

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge

2013-CP-38-00875

Cedric Flood, #217089,

Appellant,

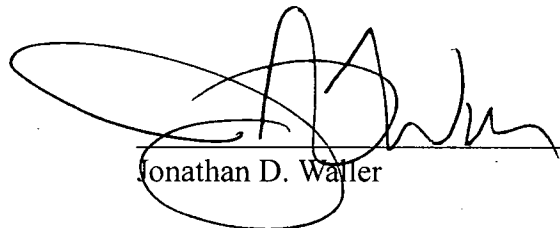
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Cedric Flood, #217089, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed September 4, 2014 and served on counsel by letter dated September 19, 2014 and received by counsel September 22, 2014, issued by the Honorable Maité Murphy, Presiding Judge, First Judicial Circuit.



Jonathan D. Waller

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S.C. SUPREME COURT

The Law Office of Jonathan Waller, LLC
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jonathanwallerlaw@gmail.com
ATTORNEY FOR PETITIONER

This 7TH day of October, 2014.

Other Counsel of Record:
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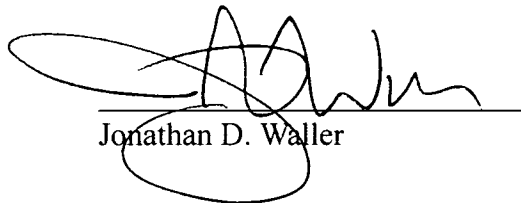
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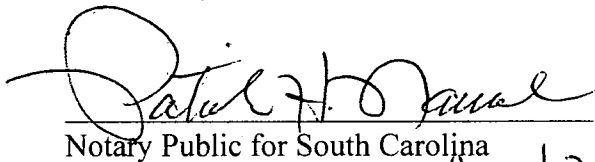
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Megan Harrigan, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 7TH day of October 2014.


Jonathan D. Waller

SWORN TO BEFORE me this 7th day
of October, 2014.


Notary Public for South Carolina

My Commission Expires: 08/17/2015

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
) Cedric Flood, #217089,)
))
) Applicant,)
))
) v.)
))
) State of South Carolina,)
))
) Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2013-CP-38-00875

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CLERK OF COURT
ORANGEBURG COUNTY
SOUTH CAROLINA
fm

ORDER OF DISMISSAL
ATTEST: TRUE COPY

Winnya B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

This matter comes before the Court by way of an application for post-conviction relief filed July 29, 2013. The State made its Return on October 9, 2013, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on May 27, 2014, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by counsel, Jonathan D. Waller, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. After reviewing all testimony and other evidence presented at the hearing, along with a review of all records provided to the Court, this Court finds that there are no constitutional deprivations or other grounds on which to grant relief and is denying and dismissing this application with prejudice.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted during the February 2010 term of the Orangeburg County Grand Jury for Criminal Sexual Conduct in the First Degree (2009-GS-38-01775) and

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Kidnapping (2009-GS-38-01776). Applicant was represented by R. Douglas Mellard and Mark Wise, both of the Orangeburg County Public Defender's Office. On July 19-21, 2011, Applicant proceeded to a trial by jury before the Honorable Edgar W. Dickson. Applicant was convicted of Kidnapping and acquitted of Criminal Sexual Conduct in the First Degree. Judge Dickson sentenced Applicant to confinement for life without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Flood, No. 2013-UP-140 (Ct. App. April 10, 2013). The Remittitur was issued on June 5, 2013.

In his application for post-conviction relief, Applicant alleged that he was being held in custody unlawfully based on the following allegations:

1. Ineffective assistance of counsel
 - a. "Failure to object to a coercive supplemental charge being given to the jury, after the jury advised the trial judge that they could not reach a unanimous decision on either charge, and after the trial judge had given an Allen¹ charge," and
 - b. "Failure to object to the trial judge not comporting with South Code Ann. § 14-7-1330 (1976)."

SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from trial counsels R. Douglas Mellard, (hereafter "Mellard") and Mark Wise (hereafter "Wise"). This Court also had before it Applicant's trial transcript, the records from the

¹ Allen v. United States, 164 U.S. 492 (1896) (defining the charge used to encourage a deadlocked jury to reach a verdict).

Orangeburg County Clerk of Court regarding the subject convictions, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

Applicant testified first on his own behalf. He testified that Mellard was appointed to represent him and Wise assisted with his case. He testified that neither Mellard nor Wise discussed the case with him, but repeatedly told him that they knew he was guilty. He testified that Mellard "was just comin' at [him] with big numbers" and telling him he would receive a lengthy sentence if convicted. He testified that Mellard had him evaluated and he discussed childhood head injuries with counsel. He testified that the trial lasted three days and that Mellard did not speak to him during the trial. He testified that counsel should have objected to jury notes during deliberations but that counsel failed to do so. He also testified that counsel did not show him these notes. He testified that he did discuss moving for a mistrial with counsel when the jury could not reach a verdict or after the trial court gave additional instruction, but that he asked counsel not to move for a mistrial because he thought he would be acquitted and did not want another trial.

Following Applicant's testimony, Mellard was called to testify by Applicant. He testified that he has been practicing law since 1997 and that his practice is exclusively criminal defense. He testified that he was appointed while employed at the Orangeburg County Public Defender's Office, where he is still presently employed. He testified that a fellow public defender, Margaret Hinds, was originally appointed to represent Applicant and that he took over the case because Applicant did not get along with Hinds. He testified that he asked Wise to act as his second chair, which is customary for cases that are likely going to trial. He testified that he filed the

appropriate Rule 5/Brady motions and reviewed these materials with Applicant. He testified that he also reviewed the elements of the offenses and potential sentences with Applicant. He testified that the State served Applicant with its intention to seek life without parole pursuant to S.C. Code § 17-25-45 based on Applicant's prior convictions. He elaborated that Applicant had been convicted for the same crimes for a similar factual scenario and those were being used to seek enhancement. He testified that it was a significant concern that the State would seek to introduce those prior offenses and he discussed this with Applicant.

Mellard testified that he sought and obtained a competency evaluation for Applicant. He testified that this is his standard practice when a client is facing a significant sentence. He testified that Applicant was found competent to stand trial. He testified that Applicant had also been evaluated previously during the pendency of his first set of similar charges and was likewise found competent.

Mellard testified that he thinks he and Wise performed well during Applicant's trial, particularly when cross-examining the State's witnesses. He testified that he was able to get an acquittal on the criminal sexual conduct charge, but that Applicant was convicted of kidnapping. He testified that this verdict did not seem analogous to the facts presented at trial and that he made this argument during post-trial motions.

Mellard testified that the jury sent several notes during deliberations, indicating difficulty reaching a consensus. He elaborated He testified that his standard practice is to review all jury notes with his client and he has no reason to believe he did not do so in the present case. He testified that in between the initial jury notes, the State offered Applicant two plea deals, one for

twenty-five years and a second for twenty years. He testified that it was Applicant's decision to reject both plea offers and proceed forward because he felt confident about this jury reaching an acquittal. He testified he also discussed moving for a mistrial with Applicant after the initial Allen charge given by the court and the subsequent charge, but that each time Applicant again, indicated he wanted to proceed forward with trial based on his belief that he would be acquitted of all charges. Additionally, he testified that he did not want to move for a mistrial or object for strategic reasons because it was "the most favorable jury [he] was ever going to get" because the entire panel was in constant argument. He testified that the jury was yelling back in forth so much during deliberations that it was audible from the courtroom. He also testified that the bailiffs had to break up fights among jurors numerous times. However, he testified that following the final instruction given by the court, the jury seemed calm and did not protest to any additional deliberation. He testified that he believes the jury would have informed the court if it did not think additional deliberation would be useful or they did not consent to additional deliberation, as it was a very boisterous jury.

Following Mellard's testimony, Applicant called Wise to testify. Wise testified that he acted as second chair on the case upon Mellard's request and that he was a fellow public defender. He testified that during deliberations, he was sitting with both Mellard and Applicant. He testified that he specifically recalled discussing the jury notes with Applicant, including the two final notes indicating that the jury could not reach a consensus. He testified that there were in chambers discussions about how to proceed and additional charges to be given, which were then discussed with Applicant. He testified that he, Applicant, Mellard were all in agreement

that it would be best to give an additional charge to hopefully get the jury to make a decision since it was a favorable jury for Applicant. He testified that he specifically recalled speaking with Applicant regarding moving for a mistrial and that Applicant was adamant that he wanted to proceed forward. He testified, similar to Mellard, that this particular jury was very animated and argumentative. He testified that following the court's final instruction to the jury, he did not hear any protests or other comments from the jury that they did not wish to deliberate further.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the 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.

After careful review based on the standard discussed above, including a review of the testimony of the witnesses presented at the evidentiary hearing, this Court denies this application on the basis that Counsel's performance did not fall below the standard required and there was no resulting prejudice to Applicant from these alleged deficiencies. Below are the specific findings as to Applicant's allegations of ineffective assistance of counsel:

Allegation that counsel was ineffective for failing to object to a coercive supplemental charge being given to the jury, after the jury advised the trial judge that they could not reach a unanimous decision on either charge, and after the trial judge had given an Allen charge

Applicant alleges that counsel was ineffective for failing to object to the "coercive supplemental charge" given to the jury after the initial Allen charge. See Tr. p. 355-56. However, the uncontroverted testimony from all witnesses, including Applicant, is that Applicant adamantly did not want counsel to object or move for a mistrial. Mellard and Wise both testified

that they reviewed all jury notes with Applicant and discussed possible options, including moving for a mistrial or objecting, and that Applicant advised them he wanted the trial to proceed forward, including additional instruction from the court urging the jury to reach a verdict. This Court finds that counsel's decision to refrain from objecting or move for a mistrial was based on informed conversations with their client and his adamant insistence that the jury proceed forward under guidance from the court to reach a verdict was prudent and in accordance with their client's wishes. This Court finds that Counsel's performance was reasonable based on professional standards. See Cherry, supra. As this Court finds no deficiency exists, this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to object to the trial judge not comporting with South Code Ann. § 14-7-1330 (1976)

Applicant alleges that counsel was ineffective for failing to object to trial court not comporting with South Code Ann. § 14-7-1330 by giving the jury additional instruction following the Allen charge and urging the jury to reach a verdict. See Tr. p. 355-56. This Court finds that this allegation is without merit, as the trial court's additional instruction did not violate South Code Ann. § 14-7-1330. Therefore, counsel was not deficient for not objecting and Applicant cannot establish prejudice.

Section 14-7-1330 of the South Carolina Code provides the procedure a trial judge must use when a jury fails to agree upon a verdict:

When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed

upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law.

S.C. Code Ann. § 14-7-1330 (emphasis added). In Edwards v. Edwards, our Supreme Court held that the jury implicitly consented to the continuation of deliberations, where the jury returned to the courtroom three times without having agreed upon a verdict, and only finally reached a verdict after additional instruction by the court asking the jury to return to the jury room one more time. Id. The Edwards court determined that S.C. Code Ann. § 14-7-1330 had not been violated because the jury made “no response or indication of unwillingness on the part of any member of the jury, but on the contrary they returned immediately to the jury room for further deliberation.” Id. This Court finds the instant case to be akin to Edwards and finds that the trial court did not violate S.C. Code Ann. § 14-7-1330. Therefore, this Court finds counsel’s decision not to object to be reasonable and in accordance with professional norms, as such an objection would not have been warranted. As this Court finds no deficiency exists, this allegation must be denied and dismissed with prejudice.

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. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

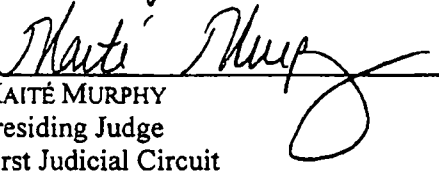
This Court notes that Applicant must file and serve a Notice of Appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate


appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on an applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief shall be denied and dismissed with prejudice; and
2. The Applicant shall remain remanded to the custody of the State.

AND IT IS SO ORDERED this 27 day of August, 2014.


MAITÉ MURPHY
Presiding Judge
First Judicial Circuit

, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG
IN THE COURT OF COMMON PLEAS

CEDRIC FLOOD, #217089

Applicant,

v.

STATE OF SOUTH CAROLINA,

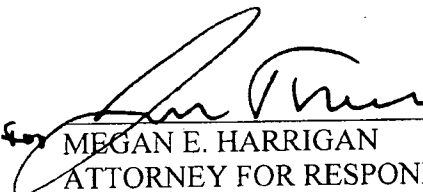
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Jonathan D. Waller, Esquire
The Law Office of Jonathan Waller, LLC
1720 Main Street, Suite 104
Columbia, SC 29201**

This 19th day of September, 2014.


MEGAN E. HARRIGAN
ATTORNEY FOR RESPONDENT

SWORN to before me this 19th day of September, 2014.


Notary Public for South Carolina.
My Commission Expires: 3-18-2023



ALAN WILSON
ATTORNEY GENERAL

September 2, 2014

The Honorable Winnifa Brown-Clark
Clerk of Court Orangeburg County
PO Box 9000
Orangeburg, SC 29115-9000

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WIFE OF COURT
CLERK OF COURT
OFFICE OF THE ATTORNEY GENERAL

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pm

Re: Cedric Flood, #217089 v. State of South Carolina
2013-CP-38-00875

Dear Ms. Brown-Clark:

Enclosed please find the original **Order of Dismissal** signed by the Honorable Maité Murphy, in the above-captioned case, for filing in your office. Please forward a **time stamped copy** back to our office for our file.

Sincerely,

Megan E. Harrigan
Assistant Attorney General

MEH/sbm
Enclosure

THE LAW OFFICE OF JONATHAN WALLER, LLC
1720 MAIN STREET, SUITE 104
COLUMBIA, SC 29201

October 7, 2014

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

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S.C. SUPREME COURT

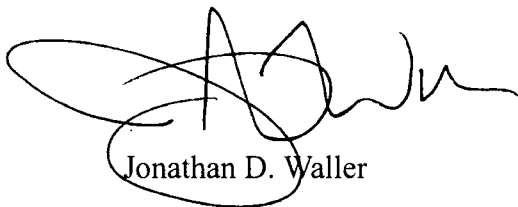
Re: Cedric Flood vs. State of South Carolina
C/A No: 2013-CP-38-00875

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

If you have any questions, please do not hesitate to ask. My telephone number is 803-256-0011.

Sincerely,



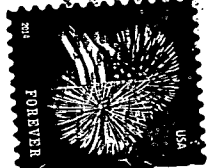
Jonathan D. Waller

Enclosures

Cc: Megan Harrigan
SC Commission on Indigent Defense

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COLUMBIA, SC 29201

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