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WALLER LAW GROUP

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JUN 08 2018

S.C. SUPREME COURT

June 6, 2018

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

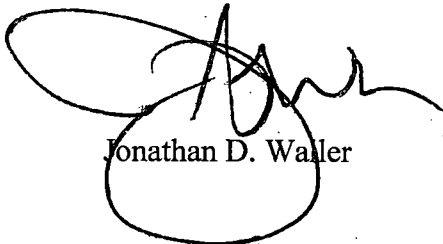
Re: Richard Lanard Sprinkle Mavins vs. State of South Carolina
C/A No: 2015-CP-38-1075

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.

I was appointed to represent Mr. Sprinkle in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,



Jonathan D. Waller

Cc: Lindsey A. McCallister, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge

2015-CP-38-1075

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JUN 08 2018

S.C. SUPREME COURT

Richard M Sprinkle, # 172425,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Richard M Sprinkle, # 172425, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed May 11, 2018, issued by the Honorable Maité Murphy, Presiding Judge, First Judicial Circuit.



Jonathan D. Waller

Waller Law Group
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803-520-7278 (phone)
jonathan@wallergroupsc.com
ATTORNEY FOR PETITIONER

June 6, 2018

Other Counsel of Record:
Lindsey A. McCallister, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge

2015-CP-38-1075

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S.C. SUPREME COURT

Richard M Sprinkle, # 172425,

Appellant,

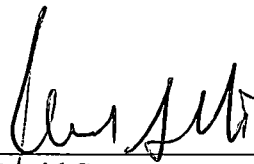
v.

STATE OF SOUTH CAROLINA,

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, Lindsey A. McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.



M. David Scott

June ⁷ 6, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS)
FIRST JUDICIAL CIRCUIT)

Richard Lanard Sprinkle Mavins¹, #172425,)

2015-CP-38-01075)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

FILED FOR COURT
APPROVED BY CLERK
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This matter comes before the Court by way of a post-conviction relief (PCR) application filed on September 2, 2015. Respondent submitted its Return and Partial Motion to Dismiss on August 14, 2017. An evidentiary hearing was held February 27, 2018, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by Jonathan Waller, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on his own behalf. Applicant also presented testimony from Jillian Ullman, Esquire, and Mark Wise, Esquire ("Trial Counsel"). Respondent presented testimony from former Assistant Solicitor Sarah Ford, Esquire. This Court had before it the records of the Orangeburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the pleadings. The Court finds as follows:

¹ Applicant's trial transcript, indictments, sentencing sheets, and appellate records show Applicant's name as "Richard Lanard Sprinkle." However, the South Carolina Department of Corrections has Applicant listed as "Richard Mavins" and Applicant's name on his PCR application is "Richard Lanard Sprinkle Mavins."

I. PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. In October 2012, the Orangeburg County Grand Jury indicted Applicant for two counts of armed robbery (2011-GS-38-1561, -1562) and attempted murder (2011-GS-38-1563). Applicant was subsequently indicted in for burglary, first degree (2013-GS-38-0287). Jillian D. Ullman, Esquire, represented Applicant. Assistant Solicitor Sarah A. Ford, Esquire, prosecuted the case. On April 8-10, 2013, Applicant proceeded to trial before the Honorable Edgar W. Dickson. The jury found Applicant guilty as indicted for both counts of armed robbery, first-degree burglary, and the lesser included offense of first-degree assault and battery. Judge Dickson sentenced Applicant to imprisonment for concurrent terms of thirty years for each count of armed robbery, ten years for first-degree assault and battery, and thirty-five years for first-degree burglary.

Applicant filed a timely notice of appeal. Robert M. Dudek, Esquire, of the Office of Appellate Defense, Tina Cudari, Esquire, and Alexander E. Davis, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on December 23, 2014. State v. Sprinkle, Op. No. 2014-UP-480 (S.C. Ct. App. filed December 23, 2014). The remittitur was issued on April 28, 2015.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "Counsel failed to object during Wright's testimony when he may three separate in-court identification."
 - b. Counsel "failed to object when the photo lineup was introduced into evidence by the State, wen Investigator Garrison and Wright describing the out of court identification procedure, and when the identification evidence draw forth in the jury's presence."
 - c. "Applicant was denied a fair trial because of defense counsel's failure to object to the introduction of the photo line up and requiring a meaningful 403 analysis be performed outside the presents of the jury."
 - d. Counsel "failed to preserve any issue related to the trial court's pretrial rulings on the identification by Wright."
 - e. Counsel "failed to call Investigator Shumpert as a witness to Echols' statement about the third party."
 - f. "Counsel failed to put up a third party defense, which Applicant statement was, he had been the third party that did not participate in the robbery or attempted murder, Echols testify that he was the one who knocked on the door and used trickery to gain entry."
 - g. "Defense counsel's performance was deficient in not exercising due diligence in using the compulsory process to obtain and investigate all exculpatory evidence that was in the possession of the prosecutor to include but not limited to the following:"
 - i. "All video and/or statements involved in concern of this case"
 - ii. "All text messages that was sent between the principle participants, Jasper Clark, Collins Shuler, and Sean Echols in this crime"
 - iii. "Any deals and/or incentives and/or compensation of any type offered to the co-defendant(s) or State's witnesses in exchange for testimony against Applicant"
2. "Brady Violations"
 - a. "Prosecutor had willful withhold Brady material from Applicant and depriving Applicant of his liberty. Applicant made a motion to require the State to disclose any plea negotiations for the testimony of their star witness, Sean Echols. The prosecutor responded that there have been no offers or negotiations or anything of that nature concerning Echols testimony, that they had provided everything to the defense, even a expired plea offer to Echols."
 - b. "Applicant was denied a fair trial due to the prosecution's withholding known exculpatory evidence from the defense such as statements (videced, written, or otherwise), text messages between known co-conspirators in this crime, as well as any negotiations with the co-defendants and/or witnesses for deals such as not prosecuting charges, or pursuing LWOP sentencing and/or any other incentives

and/or compensation for testimony against Applicant."

3. "Prosecutorial Misconduct"
 - a. "Misconduct by the prosecution in his Quasi-judicial position for failing to correct perjured testimony from both James Wright and Sean Echols, and thus through silence striking foul blows against Applicant..."
 - b. "The prosecutor is guilty of vindictive prosecution when he failed to charge any of the principle participants with burglary when the jury was charged with 'the hands of one is the hand of all.'"
 - c. "The misrepresentation of evidence by the prosecution and the use of the photo line ups multiple times to incite the jury's bias and encourage a finding of guilt on an improper basis to obtain a conviction which was highly prejudicial to Applicant's defense"
4. Trial Court Error
 - a. "Applicant was unfairly prejudiced by trial court's limitation of Applicant's cross-examination about witness plea agreement with the State under which witness was offered a cap of 20 years."
 - b. "...Applicant was not permitted to cross examine witness concerning potential bias in testifying for the prosecution in light of fact that witness was awaiting sentencing."
 - c. "Echols' testimony was not being introduced into evidence at his own trial, and therefore Rule 410 SCRE, did not bar cross-examination regarding this matter."

Applicant filed an amended application on February 22, 2018, adding the following allegations:

1. As to the representation rendered by Mark Wise, Esquire and Jillian Ullman, Esquire:
 - a. Counsel was ineffective for failing to properly investigate the facts and circumstances regarding the non-testifying confidential informant who provided information to law enforcement.
 - b. Counsel was ineffective for failing to properly preserve and argue Applicant's motion to dismiss based upon the insufficiency of the indictments. Counsel Ullman made the motion after the swearing of the jury.
 - c. Counsel was ineffective for failing to object to Applicant being viewed by the full jury pool, shackled, prior to jury selection.
 - d. Counsel was ineffective for failing to properly argue against the State's motion in limine to limit the cross examination of Sean Echols to include evidence of plea negotiations.
 - e. Counsel was ineffective for failing to request a separate and distinct charge of "mere presence" during the jury charge conference and for failing to object to the Judge's charge to the jury which did not include such a charge.
 - f. Counsel was ineffective for failing to object to multiple instances of impermissible comments made during the State's closing arguments.
 - g. Counsel was ineffective for failing to object to the incomplete verdict form returned by the jury.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Jillian Ullman's testimony

At the evidentiary hearing, Ullman testified she sat second chair to Mark Wise in this trial and assisted him with the case through the Orangeburg County Public Defender's Office. She stated she made a motion to dismiss the charges based on the insufficiency of the indictments, which is now on page 126 of the trial transcript. She stated her motion was based on jurisdictional grounds, but she did not make the motion until after the jury was sworn, and the trial court denied her motion based on case law stating such a motion cannot be made after the jury is sworn. Ullman testified she strategically chose to make the motion at that time because if she had made the motion before the jury was sworn, jeopardy would not have attached to the charges, and the solicitor could have re-indicted Applicant with new charges if her motion was granted. She stated she chose to wait until the jury was sworn to make the motion so jeopardy would attach, and if her motion was successful, the charges against Applicant would be dismissed.

Applicants' testimony

At the evidentiary hearing, Applicant testified that he was represented by another lawyer at first, but he requested a new attorney and Trial Counsel took over his case. He stated Trial Counsel represented him for eight months before the trial, and they met a few times. He testified he does not recall discussing potential penalties with Trial Counsel, and he did not understand the letter from Sean Echols to Solicitor Ford trying to make a deal. He stated he and Trial Counsel discussed the photo lineup and the victim's statements to law enforcement, and they discussed the fact that he could be convicted through accomplice liability, but he did not understand it.

Applicant testified he wanted to go to trial, and he did not want to plead guilty to something he did not do. He stated he gave a statement to law enforcement because he feared for his life. He testified that Trial Counsel told him that the statement of his codefendant, Sean Echols, would hurt him, but in his statement he said there were three people present at the scene of the crime. Applicant stated he chose not to testify at trial because he did not want his prior record introduced. Applicant stated he believed the case was "open and shut" because the victim was drinking and he wasn't there. Applicant testified the jury saw him wearing shackles and a belly chain before the jury selection, but he was not wearing his prison jumpsuit.

Trial Counsel's testimony

Trial Counsel testified his trial strategy in this case was to bring out inconsistencies in the State's case and the testimony of the victims. He stated Applicant would not have appeared before the jury in shackles, and he would have been dressed in civilian clothing, because it was consistently his policy not to let his clients appear in shackles before the jury. Trial Counsel testified he was limited in his cross-examination of Sean Echols, because he was not allowed to question him on his involvement as a gang member, nor was he allowed to question him about the ten year plea offer from the State in exchange for his testimony. He stated he did not correct the Solicitor's argument about Rule 410 because he was not familiar with the rule at the time.

Trial Counsel testified he requested a mere presence jury charge during the charge conference. He stated that when the jury returned with a question over the law, he asked the trial judge only to re-charge mere presence, but the judge read the entire instruction on mere presence and accomplice liability because it was the full instruction. Trial Counsel stated he had no specific trial strategy in choosing not to object to the use of the word "coward" in the State's closing argument, in parts of the closing argument about which there was no testimony, and in

the incomplete verdict form. Trial Counsel testified he made a motion to reveal the deal for Sean Echols' plea offer. He stated Echols had mentioned that a third person was present at the crime scene, and Applicant told him the third person was Vivian Johnson, who was charged regarding this crime. He stated Vivian Johnson was represented by an attorney, so he did not speak to her about this case. Trial Counsel testified he did not recall any Brady violations by the solicitor in this case.

Solicitor Sarah Ford's testimony

Former Assistant Solicitor Ford testified she probably made a plea offer to Sean Echols, but she cannot recall any specific offers. She stated she never offered a ten year plea deal to Sean Echols, and he was eventually sentenced to fifteen years. She stated that, although it may be possible Echols asked her for a ten year deal, she never offered a ten year deal, and she does not consider his rejected counter-offer to be a "plea negotiation." Ford testified she was prepared to try both Applicant and Echols at the same time, but Echols decided to work with her and testify against Applicant at trial. She stated she did not withhold any evidence from the defense in this case, and she turned over all discovery against him including the video and written statements and the text messages between him and his codefendant. She testified she was not aware of any perjured testimony in this case from any witness, but particularly from Sean Echols or James Wright.

Ford testified Applicant admitted to being present at the crime. She stated the State's evidence against Applicant included the testimony of the victims, one of whom identified Applicant as one of the people who came into his house, robbed him, and cut him, Applicant's own statement to law enforcement admitting he was there, and the testimony of the codefendant, Sean Echols that Applicant helped him commit this robbery.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

V. 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

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they should be denied and dismissed with prejudice. After considering the testimony, judging the credibility of the witnesses, and reviewing the materials presented to the court, this Court finds Applicant has failed to meet his burden of proof. Accordingly, post-conviction relief is denied. Each individual allegation is addressed below.

Failure to timely move to dismiss indictments

Applicant alleges counsel Ullman was ineffective for improperly moving to dismiss the indictments before his trial because her motion was made after the jury was sworn in, resulting in the denial of the motion. This allegation is meritless. The South Carolina Supreme Court stated in State v. Gentry, "we now conclusively hold that if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards." 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005); see S.C. Code Ann. § 17-19-90 (2003) ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards.").

At trial, counsel Ullman made a motion to dismiss the indictments after the jury was sworn. Tr. 126. Her motion was based on two arguments. She first argued that the grand jury process in South Carolina violates the defendant's due process rights, under both the South Carolina and United State constitutions, because they are not conducted as a public hearing. She complained that the grand jury was tainted because one member worked for DSS and another reportedly slept through many of the proceedings. However, no evidence was presented to show that either of these grand jurors were present when Mr. Sprinkle's indictments were presented. She presented no law supporting this argument. Ullman's second argument was that the attempted murder indictment was insufficient and not properly noticed because it made no mention of intent to kill or malice aforethought. In response, the State argued the attempted murder indictment was sufficient because it contained the attempted murder statute, thus noticed the jury, defendant, and his attorney of that charge. They also argued that the motion was untimely, pursuant to State v. Gentry.

At the PCR hearing, Ullman testified that she strategically waited until after the jury was sworn to make the objection so that the solicitor could not fix the indictments once she objected. She explained that if she waited until after the jury was sworn, jeopardy would attach, and if her motion were successful, Applicant would not face the charges again. The State noted that the Judge ruled on the merits of the motion to dismiss the indictments despite the fact that they were not timely made, which is the case. Tr. 135. Although it is clear from South Carolina case law that the timing of Ullman's motion was not proper, this Court finds that, because the trial court addressed the merits of the motion and denied it, there can be no resulting prejudice from this possible error. Even if the motion were properly made to preserve it for appeal, Ullman's argument, while in Applicant's interest, likely would not have prevailed, as no South Carolina

case law supports Ullman's contention that the grand jury system is unconstitutional. Accordingly, there can be no prejudice under Strickland, and this allegation is denied and dismissed with prejudice.

Allowing Applicant to appear shackled before the jury pool

Applicant alleges Trial Counsel was ineffective for allowing him to appear shackled in front of the jury pool before the jury selection, which created a bias against him which prejudiced him at trial. Trial Counsel credibly testified at the evidentiary hearing that he had no recollection of Applicant appearing in shackles or a prison uniform in front of the jury. He stated it is his policy to make sure his clients are not seen in shackles, and he was confident Applicant would have been in civilian clothing without visible shackles. Applicant has failed to present any credible evidence to suggest he was shackled or dressed in a prison uniform before or during the trial around the jury. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to Object to Photo Lineup

Applicant alleges counsel was ineffective for failing to object to the introduction of the photo lineup and make a meaningful argument about its prejudicial effect under Rule 403, SCRE. This allegation is meritless. Counsel Ullman argued against the introduction of the photo lineup in a Neil v. Biggers hearing before the trial, asserting the lineup was unduly suggestive because he was the only person in a jail uniform, and the trial court allowed the lineup to be introduced over her objection. ROA 41-48. The trial court found the lineup was not unduly suggestive, nor was there any "substantial likelihood of misidentification because [the victim] had given a general description of the Defendant, indicated that he knew where he lived and then picked him out of this photo lineup." ROA 48, line 9-14.

Applicant made the same argument on direct appeal. The South Carolina Court of Appeals ruled in their April 22, 2015 Order that "the photo does not suggest Sprinkle is wearing a jail uniform as Sprinkle contends." State v. Sprinkle, Op. No. 2014-UP-480 (S.C. Ct. App. filed December 23, 2014). The Court further found the identification "was so reliable that no substantial likelihood of misidentification existed." Id. Accordingly, because the lineup did not suggest Applicant was wearing a jail uniform as ruled by the trial court and the Court of Appeals, counsel cannot be deficient for failing to make this argument any further than she already did. Furthermore, there is no prejudice because no further argument made on this basis would have been successful or changed the court's ruling on the lineup's admissibility. Therefore, Applicant has failed to prove either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.

Failure to object to exclusion of plea negotiations under Rule 410, SCRE

Applicant argues Trial Counsel was ineffective for failing to argue that Rule 410, SCRE did not apply to witnesses and that he should be allowed to cross-examine Applicant's co-defendant, who testified at trial, about his plea negotiations with the State in exchange for his testimony. At trial, Trial Counsel was not allowed to question co-defendant Echols about any plea deal he was hoping to get in exchange for his testimony. The trial court ruled that, based on Rule 410 of the South Carolina Rules of Evidence, that evidence of plea negotiations are not admissible at trial. Trial Counsel did not argue the matter further. Applicant now argues that Rule 410 applies only to defendants and not witnesses.

Rule 410 states that evidence of plea discussions is not admissible against the defendant. The rule does not mention witnesses. Applicant argued at the PCR hearing that trial counsel should have objected and argued that Rule 410 does not apply to witnesses and that he should

have been allowed to question Echols on the issue so that the jury could evaluate his credibility. The Court of Appeals ruled on direct appeal that the trial court "erred by excluding evidence regarding Echols' plea negotiations. Nevertheless, we hold the error was harmless [T]he trial court allowed a meaningful cross-examination of Echols with adequate opportunity for impeachment, such that the jury had sufficient evidence before it to judge Echols' credibility." State v. Sprinkle, Op. No. 2014-UP-480 (S.C. Ct. App. filed December 23, 2014).

Whether this was an issue of trial court error or deficiency by Trial Counsel, this Court now finds that Applicant was not prejudiced by being prevented from this line of questioning, as explained in the Court of Appeals opinion. Because the jury was given sufficient evidence to judge Echols' credibility despite the trial court's ruling, Applicant cannot prove the result of the trial would have been different if Trial Counsel had argued the objection differently. Accordingly, Applicant has not met both prongs of the Strickland test, and this allegation is denied and dismissed with prejudice.

Failure to object to State's closing argument

Applicant argues that Trial Counsel was ineffective for failing to object when the solicitor stated in her closing argument "[t]here cannot be a more cowardly or depraved act than the burglary, the robbery, and the brutal beating of two old men who were asleep in their own house." ROA 260.

The South Carolina Supreme Court has held that a solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999) (citations omitted). Improper comments do not automatically require reversal

if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. Simmons, 331 S.C. at 338, 503 S.E.2d at 166. "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 373, 570 S.E.2d at 166-67.

Based on the record before the Court and the evidence presented by the State of Applicant's guilt, this Court here finds Applicant was not prejudiced by Trial Counsel's failure to object to the solicitor's statements in closing argument. Accordingly, because Applicant has failed to prove both prongs of the Strickland test, this allegation is denied and dismissed with prejudice.

Failing to object to the trial judge's jury instruction

Applicant alleges Trial Counsel was ineffective for failing to object to the trial court's jury instruction when the jury asked to be reinstructed during deliberations. At trial, the jury returned from deliberations with a question and asked to hear a definition of "mere presence." The State argued that the trial judge should read them both the "mere presence" and "hand of one, hand of all" charge, as they are written and charged together. Trial Counsel argued that only the "mere presence" charge should be read back to the jury. After speaking in chambers, all parties agreed that the jury would be read the "hand of one, hand of all" charge, which includes "mere presence."

Applicant now argues that Trial Counsel was deficient for not objecting to the trial court reading the "hand of one, hand of all" and "mere presence" charges together. However, Judge Dickson had already given the full charge, which included both "hand of one, hand of all" and "mere presence" during the initial jury charge. In State v. Huckabee, the Court of Appeals stated,

"[w]hen reviewing a jury charge for alleged error, the charge must be considered as a whole in light of the evidence and issues presented at trial." State v. Huckabee, 388 S.C. 232, 244, 694 S.E.2d 781, 787 (Ct. App. 2010) (citing Daves v. Cleary, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct.App.2003)). "If the jury charge is reasonably free from error, isolated portions which may be misleading do not constitute reversible error and the charge is considered correct if it contains the correct definition and adequately charges the law." Id. "The test for the sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." State v. Benjamin, 345 S.C. 470, 474, 549 S.E.2d 258, 260 (2001).

Because the trial court had already charged the jury with the full instruction of "hand of one, hand of all" and "mere presence," there was no error in repeating the full charge when the jury returned with a question. The jury charge was proper under the law and contained a full instruction that was free from error and proper under the facts and circumstances of Applicant's case. This Court finds Trial Counsel was not deficient in failing to object to the judge's instruction. Moreover, the record indicates Trial Counsel *did* object to the instruction and asked the trial court only to read the "mere presence" charge, so he cannot be deficient on these grounds. This Court further finds Applicant was not prejudiced by Trial Counsel failing to more vigorously object to Judge Dickson re-reading the jury the "mere presence" and "hand of one, hand of all" jury charge. Accordingly, Applicant has not proven either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.

BRADY VIOLATION

Applicant alleges the prosecution committed a Brady violation in his case. Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady² claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985)).

Here, Applicant has failed to present any evidence of any Brady materials that were not disclosed in his case. Trial Counsel credibly testified he could recall no Brady violations in this case, and the prosecution turned over all discovery materials. Solicitor Ford credibly testified she gave the defense all materials required by Rule 5 and Brady, and she did not withhold anything that would have been a violation. This Court finds Applicant has failed to meet his burden of proving this allegation, and the allegation is denied and dismissed with prejudice.

² Brady v. Maryland, 373 U.S. 83 (1963).

VI. CONCLUSION

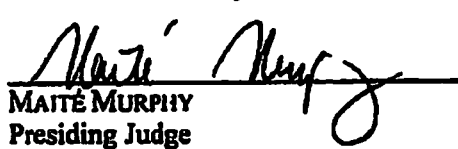
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes 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), SCRPC, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the 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 is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

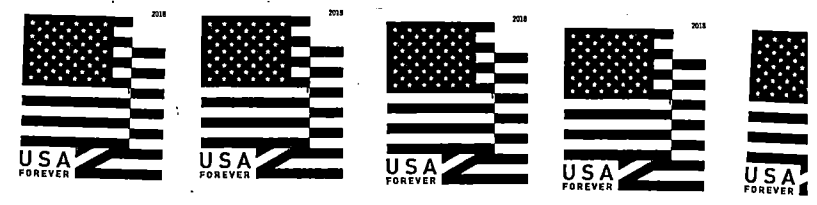
AND IT IS SO ORDERED this 1 day of May, 2018.


MAITÉ MURPHY
Presiding Judge
First Judicial Circuit

 St. James, South Carolina



1116 Blanding Street, Suite 2B
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Daniel E. Shearouse
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