

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

Calvin Eugene Whitener, #386334,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE EIGHTH JUDICIAL CIRCUIT
)

) Cases No. 2025-CP-36-00152
)

ORDER OF DISMISSAL

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This matter comes before the Court by way of an application for post-conviction relief (“PCR”) filed by Calvin Eugene Whitener (“Applicant”) on March 14, 2025. The Court convened an evidentiary hearing into the matter on January 14, 2026, at the Laurens County Courthouse. Applicant was present at the hearing and represented by J. Falkner Wilkes, Esq. Zachary W. Jones, of the South Carolina Attorney General’s Office, represented Respondent.

After reviewing all records and evidence before the Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief. The Court finds as follows:

I. PROCEDURAL HISTORY

During its February 2015 term, the Newberry County Grand Jury indicted Applicant for trafficking cocaine, 28 grams or more but less than 100 grams (2015-GS-36-00083). Applicant was represented by Ricky Harris, Esquire (“Counsel”). Deputy Solicitor C. Dale Scott and Assistant Solicitor Taylor Daniel, of the Eighth Circuit Solicitor’s Office, prosecuted the case.

On November 13, 2017, Applicant was tried *in absentia* before the Honorable Frank R. Addy. On November 15, 2017, the jury found Applicant guilty as indicted. The sentence was sealed due to Applicant’s absence. On October 20, 2021, the sentence was unsealed; Judge Addy

sentenced Applicant to twenty-five years' imprisonment, with credit for time served since his arrest in North Carolina in January of 2021.

Applicant filed a timely notice of appeal on October 22, 2021. The court of appeals affirmed Applicant's conviction and sentence in an unpublished opinion. *State v. Whitener*, Op. No. 2024-UP-143 (S.C. Ct. App. filed May 1, 2024). The remittitur was sent on May 17, 2024.

Factual Summary

On September 3, 2014, Deputy Michael Claytor of the Newberry County Sheriff's Department was conducting a radar operation when he clocked a white Nissan Altima speeding 80 mph in a 55 mph zone at approximately 1:00 am. (Tr.p.115). Claytor conducted a traffic stop of the vehicle. (Tr.p.115). There were four occupants in the vehicle: (1) Jacques Mincey, the driver; (2) Walker Camp, front seat passenger; (3) Bobby Gregory, back driver's side passenger; and (4) Applicant, in the passenger side back seat. (Tr.pp.115–21).

Mincey notified Claytor that they were on their way home from a funeral in Atlanta and the vehicle was a rental as Claytor approached the vehicle. (Tr.pp.116–17). Mincey also informed Claytor that he did not have a valid license and provided him with his South Carolina ID card. (Tr.p.116). After confirming that Mincey was driving with a suspended license, Claytor asked Mincey to step out of the car where Claytor then arrested Mincey for driving under suspension. (Tr.p.118). Mincey was then patted down to make sure he did not have any weapons or contraband on his person. (Tr.p.118). Claytor asked the remaining passengers for their identification. (Tr.p.117). In checking the passengers' identification, Claytor learned that Camp, the front passenger, had an active warrant for an unknown offense. (Tr.p.118).

Claytor had Camp step out of the vehicle and while doing so, Claytor observed a set of digital scales in the pocket of Camp's cargo shorts. (Tr.p.119). Claytor testified at trial that in his

experience this type of scale is used to weigh drugs. (Tr.p.120). Claytor testified that Mincey and Camp each had a very nervous demeanor. (Tr.p.120). Claytor then asked the remaining two passengers to step out of the vehicle in order to conduct a *Terry*¹ frisk on them to be sure they did not have any weapons on them that could harm the deputy or anyone else. (Tr.pp.121–22).

When Gregory and Applicant stepped out of the car they were not placed in handcuffs. (Tr.p.123). Claytor conducted a pat down search of Gregory and found nothing on his person. (R. 123). Claytor then conducted a pat down search of Applicant. (Tr.p.124). While conducting the search on Applicant, Claytor felt a large ball at Applicant's inner thigh. (Tr.p.124). Claytor testified that it appeared to be a ball of a powdery substance. (Tr.p.124). Claytor asked Applicant what it was, and Applicant responded, "It's a bag of powder." (Tr.p.125). Claytor removed the bag of powder and continued his search, finding \$790 in Applicant's left pocket. (Tr.p.125). Applicant was then placed into detention. (Tr.p.125).

Believing the powder to be illegal drugs, Claytor called narcotics investigator Michael Stribble to the scene. (Tr.p.126). Stribble performed a presumptive test on the substance and weight of the bag. (Tr.pp.126–27; pp.172–75). The presumptive test was positive for cocaine and weighed enough for trafficking amounts. (Tr.p.175). Applicant was then arrested for trafficking cocaine. (Tr.p.127; p.175).

Present Application

On March 14, 2025, Applicant timely filed an application for PCR. Applicant raises the following claims as grounds for relief:

1. "Trial Counsel was ineffective for failure to challenge/motion the court to suppress the chain of custody of the allege drugs."
2. "Trial Counsel was ineffective for failure to convey/communicate to Applicant the precise terms and

¹*Terry v. Ohio*, 392 U.S. 1(1968).

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- expiration dates of a plea offer before going to trial.”
3. “Trial Counsel failed to request a lesser included offense instruction when the original jury instruction was in error.”
 4. “Trial Counsel was ineffective for allowing the State to admit into evidence a statement made by Applicant while in police custody, which was involuntary.”
 5. “Trial Counsel failed to put the State’s case through adversarial testing by not challenging the Miranda warning that should have been given pertaining to the Applicant’s statement.”
 6. “Trial Counsel failed to challenge the lawfulness of seizure pursuant to the traffic stop.”
 7. “Trial Counsel was ineffective for allowing the statements he made, without objection, before being Mirandized because he was in custody at the time and being interrogated, amounted to statement not freely and voluntarily made.”
 8. “Trial Counsel was ineffective for failure to object to the burden-shifting instruction which shifted the burden of proof.”
 9. “Ineffective [*sic*] of Appellate Counsel.”

At the evidentiary hearing, Applicant submitted a trial memorandum raising two additional allegations: that Counsel was ineffective for telling Applicant that he did not need to appear on the date of his trial, causing him to be tried *in absentia*; and that Counsel was ineffective for failing to object to the trial court’s *Allen* charge.²

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, and weighed the testimony accordingly. Before the Court are Applicant’s records from the South Carolina Department of Corrections, the transcript of Applicant’s trial, the records of the Newberry County Clerk of Court regarding the subject convictions, Applicant’s appellate records, and the application for post-conviction relief. This Court has reviewed the records submitted to it by the parties, the legal arguments made by the attorneys, and the memoranda submitted by both parties. Pursuant to S.C. Code Ann. § 17-27-80,

²*Allen v. United States*, 164 U.S. 492 (1896).

this Court makes the following findings based upon all of the probative evidence presented:

Ineffective Assistance of Trial Counsel

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

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011);

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

Second, counsel's deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’” *Harrington*, 562 U.S. at 111–12 (quoting *Strickland*, 466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” *United States v. Basham*, 789 F.3d 358, 371–72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

1. Alleged failure to challenge chain of custody

The record conclusively refutes this allegation. Counsel clearly *did* object to the admission of the State’s drug evidence on the ground that the State had failed to establish a complete chain of custody. (Tr.p.184, lines 3–5). Counsel then extensively cross-examined the State’s witness, Investigator Michael Sribble, concerning apparent mistakes in the chain of custody form and the role of Lieutenant Chapman, who did not testify at trial, in the chain of custody. (Tr.pp.185–98). After Counsel concluded his cross-examination, the trial court admitted the drug evidence, over

Counsel's objection. (Tr.p.198, lines 19–20).

Counsel then raised the issue *again*, arguing that Lieutenant Chapman was an essential witness for establishing the chain of custody. (Tr.p.199, lines 18–24). The trial court overruled the objection, explaining that the State had demonstrated a sufficient chain of custody to warrant admitting the drug evidence, notwithstanding the absence of Lieutenant Chapman. (Tr.p.200, lines 3–15).

The transcript clearly reflects that this issue was specifically raised to and ruled on by the trial court. Accordingly, this allegation of ineffective assistance must be dismissed. *See Coardes v. State*, 262 S.C. 493, 206 S.E.2d 264 (1974) (holding PCR court properly dismissed applicant's claim without an evidentiary hearing, where the claim was conclusively refuted by the transcript).

2. Alleged failure to convey plea offer

Applicant claims Counsel failed to communicate the terms of a favorable plea offer to him prior to trial. Applicant claims he would have accepted the plea deal if he had been properly informed of it.

The Court finds this allegation is without merit. From the record, it is clear that—until Applicant absconded on the morning of trial—Counsel had been in communication with Applicant and believed Applicant was planning to come to court in order to accept the State's plea offer:

I did speak to Mr. Whitener as recently as this past Friday. My discussion with him, very clearly, indicated to him that his presence was required in the Newberry County Court of General Sessions on Monday, November 13th, 2017 at 9:30 a.m.

...
He said that he understood those things and actually gave me assurances that *he would appear for a scheduled plea.*

(Tr.p.19, lines 4–16) (emphasis added). The trial court acknowledged that the solicitor had “indicated to the Court and to [Counsel] that the State is going to allow Mr. Whitener to plead to

a first, as opposed to a third in lieu of going to trial.” (Tr.p.20, lines 14–17). The trial court allowed Counsel one additional day in which to reach out to his client and ascertain whether he wanted to accept the plea deal.

The following day, Counsel explained to the trial court that he informed Applicant about the State’s plea offer:

When I left here yesterday at mid-day I did speak to Mr. Whitener on the phone. I explained to him everything that had transpired and that he had an opportunity to appear this morning and proceed with his jury trial or enter a plea of guilty. *And [I] explained that the offer that had been extended to him previously, he can still take advantage of.*

...

Your Honor, I will just say that, for clarity, that *I had advised, at this point in time had advised Mr. Whitener several times in clearest terms that I possibly could*, that he faced the cost of the alleged prior record, a number of drug offenses on his record that he faced mandatory minimum 25 to 30 year sentencing if he were found guilty by a jury and if the Court determined that, in fact, he had qualifying prior offenses. *And I explained to him that he had an opportunity to plead to a first offense, to a sentencing range of 7 to 25 years.* And that it would be in the discretion of the Court as to what the sentence would be within that range. *So he clearly, in my opinion, understood the advantage, potential advantage and a benefit to him of accepting the plea offer.* And yet he’s, obviously not appeared to do that.

(Tr.pp.74–77) (emphasis added). From that point on, the trial proceeded in Applicant’s absence.

Applicant continued to evade capture for more than three years until he was ultimately arrested in North Carolina.

Here, the transcript reflects that Counsel communicated the plea offer to Applicant and even believed Applicant intended to accept the plea offer. In addition, at the evidentiary hearing, Applicant admitted that Counsel told him there was a plea offer of seven to 25 years, and Counsel confirmed that he explained that plea offer to Applicant. Counsel also credibly testified that Applicant appeared willing to accept the seven-to-25-year plea, so he contacted the Solicitor’s

Office and scheduled a plea proceeding. However, the plea did not end up going forward because Applicant absconded without explanation, so the trial proceeded in Applicant's absence.

The testimony at the PCR hearing and the transcript of Applicant's trial together show that Counsel accurately explained the terms of the plea offer to Applicant. For these reasons, the Court finds Applicant has not met his burden of showing either deficiency or prejudice as to this allegation.

3. Alleged failure to request lesser-included offense instruction

Applicant next complains that Counsel failed to request a lesser-included offense instruction. This allegation is patently meritless: Counsel clearly *did* request an instruction on the lesser-included offense of possession with intent to distribute ("PWID") cocaine; moreover, the trial court *granted* Counsel's request and proceeded to charge the jury on PWID as a lesser-included offense, over the State's objection. (Tr.pp.204-09; pp.240-42). This allegation is conclusively refuted by the transcript and must be dismissed. *See Coardes*, 262 S.C. 493, 206 S.E.2d 264.

4, 5, and 7. Alleged failure to challenge admissibility of Applicant's statement

Applicant raises multiple redundant allegations related to Counsel's alleged failure to challenge the admissibility of his statement. These allegations are also patently meritless, as Counsel clearly objected to the admissibility of Applicant's statement:

Your Honor, . . . it is the Defendant's intention to also suppress the statement allegedly made by the Defendant, Mr. Whitener. After his formal arrest where he, he has alleged to have made a statement that there is nothing else in the car, you have got it all, it's mine. And the testimony of Deputy Claytor, my recollection and my notes indicate was that at that point in time Mr. Whitener was under arrest, he had not been given *Miranda* and that this was in response to a question posed by the officer about drugs being in the car. So we would take the position that that is an involuntary and inadmissible statement because it was made without *Miranda*.

(Tr.p.82, lines 13–25). The trial court overruled the objection. (Tr.p.84, lines 9–16). Moreover, the issue was clearly preserved for appellate review, for it was raised by Applicant's appellate counsel and addressed on the merits by the court of appeals. *Whitener*, Op. No. 2024-UP-143 (S.C. Ct. App. filed May 1, 2024). Accordingly, the Court finds these allegations must be dismissed.

6. Alleged failure to challenge the traffic stop

Applicant next contends that Counsel was ineffective for failing to move to suppress the evidence against him on the ground that the traffic stop was unreasonably prolonged. This allegation is also meritless. Counsel *did* move to suppress the evidence on multiple grounds, including by arguing that the duration of the traffic stop was unjustifiably extended:

The grounds that we assert here are essentially three grounds. First of all, that even if the initial of the vehicle for a minor traffic violation was lawful, and for purposes of this hearing we don't challenge the fact that it was with probable cause for speeding, *that by the time the scope of the stop and the length of the stop extended to removing Mr. Whitener from the vehicle, that there was no justification, reasonable articulate suspicion that other criminal activity was to extend the traffic stop to the point that Mr. Whitener got -- had to be gotten out of the car and searched.* Beyond that, we allege that there was no reasonable articulable suspicion that Mr. Whitener himself as a passenger in the vehicle was involved in any criminal activity which needed to be investigated on his part. And beyond that, as an additional ground, that even if Mr. Whitener was subject to a brief investigatory detention beyond the detention he was already experiencing in the car, by getting him out of the car, that there was no reasonable articulable suspicion to believe, to believe to lead a reasonable police officer in the circumstances to believe that he was armed and dangerous and should be frisked for weapons under Terry. Beyond that, Your Honor, we answer that because of the nature and circumstances of the detention that he was detained, he was not free to leave and that he was detained to the extent that Miranda was required before police in questioning or interrogation would take place to discover the nature of the soft object in his pants. *So we believe for all of those reasons that the search of -- the detention of Mr. Whitener, the search of Mr.*

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Whitener that yielded and the questioning of Mr. Whitener that yielded the contraband was all in violation of the Fourth Amendment of the Constitution of the United States. And we ask for a suppression of the drug evidence.

(Tr.p.26, line 15–p.27, line 24) (emphasis added). The trial court received extensive argument and evidence on these points outside the presence of the jury. (Tr.pp.28–74). Ultimately, the trial court overruled Counsel’s objections and ruled that the drug evidence was admissible. (Tr.p.78, line 6–p.82, line 3). Once again, the record conclusively refutes Applicant’s allegation of ineffective assistance, and the Court finds this allegation must be dismissed.

8. Alleged failure to object to “burden-shifting instruction”

Applicant alleges that Counsel was ineffective for failing to object to a jury instruction that impermissibly shifted the burden of proof. However, Applicant does not identify the portion of the trial court’s jury instructions that he alleges to have been objectionable. The transcript reflects that the trial court correctly and repeatedly charged the jury that the State has the burden of proof beyond a reasonable doubt, both in its opening remarks and in its final instructions to the jury. (Tr.p.96, line 13–p.97, line 4; p.106, lines 5–25; p.234, line 15–p.236, line 10; p.238, lines 5–7; p.239, lines 17–20). Accordingly, the Court finds this allegation is without merit and must be dismissed.

9. Alleged ineffective assistance of appellate counsel

Applicant alleges appellate counsel provided ineffective assistance. However, he has not articulated any grounds in support of this allegation, either in his PCR application or on the record at his evidentiary hearing. “[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the appellant that he was deprived of adequate and effective assistance of counsel is insufficient.” *Coardes*, 262 S.C. at 497, 206 S.E.2d at 265.

Beyond the right to effective assistance of counsel at trial, a criminal defendant is constitutionally entitled to effective assistance of appellate counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 404–05 (1985) (finding that to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair); *accord. Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990).

In applying *Strickland* to claims of ineffective assistance of appellate counsel, reviewing courts must accord appellate counsel the “presumption that he decided which issues were most likely to afford relief on appeal. A decision with respect to appeal is entitled to the same presumption that protects sound trial strategy.” *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993).

Although appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” *Thrift*, 302 S.C. at 539, 397 S.E.2d at 526 (citing *Jones v. Barnes*, 463 U.S. 745 (1983)) (emphasis added). Indeed, “[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” *Smith v. Murray*, 477 U.S. 527, 536 (1986). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” *Jones*, 463 U.S. at 754.

“Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have

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prevalled on appeal. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

In this case, the records from Applicant's direct appeal show that appellate counsel raised three separate issues to the court of appeals. Each issue was clearly researched and briefed extensively. Although Applicant's direct appeal was ultimately unsuccessful, it is obvious that appellate counsel provided thorough and professional representation. In the face of these facts, the Court finds Applicant's merely conclusory allegation that appellate counsel was ineffective must be dismissed.

10. Alleged failure to advise Applicant to appear for court

In his supplement to the PCR application, Applicant alleges Counsel made statements which had the effect of causing Applicant's failure to appear for his trial. At the evidentiary hearing, Applicant testified that Counsel said during plea discussions that "he wasn't supposed to tell [Applicant] this, but he wouldn't go." Applicant claims he interpreted this statement as a recommendation not to appear at court.

Counsel, on the other hand, testified that he repeatedly explained to Applicant the need for him to be present at court. Counsel testified that Applicant appeared willing to accept the plea offer, so Counsel explained how the plea colloquy would proceed and reminded Applicant that he needed to appear at court on November 13th to enter the plea. However, Applicant did not show up on the 13th. Counsel tried to call Applicant but could not reach him. The trial court proceeded with jury selection but agreed to let Applicant accept the plea if he appeared the following day. After leaving court in the 13th, Counsel was able to contact Applicant by phone, and Applicant promised to appear on the 14th. However, on the 14th, he again inexplicably failed to appear, and the trial proceeded in his absence.

This Court notes that Counsel's account is consistent with the version of events he put on

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the record at trial. (Tr.p.19, lines 4–16; pp.74–77). Accordingly, the Court finds Counsel’s testimony credible, and Applicant’s contrary testimony not credible, as to this issue. Counsel’s credible testimony establishes that he did not say anything which would mislead Applicant into failing to appear; on the contrary, Counsel repeatedly reminded Applicant that he *did* need to appear for court. The Court finds, therefore, that Applicant has not met his burden of proving this allegation of ineffective assistance.

11. Alleged failure to object to Allen charge

Finally, in his memorandum submitted at the evidentiary hearing, Applicant alleges that Counsel was ineffective for failing to object to the trial court’s *Allen* charge. Applicant’s argument is premised on his belief that the language in the *Allen* charge given by the trial court was improper for two reasons: first, that it impermissibly conveyed to the jury the court’s own opinion that Applicant was guilty; and second, that it was coercive. Applicant cites the following language:

Now, ladies and gentlemen, let me explain, that if you do not agree on a verdict in this case I have to declare what is known as a mistrial. Okay. And in that case it doesn't mean that anybody wins, it doesn't mean that either party prevails. It just means that at some future time I will come back and I will try this case with some other jury sitting where you now sit. The same participants will come here, the same lawyers, we will ask basically the same questions and get basically the same answers. And we will go through this process all over again. Now, you were selected in the same manner and from the same source as any future jury will be and there is really no reason for me to suppose or believe that the case will ever be submitted with twelve more intelligent and impartial, conscientious and competent jurors than yourselves or that clear evidence will be presented in the future.

(Tr.pp.248–49).

First, Applicant argues that the trial court’s discussion of retrying the case in the future if the jury could not agree on a verdict “could only be interpreted by the jury that the judge personally believes that the evidence *supports a conviction.*” (App.Mem.pp.4–5) (emphasis added).

Applicant claims this inference amounted to the trial court “giving the jury an impression of his personal opinion on guilt.” (App.Mem.p.5).

This argument is flawed in multiple ways. First, and most obviously, the trial court said absolutely nothing about his “personal opinion” concerning Applicant’s guilt. The entire quoted portion of the charge is, on its face, completely neutral as to the issue of Applicant’s guilt or innocence.

Applicant seems to acknowledge that the trial court’s language is devoid of any explicit comment on the issue of Applicant’s guilt or innocence. Instead, Applicant’s position appears to be based on the following syllogism:

1. The trial court told the jurors that the case would be retried if they could not agree on a verdict;
2. It “would be unnecessary to re-try the case” unless “the evidence presented . . . supports a conviction” (App.Mem.p.5) (presumably referring to the court’s power to direct a verdict if the evidence is not sufficient to support a conviction);
3. Therefore, by telling the jury the case would be retried, the trial court was implying to the jury that there was sufficient evidence to support a conviction.

The Court notes several problems with this argument. First of all, there is no reason to believe a jury composed of laypersons would even *know* about the directed verdict standard. However, even one or more of the jurors *did* know the directed verdict standard, they would also have known that the standard concerns only the narrow question of whether “the case should be submitted to the jury.” *State v. Brown*, 402 S.C. 119, 134, 740 S.E.2d 493, 500 (2013). Since Applicant’s case had *already* been submitted to the jury at the time the trial court gave the *Allen* charge, it would already

be obvious that the evidence met the directed verdict standard.³ And finally, those hypothetical jurors would also know that, “when ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State.” *State v. Bennett*, 415 S.C. 232, 236, 781 S.E.2d 352, 354 (2016). “[T]he lens through which a court considers . . . evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury.” *Id.* Therefore, nothing about the court’s innocuous reference to a retrial could be interpreted as implying anything about the trial court’s personal opinion on the issue of guilt or innocence, or about how the jury should view the evidence.

Next, Applicant argues the trial court’s *Allen* charge was coercive. Applicant claims the charge “conveyed to the jury that a mistrial was not a proper result in the Applicant’s case and that it must therefore reach a verdict.” (App.Mem.p.6). This claim is simply impossible to square with the language of the charge itself. The trial court *expressly* discusses the possibility “that if you do not agree on a verdict in this case I have to declare what is known as a mistrial.” It is hard to imagine how anyone could interpret the trial court’s language, which clearly explains that a mistrial is a possible conclusion to the trial if the jury cannot agree on a verdict, as somehow *denying* the possibility of a divided vote or a mistrial. The trial judge clearly communicated to the jury “that in addition to a verdict of not guilty and guilty, a hung jury, resulting in a mistrial, is a third viable conclusion” to Applicant’s trial. *State v. Rampey*, 438 S.C. 519, 527, 885 S.E.2d 366, 370 (2022).

Next, Applicant argues that the fact the jury returned a verdict “only thirty-five minutes after the *Allen* charge” suggests that the jury interpreted the charge in a coercive way.

³ In other words, *any time a case is submitted the jury*, that fact in itself implies that the court believes the evidence is sufficient to support a conviction. But it would be absurd to argue that the very act of submitting a case to a jury somehow “invades the province of the jury.”

(App.Mem.p.8). Applicant claims that he was unable to find any reported cases where a verdict was returned within thirty-five minutes of an *Allen* charge. However, such cases abound. In countless cases, the use of an *Allen* charge has been found *not* to be coercive, even where the jury returned a verdict mere minutes after the instruction was given. See, e.g., *United States v. Hynes*, 424 F.2d 754, 758 (2d Cir. 1970) (five minutes); *United States v. Chrysler*, 533 F.2d 1055, 1057 (8th Cir. 1976) (twenty minutes); *United States v. Winters*, 105 F.3d 200, 204 (5th Cir. 1997) (thirty minutes); *United States v. Hylton*, 349 F.3d 781, 784–88 (4th Cir. 2003) (fifteen minutes); *Johnson v. United States*, 290 A.3d 500, 523 (D.C. 2023) (thirty-four minutes); *State v. Keeler*, 164 Conn. 42, 42, 316 A.2d 782, 783 (1972) (ten minutes); *Com. v. Moore*, 359 Mass. 509, 516, 269 N.E.2d 636, 640 (1971) (twenty-two minutes); *Com. v. Brunelle*, 361 Mass. 6, 12, 277 N.E.2d 826, 831 (1972) (ten minutes); *Com. v. Bregnard*, 3 Mass. App. Ct. 489, 492 n.4, 334 N.E.2d 64, 67 n.4 (1975) (ten minutes); *McGilberry v. State*, 516 So. 2d 907, 909–10 (Ala. Crim. App. 1987) (five minutes); *State v. Hutson*, 487 S.W.3d 100, 112–13 (Mo. Ct. App. 2016) (fifteen minutes).

Applicant's case was not factually complex, nor was there an excessive burden of evidence for the jury to consider. It should not be surprising that the jury was able to return a verdict within thirty-five minutes of the court's *Allen* charge, especially when they had already been deliberating for hours beforehand. Neither the language of the charge, nor the timing, suggest coercion.

For these reasons, the Court finds Applicant has not met his burden of proof as to this allegation.

[conclusion and signature on following page]

III. CONCLUSION

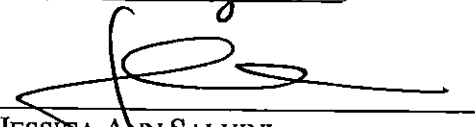
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice; and
2. The Applicant be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 12 day of August, 2026.


JESSICA ANN SALVINI
Presiding Judge
Eighth Judicial Circuit

Greenlee, South Carolina