

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

Common Pleas Case No. 2022-CP-23-5979

Appellate Case No. \_\_\_\_\_

JEREMY ALAN WATSON,

*Appellant,*

v.

STATE OF SOUTH CAR-  
OLINA,

*Respondent.*

NOTICE OF APPEAL

Comes now Jeremy Alan Watson and provides notice that he appeals from the denial of his application for post-conviction relief. That application, attached here, was denied after an evidentiary hearing before the Honorable R. Scott Sprouse via an order stamped February 29, 2024. Undersigned counsel received the stamped order on March 5, 2024.

Other counsel of record below were the following:

Melody J. Brown (14244)  
Sr. Asst. Dept. Attorney General  
Office of the Attorney General  
PO Box 11549  
Columbia, SC 29211

Respectfully submitted,

JEREMY ALAN WATSON

s/Howard W. Anderson III  
Howard W. Anderson III  
(#100329)

Dated this 5<sup>th</sup> day of March, 2024

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

Jeremy Alan Watson )  
 )  
Applicant, )  
v. )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Case No.: 2022-CP-23-5979

**ORDER OF DISMISSAL**

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This matter comes before the Court by way of an application for post-conviction relief filed by Applicant Jeremy Alan Watson, through his retained counsel, on October 31, 2022. An evidentiary hearing was held January 18, 2024, in the Greenville County Courthouse. Applicant was present and represented by counsel, Howard W. Anderson, III, Esq. Senior Assistant Deputy Attorney General Melody J. Brown represented Respondent, the State. After the receipt of testimony and argument, this Court took the matter under advisement. On January 29, 2024, after consideration of the testimony and counsel’s argument, and after reviewing the record and the controlling case law, the undersigned advised the parties that the Court had determined that Applicant failed to carry his burden of proof. At that same time, the Court also requested that counsel for the State prepared a proposed order.<sup>1</sup> This Court now DENIES relief for the specific reasons set out in this order.

<sup>1</sup> The proposed order was provided to counsel for Applicant prior to this Court’s acceptance. Applicant’s counsel was allowed sufficient time to review the proposed order while this Court made its own detailed review. *See Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019) (providing a “proposed order should be transmitted to opposing counsel” for review and that counsel “should ... alert preparing counsel and the PCR court as to any deficiencies in the proposed order.”).

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### *General Procedural History*

Applicant is not currently incarcerated but served a forty-five-day sentence imposed for a domestic violence, third degree, conviction.

A Greenville County grand jury indicted Applicant in June 2021 for domestic violence second degree and assault and battery third degree. (Return Attachment 1). Russell C. Sanford Esq. represented Applicant on the charges. A jury trial was held November 9-10, 2021, before the Honorable Edward W. Miller. The jury found Applicant not guilty of domestic violence second degree, but guilty of the lesser charge of domestic violence third degree. (Return Attachment 2, Tr. 196; *see also* Return Attachment 3, verdict form). The jury also returned a not guilty verdict as to the charge of assault and battery third degree. (Return Attachment 2, Tr. 196; *see also* Return Attachment 3, verdict form). Judge Miller sentenced Applicant to forty-five days confinement for the domestic violence conviction. (Return Attachment 2, Tr. 199; *see also* Return Attachment 4, sentencing sheet). Judge Miller also issued orders permanently restraining Applicant from contact with the victim Deanna Walker, or her family, (Return Attachment 5), and prohibiting Applicant from shipping, transporting, receiving, or possessing a firearm or ammunition for three years pursuant to S.C. Code Ann. § 16-25-30. (Return Attachment 6). Applicant did not appeal.

### **ALLEGATIONS**

In his current application, Applicant alleges he received ineffective assistance of counsel as follows:

(a) Following my conviction and sentence, my trial counsel did not discuss my motion for new trial or appellate options. I would have directed a motion for new trial and an appeal be filed had I been consulted;

(b) Trial counsel did not meet with me before trial to prepare me to testify and, as a result, examined me in an ineffective manner. Even the assistant solicitor commented in closing on the shoddy examination from trial counsel. See Trial Tr. 177. As a result of trial counsel's ineffectiveness, I was unable to fully and adequately convey what happened, including through audio and photographic exhibits that were not presented.

(c) The Allen charge, as phrased, was objectionable as unduly coercive. Among other things, the charge concluded "with the hope that you can arrive at a verdict." [Trial Tr. 195]. But see State v. Williams, 386 S.C. 503, 515 n. 7 (2010) ("[W]e take this opportunity to caution trial judges against using the following language: 'with the hope that you can arrive at a verdict.' Because jurors are not required to reach a verdict after expressing that they are deadlocked, we believe this language could potentially be construed as being coercive."). Shortly after the charge, the jury returned its verdicts.

(PCR Application at 3).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to carefully considering the record and the arguments presented by counsel, this Court has also had the opportunity to consider the testimony presented at the PCR evidentiary hearings and has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. §17-27-80 (2003).

### *Ineffective Assistance Claims*

For claims that trial counsel provided ineffective assistance, this Court is guided by the familiar test: To show a violation of the Sixth Amendment, an applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Simpson v. Moore*, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the

outcome” of the trial. *Strickland*, at 694. Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.*

To conduct a fair review of counsel’s performance, a reviewing court must “eliminate the distorting effects of hindsight” and attempt “to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. Further, it is presumed that counsel made all decisions in exercise of reasonable judgment. *Strickland*, at 689. It is the applicant’s burden to prove, by a preponderance of the evidence, that he is entitled to relief. Rule 71.1 (e), SCRPC. *See also Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (“the burden of proof is on the applicant to prove the allegations in his application”).

*Ineffective Assistance: New Trial Motion and Direct Appeal*

As to Applicant’s claim counsel failed to inform and consult regarding a new trial motion or direct appeal, this Court has considered Applicant’s testimony and counsel’s testimony on this point and is more persuaded by counsel’s testimony. Because this claim speaks to two separate acts, this Court has divided its analysis.

*New Trial Motion*

Applicant testified that he would have wanted counsel to file a motion for a new trial had counsel informed him of that possibility. Applicant argued that counsel could have asked the trial court to reconsider the verdict as a “thirteenth juror” and preserved for appeal an objection to the *Allen* charge. Applicant’s position fails as a matter of law. There could be neither deficient performance nor prejudice under *Strickland*.<sup>2</sup>

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<sup>2</sup> The matter could be denied on lack of prejudice alone, as *Strickland* provides: “The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be

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“Where there is competent evidence to sustain a jury’s verdict, the trial judge may not substitute his judgment for that of the jury and overturn that verdict.” *State v. Miller*, 287 S.C. 280, 283, 337 S.E.2d 883, 885 (1985). Our Supreme Court noted in *Miller* that, though such a motion was made, “[i]t was improper for trial counsel to move for JNOV, a civil trial motion. In a criminal trial, a motion for a new trial is the only available post-trial motion addressing the sufficiency of evidence.” *Id.*, at 282, 337 S.E.2d at 884 at n. 2. Further, our Supreme Court requires a contemporaneous objection to preserve an issue for review. *See, e.g., State v. Aldret*, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999). Failure to contemporaneously object to an instruction results in a procedural bar to the possibility of review on the merits which cannot be saved by later post-trial motion. *State v. Davis-Kocsis*, 436 S.C. 468, 489, 872 S.E.2d 415, 426 (Ct. App. 2022) (finding challenge to jury charge “unpreserved because Kocsis did not timely state a specific objection on the record until her new trial motion”). “[I]t is improper to argue new matter in a motion for reconsideration.” *State v. Hamilton*, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999).

Given that counsel could not have accomplished what Applicant asserts counsel should have sought by way of a new trial motion, Applicant has failed to carry his burden of showing ineffective assistance. *Strickland, supra*. “Counsel is not required to engage in the filing of futile motions.” *Murray v. Maggio*, 736 F.2d 279, 283 (5th Cir. 1984); *see also Moody v. Polk*, 408 F.3d 141, 151 (4th Cir. 2005) (citing *Murray v. Maggio*). *See also Truesdale v. Moore*, 142 F.3d 749,

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so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.” 466 U.S. at 697.

756 (4th Cir. 1998) (“It is certainly reasonable for counsel not to raise unmeritorious claims.”). Having failed in his burden of proof, Applicant is not entitled to any relief.

As far as faulting counsel for not seeking a new trial on “after discovered” evidence, Applicant conceded in his PCR testimony that there was no “new evidence” to support such a motion.<sup>3</sup> As a factual matter, this claim fails. But more basically, Applicant has failed to state a cognizable claim.

A convicted defendant is “not entitled to counsel” on a motion for new trial on after-discovered evidence. *State v. Clinkscales*, 318 S.C. 513, 515, 458 S.E.2d 548, 549 (1995). Simply, the Sixth Amendment right to counsel does not extend to discretionary, collateral post-trial motions. *United States v. Williamson*, 706 F.3d 405, 417 (4th Cir. 2013). *Accord Folkes v. Nelsen*, 34 F.4th 258, 281 (4th Cir. 2022) (“Filing a petition for rehearing in the South Carolina Court of Appeals is a solely discretionary proceeding, meaning the constitutional right of counsel does not extend to it.”). It follows, then, that there could not be a finding that Applicant was “deprived of the effective assistance of counsel” in regard to a new trial motion on after-discovered evidence. *Clinkscales*. See also *Wainwright v. Torna*, 455 U.S. 586 (1982) (where there is no constitutional right to counsel there can be no finding of ineffective assistance). Thus, this portion of Applicant’s claim is not cognizable. See S.C. Code Ann. § 17-27-20 (A) (1) (recognizing claims of a violation of the Constitution may be raised). He is not entitled to any relief. All arguments to the contrary asserted on this ground are rejected.

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<sup>3</sup> At the hearing, Applicant initially claimed there was “new evidence” which he apparently interpreted as evidence (a video or other recording) that was not shown a trial. Counsel for Applicant clarified at the hearing that he chose not to raise a claim about the item Applicant was referencing, adding that defense counsel had expressed a strategic reason for not introducing the evidence.

### *Direct Appeal Claim*

The allegations about the direct appeal advice, however, are cognizable. The Supreme Court has recognized “that counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). The normal requirement of showing prejudice, however, does not attach. Rather, the prejudice showing required is that the applicant “must demonstrate that there is a reasonable probability that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed.” *Id.*, at 484. Further, our Supreme Court has instructed that “[f]ollowing a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal.” *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008).

In his PCR testimony, Applicant conceded that he did not ask counsel to file a notice of appeal. *See Roe v. Flores-Ortega*, at 477 (disregarding the direction to appeal is “professionally unreasonable”). Thus, the question comes down whether counsel made his client “aware of the right to appeal,” *Turner, supra*, or otherwise thought to further advise Applicant on a reasonable perception “that a rational defendant would want to appeal” in this particular case, *Roe v. Flores-Ortega*, at 480.

Counsel testified at the PCR hearing that he had advised Applicant of the right generally but did not discuss the right to appeal in detail and did not discuss at all any possible issues. Counsel clarified that he discussed the matter generally in advising that if Applicant should be found guilty there was an appeal process. Counsel testified that as part of the retainer agreement

for representation, counsel explained to Applicant that he would be responsible for filing a notice of appeal if he should want to appeal, but the agreement expressly did not extend to representation on appeal. The retainer agreement was offered as State's Exhibit 1. The agreement reflects Applicant signed in acknowledgement of that particular point. Counsel testified that he was aware that Applicant was not happy with being found guilty at all, but correctly noted that Applicant received a favorable result in that he was acquitted of the assault and battery charge, and only convicted of the lesser charge of domestic violence third degree, which reduced his sentencing exposure. Counsel recalled some contact with Applicant well after trial, specifically well after the ten days in which a notice could have been timely served. Counsel believed that contact to have been an inquiry into expungement of the charge.

Applicant testified that he wanted to appeal and that he wanted to be found not guilty of anything. He asserted his factual innocence, though he acknowledged that the two victims and police officers, who had immediately responded, testified for the State. He also acknowledged there were only three individuals involved in the domestic violence – the two victims who testified and Applicant. Applicant testified that he did not know about appeal at all. He testified he was not familiar with felonies and general sessions. Applicant recognized his signature on the retainer agreement but testified that he did not know what it meant to file a notice of appeal. He testified that he had to sign to obtain representation and that did not mean that he understood the provision. Applicant testified that he had contacted counsel's office well after trial and spoke to a paralegal. He denied he contacted counsel about possible expungement. When asked if perhaps the gun restriction was the reason that he reached out to counsel well after trial, he admitted that he "loved" his guns.

Counsel, of course, is presumed to have discharged his obligations professionally and reasonably. *Strickland*, at 689. It is Applicant's burden to show the representation was deficient. *Id.* See also *Speaks, supra*. Here, there are solid indications that Applicant would not wish to appeal – he was acquitted of one charge, received a guilty verdict of a lesser offense on the other, and received a sentence of days, and that was only half of the time requested by the State. Further still, the conviction rested in large measure on credibility determinations, not a contested search or statement or other evidence offered and received. The record shows no overruled objection(s) in the record that would preserve any issue and Applicant has not identified any. See *Kinard v. State*, 418 S.C. 478, 481, 795 S.E.2d 15, 16 (2016) (“The merits of any such appeal, while relevant to an allegation that counsel failed to advise a defendant of the right to appeal, are not relevant where a PCR applicant alleges counsel failed to file an appeal after being asked to do so.”) (emphasis in original). This Court credits counsel's testimony that the only contact from Applicant was well after the appeal period passed, and that it was an inquiry on expungement. This Court finds that the greater weight of the evidence supports that Applicant was aware of the right appeal, and even that counsel would file a notice of appeal if asked without further expense – that is supported by the plain terms of the retainer agreement. Thus, this Court concludes that counsel made his client aware of the essential fact that an appeal process was available. Further, this Court concludes there was no logical reason for counsel to believe his client would want to appeal a verdict of a lesser offense when he had just avoided conviction on the greater offense and secured an acquittal of another. Thus, no additional consultation was reasonably warranted.

Counsel candidly admitted that he knew that his client was “unhappy” about the conviction, but an appeal is not a new trial but, in large measure, a review of rulings and potential errors of law. As Applicant had to admit, there was evidence presented to support the verdict – the two

victims' testimony alone would support the verdict – he simply maintains the evidence against him should not have been believed. This Court finds counsel logically saw the two as distinct under the law, as the law supports that distinction. *See, e.g., State v. Herndon*, 430 S.C. 367, 373, 845 S.E.2d 499, 502 n. 6 (2020) (“As an appellate court, we must be careful not to weigh the evidence. ... Fundamental to a jury’s role as fact-finder is making credibility determinations, which lie in the sole province of the jury.”); *Melton v. Williams*, 281 S.C. 182, 186, 314 S.E.2d 612, 614–15 (Ct. App. 1984) (“Assessment of the credibility of witnesses is a question for the jury, not the court, and it is the jury that decides the weight to be afforded the testimony.”). It appears to this Court that the late phone call to counsel was more likely occasioned by the desire to challenge the gun restriction, thus more likely expungement as counsel recalled than a late concern about appeal.

Based on the totality of the circumstances, this Court finds that Applicant has failed in his burden of proof. He is not entitled to any relief. All arguments to the contrary asserted on this ground are rejected.

*Ineffective Assistance: Preparation for Applicant’s Testimony*

Applicant testified that counsel failed to prepare him for giving testimony at trial and that lack of preparation allowed the State to use Applicant’s testimony against him. Counsel candidly admitted not sitting down with Applicant in a proposed question and answer setting; however, counsel credibly testified that counsel was well aware of Applicant’s version of events – he had reviewed them many times with Applicant in preparation for trial. Further, counsel agreed that Applicant had been present the whole trial and heard the testimony from the State’s witnesses. Applicant’s testimony was going to be different. Further, counsel testified that Applicant was active during trial and wrote numerous notes and made multiple comments to him especially about specific testimony from the victims. Notably, counsel testified that Applicant did not complain to

counsel during the trial concerning the way Applicant's testimony was presented or express an opinion or fear that the testimony did not go as Applicant had expected.

Further, the record shows that Judge Miller directly addressed Applicant concerning Applicant's right to testify and advised that it was Applicant's decision to make. (Return Attachment 2, Tr. 122). Judge Miller also gave Applicant an opportunity to ask questions of the trial court concerning the decision, and afforded Applicant additional time to speak with counsel before making the decision. (Return Attachment 2, Tr. at 123). Counsel did not recall the exact conversation but noted that he would normally tell his clients that the choice was theirs to make. Counsel agreed that Applicant, having been present throughout the trial, would have been aware of real examples of cross-examination. There was no suggestion made at trial that Applicant was not ready to testify.

Based on the totality of the circumstances, this Court finds that Applicant has failed in his burden of proof. In particular, Applicant was aware of the testimony presented before he decided to testify and was aware his testimony would be different. It is unsurprising that the State would point that out in closing argument. That was a function of the evidence, not a deficiency by counsel. Applicant is not entitled to any relief.

*Ineffective Assistance: Failure to Object to Allen Charge Language*

Applicant submits that counsel was ineffective because he failed to object to the phrasing of the *Allen* charge. Counsel testified that, to him, the charge seemed fairly standard, and was not delivered in a coercive matter. He did not recall any reaction by the jury, nor did he see a reason to object. Counsel testified that had he perceived coerciveness, he would have made an objection.

Though Applicant makes a general claim that the charge given was "objectionable as unduly coercive," Applicant only specifies one statement in support of that claim. He alleges

counsel should have objected to the language at the conclusion of the charge were Judge Miller requested the jury “return to [their] deliberations with the hope that [the jury] can arrive at a verdict within a reasonable time.” (Application at 3, 11(c)). Applicant relies upon *State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010), in support of his claim that counsel should have objected to the charge. However, his reliance on *Williams* is misplaced.

In *Williams*, the Supreme Court of South Carolina found the *Allen* charge which included that exact language was not coercive, though it did caution, by footnote, that the language had the potential to be problematic. *Id.*, at 512 and n. 7, 690 S.E.2d at 66-67 and n. 7. Rather than focusing on an isolated phrase, our Supreme Court recognized that the challenged charge “must be judged in its context and under all the circumstances” under the factors outlines in *Tucker v. Catoe*, 346 S.C. 483, 490–91, 552 S.E.2d 712, 716 (2001). *Id.*, at 512, 690 S.E.2d at 66. *Tucker* requires a reviewing court to evaluate the charge in light of these considerations:

- (1) Does the charge speak specifically to the minority juror(s)?
- (2) Does the charge include any language such as “You have got to reach a decision in this case”?
- (3) Is there an inquiry into the jury’s numerical division, which is generally coercive?
- (4) Does the time between when the charge was given, and when the jury returned a verdict, demonstrate coercion?

*Workman v. State*, 412 S.C. 128, 131, 771 S.E.2d 636, 638 (2015) (rephrasing *Tucker*).

Here, all the listed factors favor finding the charge should not be deemed coercive. The charge does not single out a minority juror; there is no language included that a decision must be reached; though the court was aware by the jury’s volunteered information that there was

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disagreement by one person on one charge, there was (properly)<sup>4</sup> no inquiry to specifics as to which charge and what vote; and, the jury returned to deliberations for around thirty minutes before coming back to report a decision. (See Return Attachment 2, Tr. 193-195). It is often difficult to address the time factor, but considering the entirety of the testimony was presented in approximately two and half hours, and the jury had deliberated for nearly four hours prior to the charge and thirty minutes after, (Return Attachment 2, Tr. 195), appears to favor finding that the jury actually engaged in additional deliberations and did not perform a simple “turn around” after the charge.

Further, what is *not* included in Judge Miller’s charge is most notable: there was no “overemphasis of the resources expended and the need for a verdict” or an instruction ““you should come to a decision in this matter,”” which could propel a finding of a coercive charge. See *State v. Rampey*, 438 S.C. 519, 526, 885 S.E.2d 366, 370 (2023)(charge found coercive where “[o]n no less than three separate occasions during the brief *Allen* charge, the trial court reminded the jury of the substantial resources spent in bring the case to trial” and direction the jury “should” return a decision “skirted close to the language found coercive” in Supreme Court precedent). Again, the language from *Williams* was not found *per se* coercive in *Williams* or in any case since *Williams*; rather, a reviewing court will consider whether the charge as a whole, “conveyed to the jury the clear impression that it should reach a verdict, which is sufficient to satisfy the second *Tucker* factor.” *Rampey*, at 527, 885 S.E.2d at 370.

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<sup>4</sup> See *State v. Taylor*, 427 S.C. 208, 216, 829 S.E.2d 723, 728 (Ct. App. 2019) (“the trial judge wisely did not inquire further into the specifics of the split when the jury volunteered its vote tally”); *id.*, at 217, 829 S.E.2d at 728 (“It is not coercive to give an *Allen* charge simply because the jury volunteers how it is split” however, such knowledge should “make[] an already subtle task even more delicate”).

Similarly, what is included in Judge Miller's charge is also notable. Judge Miller instructed the jury that while they should listen to each other, jurors "should not give up [their] firmly held beliefs merely to be in agreement with your fellow jurors." (Return Attachment 2, Tr. 194, lines 4-9). This caution has been deemed "one of the hallmarks of a typical *Allen* charge," tempering the charge to shield against coercion. *Rampey*, at 530, 885 S.E.2d at 371-372. When reviewed as a whole, the charge should not be deemed coercive.

Therefore, Applicant has shown no deficiency in counsel's not objecting to the charge, but even if he could, he can show no prejudice for the same reason – the charge, when considered as whole, was not unduly coercive. Applicant has failed in his burden of proof and is not entitled to any relief. All arguments to the contrary on this ground are rejected.

#### CONCLUSION


For the above stated reasons, this Court finds that Applicant failed to carry his burden of proof. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

#### IT IS THEREFORE ORDERED:

Applicant's application for post-conviction relief is denied and dismissed with prejudice.

AND IT IS SO ORDERED this 14 day of February, 2024.

Copy mailed to
Attorney <u>general/Howard Anderson</u>
on <u>2/29/2024</u> .

  
R. SCOTT SPROUSE  
Presiding Judge