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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Bamberg County

Honorable Kristi F. Curtis, Circuit Court Judge  
\_\_\_\_\_

KWAMAINE ROSS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000412  
\_\_\_\_\_

APPENDIX  
\_\_\_\_\_

GARY H. JOHNSON  
Appellate Defender

ALAN WILSON  
Attorney General

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

T. CRUISE MITCHELL  
Assistant Attorney General  
PO Box 11549  
Columbia, SC 29201-1549  
(803) 734-3737

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

INDEX

INDEX ..... i

TRIAL TRANSCRIPT DATED JUNE 19-20, 2018.....1

TRIAL TRANSCRIPT DATED JUNE 21, 2018 .....327

COURT’S EXHIBIT 1 (NOTE FROM THE JURY).....356

COURT’S EXHIBIT 2 (NOTE FROM THE JURY).....358

COURT’S EXHIBIT 3 (NOTE FROM THE JURY).....359

COURT’S EXHIBIT 4 (JURY NOTE) .....360

COURT’S EXHIBIT 5 (JURY NOTE) .....361

STATE’S EXHIBIT 1 (AFFIDAVIT/LINEUP – J. GREEN).....362

STATE’S EXHIBIT 2 (AFFIDAVIT/LINEUP – Q. ROSS) .....364

STATE’S EXHIBIT 3 (AFFIDAVIT/LINEUP – KWAMAINE ROSS).....366

STATE’S EXHIBIT 5 (MIRANDA RIGHTS – KWAMAINE ROSS).....368

INDICTMENT.....369

SENTENCE SHEET.....371

APPLICATION FOR POST-CONVICTION RELIEF DATED MARCH 31, 2022.....373

RETURN TO THE APPLICATION FOR POST-CONVICTION RELIEF AND MOTION  
FOR A MORE DEFINITE STATEMENT DATED AUGUST 8, 2022.....378

AMENDED APPLICATION FOR POST-CONVICTION RELIEF DATED JANUARY 26,  
2024.....397

POST-CONVICTION RELIEF HEARING DATED FEBRUARY 1, 2024 .....399

APPLICANT’S EXHIBIT #1 (INCIDENT REPORT) .....490

APPLICANT’S EXHIBIT #2 (MOTIONS) .....492

ORDER OF DISMISSAL DATED JANUARY 8, 2025 .....495

NOTICE OF MOTION AND MOTION TO ALTER OR AMEND THE  
JUDGEMENT DATED JANUARY 31, 2025 .....519

RETURN TO APPLICANT’S MOTION PURSUANT TO  
RULE 59€, SCRCPB DATED FEBRUARY 10, 2025 .....524

ORDER DENYING APPLICANT’S MOTION TO ALTER OR AMEND DATED  
FEBRUARY 20, 2025 .....528

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 25<sup>th</sup>, 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 know 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), SCRCR, 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 30<sup>th</sup> day of Dec., 2024.




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THE HONORABLE KRISTI F. CURTIS  
Presiding Judge  
Second Judicial Circuit

Sumter, South Carolina

FILED  
BAMBERG COUNTY

STATE OF SOUTH CAROLINA )  
COUNT OF BAMBERG )  
CASE NO.: 2022-CP-05-0098

2025 JAN 31 AM 11:06

JANNIE C. JOHNSON  
CLERK OF COURT  
BAMBERG, SC

Kwamaine Jarelle Ross #376871,

Applicant, )  
State of South Carolina, )  
Respondent. )  
NOTICE OF MOTION AND MOTION TO  
ALTER OR AMEND THE JUDGMENT

PLEASE TAKE NOTICE that the Applicant, through his undersigned attorneys will move before the Honorable Kristi F. Curtis to alter or amend the judgment entered on December 30, 2024, recorded January 8, 2025 and received on January 21, 2025.

The above-captioned matter came before the court via an application for post-conviction relief filed by Kwamaine Jarelle Ross (Applicant) on March 31, 2022. This court convened an evidentiary hearing before the Honorable Kristi F. Curtis on February 1, 2024. Applicant was present at the hearing and represented by Tommy A. Thomas, Esquire, and T. Cruise Mitchell, Esquire of the South Carolina Attorney General's Office represented Respondent.

After consultation of the Applicant counsel now moves before this court pursuant to SCRCF Rule 59(e) for reconsideration and Alter or Amend on the basic outlined below.

**ARGUMENT**

Applicant is informed and believes this motion is necessary and appropriate due to the following:

- 1. **The Order of Dismissal does not adequately address the issue of the Allen charge.**

This issue covers a time span of 11:21 a.m. to 1:10 p.m. from the time of the *Allen* charge to the jury returning with a verdict. The Order specifically states that the Allen charge was given

at 11:21 a.m. and returned a verdict at 1:10 p.m. In which the Court finds this charge was not constitutionally coercive. The PCR Court finds that the jury begins redeliberating after the *Allen* charge was given at 11:21 a.m. and returned a verdict at 1:10 p.m. The PCR Court finds does not indicate coercion. (Trial Tr. date June 21, 2018, P. 8; p. 11). The Court finds the *Allen* charge was not constitutionally coercive; thus, Counsel had no meritorious reason to object.

The Applicant testified to this issue on Page 82 of the PCR Transcript. He states that the *Allen* charge was given and the Jury went back to deliberate. It was his testimony that the jury deliberated between 2 and 5 minutes. He believes that the shorter period of deliberation time is a result of the Court Reporter's failure to notate the last time the Jury came back into the court room. (PCR Transcript p. 82, lines 11-18).

The *Allen* charge is given and a recess is noted at 11:23 a.m. (Appendix Trial transcript p. 235, line 9-15 Trial transcript designated as June 21, 2018 day three of trial transcript p. 9, lines 9-15.) This transcript further notes that the Jury reenters the Court Room at 11:48 a.m. indicating that they wished to hear approximately 30 to 40 minutes of testimony (Appendix Trial transcript p. 235, lines 16-23, Trial Transcript p. 9 lines 16-23. They also discussed ordering lunch. The Court then stands at ease awaiting Jury decision. Jury returns to Jury room. Time is not noted. (Appendix Trial transcript p. 237, lines 6-19, Trial transcript p. 11 lines 6-19)

Applicant would respectfully ask the Court to reconsider the Court's finding on the issue, that the Jury was not deliberating for the entire time from 11:21 a.m. when the *Allen* charge was give through 1:10 p.m. when they returned the verdict. Applicant argued that the shorter time between when the charge was given and when the jury actual returned a verdict demonstrated coercion.

## **2. Octavia Bannister's Inconsistent Statements.**

That the Applicant alleges counsel was ineffective for failing to bring to the attention of the jury the discrepancies and inconsistencies in Octavia Bannister's statements. 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 Trial Counsel testified to at the evidentiary hearing, he cross-examined Ms. Bannister on this point at trial. Counsel was clearly attempting to impeach Ms. Bannister on this issue through her inconsistent statements. The PCR Court found that any additional attempt to cross-examine Ms. Bannister on this inconsistency would have been merely cumulative to testimony already given and finds that the Applicant has failed to prove he was prejudice as to this allegation.

The Applicant testified at Post Conviction Relief that the witness Octavia Bannister completely changed her statement from what she originally told the police. She stated that she saw a black male subject run out of the back door, that he was wearing a lime green shirt with dreadlocks. Applicant testified that the closer the case got to trial that Ms. Bannister's statement got more concrete in favor of the State. It was at that point that Ms. Bannister testified that she was eye to eye with the perpetrator inside of the house. (PCR Transcript, p. 66, lines 1-18)

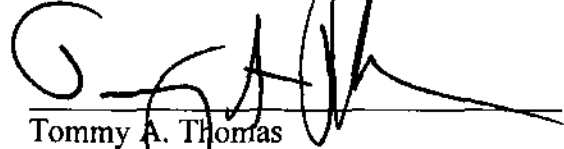
Applicant goes further to testify that the critical evidence that hurt him was the fact that the Jury did not know that Ms. Bannister gave three totally different statements and if the proper foundation had been laid for prior inconsistent statements for her impeachment, this would have given the Jury a different outlook of what took place. (PCR Transcript p. 67, lines 20-25, p. 68, lines 1-2) Applicant further states that Trial Counsel was ineffective in that he could have Subpoenaed Christopher Sanderford and Corporal Preacher who were the officer's that Octavia

Bannister gave her original statement. Not doing so prejudiced him. (PCR Transcript p. 68, lines 5-12).

Applicant would respectfully request that the Court reconsider this issue.

Therefore, based upon the foregoing, we would respectfully request that the Court reconsider its Order denying Post Conviction Relief as well as Alter and Amending this Order to correct any deficiencies.

Respectfully submitted

A handwritten signature in black ink, appearing to read 'Tommy A. Thomas', written over a horizontal line.

Tommy A. Thomas  
Attorney for Applicant  
P.O. Box 88  
Irmo, SC 29063  
(803) 732-5507

January 30, 2025

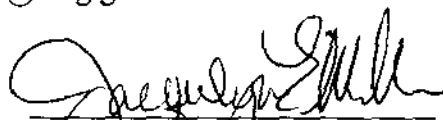
STATE OF SOUTH CAROLINA )  
 )  
 COUNT OF BAMBERG )  
 )  
 Kwamaine Jarelle Ross #376871, )  
 )  
 Applicant, )  
 )  
 vs. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

THE COURT OF COMMON PLEAS  
 CASE NO.: 2022-CP-05-0098

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Paralegal to Tommy A. Thomas, Attorney for the Applicant, hereby certify that I emailed, a copy of a Notice of Motion and Motion to Alter and Amend to the Attorney General's Office, at:

Cruise Mitchell, Esq.  
 Attorney General's Office  
 P.O. Box 11549  
 Columbia, SC 29211-1549  
 cruisemitchell@scag.gov



Jacquelyn E. Miller  
 Paralegal to Tommy A. Thomas  
 Attorney for Applicant  
 P.O. Box 88  
 Irmo, SC 29063  
 (803) 732-5507

Irmo, SC  
 January 30, 2025

FILED  
 BAMBERG COUNTY  
 2025 JAN 31 AM 9:06  
 JANNIE C. JOHNSON  
 CLERK OF COURT  
 BAMBERG, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF BAMBERG	)	
Kwamaine J. Ross,	)	Case No.: 2022-CP-05-00098
S.C.D.C. No. 376871,	)	
	)	
Applicant,	)	
	)	<b>RETURN TO APPLICANT'S MOTION</b>
v.	)	<b>PURSUANT TO RULE 59(e), SCRCP</b>
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

FILED  
 BAMBERG COUNTY  
 2025 FEB 10 AM 9:54  
 JANIE C. JOHNSON

In response to Motion to Alter or Amend the Judgment filed by Kwamaine J. Ross (Applicant) on January 31, 2025, Respondent would show this Court:

**I.**

This matter originally came before the Court by way of an application for post-conviction relief filed March 31, 2022. This Court convened an evidentiary hearing before the Honorable Kristi F. Curtis on February 1, 2024. Applicant was present at the hearing and represented by Tommy A. Thomas, Esquire. The State was represented by Assistant Attorney General T. Cruise Mitchell. The Court issued an Order of Dismissal filed January 8, 2025, denying and dismissing the application with prejudice. Applicant timely filed his Motion to Alter or Amend the Judgment on January 31, 2025.

**II.**

In his motion, Applicant asks the Court to reconsider its ruling pursuant to Rule 59(e), SCRCP. Applicant's motion for reconsideration should be denied. The Court's Order of Dismissal contains the required findings of fact and conclusions of law necessary to dispense

with Applicant's allegations as required by S.C. Code Ann. § 17-27-80 and Rule 52(a), SCRPC; see also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

**The Order of Dismissal Made the Required Findings of Fact and Conclusions of Law Regarding the Allen Charge Allegation**

The Court properly found that, based on the entirety of the Allen Charge given during Applicant's trial, it was not constitutionally coercive. Thus, Counsel had no meritorious reason to object. Applicant contends that because the jury indicated they wished to hear testimony after the Allen charge was given, this time should not be considered as deliberation. This argument is without merit. The fact that the jury indicated they wished to rehear testimony, after the Allen charge was given, is further evidence that the Allen charge was **not** constitutionally coercive. Furthermore, reviewing evidence is an essential role of a jury's deliberation and the time spent reviewing that evidence is clearly part of the jury's deliberation. Furthermore, the Court properly ruled that the substance of the Allen charge itself was not constitutionally coercive. Therefore, the Court properly addressed this issue.

**The Order of Dismissal Properly Found Counsel Was Not Ineffective for Failing to Bring to the Attention of the Jury the Inconsistent Statements of Octavia Bannister**

The Court properly made its findings of fact and conclusions of law regarding this allegation. The Court's order properly considered and made findings regarding Counsel's use of Octavia Bannister's statements at trial. In Applicant's motion to reconsider, he cites to his own testimony at the PCR hearing regarding the inconsistent statements Counsel should have addressed:

She stated that she saw a black male subject run out of the back door, that he was wearing a lime green shirt with dreadlocks. Applicant testified that the closer the case got to trial that Ms. Bannister's statement got more concrete in favor of the State. It was at that point that Ms. Bannister testified she was eye to eye with the perpetrator inside of the house.

(Mot. to Reconsider) (citing PCR Transcript, p. 66, lines 20-25, p. 68, lines 1-2).

This Court properly ruled on Counsel's actions at trial on each of these inconsistencies. The Court's order addresses Counsel bringing to the attention of the jury the fact that Ms. Bannister's first account of seeing Applicant inside her home was at trial. (Order of Dismissal, pg. 6). As the Court noted, Ms. Bannister agreed the first time she mentioned seeing Applicant inside her home was the day before trial began. (Order of Dismissal, pg. 6). The Court's order addresses, at length, Counsel bringing to the attention of the jury Ms. Bannister's statement regarding the dreadlocks and lime green shirt. (Order of Dismissal, pg. 12-13). The Court's order cited Counsel's cross-examinations of SLED Agent David Owen and Octavia Bannister to support the Court's finding that Counsel was not deficient in this regard. (Order of Dismissal, pg. 13). Therefore, the Court's order adequately addressed the issue regarding Counsel's use of Ms. Bannister's inconsistent statements at trial.

Furthermore, as Counsel testified to at the PCR hearing, he did not admit Ms. Bannister's statement into evidence at trial because Ms. Bannister never denied making any of the statements. (PCR Tr. p. 28-29). Therefore, this further supports the Court's finding that Counsel was not deficient for failing to bring to the attention of the jury the inconsistencies of Octavia Bannister's statements.

Accordingly, the Court properly ruled on all issues before it, and Applicant's motion should be denied.

## III.

WHEREFORE, Respondent respectfully requests the Court deny Applicant's motion for reconsideration.

Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

D. RUSSELL BARLOW, II,  
Senior Assistant Deputy Attorney General

T. CRUISE MITCHELL  
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT  
Office of the Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211

February 7, 2025

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**

FILED  
BAMBERG COUNTY  
2025 FEB 20 AM 10:40  
JANETTE C. JOHNSON  
CLERK OF COURT  
BAMBERG, SC

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), SCRCPC. 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), SCRCPC, 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.

February 13, 2025  
Sumter, South Carolina.

  
\_\_\_\_\_  
The Honorable Kristi F. Curtis