STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

CERTIORARI TO ORANGEBURG COUNTY
Court of Common Pleas
Maité Murphy, Circuit Court Judge

Appellate Case No. 2014-002164

CEDRIC FLOOD, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

I. Did the post-conviction relief court err in its determination that counsel was not ineffective for deciding not to move for a mistrial pursuant to S.C. Code Ann. § 14-7-1330, where the jury gave implied consent to continue deliberating and counsel made a strategic decision not to move for a mistrial based on informed conversations with Petitioner?

II. Did the post-conviction relief court err in its determination that counsel was not ineffective for deciding not to object to an additional jury instruction made after receiving notes for the jury indicating difficulty in reaching a verdict, where the additional jury instruction was proper and counsel articulated a valid strategy based on informed conversations with Petitioner?

STATEMENT OF THE CASE

Petitioner was indicted by the Orangeburg County Grand Jury during the February 2010 term for criminal sexual conduct in the first degree (2009-GS-38-1775) and for kidnapping (2009-GS-38-1776), stemming from an alleged sexual assault and confinement of his ex-girlfriend. R. Douglas Mellard, Esquire, and Mark Wise, Esquire, both of the Orangeburg County Public Defender's Office, represented Petitioner. Assistant Solicitors Glenn Justis and Harrison Bell prosecuted the case on behalf of the State.

On July 19, 2011, Petitioner proceeded to a jury trial before the Honorable Edgar W. Dickson. The jury began its deliberations at 4:25 p.m. on the second day of trial. (App. p. 330). At 5:05 p.m., the jury sent the court a note asking for the definitions of criminal sexual conduct and kidnapping; the court recharged the law of each. (App. pp. 330-334). Thereafter, the jury sent another note to the court, asking for a transcript of the victim's testimony. (App. p. 335). After conferring with the State and Petitioner, the court elected to send the jury home for the evening and replay the victim's testimony for the jury the following morning over Petitioner's objection. (App. pp. 335-342).

On July 21, 2011, the jury returned for the third day of trial and reheard the victim's testimony, again over Petitioner's objection. (App. pp. 342-350). After listening to the victim's testimony for a second time, the jury continued with deliberations. (App. p. 350). Thereafter, the jury sent another note informing the court that it could not come to a unanimous decision on either charge. (App. p. 350-51). In response, the trial court said the following to both parties:

> Now, they probably haven't been given enough time to deliberate is the Court's position. What I was going to do is – well, I have two choices, I can just let them sit back there for a little while and not give them the Allen charge, or I can go ahead and give the Allen charge. I'm inclined to go ahead and give them the Allen charge and then we've got a work day ahead of us and we'll just see what happens.

(App. pp. 351). After a brief discussion with both parties, the court gave the following jury instruction pursuant to Allen v United States, 164 U.S. 492 (1896):

> Now, you have stated to the Court that you have been unable to agree on a verdict in this case. As I instructed you earlier, the verdict of the jury must be unanimous. When a matter is in dispute it isn't easy for even two people to agree. So, when twelve people must agree it becomes even more difficult. In most cases absolute certainty cannot be reached or expected. However, you have a duty make every reasonable effort to reach a unanimous verdict. In doing this you should consult with one another, express your own views and listen to the opinions of your fellow jurors. Tell each other how you feel, and why you feel that way. Discuss your differences with open minds. Although the verdict of the jury must be unanimous, every one of you has the right to your own opinion. The verdict you agree to must be your own verdict, the result of your own convictions and you should not give up your firmly held beliefs merely to be in agreement with your fellow jurors. The majority should consider should consider the minority's position, and the minority should consider the majority's position. You should carefully consider and respect the opinions of each other and re-evaluate your position for reasonableness, correctness, and impartiality. You must lay aside all outside matters and reexamine the questions before you aside all outside matters and reexamine the questions before you based on the law and the evidence in this case. If you do not agree on a verdict in this case I must declare a mistrial. In that case it does not mean that anybody wins, it just means that at some future time I will try this case with some other jury sitting where you now sit. The same participants will come and the same lawyers will ask basically the same questions and get basically the same answers, and we will go through this whole entire process again. You were selected in the same

> manner and from the same source as any future jury will be, and there is no reason for me to suppose that the case will ever be submitted to twelve more intelligent, impartial, conscientious and competent jurors than you, or that more or clearer evidence will be produced on one side or the other. Therefore, I ask you to return to your deliberations with the hope that you can arrive at a verdict within a reasonable time. So, I am sending you back into the jury room for you to continue your deliberations. Okay? Thank you.

(App. p. 352-353). Following the additional instruction, the jury continued its deliberations.

A short while later, the jury sent two additional notes to the court, marked as Court's Exhibits No. 9 and No. 10, indicating that trouble in reaching a unanimous verdict. (App. pp. 354, 495). Both notes indicated that there was one particular juror who stated that he would "never" change his mind. (App. p. 495). After an in-chambers conference with counsels, the court gave the following instruction to the jury:

> I've gotten two notes from you. I did not respond to the first one, so I got the second one that's essentially the same thing. You know, it reminds me of when my children repeat things like I was hard of hearing, and I apologize for not getting back to you sooner than that. But let me tell you, I'm not going to recharge the law to you again, I'm not going to do that. But I want y'all — if y'all have ever been involved in Court proceedings before, y'all know that it takes a lot of people a lot of time and a lot of work just to get to Court. Okay? And we've been in this trial now for a few days, and I know that these deliberations have been hard on y'all, and I know that they are some very hard decisions that you are being asked to make, and I know that there's some serious disagreement among you. But I want to remind you that if you think it is tough on you, I want you to think about how tough it is on the parties.
>
> Now, the parties want you to make a decision in this case, and they want you to make that decision ***without compromising any of your convictions or your beliefs***.

> Now, considering that and considering that it's still early in the day, I want to apologize to you and tell you that rather than try this case again I'm treating this as a work day. Sometimes you've got to work overtime. So, I'm asking y'all to return to your deliberations and bring back a fair, just and impartial verdict. Okay? Thank y'all very much.

(App. pp. 354-55) (emphasis added). At the conclusion of this additional charge, the jury returned to its jury room to continue deliberations at 2:50 p.m. (App. p. 355). No member of the jury panel objected or otherwise indicated they did not wish to continue deliberating. (App. p. 355).

Two hours later, the jury returned with a verdict convicting Petitioner of kidnapping but acquitting him of criminal sexual conduct. (App. pp. 356-57). Judge Dickson sentenced Petitioner to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45.

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

Thereafter, Petitioner filed an application for post-conviction relief on July 29, 2013. In his application, Petitioner alleged 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 Allen[1] charge," and

b. "Failure to object to the trial judge not comporting with South [sic] Code Ann. § 14-7-1330 (1976)."

Respondent made its Return on October 9, 2013, requesting an evidentiary hearing be held. An evidentiary hearing on Petitioner's application was convened on May 27, 2014, at the Dorchester County Courthouse before the Honorable Maité Murphy. Petitioner was present at the hearing and was represented by counsel Johnathan D. Waller, Esquire. Respondent was represented by Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. Petitioner proceeded forward on the grounds as set forth in his application. Petitioner testified on his own behalf and presented testimony from trial counsels, R. Douglas Mellard and Mark Wise.

After a review of all materials presented, post-conviction relief court denied and dismissed Petitioner's application by written order signed August 27, 2014 and filed on September 4, 2014.

Petitioner filed a Notice of Appeal on October 7, 2014. Thereafter, Petitioner filed a Petition for Writ of Certiorari on May 12, 2015. This Return follows.

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

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "***any*** evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's findings. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court if it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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. Strickland, 466 U.S. 668. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, 466 U.S. 668. 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.

This Court has held that "when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)).

ARGUMENT

I. Did the post-conviction relief court err in its determination that counsel was not ineffective for deciding not to move for a mistrial pursuant to S.C. Code Ann. § 14-7-1330, where counsel made a strategic decision not to move for a mistrial based on informed conversations with Petitioner and the jury gave implied consent to continue deliberating ?

Petitioner argues that counsel was ineffective for failing to move for a mistrial when the jury sent two notes indicating it had reached an impasse. Specifically, Petitioner argues that pursuant to S.C. Code Ann. § 14-7-1330, the trial court would have been required "to declare a mistrial regardless of any purported wishes of [Petitioner]" if counsel moved for a mistrial and counsel's failure to so move constituted deficient performance. Petitioner argues that the post-conviction relief court's finding that counsel acted reasonably and in accordance with professional standards when deciding not to move for a mistrial is clear error, as counsel did not know of S.C. Code Ann. § 14-7-1330 at the time of Petitioner's trial.[2] However, the post-conviction relief court properly denied and dismissed this allegation, as counsel made a strategic decision not to move for a mistrial after informed conversations with Petitioner and the jury gave its implied consent to continue deliberating.

In its Order of Dismissal, the post-conviction relief court found that counsel was not ineffective for deciding not to move for a mistrial, as "the trial court's additional instruction did not violate S.C. Code Ann. § 14-7-1330." (App. pp. 459-460). The court concluded that the jury's behavior and reaction to the court's additional instruction amounted to implied consent. (App. pp. 459-460). The post-conviction relief court held

[2] Petitioner's argument is a mischaracterization of the record, as Wise testified that the post-conviction relief hearing that he was aware of S.C. Code Ann. § 14-7-1330 ***prior to*** Petitioner's trial. (App. pp. 442-43).

that as the instruction was proper, counsel was not deficient for failing to move to a mistrial and that Petitioner could not establish prejudice. (App. pp. 459-460).The court also held that counsel discussed moving for a mistrial with Petitioner when the jury indicated it was at an impasse and that Petitioner insisted that counsel not move for a mistrial and allow the jury to continue deliberating. (App. pp. 458-460).The court also noted counsel's strategy in deciding not to move for a mistrial based on the behavior of the jury. The post-conviction relief court's findings are supported by ample probative evidence in the record and are not controlled by an error of law; therefore, this Court should affirm the lower court's findings.

South Carolina Code Ann. § 14-7-1330 provides as follows:

> 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.

(Emphasis added). "The purpose of § 14-7-1330 is 'to prevent forced verdicts, and to prevent undue severity of jury service.'" Buff v. S. Carolina Dep't of Transp., 342 S.C. 416, 420, 537 S.E.2d 279, 281 (2000) (citing State v. Freely, 105 S.C. 243, 247, 89 S.E. 643, 644 (1916).

In State v. Rowell, 75 S.C. 494, 56 S.E. 23 (1906), the jury notified the trial court twice of its inability to reach a unanimous verdict. The trial court sent the jury back to deliberate for a third time; however, it did not inform the jury its consent was necessary in order to pursue further deliberations. Id. When challenged on appeal, this Court held

there was no abuse of discretion in returning the jury to deliberate a third time where there was no indication of unwillingness on the part of the jury to retire. Id.

In Freely, the trial court did not advise the jury it could not be required to deliberate a third time without its consent. 105 S.C. 2 , 89 S.E. 643. On appeal, this Court held the question is whether, under all the circumstances, it appeared to the trial court that the jury consented to deliberate a third time. Affirming the trial court, this Court noted: "[t]he exercise of such a discretion at so delicate stage of a trial ought not to be disturbed unless it was obviously wrongly exercised." Id.

In State v. Drakeford, 120 S.C. 400, 113 S.E. 307 (1922), the trial court gave the jury foreman instructions on how to deliver the verdict when reached. The foreman inquired, "[s]uppose we can't agree?" and the trial court responded, "[o]h, but you must agree; we wouldn't consider a mistrial in this case." Id. The following morning, the jury stated it had not reached a verdict in response to the trial court's inquiry. Id. After giving an Allen charge, the trial court instructed the jury to "make one more effort." Id. Thereafter, the jury returned with a verdict. Id. The Court held, even if the jury had twice indicated it was unable to reach a verdict, the statute was not violated because "[t]here was no insistence here that a verdict could not be agreed on and no objection or complaint . . . on the part of the jury as to retiring for further deliberations." Id. at 406, 113 S.E. at 310.

In Edwards v. Edwards, 239 S.C. 85, 121 S.E.2d 432 (1961), the trial court, upon sending the jury back to continue deliberations for a third time, stated:

> I'm going to ask you in all seriousness, Gentlemen, to make one more attempt at this case. When you tell me you can't do it, that's going to be the end of it, because I'm not going

> to send you back again. So, I'm putting it right straight up to you, see what you can do with it, Gentlemen. Was there any question any of you Gentlemen wanted to ask?

Id. at 93, 121 S.E.2d at 436. In determining whether the jury was returned with its consent as required by statute, this Court held:

> ***There was 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. ***No verbal acceptance of the request of the trial Judge was made, but consent was implied.*** Had there been a statement to the effect that further consideration of the case was without their consent, it would have become the duty of the trial Judge to discharge them. However, ***under the circumstances, if the Judge was satisfied in the exercise of his discretion that the jury consented to return for further deliberation, he should not have dismissed them but permitted further deliberation as was done in the instant case.***

Id. (emphasis added).

However, this Court has found a violation of S.C. Code Ann. § 14-7-1330 when the trial court's comments clearly coerce the jury into reaching a verdict. See Rowland v. Harris, 218 S.C. 42, 61 S.E.2d 397 (1950) (statute violated where trial judge indicated jury would spend weekend in jury room until it reached a unanimous verdict); State v. Simon, 126 S.C. 437, 120 S.E. 230 (1923) (statute violated where trial judge notified jury it would spend night in jury room unless it reached a unanimous verdict); State v. Kelley, 45 S.C. 659, 24 S.E. 45 (1896) (statute violated where jury deliberated from 4:00 p.m. until 6:00 p.m. the next day without lunch, indicated it could not agree, judge instructed jury to retire again, and foreman responded "[w]e have been in the room for twenty-four hours, and can't agree").

This Court has held that it is the trial court that "is in the best position to observe the jury's demeanor should have some flexibility in guiding a case to its final resolution while protecting the parties' rights to a fair, impartial, and conscientious verdict." Buff v. S. Carolina Dep't of Transp., 342 S.C. 416, 422-23, 537 S.E.2d 279, 282-83 (2000). In Buff v. S. Carolina Dep't of Transp., this Court held that "when a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial. The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial judge's comments." Id. (citing Edwards, 239 S.C. 85, 121 S.E.2d 432 (jury's consent to continue deliberations may be implied from lack of verbal response to request or failure to indicate unwillingness to resume deliberations); Drakeford, 120 S.C. 400, 113 S.E. 307 (consent implied where jury did not insist verdict could not be rendered and jury did not complain about further deliberations); Rowell, 75 S.C. 494, 56 S.E. 23 (consent implied where jury did not indicate it was unwilling to deliberate a third time). However, "[w]hile there is no requirement that the judge inform the jury that its consent is necessary, [this Court] do[es] not permit coercion." State v. Barnes, 402 S.C. 135, 139, 739 S.E.2d 629, 631 (2013) (holding that the trial court abused his discretion in finding that petitioner's jury consented to continued deliberations as required by § 14–7–1330 when it indicated that it could order the jury to continue deliberating ***after*** the jury informed the court that additional deliberations would be fruitless).

In the present case, the jury made no response or indication of an unwillingness to continue with deliberations. (App. pp. 354-55). Rather, the jury, which was described as quite loud, boisterous, and argumentative, retired to the jury room to continue

deliberations without any protest upon receiving the additional instruction from the trial court. (App. pp. 354-55, 425, 433-35,437-38). The jury gave its implied consent to continue on with deliberations. The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial judge's comments." Buff, 342 S.C. at 422-23, 537 S.E.2d at 282-83 (citing Edwards, 239 S.C. 85, 121 S.E.2d 432 (jury's consent to continue deliberations may be implied from lack of verbal response to request or failure to indicate unwillingness to resume deliberations); Drakeford, 120 S.C. 400, 113 S.E. 307 (consent implied where jury did not insist verdict could not be rendered and jury did not complain about further deliberations); Rowell, 75 S.C. 494, 56 S.E. 23 (consent implied where jury did not indicate it was unwilling to deliberate a third time). Furthermore, the trial court's instructions did not amount to impermissible coercion. Therefore, the trial court did not violate S.C. Code Ann. § 14-7-1330 and any mistrial motion would not have been granted. The post-conviction relief court properly concluded that counsel was not deficient and that Petitioner could not establish prejudice.

Furthermore, the post-conviction relief court properly held that counsel articulated a valid trial strategy in deciding not to move for a mistrial. Counsel Wise and Mellard both testified that they discussed moving for a mistrial with Petitioner after receiving the notes and that Petitioner was adamant they not move for a mistrial, but rather, allow the jury to continue deliberating. Counsel elaborated that Petitioner felt the jury would reach a favorable disposition of his case and he wanted to proceed forward. At the evidentiary hearing, Mellard testified he did not object to the additional charge or move for a mistrial because they all agreed the present jury was the most favorable they would get to hear

Petitioner's case. (App. pp. 433). He testified that the jury was loud and boisterous and, and he noted that they were yelling at one another during their deliberations. (App. pp. 433, 435, 437). Mellard also testified that the jury did not protest going back to the jury room and continuing their deliberations. (App. pp. 434). Wise testified that after the jury sent out its first note indicating that they were unable to reach a unanimous verdict, he discussed this issue with Petitioner. (App. pp. 441). He further testified that Petitioner felt that the jury would decide in his favor and was adamant they not move for a mistrial but allow the jury to continue deliberating until a verdict was reached. (App. pp. 441). Wise also testified that he and Mellard did not oppose the additional charge to the jury after the jury again informed the trial court that they could not reach a verdict because Petitioner felt that if the jury were forced to reach a verdict, they would decide in his favor. (App. pp. 442). He also testified that he neither had an objection to the language of the additional charge nor to the fact that the additional charge was given. (App. pp. 442). Wise testified that he was aware of the statute at the time of Petitioner's trial. (App. pp. 442-43). Counsel articulated a valid trial strategy that was in accordance with their client's wishes, and therefore, was not ineffective. See Edwards, 392 S.C. at 456-57, 710 S.E.2d at 64 (holding that "when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness."). The validity of this strategy is apparent, as Petitioner was acquitted of one of the two charges he faced.

Based on the foregoing, the post-conviction relief court properly discerned that counsel was not ineffective, as the additional charge given by the trial court was not

improper and any mistrial motion would have been denied. Furthermore, it is clear that counsels made well-reasoned, thoughtful, and informed strategic decisions in not moving for a mistrial. As counsel articulated valid strategic logic behind their decisions regarding the additional charge, the post-conviction relief court correctly denied relief. These findings are supported by more than ample evidence of probative value and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

II. Did the post-conviction relief court err in its determination that counsel was not ineffective for deciding not to object to an additional jury instruction made after receiving notes for the jury indicating difficulty in reaching a verdict, where the additional jury instruction was proper and counsel articulated a valid strategy based on informed conversations with Petitioner?

Petitioner also asserts that that the post-conviction relief court erred in its determination that counsel was not ineffective for failing to object to the additional jury instruction given after receiving the two additional notes from the jury indicating it was deadlocked. Petitioner argues that the trial court's additional instruction was coercive and resulted in a compromised verdict. In support of this position, Petitioner cites to Workman v State, 412 S.C. 128, 771, S.E.2d 636 (2015) and State v. Williams, 386 S.C. 503, 690 S.E.2d 62 (2010). However, both of these cases are readily distinguishable from Petitioner's case. The post-conviction relief court properly denied and dismissed this allegation, as counsel made a strategic decision not to not to object and the additional jury instruction was proper.

After an in-chambers conference with counsel for Petitioner and the State, the trial court gave the following instruction to the jury:

> I've gotten two notes from you. I did not respond to the first one, so I got the second one that's essentially the same thing. You know, it reminds me of when my children repeat things like I was hard of hearing, and I apologize for not getting back to you sooner than that. But let me tell you, I'm not going to recharge the law to you again, I'm not going to do that. But I want y'all — if y'all have ever been involved in Court proceedings before, y'all know that it takes a lot of people a lot of time and a lot of work just to get to Court. Okay? And we've been in this trial now for a few days, and I know that these deliberations have been hard on y'all, and I know that they are some very hard decisions that you are being asked to make, and I know that there's some serious disagreement among you. But I want

> to remind you that if you think it is tough on you, I want you to think about how tough it is on the parties.
>
> Now, the parties want you to make a decision in this case, and they want you to make that decision ***without compromising any of your convictions or your beliefs***. Now, considering that and considering that it's still early in the day, I want to apologize to you and tell you that rather than try this case again I'm treating this as a work day. Sometimes you've got to work overtime. So, I'm asking y'all to return to your deliberations and bring back a fair, just and impartial verdict. Okay? Thank y'all very much.

(App. pp. 354-55) (emphasis added). At the conclusion of this additional charge, the jury returned to its jury room to continue deliberations at 2:50 p.m. (App. p. 355). No member of the jury panel objected or otherwise indicated they did not wish to continue deliberating. (App. p. 355).Two hours later, the jury returned with a verdict convicting Petitioner of kidnapping but acquitting him of criminal sexual conduct. (App. pp. 356-57).

In its Order of Dismissal, the post-conviction relief court found counsel made a strategic decision not to object to the additional jury instruction based on informed conversations with Petitioner and his adamancy that the jury continue deliberating until a verdict was reached. (App. p. 458-59). This is supported by ample evidence in the record. (App. pp. 415, 430-31,433-34, 441-42, 443-44). Petitioner even testified that he wanted to proceed forward with the trial, (App. p. 415).[3] Additionally, counsel testified that they made a strategic decision not to object to the additional charge based on their experience and observance of the jury's behavior. (App. p. 424, 433, 441-44). Counsel articulated a

[3] In his Petition, Petitioner surmised that this "may have been in response to the plea offer made by the State in the second day of deliberations." See PWC p. 7. This is purely speculative and in direct opposition with the testimony of Mellard and Wise that Petitioner insisted they not object or move for a mistrial because Petitioner believed the jury would decide the matter in his favor.

valid trial strategy that was in accordance with their client's wishes, and therefore, was not ineffective. See Edwards, 392 S.C. at 456-57, 710 S.E.2d at 64 (holding that "when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.").The post-conviction relief court properly determined that counsel was not ineffective for electing not to object to the additional charge in accordance with their client's wishes and based on a valid trial strategy.

Petitioner cites to Workman, to support that trial counsels should be found ineffective. 412 S.C. 128, 771, S.E.2d 636 (2015) In Workman, the trial court gave the following instruction to the jury:

> Now it's been said that jury service is perhaps the highest service that a citizen can perform for his or her country during peace-time. And I certainly agree with that. *However, I tell you that a juror does not render good jury service who arbitrarily says, I know what I want to do in this case, and if and when everybody agrees with me, then we'll write a verdict. And we will not write a verdict until that time.*
>
> . . .
>
> I tell you that it is the duty of each of you to tell the others how you feel and why you feel that way. *However, I also tell you that if much the larger number of your panel are in favor of one particular verdict, then a dissenting [sic] juror or jurors should consider whether or not his or her or their positions is a reasonable one which makes no impression upon the minds of the majority.*
>
> *In other words, if a majority of you are for one particular form of a verdict, the minority ought to seriously ask themselves whether they can reasonably doubt the correctness of the judgment of the majority.*

Id. (emphasis in original). The trial judge did not charge the majority jurors to consider the positions of the minority jurors. The trial judge concluded the Allen charge by stating:

> *Therefore, ladies and gentlemen, I cannot accept any report at this time that you cannot agree on a unanimous verdict in this case. I am of the opinion that you have not deliberated sufficiently long that I could in good conscience accept that report. And I tell you frankly it will take considerably more time before I am convinced that you cannot reach a verdict.*
>
> I therefore, humbly beseech you to return to your jury room, continue your deliberations *with the hope that you can arrive at a unanimous verdict within a reasonable time.*

Id. (Emphasis in original). Trial counsel made no objection to the charge, and the jury returned a guilty verdict at 4:47 p.m., two hours after receiving the Allen charge. This Court held that petitioner was prejudiced by trial counsel's deficient performance in failing to object to a coercive Allen charge. Because this instruction only addressed the minority jurors as opposed to the jurors as a whole, this Court held that the additional jury instruction was unconstitutionally coercive. Id.

However, the additional charge given by the trial court in Petitioner's case is readily distinguishable from Workman. Here, the trial court urged all jurors, not just the minority, to reach a unanimous decision. The trial court stresses that the jury should reach that decision without giving up any of their convictions or beliefs. The trial court's additional instruction was "even-handed" and "directed both the majority and minority to consider each other's views." Id. The trial court's additional instruction was not coercive and counsel was not ineffective for choosing to not object to it.

Petitioner also cites to State v. Williams in support of his argument that the trial court's additional charge was coercive. 386 S.C. 503, 690 S.E.2d 62 (2010). In Williams,

this Court held that the trial court's Allen charge was not coercive when the jury informed the court of its nine to three split. Id. The trial court instructed the jury:

> Every one of you has the right to your own opinion, the verdict you agree to must be your own verdict, a result of your own convictions. You should not give up your firmly held beliefs merely to be in agreement with your fellow jurors. The minority should consider the majority's opinion and the majority should consider the minority's opinion. You should carefully consider and respect the opinions of each other and evaluate your position for reasonableness, correctness, and partiality. . . . I, therefore, ask you to return to your deliberations *with the hope that you can arrive at a verdict.*

Id. at 514, 690 S.E.2d at 67-68 (emphasis added). This Court reasoned that the above charge was not coercive because it addressed both the majority and minority jurors equally, did not mandate that the jury had to reach a verdict, did not inquire into the jury's numerical division, and the jury deliberated for an ample amount of time following the charge. Id. at 515, 690 S.E.2d at 68. Although this Court, in dicta, cautioned trial judges from using the emphasized language above, it nevertheless held that there was no reversible error. Moreover, this Court has never held that such language would constitute reversible error. Similarly, the trial court in Petitioner's case addressed both the majority and minority jurors and further urged the jury to reach a "fair, just and impartial verdict" without compromising their personal convictions or beliefs. The trial court's instruction was not coercive.

Based on the foregoing, the post-conviction relief court properly discerned that counsel was not ineffective, as the additional charge given by the trial court was not improper and any objection would have been overruled. Furthermore, it is clear that counsels made well-reasoned, thoughtful, and informed strategic decisions in not

objecting. As counsel articulated valid strategic logic behind their decisions regarding the additional charge, the post-conviction relief court correctly denied relief. These findings are supported by more than ample evidence of probative value and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

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August 20, 2015

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO ORANGEBURG COUNTY
Court of Common Pleas
Maité Murphy, Circuit Court Judge

Appellate Case No. 2014-002164

CEDRIC FLOOD, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within **Return to the Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
Post Office Box 11589
Columbia, South Carolina

I further certify that all parties required by Rule to be served have been served.

This 20th day of August, 2015.

Megan Harrigan Jameson

MEGAN HARRIGAN JAMESON
Assistant Attorney General
S.C. Bar No. 100108

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Columbia, SC 29211
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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
AUG 20 2015
S.C. Supreme Court

August 20, 2015

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

Re: Cedric Flood v. State of South Carolina
Appellate Case No. 2014-002164

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above case.

Sincerely,

Megan Harrigan Jameson

Megan Harrigan Jameson
Assistant Attorney General
S.C. Bar No. 100108

MHJ
Enclosures

cc: Kathrine H. Hudgins Esquire
Trisha Allen, Victim Services