STATE OF SOUTH CAROLINA COUNTY OF colleton	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Maurio Daetrel Rivers, #232669, Applicant, v. State of South Carolina, Respondent.	Case # 2016-CP-15-0647 **SUPPLEMENTAL ORDER OF DISMISSAL**

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INTRODUCTION

This matter is currently before the Court by way of a remand from the South Carolina Court of Appeals. Through its decision remanding the matter, the Court of Appeals instructed this Court to issue a supplemental order addressing a single allegation raised by Mauio Daetrel Rivers ("Applicant") that was not previously addressed in the original order of dismissal issued in connection to his application for post-conviction relief. State v. Rivers, Op. No. 2025-UP-040 (S.C. Ct. App. filed Feb. 5, 2025). Specifically, the Court of Appeals has directed this Court to make specific findings of fact and conclusions of law on Applicant's claim "his trial counsel was ineffective for failing to object to the trial court's accomplice liability charge, which he contends constituted an improper comment on the facts." Id. Consistent with that appellate mandate, this Court—after reviewing the record from the trial proceedings conducted in Applicant's case, the testimony and evidence presented during the original post-conviction relief evidentiary hearing, the appellate records from Applicant's post-conviction relief appeal, and proposed orders submitted by counsel for both parties—finds Applicant has failed to meet his requisite burden of proof as to the lone allegation currently at issue. Therefore, for all the reasons that follow, Applicant's application for post-conviction relief is again denied and dismissed with prejudice.

PROCEDURAL HISTORY

In July of 2011, Applicant was arrested following a high-speed vehicle chase that ended in a crash and an unsuccessful attempt to flee on foot. In August of 2011, the Colleton County Grand Jury indicted Applicant for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. On December 12, 2012, a jury trial was commenced in the Colleton County Court of General Sessions with the Honorable Diane Schafer Goodstein, circuit court judge, presiding. During that trial, Applicant was represented by John D. Bryan, Esquire, and the case was prosecuted by Assistant Solicitor Steven Knight of the Fourteenth Judicial Circuit Solicitor's Office. At the conclusion of the two-day trial, the jury convicted Applicant of one count of attempted murder and acquitted him of the remaining charges. The trial judge sentenced Applicant to a thirty-year term of imprisonment. At present, Applicant is incarcerated and serving that sentence in the custody and control of the South Carolina Department of Corrections.

Following his convictions, Applicant timely appealed. On appeal, the Court of Appeals —following briefing and oral argument—issued an unpublished opinion in which it unanimously affirmed Applicant's conviction. State v. Rivers, Op. No. 2014-UP-441 (S.C. Ct. App. filed Dec. 3, 2014). Applicant—while represented by appellate counsel—then submitted a pro se petition for rehearing in the Court of Appeals and a pro se notice of appeal in the Supreme Court. In response, the Supreme Court construed Applicant's notice of appeal as a petition for a writ of certiorari and dismissed it without prejudice as premature. Meanwhile, the Court of Appeals rejected Applicant's pro se petition as an improper pro se filing and issued the remittitur on December 31, 2014. However, a short time later, the Court of Appeals recalled the remittitur and issued an order relieving Applicant's appellate counsel. Applicant then again submitted a pro se petition for rehearing along with a suggestion for rehearing en banc, and, this time, the petition was denied. Thereafter, Applicant filed a pro se petition for a writ of certiorari in the Supreme Court, and that petition was likewise denied. On December 7, 2015, the remittitur was issued.

Subsequent to the final issuance of the remittitur, Applicant timely filed an application for post-conviction relief, and, in response, the State filed a return requesting an evidentiary hearing. Applicant then moved to file a pro se amendment to the post-conviction relief

application. On April 3, 2019, an evidentiary hearing was conducted in the Colleton County Court of Common Pleas with the Honorable William H. Seals, Jr., circuit court judge, presiding. Applicant was present at the hearing and represented by Leslie T. Sarji, Esquire. Assistant Attorney General Benjamin Limbaugh from the South Carolina Attorney General's Office appeared on behalf of the State. During the course of the hearing, both Applicant and Applicant's trial counsel testified, and several exhibits were introduced, including some proposed jury charges from Applicant's trial. At the conclusion of the hearing, this Court took the matter under advisement.

Shortly after the hearing concluded, Applicant—despite being represented by post-conviction relief counsel and despite no final ruling having yet been issued—filed a pro se notice of appeal in the Court of Appeals, and the matter was transferred the Supreme Court. The Supreme Court then dismissed the appeal as improper, and the remittitur was issued on May 3, 2019.

Thereafter, through an order filed on January 2, 2022, this Court denied and dismissed Applicant's post-conviction relief application. Following that, Applicant—through post-conviction relief counsel—submitted a timely motion to alter or amend that was filed on January 23, 2020, and the State subsequently submitted a return. Through a Form 4 order filed on July 30, 2020, this Court denied the motion. Applicant then timely filed a notice of appeal.

After initiating his appeal, Applicant filed a petition for a writ of certiorari with the Supreme Court, and the Supreme Court transferred the matter to the Court of Appeals. Subsequently, on November 28, 2023, the Court of Appeals granted the petition as to a single issue and denied it as to all the remaining issues. Thereafter, following briefing, the Court of Appeals issued an unpublished decision remanding the matter to this Court for the issuance of a supplemental order. State v. Rivers, Op. No. 2025-UP-040 (S.C. Ct. App. filed Feb. 5, 2025). At present, the matter remains pending in this Court as a result of that remand.

SUMMARY OF INCIDENT GIVING RISE TO APPLICANT'S CONVICTION

Around 7:00 p.m. on July 12, 2011, Deputy Justin Eaches of the Dorchester County Sheriff's Office was monitoring Interstate 95 when he observed a black Acura partially enter the emergency lane and then shift lanes without using a turn signal. (App'x pp. 63-65; p. 72). In response, Deputy Eaches began following the vehicle, and, when he did, he spotted a man with a ponytail—Applicant—in the vehicle's driver's seat along a man with shorter hair in its passenger's seat. (App'x p. 64). Deputy Eaches then activated his patrol vehicle's blue lights and siren in an effort to initiate a routine traffic stop. (App'x pp. 66-67).

Initially, Applicant responded to the deputy's lights and siren in an appropriate fashion by turning on his vehicle's turn signal and moving over to the emergency lane like he was going to pull over. (App'x p. 67). However, instead of slowing down and stopping, Applicant continued to maintain a constant speed. (App'x p. 67). Applicant then suddenly changed lanes in an erratic manner and took off at a high rate of speed. (App'x p. 67). At that point, a high-speed chase ensued, and Deputy Eaches quickly requested assistance from other officers due to the poor condition of his patrol vehicle. (App'x pp. 67-68; p. 78).

Shortly thereafter, Lieutenant Joseph Burnette of the Dorchester County Sheriff's Office joined the pursuit and got into position behind Applicant's vehicle, which reached speeds over 100 miles per hour as it sped down the roadway. (App'x pp. 67-68; pp. 77-78; p. 84). Once the lieutenant had done so, Applicant's passenger—Bronson Shelley—shockingly fired a volley of gunshots that struck the front bumper and windshield of Lieutenant Burnette's pursuing vehicle on the driver's side near where he was seated. (App'x p. 73; pp. 89-90; p. 99). Lieutenant Burnette responded by ramming the Acura, which caused it to spin around and begin travelling backwards. (App'x p. 84; p. 87; p. 100). As the Acura did so, someone inside it fired another volley of gunshots through its windshield on its driver's side. (App'x p. 87; p. 100; p. 124; p. 127; p. 129). The Acura then crashed and flipped over onto its roof. (App'x p. 70; p. 84; p. 106).

After the crash, Applicant and Shelley rapidly exited the vehicle and immediately fled into a nearby wooded area in different directions. (App'x p. 70). Several officers pursued Shelley, and he was quickly captured. (App'x p. 73). Meanwhile, Lieutenant Burnette deployed his police dog, and the dog promptly chased Applicant down and apprehended him by biting his groin. (App'x pp. 84-86; p. 93). Lieutenant Burnette and another officer then took Applicant into custody and arrested him. (App'x p. 86; pp. 150-151).

Following that, a member of the Dorchester County Sheriff's Office processed the scene and examined the crashed Acura. (App'x pp. 103-106). Underneath the vehicle, he located a .38-caliber revolver with five fired cartridge cases in its cylinder. (App'x pp. 106-108). In addition to that, he found another .380-caliber pistol inside the vehicle that also had been used to fire all its ammunition along with another pistol inside the vehicle's glovebox. (App'x pp. 108-109; pp. 111-112; pp. 133-134). Furthermore, he found a number of spent cartridge cases nearby along with several bullet fragments. (App'x p. 116). Subsequent analysis determined the recovered cartridge cases had been fired by the .380-caliber pistol and the bullet fragments were fired by the revolver. (App'x pp. 144-146).

SUMMARY OF POST-CONVICTION RELIEF PROCEEDINGS PRIOR TO REMAND

After he was convicted by a [illegible] of attempted murder in connection to the incid[illegible]d following an unsuccessful appeal, Applicant sought relief through the filing of a pro se post-conviction relief application. (App'x pp. 271-284). Amongst the claims raised in that application, Applicant alleged his trial counsel was constitutionally ineffective for: (1) failing to object to the trial judge's jury instruction concerning "the hand of one is the hand of all"; and (2) failing to object to the "inclusion of a criminal offense" for which he was not indicted as part of the explanation of accomplice liability and "the hand of one is the hand of all." (App'x p. 278). More specifically, Applicant alleged trial counsel should have objected to a "hand of one is the hand of all" jury instruction because that theory of criminal liability was not specifically mentioned in the indictment and was purportedly not supported by the evidence presented during trial. (App'x pp. 279-280). Likewise, while referencing portions of the trial transcript containing the trial judge's jury instructions, Applicant alleged trial counsel should have objected to an illustrative example presented to the jury that explained someone acting as a lookout and getaway driver for a burglar would also be guilty of the burglary to the same extent as the burglar because it somehow created a "mandatory presumption" that unconstitutionally shifted the burden of persuasion to him and was confusing to the jury since he had not been charged with burglary. (App'x pp. 283-284). Applicant later included similar claims through a pro se motion to amend his post-conviction relief application. (App'x pp. 293-297).

In response to Applicant's filings, post-conviction relief counsel was appointed, and an evidentiary hearing was conducted on the matter. (App'x pp. 302-305). At the outset of the hearing, post-conviction relief counsel indicated she wished to raise additional claims beyond those identified in the application, and this Court delayed the matter until later in the week to give counsel for the State time to prepare to respond to the belated claims. (App'x p. 305). Thereafter, when the hearing resumed later that week, testimony was presented from Applicant and Applicant's trial counsel. (App'x pp. 323-338; pp. 343-379).

Notably, as part of his testimony, Applicant complained about trial counsel failing to object to the trial judge's use of an example. (App'x p. 328). And, as to why he believed that example usage was problematic, Applicant noted he was charged with attempted murder while the example used by the trial judge involved burglary and a getaway driver, which he contended was "very prejudicial" and supposedly improperly influenced the jury. (App'x pp. 337-338).

In addition to that, trial counsel also offered testimony about that particular matter and acknowledged he did not object to the burglary example provided by the trial judge as a "flawed example." (App'x pp. 368-369). He further indicated he could not remember precisely why he did not do so. (App'x pp. 378-379). Importantly though, trial counsel explained he believed the jury would have understood the difference between that example and what was being alleged in Applicant's case. (App'x p. 379).

At the conclusion of the hearing, this Court took the matter under advisement and, upon giving it consideration, declined to grant relief. (App'x p. 392; pp. 411-420). In declining to grant relief, this Court—in part—concluded Applicant failed to establish trial counsel's performance was constitutionally ineffective because: (1) the trial judge's "hand of one is the hand of all" jury instruction was supported by the evidence presented; and (2) the trial judge's jury instructions corrected any conceivable error that could have occurred as the result of the *solicitor*'s use during his closing argument of an example involving a burglary and a getaway driver. (App'x pp. 416-418).

Subsequent to that, post-conviction relief counsel timely filed a motion to alter or amend on Applicant's behalf. (Supp. App'x pp. 1-2). However, through that motion, post-conviction relief counsel did *not* allege this Court erred by failing to address Applicant's claim regarding the illustrative example used by the trial judge as part of her jury instructions. (Supp. App'x pp. 1-2).

Meanwhile, around the same time, Applicant—despite being represented by counsel—attempted to submit his own pro se "Motion to Amend and Alter Judgement Rule 59(e)" raising additional claims, including one related to this Court's failure to rule on his claim related to the trial judge's use of an example as part of her jury instructions on accomplice liability. (App'x pp. 421-424). Critically though, as reflected in the Colleton County Fourteenth Judicial Circuit Public Index, that pro se motion was *not* actually filed in Applicant's case and was never actually before this Court for its consideration. Records for Maurio D. Rivers, Colleton County Fourteenth Judicial Circuit Public Index, https://publicindex.sccourts.org/colleton/publicindex.

Ultimately, this Court considered the matter that was actually presented to it for consideration, including the State's return. (App'x pp. 425-426; Supp. App'x pp. 3-6). Upon doing so, this Court declined to alter or amend its judgment. (App'x pp. 425-426).

NATURE OF ALLEGATION ON REMAND

In his application for post-conviction relief, Applicant raised a number of allegations, and most of those allegations have previously been ruled upon and rejected in this Court's original order of dismissal. (App'x pp. 411-420; pp. 425-426). However, one issue remains for this

Court to address on remand. Specifically, that issue is:

> Was trial counsel constitutionally ineffective for failing to object to the trial judge's jury charge on accomplice liability?

State v. Rivers, Op. No. 2025-UP-040 (S.C. Ct. App. filed Feb. 5, 2025).

STANDARD APPLICABLE TO ALLEGATION RAISED

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of trial counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of trial counsel does not mean perfect or mistake-free representation. See Weaver v. Massachusetts, 582 U.S. 286, 300 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, trial counsel's assistance is considered to be constitutionally ineffective only when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) ("Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (citation and internal quotations omitted)).

When faced with a claim of ineffective assistance of trial counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of trial counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see United States v. Balzano, 916 F.2d 1273, 1292 (7th Cir. 1990) (characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a "high mountain a defendant must climb"); Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment" and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); see also Weaver, 582 U.S. at 303 (explaining "the rules governing ineffective-assistance claims must be applied with scrupulous care" (citation and internal quotations omitted)).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Richter, 562 U.S. at 110 (instructing the proper analysis "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind"). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances. Strickland, 466 U.S. at 689. To establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687; see Dunn v. Reeves, 594 U.S. 731, 739(2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." (citation, internal quotations, and

brackets in original omitted)). Thus counsel's performance will be considered to be deficient only when it objectively amounted [illegible]ompetence under prevailing professional norm[illegible] not when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at 105; see State v. Woullard, 813 N.E.2d 964, 971 (Ohio Ct. App. 2004) ("Defense counsel's strategy must have been outside the realm of legitimate trial strategy so as 'to make ordinary counsel scoff' before a conviction will be reversed on the basis of ineffective assistance." (citations omitted)).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. For that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112; see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Through the lone allegation at issue on remand, Applicant contends trial counsel was ineffective for failing to object to the trial judge's jury instructions on accomplice liability. For all the reasons that follow, this allegation is denied.

RELEVANT FACTS

Toward the outset of Applicant's ensuing trial on charges of attempted murder and possession of a weapon during the commission of a violent crime, the trial judge presented some preliminary remarks to the jury. (App'x p. 8; pp. 48-59). As part of those remarks, the trial judge emphasized: (1) she had no opinion on the facts and the law did not permit her to have such an opinion; (2) anything she said regarding the facts should be disregarded; and (3) a trial judge in South Carolina could not tell jurors what the facts are. (App'x pp. 51-52).

As the trial proceeded forward, Deputy Eaches, Lieutenant Burnette, and the others involved in the response to the incident recounted the terrifying details of the high-speed chase, shooting, crash, and subsequent apprehension of Applicant and his passenger. (App'x pp. 63-75; pp. 77-100; pp. 103-129; pp. 132-139; pp. 141-147; pp. 149-151). Likewise, testimony and evidence was presented about the multiple fired guns recovered from in and around the crashed vehicle Applicant had been driving and about the gunshot damage to the windshield near the driver's seat of that vehicle that had resulted from someone inside it firing out through the windshield. (App'x pp. 103-129).

After all that testimony and evidence was presented, the trial judge conducted a charge conference with the parties in her chambers. (App'x p. 166). Following that, the parties presented their closing arguments to the jury. (App'x pp. 168-179). Notably, as part of the State's closing argument, the solicitor made the following remarks:

> Another principle is called the hand of one is the hand of all. It's sort of like if one commits an act and the other one is participating, even though he didn't commit that particular act, he's guilty also. I'll give you a couple of examples.
>
> You drive a car -- I drive the car to a convenience store and the fellow with me has a weapon and he's going in to rob the convenience store. He says: Keep the car running.
>
> I never go into the store, but I'm as guilty as he is for robbing the store with a weapon.
>
> Another example is I go with my friend. He says: I'm going into the convenience store. You stand outside and be my lookout.
>
> I'm as guilty as he is. That's called the hand of one is the hand of all. Even though I didn't go inside, I didn't point the gun at the clerk, I'm as guilty as he is.

> Now, mere presence, because you're at the scene of a crime doesn't mean that you're guilty, but if you understand the plan, you understand what's going on, you're participating, aiding, assisting in some form or fashion, you're not there just as a result of mere presence. You're participating in the event.

(App'x pp. 169-170).

Following the closing arguments, the trial judge instructed the jury on the applicable law. (App'x pp. 182-207). As part of those instructions, the trial judge explained the State bore the burden of proving Applicant's guilt beyond a reasonable doubt and Applicant was presumed innocent of the charged crimes unless and until the State met its burden of proof. (App'x pp. 183-184). Additionally, the trial judge reiterated to the jurors they were the sole judges of the facts while she could not as the trial judge comment on the facts. (App'x p. 187). Furthermore, the trial judge instructed the jury on the law concerning "the hand of one is the hand of all" and accomplice liability while further emphasizing neither a defendant's mere presence at the scene of a crime, a defendant's mere knowledge a crime was going to be committed, nor a defendant's association with a person who commits a crime would be alone sufficient to establish guilt or "make a defendant an accomplice or an aider or abettor of the person committing the crime." (App'x pp. 193-196). Beyond that, as part of her explanation of accomplice liability, the trial judge presented—without objection—the following illustrative example to the jury:

> For example, ladies and gentlemen, two people can be responsible and can be guilty of burglary if one -- only one person went into the house and one person was the lookout and driving the car or the getaway car and the lookout but only one person actually went into the house at night. Ladies and gentlemen, although only one person went into the house, both people are guilty of burglary in the first degree because they acted *together in concert to commit* a burglary.

(App'x pp. 193-194; p. 207) (emphasis added).

Thereafter, the jury began its deliberations. (App'x p. 209). A little over an hour later, the jury asked to—amongst other things—be instructed again on "the hand of one is the hand of all." (App'x pp. 209-210). In response, the trial judge did so, and, as part of her supplemental instructions, she stated the following:

> A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the acts done in carrying out the common plan and purpose. For example, two people can be guilty of burglary when only one of the people goes into the house and the other person sits in the car as the lookout and is the getaway driver.
>
> If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all, or as it is sometimes said, the hand of one is the hand of all.
>
> In the example that I gave you, only one person went into the house and actually committed the going into the house, the burglary; however, both are responsible, both are guilty if they are acting together, assisting each other in committing the offense.

(App'x p. 211). Furthermore, in addition to that, the trial judge again emphasized prior knowledge and mere presence would not alone be sufficient to establish guilt. (App'x pp. 211-212).

Following that, the jury resumed its deliberations. (App'x p. 213). Just under two hours later, the jury returned with its verdict, convicted Applicant of one count of attempted murder, and acquitted him of the remaining charges. (App'x pp. 215-216).

Later on during the post-conviction relief evidentiary hearing, Applicant—as part of his testimony—discussed his view on trial counsel's failure to object to the trial judge's use of an illustrative example as part of her jury instructions on accomplice liability. Specifically, he maintained the instruction was "very prejudicial" because he believed it would have led the jurors to think "if the driver [in the burglary example used by the trial judge] is just as guilty as

the burglar then surely the driver in this vehicle is just a guilty as the murder attempted." (App'x pp. 337-338). In addition to that, A[illegible]nt's trial counsel was questioned about his fai[illegible]o raise an objection to the trial judge's use of an illustrative example as part of her jury instructions on accomplice liability, and he confirmed he could not remember why he did not do so. (App'x pp. 368-369; p. 378). However, trial counsel indicated he believed the jury would have been capable of drawing a distinction between the facts of Applicant's case and the example used. (App'x pp. 378-379).

ANALYSIS

On remand, Applicant contends trial counsel was constitutionally ineffective for failing to object to the trial judge's jury instructions on accomplice liability. As support for that allegation, Applicant appears to now be maintaining trial counsel should have objected to the trial judge's use of an illustrative example as part of those instructions because doing so purportedly constituted an improper comment on the facts.

While it is unquestionably true a trial judge in South Carolina cannot properly make a comment on the facts when instructing the jury on the law, the usage of illustrative examples as part of a jury charge has *for more than a century* been recognized as proper in our state and not violative of the constitutional prohibition on comments on the facts. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); State v. Young, 238 S.C. 115, 135, 119 S.E.2d 504, 514-515 (1961) ("[A] judge does not violate this provision of the Constitution [prohibiting a jury charge on the facts] by the use of hypothetical or supposed facts for the purpose of illustrating some principle of law."), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); Norris v. Clinkscales, 47 S.C. 486, __, 25 S.E. 797, 806-808 (1896) (explaining an impermissible comment on the facts occurs when a trial judge "expresses in his charge his own opinion upon the force and effect of the testimony, or of any part of it, or intimates his views of the sufficiency or insufficiency of the evidence in whole or in part" and instructing "statements used in illustration of some principle of law" do not violate the constitutional prohibition on a trial judge commenting on the facts); see also State v. Quick, 141 S.C. 442, __, 140 S.E. 97, 99 (1927) ("Oftentimes juries can be made to understand the law of the case easier if they are given helpful illustrations."). Indeed, that principle has even been recognized as being so settled citation to authority is no longer needed to support it. See State v. Duncan, 86 S.C. 370, __, 68 S.E. 684, 686 (1910) ("It has been decided too often to require citation of cases that a hypothetical statement of the facts with a statement of the legal result following thereupon, is *not a charge upon the facts*." (emphasis added)).

With that law in mind, the trial judge did not violate the prohibition on comments on the facts by using an illustrative example that—just as trial counsel appeared to recognize—was highly distinct from the factual scenario involved in Applicant's case. Demonstrating that fact, Applicant's case primarily involved an attempted murder charge that stemmed from a factual scenario in which the driver of a vehicle—Applicant—suddenly fled when a law enforcement officer attempted to stop him for a simple traffic violation. Then, during the dangerous high-speed chase that spontaneously and unexpectedly ensued, Applicant's passenger began firing on the pursuing law enforcement officers as Applicant continued to try to speed away. Meanwhile, the illustrative example employed by the trial judge as part of her accomplice liability jury instructions involved a factual scenario that did *not* involve anything unexpected, spontaneous, or sudden. Instead, the trial judge's example involved a scenario in which two individuals joined with one another for the *specific purpose* of committing a *planned* criminal act and "acted together in concert to commit a burglary." And, in that example involving a jointly-planned crime, one went inside the burglarized residence while the other actively participated by waiting outside to serve both as a lookout during the crime and as the getaway driver once the other had returned to the vehicle. Thus, the easy-to-understand illustrative example employed by the trial judge involved strikingly different circumstances from the circumstances involved in Applicant's case, which ensured it could *not* have been misconstrued by the jurors as an improper comment on the facts. Compare State v. Steadman, 257 S.C. 528, 541, 186 S.E.2d 712, 716 (1972) ("Neither is the charge subject to a valid criticism, as claimed, that it constituted a comment on the facts. The trial judge prefaced a comment with the statement that it was by way of illustration. The comment related to the breaking and entry on an apartment used for both business and dwelling purposes. While it was designated by the trial judge as an illustration, it was nothing more than a general statement of law and did not constitute a comment on the facts."); Harrelson v. Reaves, 219 S.C. 394, 402, 65 S.E.2d 478, 482 (1951) ("The Court merely used said hypothetical statements in an effort to clarify the applicable law without expressing or intimating any opinion as to the weight of the evidence. This is permissible."); and State v. Aughtry, 49 S.C. 285, __, 26 S.E. 619, 622 (1897) (instructing a trial judge's use of a hypothetical to help explain the law concerning alibi to the jury was neither erroneous nor an impermissible comment on the facts); with State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (concluding the trial judge did not err by refusing to give Hughey's requested jury instruction concerning "specific examples of legal provocation" not because all jury instructions involving illustrative examples are categorically improper but, instead, because the specific

examples Hughey requested related to the "specific facts of the case" and, thus, would [illegible] constituted an improper charge on t[illegible]ts), overruled on other grounds by Rosemond [illegible] toc, 383 S.C. 320, 680 S.E.2d 5 (2009). And, that was particularly true since the trial judge *repeatedly* stressed to the jurors throughout the trial she did not have an opinion on the facts, she could not comment on the facts to them, and they as the members of the jury were the sole judges of the facts. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them.").

Relatedly, since the trial judge's use of the illustrative example was neither improper nor a prohibited comment on the facts, defense counsel could not have performed in a deficient manner by failing to raise a meritless objection to an appropriate jury instruction, and his decision not to raise such an objection certainly was not one *no* competent attorney would have made under the circumstances involved. See State v. Glenn, 88 S.C. 162, __, 70 S.E. 453, 453 (1911) (explaining a trial judge's use of a hypothetical statement of facts during a jury charge "is not a charge on the facts"); see also Reeves, 141 S. Ct. at 2410 ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that *no* competent lawyer would have chosen." (emphasis added and citation, internal quotations, and brackets omitted)); cf. Winkler v. State, 418 S.C. 643, 653, 795 S.E.2d 686, 692 (2016) ("One of the key circumstances a court must consider in its examination of counsel's decision not to make a particular objection is whether there was any law to support the objection."); Mayo v. State, 347 S.C. 422, 426, 556 S.E.2d 380, 382 (2001) (holding a post-conviction relief judge's grant of relief based on defense counsel's failure to raise an objection to be without factual support where "there was no sustainable objection" defense counsel could have made). Accordingly, since Applicant could not meet his burden of establishing trial counsel's failure to object to the trial judge's use of an illustrative example constituted deficient performance as required, Applicant's ineffective assistance of counsel claim necessarily must—and does—fail. See Campbell v. State, 441 S.C. 361, 367, 893 S.E.2d 492, 495 (Ct. App. 2023) (explaining a failure to make the requisite showing of either deficient performance or sufficient prejudice is fatal to an ineffective assistance of counsel claim); see also Hillerby v. State, 431 S.C. 323, 333, 847 S.E.2d 500, 505 (Ct. App. 2020) ("Deficiency is judged by whether trial counsel failed to provide reasonably effective assistance under prevailing professional norms." (citation and internal quotations omitted)).

Furthermore, even if trial counsel's failure to object could somehow be deemed deficient performance, Applicant nevertheless was not and could not have been prejudiced by defense counsel's performance in that regard because there was no reasonable likelihood of a different outcome even if an objection had been raised since: (1) the trial judge's illustrative example was not improper or objectionable; (2) the jury was otherwise properly instructed on the law concerning accomplice liability and "the hand of one is the hand of all"; (3) the illustrative example employed a factual scenario entirely distinct from the factual scenario involved in Applicant's case such that it could not have improperly influenced the jury in any manner; and (4) the jury heard a highly-similar illustrative example from the solicitor as part of his closing argument remarks. See Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (an applicant—in order to prove an ineffective assistance of counsel claim—must establish: (1) trial counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for trial counsel's deficient performance); see also Strickland, 466 U.S. at 693-694 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); cf. Stone, 419 S.C. at 383, 798 S.E.2d at 568 ("There are a variety of reasons counsel may soundly choose not to make such an objection, including the reality that not all evidence offered by the State is harmful to the defendant. Under certain circumstances, therefore, counsel may employ a strategy of not objecting—even when counsel has a good argument for exclusion—if counsel reasonably perceives the benefits of doing so are outweighed by some other consideration."). Under such circumstances, Applicant was not and is not entitled to any relief because he cannot possibly meet his burden of establishing the requisite prejudice necessary to establish his ineffective assistance of counsel claim. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

For those reasons, Applicant has failed to meet his requisite burden of establishing both deficiency and prejudice in regard to trial counsel's performance concerning the trial judge's use of an illustrative example as part of her jury instructions on accomplice liability, and, thus, Applicant did not and cannot overcome the presumption trial counsel provided adequate representation during trial. Accordingly, this allegation is denied.

CONCLUSION AND ADVISEMENTS REGARDING APPEAL

For all the foregoing reasons, this Court finds Applicant has failed to meet his burden of

proof as to the allegation advanced in this post-conviction relief action that was mistak... ot previously addressed in the original ... of dismissal and has again not established an, constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, Applicant's application for post-conviction relief is once again denied and dismissed with prejudice.

As before and pursuant to the guidance provided by the Court of Appeals in its decision remanding the matter for the issuance of a supplemental ruling, Applicant must file and serve a new notice of appeal within thirty days from the receipt of this supplemental order by Applicant's counsel to secure the appropriate appellate review if so desired. Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to the assistance of appellate counsel when seeking review of an order denying post-conviction relief. Rule 71.1(g) of the South Carolina Rules of Civil Procedures provides post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf in the event the applicant wishes to seek appellate review of a post-conviction relief ruling. Applicant is directed to Rule 243 of the South Carolina Appellate Court Rules for guidance on the appropriate procedures for an appeal in a post-conviction relief matter.

IT IS THEREFORE ORDERED:

(1) Applicant's application for post-conviction relief is again denied and dismissed with prejudice;

and

(2) Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 23 day of Feb., 2025.

WILLIAM H. SEALS, JR.,
Circuit Court Judge

, South Carolina

Fourteenth Judicial Circuit

ALAN WILSON
ATTORNEY GENERAL

March 3, 2025

The Honorable Gary Hale
Clerk of Court, Colleton County
Post Office Box 620
Walterboro, South Carolina 29488-0028

Re: **<u>Maurio Daetrel Rivers, #232669 v. State of South Carolina</u>**
2016-CP-15-00647

Dear Mr. Hale:

Enclosed please find the original Supplemental Order of Dismissal signed by the Honorable William H. Seals, Jr. in the above-captioned case for filing in your office.

In addition, please forward a proof of service and a time stamped copy back to our office for our file.

Sincerely,

Mark R. Farthing
Senior Assistant Deputy Attorney General

MRF/cc

cc: Kathrine H. Hudgins, Esquire