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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas
Post Conviction Relief

Kristi F. Curtis, Circuit Court Judge

Lower Court Case No.: 2022-CP-05-00098

Kwamaine Ross #376871,..... Petitioner,

vs.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

The Petitioner, Kwamaine Ross #376871, appeals the Order of Dismissal signed by the Honorable Kristi F. Curtis on December 30, 2024 and filed on January 8, 2025. A Motion to Alter or Amend was timely filed. An Order Denying Applicant's Motion to Alter or Amend was sign February 13, 2025 and filed February 20, 2025. Applicant received a copy of this Order Denying Applicant's Motion to Alter or Amend on February 25, 2025.

Respectfully submitted,

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March 4, 2025

STATE OF SOUTH CAROLINA COUNTY OF BAMBERG	)	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
Kwamaine Ross, SCDC #376871, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2022-CP-05-00098 **ORDER OF DISMISSAL**

INTRODUCTION

The matter before this Court is an action for post-conviction relief (PCR) commenced by Kwamaine Ross ("Applicant") on March 31, 2022. On February 1, 2024, a hearing into the matter was convened before the Honorable Kristi F. Curtis at the Aiken County Courthouse. Applicant was present and represented by Tommy A. Thomas, Esquire. Assistant Attorney General T. Cruise Mitchell represented the State. At the evidentiary hearing, testimony was taken from Ola A. Johnson ("Counsel") and Applicant.

After hearing the testimony at the PCR hearing and upon full review of the record, this Court finds Applicant's allegations regarding ineffective assistance of counsel are without merit. For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections. During the February 2017 term, the Bamberg County Grand Jury indicted Applicant for murder (2017-GS-05-00028). Applicant was originally represented by retained counsel Alex Postic, Esquire, then J. Todd Rutherford, Esquire, but was eventually represented by appointed counsel Ola Johnson,

Esquire. Deputy Solicitor David W. Miller and Assistant Solicitor R. Jackson Cooper of the Second Circuit Solicitor's Office prosecuted the case.

Prior to trial, the court ordered Applicant undergo an evaluation by the South Carolina Department of Mental Health to determine if he was competent to stand trial based on his history of mental health treatment. A subsequent evaluation determined Applicant was competent to stand trial.

On June 19, 2018, the State called the matter to trial before the Honorable Doyet A. Early, III., Circuit Court Judge, and a jury. Following the presentation of evidence and deliberations, the jury convicted Applicant as indicted. Judge Early sentenced Applicant to imprisonment for thirty years for murder.

Applicant filed a timely notice of appeal. Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense-Office of Appellate Defense perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issue:

> The [trial] court erred by allowing Agent David Owen to testify that Lenell Ross allegedly told him that appellant was wearing a yellow shirt on the night of the murder, and that appellant changed his shirt later that night, since this was highly prejudicial hearsay testimony where the state was urging that the evidence showed that the murderer was wearing a yellow shirt.

Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion. *State v. Kwamaine Jarelle Ross.*, Unpub. Op. No. 2021-UP-100 (Ct. App. filed Mar. 31, 2021). The remittitur was issued on April 21, 2021.

STATEMENT OF FACTS

On October 24, 2015, Applicant and one (1) associate, and possibly another associate, unlawfully entered the home of Travis Anderson ("the victim") in Bamberg County and murdered Anderson by shooting him with a handgun. After an investigation by the Bamberg County

Sheriff's Office and the State Law Enforcement Division ("S.L.E.D."), Appellant was arrested for the murder. (Tr. June 19-20, 2018, pp. 87-141, 143-184; 188-248; 256-271; Tr. June 21, 2018, pp. 1, 4, 11-15, 17-18, 25-26).

CURRENT APPLICATION

Applicant timely commenced this PCR application on March 31, 2022. In his application Applicant alleged he was entitled to relief based on the following grounds:

(a) Ineffective assistance of counsel

On January 24, 2024, Applicant, through retained counsel, amended his application to include the following allegations:

1. That trial counsel was ineffective in failing to adequately investigate the case for trial. Counsel was also ineffective at trial. More specifically, counsel failed to:
    a. Adequately bringing to the attention of the jury the various inconsistencies in the statements and testimony of Octavia Bannister. She had made three different statements regarding who she saw, when she saw and how she saw, the alleged assailant.
    b. Adequately bringing out the discrepancies regarding the three different photo lineups presented to Octavia Bannister by law enforcement.
    c. Failure to properly refute and/or show bias of Jail House Witnesses.
    d. Failure to adequately prepare the applicant to testify in his defense.
    e. Failed to object and allowed the Solicitor in effect to testify before the Jury by asking leading questions that contained factual statements.
    f. Allowed the Solicitor to ask questions that shifted the burden to the Applicant to prove his innocence. This was compounded in his closing argument.
    g. Failed to adequately prepare for and address at trial the issues of the alleged color of the perpetrator's shirt and prior statements of Uncle Duck, Alonzo Ross and Lenell Ross.
2. Counsel was ineffective in allowing the Court to incorrectly state and charge an Allen charge.
3. Counsel was ineffective in his failure to receive and review all discovery items with Applicant.
4. Any and all other issues as they may arise from the PCR Trial.

Before this Court are the records of the Bamberg County Clerk of Court regarding the underlying conviction, the trial transcript, Applicant's records from the South Carolina Department

of Corrections, the records from Applicant's direct appeal, and the records of this post-conviction relief action.

INEFFECTIVE ASSISTANCE OF COUNSEL, GENERALLY

In a PCR action, Applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985); Rule 71.1(e), SCRCP. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 687; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011);

Harrington v. Richter, 562 U.S. 86, 109–10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696–97.

FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims raised in

the application and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

Allegations Regarding Trial Counsel's Failure to Adequately Cross-Examine Witnesses[1]

Applicant alleges Counsel was ineffective for failing to cross-examine witnesses to bring to the attention of the jury various discrepancies and inconsistencies regarding various pieces of evidence. This Court finds these allegations to be without merit.

Octavia Bannister's Inconsistent Statements

First, Applicant alleges Counsel was ineffective for failing to bring to the attention of the jury the discrepancies and inconsistencies in Octavia Bannister's statements. At Applicant's trial, Counsel thoroughly cross-examined Ms. Bannister regarding the inconsistencies in her statement. Ms. Bannister testified that she saw Applicant twice, once inside her house with a gun and again outside her house. (Trial Tr. p.240). The first time Ms. Bannister mentioned witnessing Applicant inside of her home was at trial. As Counsel testified to at the evidentiary hearing, he cross-examined Ms. Bannister on this point at trial:

> Q. Okay. And this issue - - now, you had just testified that you went into your house and you saw my client inside your house, but to be fair, that's something you mentioned about a day ago to the solicitor because a couple of years ago, you told police nothing about that. You said you saw a man at the door, coming out the house, correct?
>
> A. Correct. I saw him twice.
>
> Q. Okay. But the information about him being inside your house, in the house, when you were in the house, that came up about a day ago between you and the solicitor, to be fair, correct?

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[1] Allegations 1(a), (b), and (g) of Applicant's amended application will be addressed in this section.

A. Correct.

(Trial Tr. dated June 19-20, 2018, p.246–247).

Counsel was clearly attempting to impeach Ms. Bannister on this issue through her inconsistent statements. This Court finds Counsel adequately addressed the inconsistencies in Ms. Bannister's statements. At the evidentiary hearing, Counsel testified he did not want to call Ms. Bannister a liar because he believed her to be a sympathetic witness to the jury. (PCR Tr. p.22–23). Counsel explained his strategy in his cross-examination of Ms. Bannister was to bring out the various inconsistencies so the jury would believe she was mistaken regarding the identity of the perpetrator. (PCR Tr. p.23). This Court finds this a valid reason for not further pressing this witness regarding any inconsistencies. For the foregoing reasons, this Court finds Counsel was not deficient.

Furthermore, this Court finds any additional attempt to cross-examine Ms. Bannister on this inconsistency would have been merely cumulative to testimony already given. Thus, Applicant has failed to prove he was prejudice as to this allegation.

Photo Lineups

Applicant contends Counsel was ineffective for failing to adequately bring out the discrepancies regarding the three different photo lineups presented to her by law enforcement. The record of Applicant's trial refutes this allegation. Counsel properly addressed the photo lineups during his cross-examination of Ms. Bannister:

> Q. Okay. Okay. And just briefly, just to be accurate, you were shown, before you saw a picture of my client the day before, you were shown a lineup, and this is State's Exhibit 12 that I'm holding. And you did indicate on here number 2 and you put T-0, your talking about picture number 2 is what you're referring to, Looks like the guy I saw. Now, that's what you put, right?
>
> A. Uh-huh.

Q. Those are your words?

A. Correct.

Q. And said, I'm not a hundred percent positive, but you did select that photo?

A. I did not select it.

Q. Well, you - -

A. I did not initial it, so I didn't select it.

Q. But that's what you're referring to here in the affidavit?

A. Right. But I wasn't a hundred percent sure until I saw the other lineup.

Q. But that does look like the guy, doesn't it?

A. A little bit, but it's not the guy.

(Trial Tr. dated June 19-20, 2018, pp.247–248).

Clearly, Counsel was attempting to elicit testimony from Ms. Bannister that she initially indicated another individual in the lineup, besides Applicant, looked like the perpetrator. Furthermore, on cross-examination of SLED Agent David Owen, Counsel elicited testimony, over the State's objection, that Ms. Bannister selected an individual who looked like the perpetrator. (Trial Tr. dated June 19-20, 2018, pp. 155–157). While referencing the testimony elicited from his cross-examinations, Counsel argued, at length, that the discrepancies surrounding the photo lineups undermined Ms. Bannister's credibility. (Trial Tr. dated June 19-20, 2018, pp. 295–298). This Court finds Counsel adequately brought up the discrepancies regarding the photo lineups—Counsel raised this issue on cross-examination of SLED Agent David Owen and again on cross-examination of Ms. Bannister, as well as arguing this point extensively during his closing. Thus, Counsel was not deficient.

Applicant has also failed to show what additional actions Counsel could have taken to more

adequately bring out the discrepancies regarding the photo lineups. The entirety of Ms. Bannister's testimony reflects she was able to explain the discrepancies in her identification of the perpetrator. Ms. Bannister testified that, although she thought the man in the second lineup looked like the perpetrator, she never selected him as she was not 100% certain. (Trial Tr. dated June 19-20, 2018, p.242; p.248). When presented with the third photo lineup, Ms. Bannister explained she became emotionally distressed because she immediately recognized Applicant as the man she saw in her house. (Trial Tr. dated June 19-20, 2018, p.243–244). She repeatedly and unwaveringly testified she was 100% certain Applicant was the perpetrator. (Trial Tr. dated June 19-20, 2018, p.244; p.248). This Court finds any more attempt to impeach Ms. Bannister regarding the discrepancies in the photo lineups would have been needless, and perhaps damaging, to Applicant's defense. Nevertheless, any additional testimony regarding the discrepancies would have been merely cumulative to the testimony already presented. Thus, for the foregoing reasons, Applicant has failed to prove prejudice.

Accordingly, this allegation is DENIED.

Color of the Perpetrator's Shirt

Applicant further alleges Counsel was ineffective for failing to adequately prepare for and address at trial the issues of the alleged color of the perpetrator's shirt and prior statements of Uncle Duck, Alonza Ross and Lenell Ross. This Court finds this allegation is without merit.

At the evidentiary hearing, Counsel explained his preparations regarding Alonza and Lenell Ross. Counsel testified he hired investigators to interview both Alonza Ross and Lenell Ross. Counsel explained that, following these interviews, he was hopeful their testimony was going to be helpful. (PCR Tr. p. 15). Counsel believed their testimony did not "go the way [Solicitor] wanted it to go for the State." (PCR Tr. p.15). Counsel was aware the State was using

Lenell and Alonza to prove Applicant changed clothes following the murder. (PCR Tr. p. 16). Counsel explained his strategy was to bring up the discrepancy regarding the color of the shirt through cross-examination of SLED Agent Owen and Ms. Bannister. (PCR Tr. p. 16).

At Applicant's trial, a key distinction between the State and defense was the color of the shirt Applicant was wearing. The State alleged that Applicant was wearing a yellow shirt during the murder but changed shirts with his cousin once Applicant realized law enforcement was searching for an individual wearing a yellow shirt. (Trial Tr. dated June 19-20, 2018, pp. 281–282). Additionally, Octavia Bannister testified the individual she saw in her home was wearing a light green shirt—another point of contention raised by Counsel at Applicant's trial. (Trial Tr. dated June 19-20, 2018, p. 245).

This Court finds Counsel was prepared for and adequately addressed these issues at Applicant's trial. Applicant alleges Counsel should have used the prior statements of Alonza Ross and Lenell Ross to address the issue with the color of the shirt. This Court finds Counsel properly used the prior statements to the extent they would be helpful to Applicant's defense.

During the direct examination of Alonza Ross, Solicitor used Alonza's prior statement to impeach him regarding the color of the shirt Applicant was wearing:

Q. Mr. Ross, you were asked: Did Kwamaine do anything when he came back. And the answer was: I said, What's wrong, and Kwamaine said, I ain't did nothing. I told him somebody said something about the shooting and a yellow shirt. Kwamaine changed shirts and took it with him when he left. Do you remember telling - -

A. I don't remember saying he took it with him when he left. I don't know whether he took it or not. I don't remember saying that now.

Q. So you don't remember that part?

A. Not that part. I remember him changing, but I don't remember him taking it with him now.

Q. You remember him changing shirts out of a yellow shirt and into another shirt?

A. Uh-huh. That was after I told him about the yellow shirt.

(Trial Tr. dated June 19-20, 2018, pp.107–108).

Here, Alonza's prior statement regarding Applicant changing shirts was raised by the Solicitor and was clearly not helpful to Applicant's defense. Applicant has failed to show how Counsel should have utilized this statement in a way that would have been helpful to Applicant's defense. Because Alonza's prior statement to law enforcement was not helpful regarding this issue, this Court finds Counsel was not deficient for failing to use this statement in Applicant's defense.

Applicant further contends Counsel should have used the prior statement of Applicant's cousin, Lenell Ross to address the issue of the shirt. During Lenell's direct examination, the following exchange occurred regarding the shirt:

Q. What color shirt was Kwamaine wearing that night?

A. I told y'all it was - - it was a dark color shirt, but I don't know the known color.

Q. Do you admit or deny you told Agent Owen that Kwamaine had on a yellow colored shirt?

A. I deny it because there are people came messing me with a bunch of stuff I never said. I never said he had on a yellow shirt.

Q. Do you recall telling Detective - - I'm sorry, do you recall telling Agent Owen that after Duck, Uncle Duck received a call about Kwamaine's possible involvement and a person with a yellow colored shirt, Kwamaine changed from the shirt he was wearing. Do you recall saying that?

A. Well, Duck changed the shirt, he attempted to change his shirt but he never truly did because he couldn't fit a shirt I wear because he's bigger than me. So he kept his shirt on, but he did thought about it.

Q. So you are saying now that you never told the SLED agent that Kwamaine Ross changed his shirt?

A. No, he tried to change the shirt but he couldn't fit if.

Q. No - -

A. He kept his shirt on, yeah.

Q. Are you saying that you didn't tell the SLED agent - -

A. No, I didn't because he can't fit my shirt. I'm positive.

Q. Are you - - you remember sitting in my office yesterday?

A. Yes, sir.

Q. And yesterday in my office, do you recall telling this SLED agent - -

A. Said he attempted to change his shirt. I said he attempted.

Q. Do you admit or deny that yesterday sitting in my office, you said he changed shirts, he put on one of your shirts?

A. He couldn't fit, that's what I'm saying. He didn't fit the shirt so - -

Q. You did not say that yesterday, did you?

A. I'm say - - I say he attempted.

Q. Okay.

(Trial Tr. dated June 19-20, 2018, pp.177–178).

Here, Lenell repeatedly testified that Applicant never changed shirts following the murder. This testimony clearly did not go the way the Solicitor intended, and he tried to impeach Lenell with his prior statements. Lenell's prior statements to both law enforcement and the Solicitor were more harmful to Applicant's defense than his actual testimony at trial; thus, Counsel was reasonable in not using Lenell's prior statements to raise the issue with the shirt.

Instead of using Alonza and Lenell's prior statements, Counsel effectively utilized the prior statement of Octavia Bannister to bring out the discrepancy regarding the color of the shirt. During cross-examination of SLED Agent David Owen, Counsel elicited the following testimony:

Q. When did Ms. Octavia tell you about this fellow described by Ms. Zeigler as a slender fellow, a skinny fellow? When did she talk about him having a gold tooth?

A. Just a moment, please.
(Reading.)
When I interviewed Ms. Bannister on October 25th, the one person that she described standing at her door was big with shoulder length dreads, had on a lime green or light green shirt, was approximately 6'2" in height.

Q. Oh, not a yellow shirt?

A. She described it as a lime or light green shirt.

(Trial Tr. dated June 19-20, 2018, p. 228).

During the cross-examination of Ms. Bannister, Counsel was able to elicit the following testimony:

Q. Ms. Bannister, just briefly, to be fair, to be accurate, you described one person at your home. You saw one man?

A. Correct.

Q. Okay. And what color was his shirt?

A. Green.

Q. Okay. Not yellow?

A. Correct.

(Trial Tr. dated June 19-20, 2018, p. 245).

Using Ms. Bannister's prior statement, instead of Lanell or Alonza Ross, to raise the issues regarding the perpetrator's shirt was a valid trial strategy. Furthermore, Counsel argued in closing that the discrepancy between the color of the perpetrator's shirt was evidence that Ms. Bannister misidentified Applicant. Counsel adequately prepared for and addressed the issue of the perpetrator's shirt at Applicant's trial; thus, he was not deficient.

Failure to Properly Refute and/or Show the Bias of the Jailhouse Witnesses

Applicant alleges Counsel was ineffective for failing to properly refute and/or show the bias of the jailhouse witnesses, Charles Lott and Keon Kimble. This Court finds this allegation is without merit.

As Counsel credibly explained at the evidentiary hearing, he made a pre-trial motion to limit the testimony of both jailhouse witnesses and adequately cross-examined them on their potential bias for testifying. (Trial Tr. dated June 19-20, 2018, p.68–72; pp. 205–206; pp. 212–213). Counsel properly renewed his objections during their testimony. (Trial Tr. dated June 19-20, 2018, p.202; p.208). Since his objection was overruled, Counsel testified his strategy during cross-examination was to impeach the jailhouse witnesses on their convictions and biases for testifying. (PCR Tr. p.51). Counsel also argued against their credibility during his closing argument. (Trial Tr. dated June 19-20, 2018, p.298–299). This Court finds Counsel adequately cross-examined and refuted the testimony of the jailhouse witnesses. Thus, Counsel was not deficient.

Furthermore, Applicant has failed to demonstrate how Counsel should have more thoroughly refuted the testimony of these witnesses. Thus, Applicant has failed to prove prejudice.

Accordingly, this allegation is DENIED.

Failure to Object to Trial Court's *Allen* Charge

Applicant alleges Counsel was ineffective for failing to object to the Trial Court's *Allen* charge. This Court finds this allegation is without merit.

"A trial judge has a duty to urge jurors to reach a verdict, but must do so in a way that does not coerce them, eroding their independence and impartiality. No set definition of coercion has emerged; instead, we detect its presence by viewing the charge in context and in light of four

factors: (1) whether the charge speaks 'specifically to minority jurors'; (2) whether the charge includes 'you must return a verdict' type language; (3) whether there was an 'inquiry into the jury's numerical division,' which is generally coercive; and (4) whether the time between when the charge was given and when the jury returned a verdict demonstrates coercion." *State v. Taylor*, 427 S.C. 208, 214–15, 829 S.E.2d 723, 727 (Ct. App. 2019) (citing *Tucker v. Catoe*, 346 S.C. 483, 492–95, 552 S.E.2d 712, 717–18 (2001).

At Applicant's trial, the Court gave the following charge to the jury after they indicated they were deadlocked:

> The Court: Madam forelady, ladies and gentlemen of the jury, I received your latest notes saying that y'all have been unable to reach a - - an unanimous decision.
>
> Obviously trying to get 12 people to unanimously agree on something is not the easiest task no matter what you are trying to do, particularly in a difficult situation such that y'all have been assigned to do what the task is in this case.
>
> So what happens is if you are unable to reach a unanimous verdict the ultimate and the end result is what we call a mistrial, which means simply this: That at another time here in this place we will bring in jurors like we brought you in. We will select 12 more jurors - - juries - - 12 more jurors to form a jury. The case will be presented again.
>
> And obviously the testimony and the evidence is not going to change. It is what it is. And we will be asking another 12 jurors to make a decision in the case. So it doesn't go away. It is simply what is known as a mistrial.
>
> You have been deliberating now about five-and-a-half hours. That is not an excessive long length of time. But I don't judge by how long you have been deliberating. Sometimes I judge on how hard you are working and how many questions you have asked me. And obviously I think y'all are taking your job very very seriously and you are doing the best you can.
>
> So what I am going to ask you to do - - and I am not going to make you stay back there an inordinate amount of time, but I am going to ask you to give it one more good shot.

> And I am going to ask those who are in the majority to listen to those who are in the minority and those who are in the minority to listen to those in the majority and see if you can't accomplish your civic duty of reaching a unanimous verdict.
>
> If you can't, I understand; and you will certainly not be criticized by me or anybody here. If you can, you won't be criticized either or praised; you will simply be doing your job.
>
> But I am going to ask you to go back and give it a last effort to try to reach a unanimous decision. And, ma'am, if you can't - - and I am not going to make you stay back a long period of time. If you can't, you can't. If you can, then after having - - maybe you can after giving it another shot. But if you can't, I understand.

(Trial Tr. dated June 21, 2018, p.6–8).

This Court finds this charge was not constitutionally coercive. Here, the trial court was speaking to both majority and minority jurors; the charge did not include language informing the jurors they must return a verdict—the trial court specifically informed the jury they will not be criticized if they cannot come to a verdict; there was no inquiry into the jury's numerical division; and the record from Applicant's trial indicates the jury began redeliberating, after the *Allen* charge was given, at 11:21 am and returned a verdict at 1:10 p.m., which this Court finds does not indicate coercion. (Trial Tr. dated June 21, 2018, p.8; p.11). This Court finds the *Allen* charge was not constitutionally coercive; thus, Counsel had no meritorious reason to object.

Accordingly, this allegation is DENIED.

Failure to Adequately Prepare Applicant to Testify

Applicant contends Counsel was ineffective for failing to adequately prepare Applicant to testify in his own defense at trial. This Court finds this allegation is without merit.

Counsel credibly testified Applicant indicated to him, prior to trial, that he wished to testify. (PCR Tr. p. 10). Counsel explained they had a specific meeting for that sole purpose. (PCR Tr. p. 10). Counsel noted that they were aware Applicant's cousin and uncle were going to testify for the

State and he had "a little trouble kind of pinning [Applicant] down on what he was going to say." (PCR Tr. p. 10). Applicant testified he was not prepared to testify and Counsel "never went over anything." (PCR Tr. p. 73). Applicant explained he wanted to testify so the jury would hear his side of the story and his lack of involvement in this case. (PCR Tr. p. 74). Applicant testified he cooperated with law enforcement from the beginning and never admitted involvement in the murder; his testimony at trial was consistent with his prior statements. (PCR Tr. p. 73–74).

This Court finds Counsel's credible testimony demonstrates he adequately prepared Applicant to testify at trial. Any unpreparedness was the fault of Applicant for being vague about his potential testimony during his meeting with Counsel.

Furthermore, Applicant has failed to prove he was prejudiced by his alleged lack of preparation to testify. Applicant testified at his trial explaining his version of events. Applicant testified he was at his uncle's house the night of the murder and did not leave there until he went home late that night. (Trial Tr. dated June 19-20, 2018, p.259–260). Applicant was adamant he did not commit the murder. Applicant's testimony was consistent with his prior statements to law enforcement—even the Solicitor acknowledged as much during his cross-examination of Applicant. (Trial Tr. dated June 19-20, 2018, p.262; p.263). Because Applicant's testimony was more helpful than harmful to his defense, Applicant has failed to prove he was prejudiced by Counsel's alleged failure to advise him or prepare him to testify. *See Brown v. State*, 340 S.C. 590, 596, 533 S.E.2d 308, 311 (2000) (finding that the respondent failed to prove prejudice because "on the whole, his testimony was more helpful to him than harmful" and "there is no reasonable probability the result of the trial would have been different had he chosen not to testify, because without his testimony, the jury would only have heard uncontroverted evidence of respondent's guilt."). Additionally, Applicant presented no testimony as to how his testimony at trial would

have been different had Counsel further prepared him to testify. Therefore, Applicant has failed to prove prejudice.

Accordingly, this allegation is DENIED.

Failure to Object to Solicitor's Leading Questions

Applicant contends Counsel was ineffective for failing to object and allowed the Solicitor in effect to testify before the Jury by asking leading questions that contained factual statements. This Court finds this allegation is without merit.

At the evidentiary hearing, there was no evidence or testimony presented regarding any specific alleged leading question Counsel should have objected to. The following exchange occurred during Counsel's testimony at the evidentiary hearing regarding leading questions:

Q. Okay. Let me ask you about this, kind of moving on. The - - in reading the transcript, it appears to me that there were quite a number of leading questions by the solicitor. Did - - would you agree or disagree with that or - -

A. I - - there - - I believe - - I'm sure that you're right. There were, and I - - I believe I objected to some of them, but I don't know if I objected to all of them.

Q. You did. You did.

A. But there probably were some leading questions by the solicitor. That's true.

Q. Okay. And one thing, in reading the transcript, it appeared to me that they - - the solicitor was, in a way, testifying through leading questions. Are you - -

A. Are you looking at a specific page?

Q. Yeah. Yeah, sure. Look at page 74.

A. Okay.

Q. Line 12 through 17.

A. Okay.

Q. I'm sorry. That is yours. That is cross-examination. Mr. Johnson, let me - - let me ask you this. Did you ever - - did you ever decide to make an objection in regards to the solicitor attempting to testify through leading questions?

A. Well, I - - I could search through the transcript. I know I objected to his leading questions at some point. I don't know - -

Q. Okay.

A. - - if you showed me a specific example, I'd happy to talk to you about it.

Q. All right. All right. Now, let me ask you about page 171, line 5 through 6.

A. Okay. Now, I'm looking at 171, Kwamaine Ross cross-examination by Mr. Miller, or it's either 262 or 171 is what I'm looking at.

Q. Okay. I've got - - okay. Beginning on 5, if you'll look at - - this is - -

(PCR Tr. pp.34–35).

Applicant references two pages in the transcript, neither of which are impermissible leading questions—one was during Counsel's own cross-examination and the other was the Solicitor's cross-examination where leading questions are permitted. Applicant has failed to reference a specific example of a leading question that Counsel should have objected to. Thus, Applicant has failed to meet his burden establishing both deficiency and prejudice.

Accordingly, this allegation is DENIED.

Failure to Object to Solicitor's Burden Shifting

Applicant contends Counsel was ineffective for allowing the Solicitor to ask questions that shifted the burden to the Applicant to prove his innocence. This Court finds this allegation is without merit.

At the evidentiary hearing, Applicant's counsel referenced the following exchanges from Applicant's trial:

Q. And in 46 days, you didn't go find the one person who could back up your story?

A. I was on GPS monitor. I couldn't leave the house. I actually got arrested because of the GPS monitoring, a misunderstanding. Mr. Early actually handled that. It's not that easy. I couldn't leave the house.

Mr. Johnson: Objection, Your Honor - - to his question, burden shifting, Your Honor.

The Court: Overruled.

(Trial Tr. dated June 19-20, 2018, p.262).

Q. ...You didn't have any friends that now him [sic]. You have absolutely no way in the world to get in touch with the one guy who could back up your story; is that what your testimony is.

A. No, sir, I never said that to Mr. Owen. I told Mr. Owen at the time I did not have Q number.

(Trial Tr. dated June 19-20, 2018, p.264).

Applicant contends Counsel should have objected again to burden shifting, or, in the alternative, move for a mistrial. (PCR. Tr. p.37). Counsel objected to Solicitor's questioning of Applicant for burden shifting in the first exchange. This objection was overruled by the Trial Court and the Solicitor subsequently repeated the question to Applicant. Because the questions were essentially identical and "the trial court had already ruled on the issue, it was not necessary for trial counsel to renew his objection." *Bennett v. State*, 383 S.C. 303, 308, 680 S.E.2d 273, 275 (2009). Therefore, Counsel was not deficient of failing to object to burden shifting a second time.

Furthermore, Applicant has failed to prove prejudice because this line of questioning was not burden-shifting due to the missing witness rule. *See In Re Gonzalez*, 409 S.C. 621, 763 S.E.2d 210 (2014) (citing *Davis v. Sparks*, 235 S.C. 326, 111 S.E.2d 545 (1959) ("...if a party fails, without satisfactory explanation, to produce the testimony of an available witness on a material issue in the case and the evidence is within his knowledge, is within his power to

produce, is not equally accessible to his opponent, and is such as he would naturally produce if it were favorable to him, it may be inferred that such testimony, if presented, would be adverse to the party who fails to call the witness.")

Accordingly, this allegation is DENIED.

Failure to Receive and Review All Discovery with Applicant

Applicant contends Counsel was ineffective for failing to receive and review all discovery items with Applicant. This Court finds this allegation is without merit.

At the evidentiary hearing, Counsel testified that, according to his notes, he met with Applicant on 10 occasions. (PCR Tr. p.8). Counsel testified he hired investigators and reviewed all the evidence with them. (PCR Tr. p.9). Counsel's investigators interviewed potential witnesses, including Applicant's uncle and his cousin. (PCR Tr. p.15). Counsel testified he had adequate time to prepare for the case. (PCR Tr. p.9). Based on his consultations with Applicant and the State's evidence, Counsel developed a defense theory that someone else did it. (PCR p.10). Counsel advanced this theory by making the jury "aware that law enforcement seemed to think that obviously more than one person was involved, and they had people bringing up other people's names." (PCR Tr. p.10). As fully explained in previous sections, Counsel also argued Ms. Bannister misidentified Applicant as the perpetrator using her prior statements describing the perpetrator and the three different photo lineups presented to her by law enforcement.

Applicant testified he and Counsel spoke about the discovery a few times, but never went over it extensively. (PCR Tr. p.59). Applicant testified Counsel failed to present evidence he was wearing a blue shirt, nor did Counsel ever produce the surveillance footage from the convenience store. (PCR Tr. p.62).

This Court finds Counsel was not deficient in his consultations with Applicant. Counsel credibly testified he met with Applicant on 10 different occasions. Counsel explained the steps he took in preparing for this case, including hiring investigators and interviewing witnesses. This Court finds Counsel sufficiently met with Applicant and reviewed the discovery with him. Even Applicant testified he met with Counsel on several occasions, with those meetings typically lasting 15-30 minutes, wherein Counsel gave him the Rule 5. (PCR Tr. p.60; p.64). Applicant avers the issue of him wearing a blue shirt and footage from convenience store was never brought up at trial. (PCR Tr. pp.61–62). However, the issue with the blue shirt was brought up numerous times during Applicant's trial. (Trial Tr. dated June 19-20, 2018, p.145; p.147; p.263). Applicant himself testified at trial that he was wearing a blue shirt on the day of the incident. (Trial Tr. dated June 19-20, 2018, p.263).

The fact that Applicant left his uncle's house to buy beer was also raised several times at trial. (Trial Tr. dated June 19-20, 2018, pp.99–101; p.111; pp.224–225). Although surveillance footage was never produced, Applicant has failed to show how the footage would have exculpated him. The testimony from Applicant's trial was consistent that Applicant was only at the store for a short period of time; thus, he has failed to show how this would have supported his defense. Furthermore, Applicant has also failed to show the surveillance video from the convenience store would even have been available at the time of trial.

This Court finds Applicant has failed to show how additional testimony regarding the blue shirt would have affected the outcome at trial. Additionally, Applicant failed to produce the alleged surveillance footage at the evidentiary hearing nor present any evidence that production of the surveillance footage would have affected the outcome of his trial. Therefore, Applicant has failed

to prove he was prejudiced by any alleged failure of Counsel reviewing these pieces of evidence, or anything else included in the discovery, with him.

[CONCLUSION AND SIGNATURE PAGE FOLLOWS]

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 his application for post-conviction relief. This Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Therefore, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to 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). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 30th day of Dec., 2024.

Kristi Curtis

THE HONORABLE KRISTI F. CURTIS
Presiding Judge
Second Judicial Circuit

Sumter, South Carolina

STATE OF SOUTH CAROLINA)) **COUNTY OF BAMBERG**)	**IN THE COURT OF COMMON PLEAS** **SECOND JUDICIAL CIRCUIT** Civil Action Number 2022-CP-05-00098
Kwamaine Jarelle Ross #376871, Applicant, vs. State of South Carolina, Respondent.	**Order Denying Applicant's Motion to Alter or Amend**

This matter is before the Court upon Applicant's timely Motion for Reconsideration of the Order of Dismissal entered on December 30, 2024, pursuant to Rule 59(e), SCRCP. The Motion asks this Court to alter, amend, or reconsider its order dismissing the application for post-conviction relief.

The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to "reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004). A party may wish to file such a motion when he believes the court misunderstood, failed to fully consider, or failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. *Elam,* 361 S.C. at 24, 602 S.E.2d at 779.

After reviewing the applicable law and considering the arguments raised in the Motion, the Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or fact not appropriately considered.

Accordingly, the Court concludes that altering, amending, or reconsidering its prior Order is unwarranted, and the issues raised in the Motion do not change the Court's reasoning or conclusions. As such, Plaintiff's Rule 59(e) Motion is respectfully denied.

IT IS SO ORDERED.

Kristi Curtis

The Honorable Kristi F. Curtis

February 13, 2025
Sumter, South Carolina.