R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11 • GREENVILLE, SC 29601
PHONE 864.232.9390 • FAX 864.232.9392 • E-MAIL MILLS@RMALAWOFFICE.COM

August 16, 2016

Via US Mail
Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: ***Notice of Intent to Appeal from Gregory Allan Ivery v. State of South Carolina***
C.A. No.: 2015-CP-23-244

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable R. Knox McMahon's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law

R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG 22 2016
SC SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2015-CP-23-244

Gregory Allan Ivery..... Appellant,

v.

State of South Carolina ..... Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable R. Knox McMahon's Order of Dismissal dismissing Appellant's application for post-conviction relief. On July 29, 2016, the Honorable R. Knox McMahon signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on August 12, 2016. A copy of the Honorable R. Knox McMahon's Order of Dismissal is attached.

R. Mills Ariail, Jr.
Attorney at Law
11 North Irvine St., Suite 11
Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Gregory Allan Ivery

Greenville, South Carolina
August 16, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No.2015-CP-23-244

Gregory Allen Ivery,..... Appellant,

v.

State of South Carolina ..... Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this August 16, 2016, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Patrick Schmeckpeper, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

Gregory Allan Ivery SCDC# 131131
Lieber Correctional Institute
PO Box 205
Ridgeville, SC 29472

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

August 16, 2016

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2015CP2300244

Gregory Allan Ivery *vs.* South Carolina State Of

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

_____

PRESIDING JUDGE - R Knox McMahon

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

R. Mills Ariail Jr. 11 North Irvine Street, Suite 11
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Patrick Lowell Schmeckpeper PO Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

_____

Paul B. Wickensimer Greenville County Clerk Of Cour
- Clerk of Court

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Gregory Allan Ivery, S.C.D.C. No. 131131	)	**C.A. No. 2015-CP-23-0244**
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL** **(with prejudice)**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	ENTERED COMPUTER

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on January 13, 2015. Respondent filed its Return on June 11, 2015. An evidentiary hearing into the matter was convened on April 22, 2016, at the Greenville County Courthouse. Applicant was present, but did not testify. Applicant's trial counsel, Ernest Hamilton, Esquire, was present and testified. Applicant was represented by Mills Ariail, Jr., Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted Applicant at the June 2012 term of General Sessions for distribution of cocaine base within 1/2 mile of a school or park (2012-GS-23-9810) and distribution of cocaine base (2012-GS-23-9811). He was represented by Ernest Hamilton, Esquire.

After the State called the case to trial, Applicant was found guilty. On October 11, 2012, the Honorable William H. Seals, Jr. sentenced him to concurrent terms of 10 years for distribution of cocaine base within 1/2 mile of a school or park and 23 years for distribution of

cocaine base, third offense.

A timely Notice of Appeal was filed at the South Carolina Court of Appeals. Carmen V. Ganjehsani, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Ivery, Op. No. 2014-UP-265 (S.C. Ct. App. filed June 30, 2014). By order filed December 4, 2014, the South Carolina Supreme Court denied the Applicant's subsequent petition for writ of certiorari. The Remittitur was sent on December 10, 2014.

Allegations

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

1. Ineffective assistance of counsel.
    a. Attorney did not investigate witness statement.
2. Prosecutorial misconduct.
    a. Prosecutorial/lack of evidence no witness testimony.
3. Judgement misconduct.
    a. Allowed witness statement.

At the evidentiary hearing, Applicant proceeded only on the allegations that counsel was ineffective for failing to object to the introduction of the "controlled buy" video, and failure to object to the trial judge's Allen[1] charge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witness presented at the hearing, passed upon his credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, appellate records, Applicant's records from the South Carolina Department of

[1] Allen v. United State, 164 U.S. 492 (1896).

Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the 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 (1985).

The proper measure of performance is whether the 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 (1985). 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." Id. at 117-18, 386 S.E.2d at 625.

Failure to Object to Hearsay

i.

Applicant first alleged counsel was ineffective in failing to object to hearsay when the State introduced a video depicting a "controlled buy," in which a confidential informant – James Grant – met with Applicant and purchased crack cocaine from him.[2] Tr. p. 67, l. 9-13. Applicant has failed to furnish a copy of the video for purposes of the evidentiary hearing, or otherwise allege any particular statements that violate the rule against hearsay. Accordingly, even assuming counsel was deficient in failing to object, this Court finds Applicant has failed to show any resulting prejudice. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (mere speculation insufficient to support a finding of prejudice). As Applicant has failed to meet his burden, this allegation is denied and dismissed.

ii.

Alternatively, and after reviewing the transcript, this Court finds it is highly unlikely that the video contained any actual hearsay. By definition, statements made by Applicant in the video are not hearsay. Rule 801(d)(2)(A), SCRE (2016) ("A statement is not hearsay if [t]he statement is offered against a party and is the party's own statement. . . ."). Similarly, Mr. Grant's prior inconsistent statements are not hearsay. Rule 801(d)(1)(A)("A statement is not hearsay if [t]he declarant testifies at trial . . . and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony. . . ."). Mr. Grant denied purchasing drugs from Applicant and denied being on the video of the controlled buy. Tr.

[2] This Court notes that counsel actually did object to the introduction of this video, on the ground that it had not been properly authenticated.

p. 89, l. 7-19. The fact that the video was introduction before Mr. Grant testified is not relevant in the context of post-conviction relief. Had counsel objected to the video[3] based on hearsay and been sustained, the State could have simply introduced it following Mr. Grant's inconsistent testimony. Because it would have come in during the trial anyway, Applicant has failed to show counsel's failure to object affected the outcome of the proceeding. This allegation is therefore denied and dismissed.

Failure to Object to the Trial Judge's Allen Charge

i.

Applicant further alleges counsel was ineffective for failing to object to the trial judge's Allen charge. Even assuming counsel was deficient, this Court finds Applicant has failed to show any resulting prejudice, as the issue was fully resolved on the merits by the South Carolina Court of Appeals. The Court of Appeals affirmed Applicant's convictions, finding that the issue was not preserved, **but also** that the charge was not unduly coercive. State v. Ivery, Op. No. 2014-UP-265 (Ct. App. filed June 30, 2014). Specifically, it found the charge in Applicant's case was similar to that in Green v. State, 351 S.C. 184, 195, 569 S.E.2d 318, 323-23 (2002), which was not directed to minority jurors or otherwise coercive. Id. It further held that charging that the failure to reach a verdict will require a new trial at additional expense is not coercive. Id. (*citing* State v. Pauling, 322 S.C. 95, 99, 470 S.E.2d 106, 109 (1996)).

In light of the Court of Appeals decision on the matter, this Court finds Applicant has failed to show prejudice – even assuming his objection did not adequately preserve the issue; the Court of Appeals' resolution is controlling.

[3] While Applicant's allegation focuses on the video, the same logic applies to the statement he made to law enforcement.

ii.

Alternatively, this Court independently finds that Applicant has failed to meet his burden to prove the trial judge's Allen charge was unduly coercive. An Allen charge cannot be directed to the minority voters on the jury panel. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views. Green at 194, 569 S.E.2d at 323. A trial judge has the duty to urge, but not coerce, a jury to reach a verdict. State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996). Whether an Allen charge is unconstitutionally coercive must be judged in its "context and under all the circumstances." Workman v. State, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015). The four factors used to determine whether an Allen charge is unconstitutionally coercive are:

> (1) Does the charge speak specifically to the minority juror(s)? (2) Does the charge include any language such as "You have got to reach a decision in this case"? (3) Is there an inquiry into the jury's numerical division, which is generally coercive? (4) Does the time between when the charge was given, and when the jury returned a verdict, demonstrate coercion?

Workman at 131, 771 S.E.2d at 638.

This Court agrees with the Court of Appeals in finding that the trial judge's Allen charge was not directed to the minority jurors. Instead, the trial judge emphasized to the jury that "[t]he majority should consider the minority's position and visa [sic] versa," and that each "should carefully consider and respect the opinions of each other and re-evaluate your position for reasonableness, correctness, and impartiality." Tr. p. 142, l. 12-16. The trial judge also told the jury that "[a]lthough the verdict . . . must be unanimous, every one of you has a right to your own opinion," and "[t]he verdict that 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." Id. at 7-9. This language was not coercive, and was not directed to the minority jurors.

Concerning the second factor, the trial judge did not, at any point, include language such as "[y]ou have got to reach a decision in this case." As the Court of Appeals correctly held, charging that the failure to reach a verdict will require a new trial at additional expense is not coercive. Ivery (*citing* Pauling, supra). With respect to the third factor, the trial judge made no inquiry into the jury's numerical division. See State v. Williams, 386 S.C. 503, 515, 690 S.E.2d 62, 68 (2010) (innocent knowledge of jury's numerical division not sufficient to make a charge coercive). Finally, regarding the fourth factor, this Court would only note that the record does not indicate how long the jury deliberated following the Allen charge, and that it is Applicant's burden to prove each of his allegations. As Applicant has failed to show coercion with respect to any of the required factors, this Court is unable to find he was prejudiced by counsel's purported deficiency. This allegation is therefore denied and dismissed.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

[Signature follows]

CONCLUSION

Based on the foregoing, this Court finds that the 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 notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

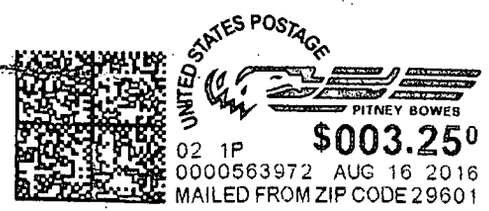
2. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 29 day of July, 2016.

R. KNOX MCMAHON
Presiding Judge
Thirteenth Judicial Circuit

Pickens, South Carolina

Law Office of R. Mills Ariail, Jr.
11 N. Irvine Street, Suite 11
Greenville, SC 29601



Daniel Shearouse
Clerk of Court
SC Supreme Court
PO Box 11330
Columbia, SC 29211