Trial Counsel made the decision to embrace the introduction of the evidence from the search. Trial Counsel did this by mentioning the sneakers seized in his opening arguments, arguing the sneakers were common, and putting up

two witnesses, Applicant's mother and uncle, that could counter the argument the sneakers belonged to applicant.

It could be argued that the failure to object and preserve this issue for appeal was deficient performance, even taking Trial Counsel's strategy into consideration. However, Applicant cannot, and has not shown resulting prejudice. As stated above, Applicant must show a motion to suppress the evidence would have been successful on appeal. Milledge, 422 S.C. at 380, 811 S.E.2d at 804. Here, the residence of Applicant was searched pursuant to a search warrant that confirmed Applicant lived at the residence and included a statement by a co-defendant, who was an employee of the restaurant robbed and was present during the robbery, that Applicant was the robber. The denial of Trial Counsel's motion to suppress would likely have been affirmed on appeal, as the facts supporting the search warrant would constitute sufficient probable cause.

This Court finds the testimony of Trial Counsel credible, and finds Applicant failed to prove deficiency and resulting prejudice. Trial Counsel failed to make a contemporaneous motion to suppress the evidence admitted at trial, but Applicant suffered no resulting prejudice from this, as denial of the motion would likely have been affirmed on appeal. Therefore, Applicant's allegations are **DENIED** and **DISMISSED** with prejudice.

#### **ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO REQUEST LOGAN CHARGE**

Applicant alleged Trial Counsel was ineffective for failing to request the entire Logan charge. For a jury instruction to be proper, the facts of the case must support it. State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003). South Carolina law dictates jury instruction, when analyzed, must be considered in their entirety. Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003); State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994) (Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not

constitute reversible error). There is no particular verbiage that must be instructed to the jury, but the substance of the law must be instructed. Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994). The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean. State v. Simmons, 310 S.C. 439, 427 S.E.2d 175 (1993), judgment rev'd on other grounds Simmons v. S.C., 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994). Harmless error will be applied where counsel ineffective in requesting jury charge if no reasonable probability existed outcome of case would have been different. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (in light of the overwhelming evidence of Ford's guilt, the Supreme Court found no reasonable probability that the result of the trial would have been different had counsel accepted the alibi charge).

The Supreme Court of South Carolina recognized the necessity for particular instruction to jury in evaluating circumstantial evidence, meaning evidence that is proof of a chain of facts and circumstances indicating existence of a fact. State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955). A circumstantial evidence charge is a construct that requires the State to prove its case beyond a reasonable doubt and provides a framework for “rational” and “cumulative” assessment to guide the jury’s consideration of circumstantial evidence. State v. Grippon, 327 S.C. 79, 87-88, 489 S.E.2d 462, 466 (1997) (citing Rosenberg, 31 Hous. L.Rev. at 1412–13).

In a criminal case where the State relies in whole or in part on circumstantial evidence, and once a proper reasonable doubt instruction is given, Grippon established the jury should be instructed as follows:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater

degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

Grippon, 327 S.C. 79, 489 S.E.2d 462 (holding modified by State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004)). Logan did not prohibit use of the Grippon charge, but when requested by defendant, trial courts should utilize the following language:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Logan, 405 S.C. at 99, 747 S.E.2d at 452.

Applicant's case relied mainly on direct evidence, but the State also had circumstantial evidence against Applicant. A statement from Leslie Green, who was present at the robbery and had a close relationship to Applicant, identified Applicant as the robber and fingerprints place Applicant at the place of the robbery. Following his instruction to the jury on governments burden to prove the case beyond a reasonable doubt, the trial court gave an instruction on circumstantial evidence, stating:

Now, ladies and gentlemen, there are two types of evidence that are generally presented. There's direct evidence and there's circumstantial evidence during a trial. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact to be proved.

Circumstantial evidence is proof of a chain of facts of circumstances indicating the existence of the fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. The circumstantial evidence is based on inference and not on personal knowledge or observation.

The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.

Ladies and gentlemen, you should weigh all of the evidence in this case. And after weighing all of the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find the Defendant not guilty.

ROA P. 295, lines 14-25 – P. 296, lines 1-14. The instruction given by the trial court includes language from the Grippon charge and Logan charge. In Logan, the issue before the court was not the weight of circumstantial evidence, as observed in Grippon, but the proper means for evaluating circumstantial evidence. 405 S.C. at 97, 747 S.E.2d at 451. The additional language in the Logan charge distinguishes circumstantial evidence from direct evidence, serving to alert the jury to their “analytical responsibility”. Id.

In Applicant’s case, the trial court correctly distinguished circumstantial evidence from direct evidence, giving the jury a framework to analyze the circumstantial evidence. The language in the trial court’s instruction does not exactly mimic the language recommended in Logan, but that is not a requirement. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994). Taking the language of the circumstantial evidence instruction as a whole shows the trial court conveyed the substance of the law to the jury, and Trial Counsel had no reason to object to its language. Todd, 355 S.C 396, 585 S.E.2d 305 (2003). Additionally, Trial Counsel testified he did not think to request the Logan charge because Applicant’s case mainly relied on direct evidence, and requesting the charge would not have made a difference in the verdict.

This Court finds Applicant failed to show deficient performance or resulting prejudice. Trial Counsel was not deficient in failing to request the entire Logan charge, as the trial

court's circumstantial evidence charge to the jury sufficiently conveyed the substance of the law. Additionally, such a charge would not have made a difference in the verdict, as there was ample direct evidence against Applicant. Therefore, Applicant's allegations are **DENIED** and **DISMISSED**.

**ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO COMMUNICATE  
PLEA DEAL**

Applicant informally alleged Trial Counsel was ineffective for failing to communicate plea deal of ten-years to Applicant prior to trial, testifying he would have taken such a deal under consideration. The Sixth Amendment right to effective assistance of counsel applies to all critical stages of criminal proceedings, and claims based on ineffective assistance of counsel in plea bargaining context are governed by deficiency and prejudice test of Strickland. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Generally, counsel has a duty to communicate formal offers from prosecution to accept plea on terms and conditions that may be favorable to the accused, and failure to inform defendant constitutes deficient performance. Missouri v. Frye, 566 U.S. 134 (2012).

To establish prejudice where plea offer has lapsed or been rejected due to deficient performance, defendant must show a reasonable probability not only that defendant would have accepted plea offer, but that plea offer would be entered into without cancellation by prosecution or trial court refusing it if they had discretion under the law. Frye, 566 U.S. at 147. If applicant would have proceeded to trial regardless of plea being presented to him, applicant cannot then assert the failure to communicate plea offer prejudiced him.

The Court finds the testimony of Trial Counsel credible, and finds Applicant failed to show Trial Counsel's performance was ineffective. Trial Counsel testified he was not sure why Applicant's case was transferred to him, either due to Ms. Dicus passing or fact Ms. Dicus had

been unsuccessful in plea negotiations and Applicant's case was nearing trial. Applicant testified Ms. Dicus had communicated an eight-year plea offer to him, which he testified he took under consideration, but ultimately he did not accept it. Trial Counsel testified he was unaware of an eight-year plea offer, but a ten-year offer was communicated to Applicant. The offer was communicated in March 2013 and available until December 2013, but Applicant rejected the offer. Applicant contends he never heard of the ten-year offer, testifying he was on vacation in Pigeon Forge in December. However, Trial Counsel references his notes on Applicant's case, evidencing he spoke with Applicant over the telephone in March and met in person in late March, which was around the time the plea offer was made. This gave Applicant about ten months to consider and accept the offer, which he ultimately did not. Additionally, Applicant contends he would have accepted ten-year plea offer when he had previously rejected an eight-year offer.

Thus, this Court finds Trial Counsel testimony credible, and finds Trial Counsel was not deficient, having communicated the plea offer to Applicant. Additionally, even if Trial Counsel was deficient, Applicant cannot demonstrate resulting prejudice, as he did not present evidence or other specific testimony he would have accepted plea offer if it had been communicated to him. Therefore, this Courts **DENIES** and **DISMISSES** Applicant's allegations with prejudice.

### CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief requested in his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notifies the Applicant that she must file and serve a notice of appeal within thirty days from post-conviction relief counsel's receipt of written notice of entry of judgment to secure

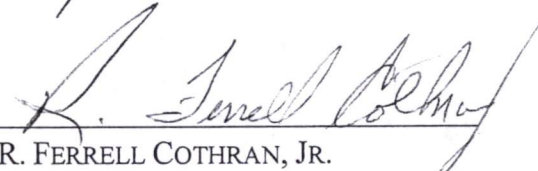
the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

**IT IS THEREFORE ORDERED:**

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 18 day of April, 2023.

Manning, South Carolina

  
R. FERRELL COTHRAN, JR.  
Presiding Circuit Court Judge  
First Judicial Circuit

**RECEIVED**

**MAY 09 2023**

**S.C. SUPREME COURT**

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Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
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**RECEIVED**  
MAY 09 2023  
S.C. SUPREME COURT

