STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Andre T. Heatley, Jr., #378998, Applicant, v. State of South Carolina, Respondent.	CASE NO. 2021–CP–40–4683 **ORDER OF DISMISSAL WITH PREJUDICE**

This matter comes before the Court by way of Andre T. Heatley, Jr's (Applicant) application for post-conviction relief (PCR) filed on September 16, 2021, challenging his trial for Murder and Armed Robbery. Respondent, the State of South Carolina, submitted its Return on December 31, 2021, requesting an evidentiary hearing to resolve the claims as set forth in the application. On April 24, 2023, Applicant filed amendments to his PCR application.

On May 12, 2023, an evidentiary hearing was held at the Richland County Courthouse before the Honorable Daniel Coble. Applicant was present and represented by Michael H. Lifsey, Esquire. Assistant Attorney General D. Russell Barlow, II, represented Respondent. Applicant proceeded forward on the claims set forth in his amended application. In support of these claims, Applicant testified on his own behalf, and Respondent presented testimony from E. Deon O'Neil, Esquire (Trial Counsel).

Following a thorough review of the record in its entirety, along with the testimony and evidence 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.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections (SCDC). In November 2016, the Richland County Grand Jury indicted Applicant for Murder (2016-GS-40-6572) and Armed Robbery (2016-GS-40-6573). Applicant was represented by E. Deon O'Neil and Khalil C. Eaddy, Esquires. Deputy Solicitor Daniel Goldberg and Assistant Solicitor Lamar Fyall, of the Fifth Circuit Solicitor's Office, prosecuted the case.

Applicant's case proceeded to a jury trial on January 22-30, 2019, before the Honorable DeAndrea G. Benjamin. The jury found Applicant guilty as indicted. Judge Benjamin sentenced Applicant to fifty years' imprisonment for murder and ten years for armed robbery, to be served consecutively.

Applicant filed a timely notice of appeal. Appellate Defender Laura M. Caudy perfected Applicant's appeal by filing an Anders[1] brief to the court of appeals presenting the following issue:

> 1. Did the trial judge abuse her discretion by admitting evidence that Appellant allegedly told a third party that the decedent told others she was "going to be with" Appellant "after she got off work" because Appellant "had some drama going on" when such evidence was hearsay within hearsay and did not meet any exceptions to the hearsay rule, and where the evidence was unfairly prejudicial since the state's theory was that the decedent was shot and killed within thirty minutes of leaving work?

Thereafter, Applicant submitted his own *pro se* brief on March 18, 2020, which identically reiterated the points raised by Appellate Counsel. The Court of Appeals dismissed the appeal in an unpublished decision. State v. Heatley, 2021-UP-265 (filed July 14, 2021). The Remittitur was returned to the lower court on August 5, 2021.

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[1] Anders v. California, 386 U.S. 738 (1976).

FACTS GIVING RISE TO THE CONVICTION

On January 26, 2016, Deanndra Roach (Victim) left her job at Walmart just after 10:00 o'clock in the evening and drove to meet Applicant, whom she had an on/off relationship with. (Tr. 303, 1173). Cell tower data showed both Applicant and Victim's phones at the crime scene that evening. (Tr. 1175). At the location Applicant and Victim met, Applicant fatally shot Victim twelve times, pulled her body out of the car, and took her phone and debit card before leaving her body on the side of the road. (Tr. 303, 1156, 1162). Applicant then drove to three different ATM machines and was recorded via video attempting to withdraw money from Victim's account with her debit card. (Tr. 305, 1161). Applicant additionally purchased a watch with Victim's credit card. The shell casings found at the scene and in Victim's body matched Applicant's gun. (Tr. 1185). Applicant was eventually apprehended and gave several conflicting statements to law enforcement. (Tr. 309, 1181).

CURRENT ACTION BEFORE THIS COURT

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

1. "Violation of Fifth and Sixth Amendment"
   a. "Do [sic] to the fact of ineffective assistance of counsel."
2. "Denial Due Process"
   a. "Lawyer failed to preserve Miranda rights violation for the record."

Applicant amended his PCR application with the following ineffective assistance of counsel allegations:

1. Failure to meet with Applicant a sufficient number of times;
2. Failure to explain the elements of the charges;
3. Failure to develop a defense and prepare for trial;
   a. These failures led Applicant to have an inaccurate view of the strength of the state's case and led to him insisting on a

jury trial rather than entering into plea negotiations with the state;

4. Failure to properly advise Applicant of his right to testify and the advantages thereof;
5. Failure to object to the trial judge's incorrect charge to the jury regarding circumstantial evidence and not requesting a charge in conformity with State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013);
6. After the jury indicated by note that a juror was refusing to deliberate further, Applicant's trial counsel failed to object to the judge recharging the jury on their oath as jurors without also requesting that the court recharge them that they should not compromise their firmly held beliefs in order to reach a verdict.

Applicant proceeded at the hearing on his amended allegations.

SUMMARY OF EVIDENTIARY HEARING TESTIMONY

APPLICANT'S TESTIMONY

On direct examination, Applicant testified that he was originally represented by Teresa Johns for about a year and a half. Applicant testified that Trial Counsel was appointed about a year before the trial, and it was a better situation because they talked more. Applicant testified that he saw Trial Counsel more than the other attorneys. Applicant testified that Trial Counsel never explained what murder was to him. Applicant testified that Trial Counsel never explained the elements of his charges to him. Applicant testified that they had a plan. Then Applicant testified that he and Trial Counsel never discussed the strength of the State's evidence or the burden of proof.

Applicant testified that there were no plea negotiations. Applicant testified that he knew he could get a life sentence. Applicant testified that there were objections that should have been done, but Trial Counsel "for the most part [] did a great job." Applicant testified that when Trial Counsel did object, it was overruled. Applicant testified that he did not testify because of a heated situation during pretrial, and there was no advantage to his testifying.

Applicant testified that those were all his complaints with Trial Counsel, and the rest of his complaints were about the judge and jury.

On cross-examination, Applicant testified that no one explained murder to him, and he did not know what murder meant when he was charged. Applicant testified that Trial Counsel failed to develop a defense because he is innocent. When asked what Trial Counsel should have done, Applicant testified that Trial Counsel should have taken a plea. Applicant testified that it did not matter if he testified.

On redirect examination, Applicant testified that no one advised him to plea or discussed that he could get less time if he pled.

TRIAL COUNSEL'S TESTIMONY

On direct examination, Trial Counsel testified that he got the case in April of 2018, and he met with Applicant on the kiosk at the jail and saw him on April 27, 2018, to review discovery, met with him again on July 30, 2018, September 23, 2018, October of 2018, November of 2018, went over video in December 2018, and saw him the week before trial in January 2019. Trial Counsel testified that their theory of the case was that it was not Applicant because there was no direct evidence. Trial Counsel testified that the ATM videos linked Applicant to Victim's debit card.

Trial Counsel testified that Applicant and Deputy Solicitor Goldberg had a heated exchange, so it was not a good idea for him to testify in front of the jury. Trial Counsel testified that it is sometimes good for the defendant to get their story out to the jury, but he had given a statement to law enforcement, so there was no need to testify. Trial Counsel testified that it was a primarily circumstantial case and the Logan[2] charge is more favorable to a defendant, and he failed

[2] State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013).

to request it. Trial Counsel testified that the trial judge recharged the jurors' oath, and he did not request a charge about compromising their beliefs.

On cross-examination, Trial Counsel testified that it was his standard practice to go over the charges and the elements of the charges with his clients. Trial Counsel testified that he advised his client about his right to testify. Trial Counsel testified that while the Logan charge is more favorable to a defendant, the charge given was correct. Trial Counsel testified that no Allen[3] charge was given to the jurors, and the trial judge just recharged their oath. Trial Counsel testified that he did move for a mistrial based on what happened with the juror.

Trial Counsel testified that it was Applicant's decision to go to trial. Trial Counsel testified that he stood by his representation of Applicant.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[4] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based 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[.]

[3] Allen v. United States, 164 U.S. 492 (1896).
[4] S.C. Code Ann. §§ 17-27-10 to -160.

S.C. Code Ann. § 17-27-20(A).

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, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. 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), SCRCP; 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 v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). 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)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden,

counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S.at 112.

Finally, 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 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. 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. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

As a matter of general impression, this Court finds Trial Counsel's testimony at the evidentiary hearing **credible** and **persuasive,** where she presented well-recollected testimony of relevant background, facts, and discussions leading up to and during the trial. This Court finds Applicant's testimony at the evidentiary hearing **not credible**. This Court further finds applicable

the strong presumption that at all stages of Trial Counsel's representation of Applicant that she rendered adequate assistance and exercised reasonable professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689, 104 S.Ct. 2052; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS ON THE MERITS

Applicant has alleged multiple claims of ineffective assistance of trial counsel and asserts that as a result of Trial Counsel's purported errors, he is entitled to a new trial. This Court finds Applicant has failed to meet his requisite burden of proof as to each allegation. Each allegation is addressed below:

Allegation 1: "Failure to meet with Applicant a sufficient number of times."

Applicant alleges Trial Counsel was constitutionally ineffective for failing to meet with him a sufficient number of times. This Court finds this allegation is without merit.

At the evidentiary hearing, Trial Counsel **credibly** testified to numerous meetings and expounded at times as to what he and Applicant reviewed in those meetings. Trial Counsel **credibly** testified that he reviewed discovery with Applicant and explained the charges and their corresponding elements. Regardless of the number of times they met, the record reflects that Trial Counsel was clearly prepared for trial and fully defended Applicant at the trial.

Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. Campbell v. Polk, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency);

United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with his client twice before trial as long as counsel devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.).

South Carolina case law has established that even if Trial Counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter) (finding "Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation."), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

As stated *supra*, this Court finds the record reflects Trial Counsel was well-prepared in his defense and was familiar with the facts of the case and the law surrounding the charges. Importantly, this Court finds Applicant has failed to present "any evidence of how additional preparation or communication would have resulted in a different outcome." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012); see Harris, 377 S.C. at 75, 659 S.E.2d at 145 (finding that, when there is evidence counsel met with a defendant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective). This Court finds Trial Counsel was not deficient in their representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Trial Counsel's performance in this matter.

Accordingly, Applicant's allegation Trial Counsel did not meet with him a sufficient number of times is **DENIED** and **DISMISSED**.

Allegation 2: "Failure to explain the elements of the charges."

Applicant alleges Trial Counsel was constitutionally ineffective for failing to explain the elements of the charges. This Court finds this allegation is without merit.

On direct examination, Applicant testified that Trial Counsel did not explain the elements of the charges against him.

On cross-examination, Applicant testified that he did not know what murder meant.

On direct examination, Trial Counsel testified that he explained the charges and the elements of the charges, and it was his standard practice to review the charges and elements with all clients.

This Court finds Trial Counsel's testimony **credible** and Applicant's testimony **not credible**. Applicant has the burden to prove every allegation in his application. See Butler, 286 S.C. at 441, 334 S.E.2d at 814. Based on Trial Counsel's **credible** testimony, this Court finds Trial Counsel explained the elements of murder and armed robbery to Applicant. Therefore, this Court finds Trial Counsel was not deficient in their representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Trial Counsel's performance in this matter.

Accordingly, Applicant's claim Trial Counsel did not explain the elements of the charges **DENIED** and **DISMISSED**.

Allegation 3: "Failure to develop a defense and prepare for trial."

Applicant alleges Trial Counsel was constitutionally ineffective for failing to develop a defense and prepare for trial. This Court finds this allegation is without merit.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Here, Applicant has presented no witnesses or specific testimony other than his self-serving assertion that Trial Counsel failed to develop a defense because Applicant is "*innocent*." This Court finds Applicant's testimony **not credible**—thus, he has failed to show this Court how the result at trial would have been different with additional preparation and what further defenses Trial Counsel could have pursued. As well, as noted *supra*, this Court finds the record reflects Trial Counsel was well-prepared in his defense and was familiar with the facts of the case and the law surrounding the charges. This Court finds Trial Counsel was not deficient in their representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Trial Counsel's performance in this matter.

Accordingly, Applicant's allegation that Trial Counsel failed to develop a defense and prepare for trial is **DENIED** and **DISMISSED**.

Allegation 4: "Failure to properly advise Applicant of his right to testify and the advantages thereof."

Applicant alleges Trial Counsel was constitutionally ineffective for failing to properly advise him of his right to testify and the advantages thereof. This Court finds this allegation is without merit.

"The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. [However], if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations." Id. "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id.

As an initial matter, this Court finds that Applicant's testimony *refutes* this allegation. On direct examination, Applicant testified that there was no advantage in his testifying. On cross-examination, Applicant testified that it did not matter if he testified.

On direct examination, Trial Counsel testified that discussions with Deputy Solicitor Goldberg and Applicant were heated in the pretrial phase, and he did not think it would be a good idea for Applicant to be cross-examined and have that happen in front of the jury. Furthermore, Trial Counsel testified that Applicant gave a written statement to law enforcement, so he did not need to testify.

This Court finds that Applicant was fully aware of his right to testify and the advantages and disadvantages of doing so. The record reflects, Applicant knowingly waived his right to testify after a thorough colloquy with the court. (Trial Tr. 1143 - 1146). Further, the record reflects that

Applicant informed the trial court that Trial Counsel discussed his right to testify with him, that he had no questions for the trial court, and that he had no questions for Trial Counsel regarding his right to testify. (Trial Tr. 1145). This Court finds Trial Counsel was not deficient in their representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Trial Counsel's performance in this matter.

Accordingly, Applicant's allegation that Trial Counsel did not discuss his right to testify is **DENIED** and **DISMISSED**.

Allegation 5: **"Failure to object to the trial judge's incorrect charge to the jury regarding circumstantial evidence and not requesting a charge in conformity with State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013)."**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to the incorrect charge to the jury regarding circumstantial evidence and not requesting a charge in conformity with State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). This Court finds this allegation is without merit.

As an initial matter, this Court finds that the allegation that the charge given was the incorrect charge fails as a matter of law. In State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997), the Supreme Court of South Carolina adopted the reasoning that "if a proper reasonable doubt instruction is given, a jury need not be instructed that circumstantial evidence must be so strong as to exclude every reasonable hypothesis other than guilt." Id., 327 S.C. at 83, 489 S.E.2d at 464 (citing Holland v. U.S., 348 U.S. 121 (1954)). Pursuant to that reasoning, the Court recommended a specific jury instruction for circumstantial evidence:

> 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.

Id., 327 S.C. at 83-84, 429 S.E.2d at 464 (citation omitted). Subsequently, to eliminate any confusion in circumstantial evidence instructions, the Supreme Court affirmed the above language as "the sole and exclusive charge to be given in circumstantial evidence cases in this state, along with a proper reasonable doubt instruction." State v. Cherry, 361 S.C. 588, 601, 606 S.E.2d 475, 482 (2004).

The Supreme Court substantially modified its restrictive ruling in Cherry in State v. Logan. Logan provides that defendants should not be restricted from requesting a jury charge that reflects the requisite connection of collateral facts necessary for conviction and, thus, Courts must provide the following alternative language in its jury instructions when so requested by a defendant:

> 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.

Id., 405 S.C. at 99, 747 S.E.2d at 452. Though the Court must give the above charge if requested by a defendant, the Grippon instruction remains valid. Id., 405 S.C. at 100, 747 S.E.2d at 452-53.

At trial, Trial Counsel did not request a Logan charge, and he did not object to a Logan charge not being given. (Trial Tr. 1220 – 1221).

At the evidentiary hearing, Trial Counsel testified on direct examination that while this case was primarily a circumstantial case, he did not ask for a Logan charge. Trial Counsel also testified that the charge the trial judge gave was a correct charge, and a Logan charge is not required.

This Court finds that Trial Counsel's failure to request a Logan charge does not amount to deficient performance, nor can this Court discern any prejudice that would result if it did. First, as a matter of law, the Court cannot reconcile Applicant's proposition that failure to seek a Logan charge constitutes deficient performance with the Supreme Court's preservation of the Grippon charge as valid—if satisfaction with and reliance upon the Grippon charge by Trial Counsel were a deficiency, then Grippon would, as a practical matter, no longer constitute a valid charge.

Second, the Court cannot determine what, if any, prejudice Applicant suffered from the lack of the Logan language, given the case against him—Applicant was found with Victim's debit card on his person, the bank video of him using Victim's debit card to withdraw cash from Victim's accounts at three separate ATM's on the night of the murder, the text messages from Applicant to his girlfriend, and the gun that Applicant admitted was his property linking him to the murder through the ballistics analysis showing the bullets that killed Victim were shot from Applicant's gun. Simply put, all of the circumstances were consistent with each other and pointed conclusively to Applicant's guilt beyond a reasonable doubt. This Court finds Trial Counsel was not deficient

in their representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Trial Counsel's performance in this matter.

Accordingly, Applicant's allegation that Trial Counsel failed to object to the trial judge's incorrect charge to the jury regarding circumstantial evidence and not requesting a charge in conformity with State v. Logan is **DENIED** and **DISMISSED.**

Allegation 6: **"After the jury indicated by note that a juror was refusing to deliberate further, Applicant's trial counsel failed to object to the judge recharging the jury on their oath as jurors without also requesting that the court recharge them that they should not compromise their firmly held beliefs in order to reach a verdict."**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to the judge recharging the jury on their oath as jurors without also requesting that the court recharge them that they should not compromise their firmly held beliefs in order to reach a verdict. This Court finds this allegation is without merit.

At trial, when one of the jurors stopped deliberating, and after an exhaustive discussion between the trial judge, Trial Counsel, and the Solicitor, the trial court brought the jury out and charged them with their oath they took at the beginning of trial:

> I am going to read you, remind you of the oath that you took on last week, Tuesday or Wednesday. And this is an oath that all jurors take in this state in criminal cases. It says: Do you swear or affirm that you shall well and truly try, and true deliverance make, between the State of South Carolina and the Defendant at bar, whom you shall have in charge, and a true verdict give, according to the law and the evidence, so help you God? I remind you that you all took that oath. I am going to send you back in the room and continue to deliberate. I ask that you be respectful to each other during your deliberations.

(Trial Tr. p. 1259).

Here, Applicant contends that the trial court was required to include language that the jurors were not required to compromise their beliefs because an Allen charge is inherently coercive.[5] This Court finds that the charge of the jurors' oath was not an Allen charge; therefore, the trial court was not required to include any other language. An Allen charge is used to encourage a deadlocked jury to reach a verdict. State v. Jones, 320 S.C. 555, 466 S.E.2d 733 (Ct. App. 1996); See Allen v. U.S., 164 U.S. 492 (1896) (if the jury returns without a verdict, the trial judge may instruct the jury to take more time to deliberate, to re-examine their views, and to avoid a mistrial by reaching a unanimous verdict).

In Applicant's case, the record reflects that the jury was not deadlocked, but that one juror decided not to further participate in deliberations. The foreman reported that the juror participated in part, but refused to consider evidence, engage in conversations, and refused to voice her opinion when asked. The foreman further stated to the trial judge that the juror was, at that point, sitting in a corner reading a book and completely refusing to participate. (Trial Tr. 1247-1250). Also, the record reflects that the trial court, Trial Counsel, and Solicitor exhaustively discussed exactly what the trial court was going to do with regard to the jurors, and that was to charge them with their oath and to continue to deliberate. (Trial Tr. pp. 1250 – 1257). Further, this Court finds that there was no objectionable basis for Trial Counsel to object as the trial court did not give an Allen charge.

Accordingly, Applicant's allegation that Trial Counsel failed to object to the judge recharging the jury on their oath as jurors without also requesting that the court recharge them that they should not compromise their firmly held beliefs in order to reach a verdict is **DENIED** and **DISMISSED.**

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[5] Applicant pointed this Court to State v. Rampey, 438 S.C. 519, 885 S.E.2d 366 (2022).

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 a right to an appellate counsel's assistance in seeking a review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 27 **day of** Aug, **2023.**

THE HONORABLE DANIEL COBLE
Presiding Judge
Fifth Judicial Circuit

Richland County, South Carolina