

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN 2024 APR -8) PM 3:46 FOR THE FIRST JUDICIAL CIRCUIT

LAWRENCE D. BUCKNER
CLERK OF COURT
CALHOUN COUNTY
ST. PATRICK, SC

Charles Winston, Jr., SCDC #368128) Case No. 2019-CP-09-00058

Applicant,) **ORDER OF DISMISSAL**
v.)
State of South Carolina,)
Respondent.)
_____)

This matter is before the Court pursuant to an application for post-conviction relief (“PCR”) filed by Charles Winston, Jr. (“Applicant”) on April 17, 2019. On February 6, 2024, an evidentiary hearing convened before the Honorable Paul M. Burch. Applicant was present and represented by Arthur K. Aiken, Esquire. Assistant Attorney General Bryan T. Hall represented Respondent. At the hearing, Applicant testified on his own behalf. Respondent called as witnesses Martin R. Banks, Esquire, (“Counsel”) and Assistant Solicitor Theodore Lupton. Following a thorough review of the trial transcript and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections (“SCDC”) serving a thirty-year sentence. In November 2014, the Calhoun County Grand Jury indicted Applicant for attempted murder (2014-GS-09-00260). The indictment arose from an incident in which Applicant stabbed victim with a knife in the face and neck. Between May 9-12,

2016, Applicant proceeded to a bench trial before the Honorable Maite Murphy. Assistant Solicitor Theodore Lupton prosecuted the case. Martin R. Banks, Esq., represented Applicant. The court found Applicant guilty and sentenced him to thirty (30) years.

On May 16, 2016, a notice of appeal was filed on Applicant's behalf. On appeal, Applicant was represented by Appellate Defender Kathrine Hudgins who filed a brief raising the following issue:

At this bench trial, did the trial judge err in refusing to find Appellant guilty but mentally ill when the State only evaluated Appellant for competency to stand trial and the only evidence in regard to criminal responsibility came from the forensic psychiatrist, called by the defense, who testified that Appellant suffered from a delusional disorder which impaired his ability to conform?

On May 9, 2016, following briefing and without oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence, determining the trial court did not abuse its discretion in refusing to find Applicant guilty but mentally ill.¹ On October 18, 2018, the South Carolina Supreme Court denied certiorari. The Remittitur was sent on November 15, 2018.

CURRENT APPLICATION

Applicant timely commenced this PCR action on April 17, 2019, alleging he is being held in custody unlawfully for the following reasons:

- 1) Ineffective Assistance of Counsel
 - a. Conflict of Interest
 - b. Being absent at the beginning of trial
 - c. "Ineffective with a presumption of prejudice"
 - d. Violation of 6th Amendment right to jury trial by collaborating with solicitor and judge to endorse a bench trial.
 - e. Failure to move into evidence Applicant's notebook that was read by defense's expert witness.

¹ *State v. Winston*, 2018-UP-198 (S.C. Ct. App. dated May 9, 2018).

- f. Failure to object to statement by solicitor that was not in evidence.
- 2) Prosecutorial Misconduct
- a. Improper comments on accused not testifying.
 - b. Improper comments regarding evidence that was not admitted into the record.
 - c. Presenting false testimony.
 - d. Presenting false evidence.
 - e. Expressing opinions requiring expert knowledge about how the solicitor thought a person with mental illness should think.

Respondent filed its return. Applicant, through counsel, amended his PCR application to add the following allegations:

- 1) Ineffective Assistance of Counsel
- a. Trial counsel was deficient for stipulating to Applicant's competency to stand trial.
 - b. Trial counsel was deficient for consenting to a bench trial where Applicant maintained his desire for a jury trial.
 - c. Failure to move for a new trial when the trial judge, in her explanation for the guilty verdict, referenced Applicant's retrieval of a knife.
 - d. Failure to object to trial judge's finding of a waiver of Applicant's right to a jury trial without a detailed colloquy with Applicant.

Before this Court are the Calhoun County Clerk of Court records of the subject conviction; Applicant's records from SCDC; the appellate records; trial transcript; and the records of the current PCR action.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant averred a conflict of interest because the solicitor and judge worked in the same courthouse. Applicant testified he was not present on the first day of trial, trial was organized before he arrived, and Applicant believed he was tried partially in absentia. Applicant testified he did not want a bench trial but wanted a jury trial in a different

venue, and Applicant alleged Counsel pressured him to go with a bench trial. Regarding his right to testify, Applicant testified that he had an opportunity to testify but did not do so. Applicant averred Counsel should have objected to the trial judge and solicitor stating he retrieved a knife from the back of the house. Regarding his statement to law enforcement, Applicant testified he had never seen Captain Pat Regalis except at the sheriff's station, and Regalis presented perjured testimony on Applicant's statements. Applicant testified he did not discuss a *Jackson v. Denno* hearing with Counsel because Counsel told him not to worry about it. Applicant testified Counsel should have questioned witnesses regarding Applicant's habit of turning off lights after the solicitor stated Applicant turned off the lights to gain the edge of darkness. Applicant averred Counsel's performance was deficient for stipulating to Applicant's competency. On cross-examination, Applicant testified that he gave a recorded statement to law enforcement in which he admitted to stabbing the victim, cleaning the blood, and leaving the scene. Applicant alleged the statement was given involuntarily. Applicant testified the Medical University of South Carolina ("MUSC") found him competent to stand trial.

Martin R. Banks ("Counsel") testified that he met with Applicant at least five (5) to six (6) times before going to trial. Counsel testified that no conflicts of interest arose during his representation of Applicant. Regarding the state's evidence, Counsel testified he believed the state had a good case because of the testimony of the victim, who survived the attack, and forensic evidence. Counsel testified that Applicant's defense was guilty but mentally-ill. Counsel testified he had no concerns with Applicant's competency and believed Applicant to be highly intelligent and very competent. Counsel testified that on the Monday of the term, the trial judge heard pre-trial motions including a motion to change venue. Counsel testified he explained to

Applicant his Sixth Amendment right to a jury trial, and Applicant waived this right because he was concerned about the Calhoun County jury pool and an individual Applicant believed might interfere with the jury. Counsel testified it was Applicant's decision to waive his right to a jury trial and proceed to a bench trial, and believed the waiver should have been made in a colloquy. Counsel testified Applicant did not want to accept any plea offers.

Counsel testified Applicant cut victim with a knife, and there was no issue regarding who committed the crime since Applicant gave a statement to law enforcement, and the victim was going to testify at trial. Counsel testified he did not move for a *Jackson v. Denno* hearing because he did not have any concerns about the voluntariness of Applicant's statement to law enforcement. Counsel testified he presented testimony from an expert who testified that Applicant suffers from a delusional disorder. Counsel testified he did not introduce Applicant's journal in its entirety because he did not believe the journal entries would help Applicant's case. Counsel testified he discussed with Applicant his Fifth Amendment right to testify and advised Applicant that testifying could undermine his mental health defense. Regarding stipulating to the MUSC evaluation report, Counsel testified he thought the report would come back differently but stipulated to its admissibility so Applicant could testify if he chose to do so. Regarding the solicitor's comments in closing argument, Counsel testified he wrestled with the decision to object but did not because the arguments were made to a judge in a bench trial rather than a jury. Counsel testified he did not move for a new trial because he did not believe the motion would be successful.

Assistant Solicitor Theodore Lupton ("Lupton" or "the solicitor") testified that he prosecuted the case and provided discovery to the defense. Lupton testified the victim knew

Applicant and there was no issue regarding victim's identification of Applicant as her attacker. Lupton testified victim's statements were corroborated by her injuries and other physical evidence at the scene. Lupton testified Applicant confessed to law enforcement, and Lupton believe Applicant's case was one of the more conclusively proven cases the solicitor's office had. Lupton testified there was never an issue regarding who committed the crime, and stipulations were made with the defense regarding Applicant's competency to stand trial and facts. Lupton testified he thought Applicant was competent. Lupton testified he was unaware of any false testimony presented and believed Capt. Regalis' testimony that he was present and interviewed Applicant. Lupton testified he has no reason to question Regalis' credibility. Lupton further testified he has never presented false evidence. Regarding his statement that Applicant retrieved a knife, Lupton testified it was a reasonable inference to be drawn from the evidence. Regarding his statements on Applicant's words, Lupton testified he was not commenting on Applicant's right to testify but was commenting on the expert witness' credibility regarding Applicant's mental state. Lupton further testified that he told the trial judge that he was not commenting on Applicant's right to remain silent but was commenting on the context of the expert witness' credibility. Lupton further testified that in a bench trial, the trial judge would understand what evidence she could consider.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the trial transcript in its entirety and has heard the testimony at the PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony. After a careful review based on the *Strickland* standard set forth below, this Court

finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, 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. *Strickland*, 466 U.S. at 687-88; *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Applicant must prove prejudice by showing "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.

Conflict of Interest

This Court finds Applicant failed to prove Counsel was ineffective for having a conflict

of interest. The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction. *State v. Gregory*, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). This Court finds **credible** Counsel's testimony that a conflict of interest did not arise during his representation of Applicant. Thus, Applicant has failed to meet his burden.

Applicant's Absence at Pre-Trial Motions

This Court finds Applicant failed to prove he was prejudiced by his absence at pre-trial motions. Under the Sixth Amendment, a defendant has the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. *State v. Shuler*, 344 S.C. 604, 624, 545 S.E.2d 805, 815 (2001). This Court finds **credible** Counsel's testimony that Counsel was present for a hearing on pre-trial motions that was held on the Monday of the term. This Court also finds **credible** Counsel's testimony hearing was for Applicant's motion for a change venue and waiver of a jury trial, and not a trial in Applicant's absence. Further, the record reflects Counsel waived Applicant's presence at the pre-trial hearing. (R. 6:8-11). The facts from the change of venue motion and waiver of jury trial heard at the pre-trial hearing was put on the record in Applicant's presence on the Wednesday of the term. (R. 7-8). This Court finds Applicant failed to prove he was prejudiced by his absence from the pre-trial motions hearing on Monday. Thus, Applicant failed to meet his burden.

Applicant's Waiver of Right to Jury Trial

This Court finds Applicant failed to prove he did not voluntarily waive his right to a jury trial. Applicant alleges a violation of his Sixth Amendment right to a jury trial and alleges Counsel was ineffective for failing to object to the trial court's finding of Applicant's waiver without a detailed colloquy. The Sixth Amendment guarantees a criminal defendant the right to a

public trial with a jury. U.S. Const. amend VI. A defendant has the “ultimate authority” to determine whether to waive his right to a jury trial, and the defendant’s waiver of the right to a jury trial must be knowing, voluntary, and intelligent. *Moore v. State*, 399 S.C. 641, 732 S.E.2d 871 (2012). A defendant’s knowing and voluntary waiver of a statutory or constitutional right must be established by a complete record and *may* be accomplished by a colloquy between the court and defendant, between the court and defendant’s counsel, or both. *Id.* at 641, 732 S.E.2d at 873 (emphasis added). To determine whether the waiver was made knowingly and voluntarily, the court examines the particular facts and circumstances in the case including the background, experience, and conduct of the accused. *Id.*, at 641, 732 S.E.2d at 874.

In *Moore*, the Supreme Court determined a defendant did not knowingly and voluntarily waive his right to a jury trial where the record was devoid of any evidence regarding counsel’s discussions with the defendant. *Id.* at 641, 732 S.E.2d at 874-75. The defendant’s counsel could not testify at the PCR hearing that he definitely explained to the defendant the difference between a jury trial and a bench trial. *Id.* The defendant testified he did not know ahead of time that he was going to have a bench trial, and the defendant was illiterate. *Id.* The Court reasoned the complete record did not support a finding that the defendant’s waiver was voluntary. *Id.*

This Court finds Applicant’s case is distinguishable from *Moore* as there is evidence in the record to support a finding that Applicant knowingly and voluntarily waived his right to a jury trial. This Court finds **credible** Counsel’s testimony that he advised Applicant of his right to a jury trial, and Applicant made the decision to voluntarily waive his right to a jury trial. This Court also finds **credible** Counsel’s testimony that Applicant waived his right to a jury trial due to concerns about the jury pool in Calhoun County. This Court finds **credible** Counsel’s

testimony that he discussed with Applicant a bench trial early in representation. Further, the record reflects Counsel informed the trial court of the conversations Counsel had with Applicant regarding Applicant's waiver of his right to a jury trial. (R. 6:16-7:9; 7:22-8:1). Although Counsel testified the waiver should have been placed on the record in a colloquy, a colloquy is not required where there is evidence in the record to support a finding that a defendant knowingly and voluntarily waived his right to a jury trial. Thus, Applicant failed to meet his burden.

Failure to Move into Evidence Applicant's Notebook

This Court finds Applicant failed to prove Counsel was ineffective for failing to move into evidence Applicant's personal notebook. *Strickland* requires that trial counsel be given leeway to make reasonable strategic decisions. *Strickland*, 466 U.S. at 688-89 (stating "[n]o 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 to best represent a criminal defendant"). Judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. This Court finds **credible** Counsel's testimony that he did not introduce the entirety of Applicant's notebook into evidence because such evidence could have hurt Applicant's case. This Court also finds **credible** Counsel's testimony that he believed the defense's expert, Dr. Amanda Salas, did a great job testifying to Applicant's mental health. This Court finds Counsel articulated a reasonable strategic decision for not moving the entire notebook into evidence. Further, this Court finds Applicant failed to prove he was prejudiced by Counsel's decision not to introduce the notebook as Applicant failed to show a reasonable probability that the result of trial would have been different with the notebook's admission. Thus,

Applicant failed to meet his burden.

Failure to Object to Solicitor's Comments Regarding a Knife

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to the solicitor's comments at trial. Applicant avers Counsel should have objected to the solicitor stating Applicant retrieved a knife. Failing to object does not automatically constitute ineffective assistance of counsel. *See Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800-01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to object). This Court finds **credible** Counsel's testimony that although he could not recall whether the fact that Applicant used a knife was in evidence, Applicant used a knife. The Court also finds **credible** Counsel's testimony that there was no dispute regarding Applicant cutting the victim. Further, Applicant failed to prove he was prejudiced by Counsel's failure to object because Applicant failed to show a reasonable probability the result of trial would have been different if Counsel had objected since the weapon used in the crime, or where it was retrieved from, was immaterial. Thus, Applicant failed to meet his burden.

Counsel's Stipulation to Applicant's Competency to Stand Trial

This Court finds Applicant failed to prove Counsel was ineffective for stipulating to Applicant's competency to stand trial. This Court finds **credible** Counsel's testimony that he believed Applicant was very competent and highly intelligent. Additionally, Applicant testified that he is a forty-five (45) year old man, who completed one (1) year of college. Further, this Court finds **credible** Counsel's testimony that the MUSC evaluation report was stipulated to establish Applicant's competency so that Applicant could testify at trial if he chose to do so. This Court finds Counsel articulated a reasonable strategic decision for stipulating to Applicant's

competency to stand trial. Thus, Applicant failed to meet his burden.

PROSECUTORIAL MISCONDUCT

This Court finds Applicant failed to prove the solicitor denied Applicant the due process right to a fair trial by engaging in misconduct. The Due Process Clauses of the Fifth and Fourteenth Amendments provide that no person may be deprived of liberty “without due process of law.” U.S. Const. amends V, XIV. When examining allegations of prosecutorial misconduct, the inquiry is whether the solicitor’s conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Fortune v. State*, 428 S.C. 545, 549-50, 837 S.E.2d 37, 39-40 (2019); *Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006). It is Applicant’s burden to prove actual prosecutorial misconduct. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (“the burden of proof is on the applicant to prove the allegations in his application”).

Solicitor’s Comments Regarding Applicant Not Testifying

This Court finds Applicant failed to prove he was prejudiced by the solicitor’s comments regarding Applicant failing to tell his side of the story. Improper comments do not automatically require reversal if they are not prejudicial to the defendant. *Fortune*, 428 S.C. at 550, 837 S.E.2d at 40. When reviewing a claim of prosecutorial misconduct, courts will view the alleged impropriety of the solicitor’s argument in the context of the entire record, and applicant has the burden of proving he did not receive a fair trial because of the alleged improper comment. *Id.* In closing, the solicitor stated the following:

Dr. Salas talks about that [sic] the defendant’s goal in all of this trial was to get his story out. She emphasized that repeatedly how this was all to get his story out and that’s how come she believes him. That him saying all of this because he wants to get his story out, that he is not trying to evade responsibility. And certainly there is no obligation of the defendant to take the stand at any time, and I would never

ask the court to hold his failure to testify or decision not to testify against him, but in undermining her credibility, I think it is appropriate to look at the fact that she is basing so much of her willingness to believe him because she believes that he is doing all of this because he wants to get his story out. But he declined to get his story out when he had the opportunity to go to trial, which is her basis for saying she believes what he says.

(R. 108:25-109:15).

This Court finds **credible** the solicitor's testimony that his comments were not made to comment on Applicant not testifying but to attack the credibility of Dr. Salas, the defense's expert witness. This Court also finds the records supports the solicitor's testimony as the solicitor explicitly stated at trial that Applicant was under no obligation to testify, and the solicitor was not asking the court to hold his decision not to testify against him. (R. 109:5-9). The record support's the solicitor's testimony that he made the comments to attack the credibility of Dr. Salas, as the solicitor stated, "but in determining her credibility..." (R. 109:7-9). Applicant failed to prove the solicitor's comments so infected the trial as to result in a denial of due process. Thus, Applicant failed to meet his burden.

Solicitor's Comments Regarding Applicant Retrieving a Knife

This Court finds Applicant failed to prove he was prejudiced by the solicitor stating Applicant retrieved a knife from the house to cut victim. A solicitor's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). In closing, the solicitor stated the following:

He admitted the planning[,] going back to the back. He wouldn't admit that that's when he got the knife, but he didn't deny it either. He admitted that he turned off the light when he went out to attack her, throwing the area into darkness.

(R. 110:5-9).

Applicant alleges the solicitor commented on evidence not admitted into the record. This Court finds **credible** the solicitor's testimony that his comments regarding Applicant retrieving a knife from the house was a reasonable inference that may be drawn from the evidence in the record. This Court finds **credible** Counsel's testimony that although he does not recall whether a knife was in the record, Applicant used a knife to cut victim. This Court also finds **credible** Counsel's testimony that there was no dispute to the fact that Applicant cut the victim. Applicant failed to prove the solicitor's comments so infected the trial with unfairness as to result in a denial of due process. Thus, Applicant failed to meet his burden.

Presenting False Testimony and Evidence

This Court finds Applicant failed to prove the solicitor engaged in misconduct by presenting false testimony and evidence. A conviction obtained through the use of false evidence, known to be such by the State, must fall under the Fourteenth Amendment. *Simmons v. State*, 416 S.C. 584, 591, 788 S.E.2d 220, 224 (2016) (quoting *Napue v. Illinois*, 360 U.S. 264 (1959)). The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected. *Id.*

This Court finds **credible** the solicitor's testimony that he provided all discovery to the defense and did not present false evidence. This Court finds **credible** the solicitor's testimony that he was unaware of any false testimony presented. This Court finds **credible** the solicitor's testimony that he believed Capt. Regalis' testimony that he was present and interviewed Applicant, and he had no reason to question Capt. Regalis' credibility. This Court also finds **credible** the solicitor's testimony that the victim's statements were corroborated by her injuries and other physical evidence obtained at the crime scene. Applicant failed to prove the solicitor

presented false testimony and evidence. Thus, Applicant failed to meet his burden.

Expressing Opinions Requiring Expert Knowledge

This Court finds Applicant failed to prove he was prejudiced by the solicitor attacking the credibility of testimony regarding Applicant's guilty but mentally ill defense. A solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony. *Vasquez*, 388 S.C. at 458, 698 S.E.2d at 566. In closing, the solicitor gave several statements attacking the credibility of testimony presented regarding Applicant's guilty but mentally ill defense. (R. 110-117). This Court finds **credible** the solicitor's testimony that the sole issue of Applicant's case was his mental health state. This Court also finds **credible** the solicitor's testimony that his comments were meant to attack the credibility of Dr. Salas. This Court finds Applicant failed to prove the solicitor's comments so infected the trial with unfairness to result in a denial of due process. Thus, Applicant failed to meet his burden.

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CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty (30) days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCR. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.


IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 27th day of March, 2024.



PAUL M. BURCH
Presiding Judge
First Judicial Circuit

, South Carolina