LAW OFFICE OF

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

September 10, 2018

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

RE: Mitchell Logan Hinson, SCDC 346676, vs. State of South Carolina
Appeal of Case No. 2016-CP-28-0963

Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal. I was **appointed** to represent Mr. Hinson on his PCR.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,

Kristy Goldberg

CC: Megan Harrigan Jameson
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Mitchell Hinson, SCDC # 346676
Chester County Detention Center
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Kershaw County Clerk of Court
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Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 17 2018
S.C. SUPREME COURT

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-28-0963

Mitchell Logan Hinson, SCDC 346676, ... Appellant

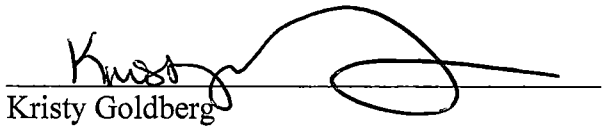
v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant Mitchell Logan Hinson hereby appeals from the Order of the G. Thomas Cooper, presiding Judge for the 5th Judicial Circuit, filed April 12, 2018 and received by counsel for the Applicant on April 16, 2018, and the Order Denying Defendant's Motion to Alter or Amend Judgment, filed September 5, 2018 and received by counsel on September 10, 2018, in the matter of Mitchell Logan Hinson v. State of South Carolina, Case No. 2016-CP-28-2963.

September 10, 2018



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM KERSHAW COUNTY
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Mitchell Logan Hinson, SCDC # 346676, ... Appellant

v.

State of South Carolina, ... Respondent.

PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on September 10, 2018 by depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Megan Harrigan Jameson
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Kristy Goldberg
Attorney for Plaintiff

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Other Counsel of Record:
Assistant Attorney General, Megan Harrigan Jameson
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Post Office Box 11549
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF KERSHAW	)	C/A No. 2016-28-0963
	)	
Mitchell Logan Hinson, S.C.D.C. No. 346676	)	
	)	
Applicant,	)	**ORDER DENYING DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT**
	)	
v.	)	
	)	
State of South Carolina	)	
	)	
Respondent.	)	

This Court has reviewed the Applicant's Proposed Order Granting Post-Conviction Relief, the Applicant's Motion to Alter/Amend Judgment, this Courts Order of Dismissal and the transcript of Applicant's trial. After careful consideration of the Defendant's Motion, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Defendant's Motion pursuant to Rule 59(e) SCRCP to Alter or Amend the Judgment Order of Dismissal entered on or about April 12, 2018. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Presiding Judge, Fifth Judicial Circuit

September 5, 2018

STATE OF SOUTH CAROLINA COUNTY OF KERSHAW	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Mitchell Logan Hinson, #346676, Applicant, v. State of South Carolina, Respondent.	Case No. 2016-CP-28-0963 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed on November 4, 2016, and amended on May 24, 207, filed by Mitchell Logan Hinson (Applicant). The State (Respondent) made its return on June 23, 2017. An evidentiary hearing into the matter was convened on July 19, 2017, at the Richland County Courthouse. Applicant was present at the hearing and represented by Kristy Goldberg, Esquire. Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant and his trial counsel, Cornelius Riley (counsel), testified at the hearing, as did Jason Kirincich, Esquire. The Court had before it a copy of the trial transcript, the records of the Kershaw County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this action. After reviewing the record and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application with prejudice.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. During its March 2011, the Kershaw County Grand Jury indicted Applicant for first-degree burglary (2011-GS-28-0220).

Public Defender Cornelius J. Riley, Esquire represented Applicant, and Assistant Solicitor Ron Moak, Esquire prosecuted the case. On June 27-29, 2011, Applicant proceeded to trial before the Honorable L. Casey Manning and a jury. The jury found Applicant guilty as indicted. Judge Manning sentenced Applicant to fifteen years imprisonment. Thereafter, counsel filed a motion to reconsider the sentence or in the alternative a new trial, on July 8, 2011. An order denying the motion was signed on March 24, 2016 and filed on April 4, 2016. Applicant did not appeal his conviction or sentence.

On November 3, 2015, while his post-trial general sessions motion was still pending, Applicant filed an initial post-conviction relief application. However, because the motion for reconsideration of sentence was still pending, Respondent moved to summarily dismiss this application as premature. On January 12, 2016, the Honorable Alison Renee Lee, acting in her capacity as Chief Administrative Judge for Common Pleas for the Fifth Judicial Circuit, dismissed the application without prejudice, with leave for Applicant to refile for post-conviction relief within a year from the date that the motion was ruled upon. Thereafter, on November 4, 2016, Applicant timely filed his current application for post-conviction relief.

II. ALLEGATIONS

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

1. Ineffective assistance of counsel
   a. "For 4 years no one has heard my motion for new trial therefor I have been unable to appeal my conviction."
2. "Lack of complete understanding as to sentencing."

The amendment filed by Applicant's counsel added the following allegations:

1. Ineffective assistance of counsel for

a. Failure to disclose and explain plea offers to Applicant and failure to accurately and fully explain the consequences of refusing a plea offers and proceeding to trial.
b. Failure to ensure that the jurors did not witness the Applicant in leg shackles.
c. Failure to object to pitting the witnesses.
d. Failure to object to admission the Applicant's prior conviction for Receiving Stolen Goods.
e. Failure to object to the Court's Allen charge.
f. Failure to file Notice of Appeal after the Motion to Reconsider was disposed of March 24, 2016.

Allegation (c) was withdrawn during the hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe the witnesses who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

Evidence Adduced at Trial.

On the evening of January 14, 2011, the home of James Eubanks was broken into while he and his family were out. Several items were stolen, including a PlayStation console, several games, and a watch. Upon entering the house, Mr. Eubanks noticed that the door had been forced open, and his dog had been put in its kennel and seemed confused. Mr. Eubanks checked the home and, upon finding it empty, called 911 to inform them of the break-in and his son's missing items. While waiting for law enforcement, Mr. Eubanks reviewed the video of his self-installed home surveillance system. On it, he saw Applicant and another teenager surveying the house and leaving with the stolen items. Applicant was friends with Mr. Eubanks's son, so he had no doubt as to his identity. (Tr. p.77).

Corbin Bailey, the other teenager, testified to the events that transpired that evening. He admitted he was involved, as was Applicant, and stated that the crime was Applicant's idea. He further testified that they sold the items they stole, other than the watch, which was returned. (Tr. p. 82-94). Lindsey Stitzel, Applicant's then-girlfriend, testified that she spent part of the evening with Applicant, but it was shown that she gave law enforcement conflicting stories, and also admitted to wanting to protect Applicant. (Tr. p. 114-131). Applicant testified and maintained his innocence. He admitted that the Eubanks had been very good to him when he needed help growing up, but he believed they were lying about his involvement in the crime. (Tr. p. 132-49).

Summary of PCR Testimony

Applicant was the first witness to testify. He testified he was arrested in January 2011 and proceeded to trial six months later. He testified counsel represented him for this entire time, but only visited him two or three times and an associate accompanied counsel who did most of the interactions. He admitted he entered a home at night and stole the items, but pointed out that no one was home or hurt and that he did not have a weapon. He saw the surveillance video approximately two weeks before trial, but maintained that all you could see was two people entering the house.

When asked about plea negotiations, Applicant remembered that he was offered a sentence under the Youthful Offender Act ("YOA"), but did not want to plead as he had charges in Lancaster County and was on probation, so he did not want the violation. Those charges were distribution of marijuana and receiving stolen goods, to which he pled guilty in exchange for a sentence of five years' probation PTUP on $2,000.00 restitution. He then testified that he received an offer when he and trial counsel were at the courthouse for his bond hearing. Trial counsel informed him the offer was a good deal, and said he would speak to the prosecutor about

it when Applicant mentioned his concerns regarding his other charges. Applicant testified that he never formally rejected the plea offer, nor did trial counsel tell him that the service on the charges could run concurrently. He also recalled another offer of two to three years, which involved disposing of his pending probation violation, and his family trying to pay restitution before the plea. He testified that he did not want to plead guilty at the time, though trial counsel told him they were good offers and he should take them. Trial counsel never told him that the offers would expire.

At the time of trial, Applicant received a plea offer of twelve years during jury selection, and he felt like that was a long time, and was unsure of what he would receive at trial. However, on cross-examination, he testified that he knew he faced fifteen years if convicted. He testified that he felt trial just "popped up" because the solicitor was frustrated that he would not plead. He further testified that he did not want to go to trial, but wanted to try to pay the restitution before he pled guilty, and was also scared of the consequences of the probation revocation in Lancaster. Applicant stated that trial counsel never said he had to take a plea or go to trial, and he did not realize that they were proceeding closer to trial every time he rejected an offer. Applicant testified that he did not believe they would win at trial. He recalled hearing the word "deadlocked" during trial, and thought it was a good thing. Trial counsel told him that, because the jury was taking so long, it could be a good thing. However, Applicant then stated that trial counsel never said the jury was deadlocked. After trial, he asked for an appeal because it was all he knew to do. He remembers that a motion for a new trial was filed, but it was denied without a hearing. After that, he never spoke with anyone in the public defender's office about an appeal, though he expected one to be filed. Instead, he filed for post-conviction relief.

The State called Cornelius Riley to testify, who began by stating that he had been practicing for twenty-five years at the time of the trial. He was with the public defender's office at the time, and as the chief public defender for Kershaw County, appointed himself to the case. He testified that he could not recall the specifics of meeting with Applicant, but knew they discussed the case multiple times. He further recalled discussing plea offers and the ramifications of rejecting them, as well as potential sentences he may receive and how those would be classified. He testified that Applicant's problem was that he could not make a decision between pleading and going to trial, and he seemed to just want the whole thing to go away. Trial counsel testified that he attempted to delay the solicitor's office as much as possible, but they eventually revoked his offers. He further testified that he was aware of the probationary sentence in Lancaster County, and was aware that Applicant was scared of revocation. He explained to Applicant that he had no control over the Lancaster charge, but thought they would likely revoke his probation based on this charge. Contrary to Applicant's prior testimony, trial counsel testified that he told Applicant that the revocation sentence would likely run concurrently with any time on the burglary charge.

Trial counsel remembered the YOA plea offer, and that he tried to negotiate a suspended YOA sentence. He did not recall the 2-3 year offer, or the 12 year offer, but testified that he would have conveyed them to Applicant had he received them. He remembers never formally rejecting the offers on behalf of Applicant, but was in a difficult position because Applicant could not make up his mind. Trial counsel further recalled Applicant stating that he would pay off the restitution in order to get off probation in Lancaster before pleading to this Kershaw County charge.

Regarding trial strategy and preparation, trial counsel testified that he showed the surveillance video to Applicant far earlier than the two weeks prior to trial Applicant alleged. He testified that his strategy was to raise doubt with the jury regarding the video quality, but he was aware that there was not much to defend. The testimony of Applicant's girlfriend was not as helpful as he had hoped it might be, and Applicant himself testified well on direct examination, but seemed to get confused on cross-examination. It was Applicant's decision to testify, and he knew it meant giving up last argument. Applicant also knew well in advance that his co-defendant had taken a deal to testify against him. Trial counsel also testified that Applicant knew he was facing fifteen years to life due to the conversations regarding the plea deal. Specifically regarding the allegation that he was ineffective for allowing Applicant to take the stand while wearing leg shackles, trial counsel admitted that it was his responsibility to ensure that did not happen, and that he believed the jury actually saw the shackles. He testified on cross-examination that the sentence seemed outrageous for the crime, but acknowledged Applicant's conduct comported with the elements of first-degree burglary and the sentence was the mandatory minimum sentence he could receive upon conviction. He further testified that, due to Applicant's refusal to accept that he had to either plead or go to trial, it was difficult to work out deals or do much preparation. Trial counsel testified that he attempted to have the post-trial motion resolved before his retirement, but he was being advised by the judge and solicitors to let the victims calm down before reassessing the sentence, and he agreed with that wisdom.

Assistant Public Defender Jason Kirinich was called to testify regarding the post-trial motion and its resolution. He testified that it came to his attention after Applicant filed his first post-conviction relief application, and he got in touch with the solicitor's office regarding the status. He testified that Judge Manning denied the motion without a hearing, and he was not

immediately served with it. When he discovered the order, he contacted the Attorney General's office to resolve any outstanding post-conviction relief issues.

Ineffective Assistance of Trial Counsel

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

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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. "A reasonable probability is a

probability sufficient to undermine confidence in the outcome [of the proceeding]." Strickland, 466 U.S. at 694. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 389. "It is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." Bell v. Cone, 535 U.S. 685, 702 (2002) (citing Strickland). Based on the foregoing, this Court finds as below to as to each specific allegation of ineffective assistance of counsel:

Allegation: Failure to disclose and explain plea offers to Applicant and failure to accurately and fully explain the consequences of refusing a plea offers and proceeding to trial

Applicant alleges trial counsel failed to present and explain plea offers, as well as the consequences of refusing those offers, to him prior to trial. Applicant asserts he did not want to proceed forward to trial and failed to accept favorable plea offers from the State due to counsel's failure to properly advise him. The Court finds this allegation to be without merit based on the testimony provided at the evidentiary hearing.

A defendant has the right to effective assistance of counsel during the plea bargaining process, even if he ultimately elects to proceed to trial. Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). Here, the uncontroverted testimony establishes that counsel advised Applicant of favorable plea offers from the State and advised him that it was in Applicant's best interest to accept these plea offers due to the strong case the State would present at trial, but that Applicant never accepted any of these offers due to his own hesitance and unwillingness to make a decision

on whether to proceed to trial versus plea guilty. Notably, trial counsel testified at length regarding the difficulties he had with getting Applicant to understand the consequences of rejecting plea offers, as well as the fact that the charges would not simply disappear as Applicant wanted. This Court finds counsel's performance was reasonable, as he properly conveyed the State's plea offers to Applicant and advised him to seriously consider accepting the State's offers based on the strength of the State's case. Therefore, this allegation is denied and dismissed.

Allegation: Failure to ensure that the jurors did not witness the Applicant in leg shackles

Applicant alleges counsel was ineffective for allowing him to proceed to trial in shackles. Applicant alleges the jury saw these shackles when he began walking to the witness stand during trial. See Tr. p. 132. This Court finds Applicant has failed to meet his requisite burden of proof as to this allegation.

Generally, it is improper for a defendant to appear for a jury trial dressed in readily identifiable prison clothing. Humbert v. State, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001). However, to establish that counsel was ineffective for allowing his client to be tried in shackles or prison attire, an applicant must establish he was prejudiced by counsel's error. Id. (finding a robbery defendant was not prejudiced by counsel's deficient performance in allowing trial to proceed while defendant was wearing prison clothing, and thus, defendant could not prevail on ineffective assistance claim; evidence of defendant's guilt was overwhelming, where store clerk identified defendant as the perpetrator and defendant was driving a truck that matched description of getaway vehicle). Indeed, the United States Supreme Court has explained that "[r]ecognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a

defendant to punish him for allegedly criminal conduct." Holbrook v. Flynn, 475 U.S. 560, 567 (1986).

In the present case, there is overwhelming evidence establishing Applicant was guilty of the charged offense, including an identification by a victim who knew Applicant by sight and testimony from a cooperating co-defendant. This Court finds there is no reasonable likelihood the result of Applicant's trial would have been different but for the fact that the jury saw Applicant in shackles. For these reasons, this allegation is denied and dismissed.

Allegation: Failure to object to admission the Applicant's prior conviction for Receiving Stolen Goods

Applicant alleges counsel was ineffective for failing to make an argument that Applicant's prior conviction for receiving stolen goods was not admissible for impeachment purposes. Applicant argued that his prior conviction was not a crime of moral turpitude[1] and was more prejudicial than probative, and therefore, was inadmissible. However, this argument is without merit, as Applicant's prior conviction was admissible for impeachment purposes at the time of Applicant's trial in 2011.

Rule 609(a)(2), SCRE, provides that a witness's character for truthfulness may be attacked "by evidence of a criminal conviction for any crime regardless of the punishment, the

[1] At the hearing, Applicant repeatedly argued that his prior conviction was not a "crime of moral turpitude." Prior to the adoption of the South Carolina Rules of Evidence, conduct constituting a crime of moral turpitude was admissible to impeach a witness. See State v. Outlaw. 307 S.C. 177, 179, 414 S.E.2d 147, 148 (1992) (holding defendant may be questioned about prior bad acts that relate to credibility and prior convictions for crimes of moral turpitude); State v. Majors. 301 S.C. 181, 184, 391 S.E.2d 235, 237 (1990) (finding past transactions affecting credibility can be inquired into on cross-examination); State v. McGuire. 272 S.C. 547, 550, 253 S.E.2d 103, 104 (1979) (finding trial judge erred in refusing to permit cross-examination concerning crimes of moral turpitude). However, the common law rule applying the moral turpitude standard is no longer appropriate in light of the adoption of the Rules of Evidence in 1995. See Rule 1103(b), SCRE ("these rules shall become effective September 3, 1995."); State v. Johnson. 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (holding the common law moral turpitude standard was replaced with the adoption of Rule 609(a), SCRE).

evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement." Such convictions may be used to impeach a defendant witness who elects to take the stand in his defense.

At the time of Applicant's trial in 2011, receiving stolen goods was recognized as a crime of dishonesty pursuant to Rule 609(a)(2), SCRE. See State v. Williams, 380 S.C. 336, 669 S.E.2d2d 640 (Ct. App. 2008) (acknowledging a witness' conviction for receiving stolen goods was a crime of dishonesty). Therefore, counsel was not ineffective for failing to object or otherwise present an argument as to why Applicant's prior conviction for receiving stolen goods should have been inadmissible for impeachment purposes.

Allegation: Failure to object to the Allen charge

Applicant alleges counsel was ineffective for failing to object to the trial court's jury instruction during deliberations encouraging the jury to attempt to reach a unanimous verdict, often referred to as an Allen[2] charge. Pursuant to S.C. Code Ann. § 14-7-1330, "[w]hen 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."

The record reflects the jury began deliberations on the afternoon of June 28, 2011. (Tr. p. 172-73). After sending in several jury notes, including notes to watch the surveillance video again, the court excused the jury for the evening. (Tr. p. 173-79). The jury returned the following morning and resumed deliberations. (Tr. p. 179). After a few more hours of deliberation, a discussion with the jury off the record, and a discussion with counsels in-chambers, the trial court elected to give the jury an Allen charge. (Tr. p. 185-192).

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

In order for the judicial process to properly function, it is important for cases to reach a final resolution at some point. See Nickles v. Seaboard Air Line Ry., 74 S.C. 102, 142, 54 S.E. 255, 268 (1910) ("It is important that the trial of causes should be ended."). As a result, trial judges have a duty to urge juries to agree upon a verdict. State v. Kelly, 372 S.C. 167, 171, 641 S.E.2d 468, 470 (Ct. App. 2007). However, trial judges are not permitted to coerce juries into doing so. See State v. Darr, 262 S.C. 585, 587, 206 S.E.2d 870, 870 (1974) ("It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them."); State v. Ayers, 284 S.C. 266, 269, 325 S.E.2d 579, 581 (Ct. App. 1985) ("The trial judge has a duty to urge the jury to agree on a verdict, so long as he is not coercive.").

"The typical judicial mechanism for encouraging an indecisive jury is the Allen charge, in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors." State v. Robinson, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004). In giving the supplemental charge to the jury, a trial judge is permitted to encourage the jury to reach a verdict in a number of ways, including by advising the jurors in the majority and minority to consider each other views, by asking the jurors to give deference to one another's opinions, by instructing the jurors to try to reach a decision if they are capable of doing so, and by explaining the high societal costs associated with the retrial of a case to the jury. See Allen v. United States, 164 U.S. 492, 501 (1896) (finding no error in a supplemental charge to a deadlocked jury instructing that absolute certainty cannot be expected, that the verdict must be the verdict of each juror and not mere acquiescence in the views of the others, that they should examine the case with candor and give proper deference and regard to one another's opinions, that they had a duty to decide the case if they could conscientiously do so, that they should listen to each other with a disposition to be convinced,

and that they should consider the position of jurors holding a differing opinion); see also Nickles, 74 S.C. at 141-142, 54 S.E. at 268 (finding a supplemental jury charge to a deadlocked jury in which the trial judge instructed the jury that the expenses associated with trying the case were a "very strong reason" that the jury ought to get together and agree upon a verdict was not coercive or erroneous). Significantly, the presentation of such a supplemental charge "has long been sanctioned[,]" and, by doing so, a trial judge is merely discharging his duty to the public. Lowenfield v. Phelps, 484 U.S. 231, 237 (1988); see Nickles, 74 S.C. at 142, 54 S.E. at 268 ("A circuit judge is but discharging his duty to the public, and especially to the litigants, when he urges the jury to reach a verdict, provided nothing like coercion takes place.").

In reviewing a trial judge's jury instructions, a reviewing court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). In particular, when reviewing an Allen charge to determine if the charge was unconstitutionally coercive, the court must judge the charge in the proper context and under the totality of the circumstances. Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002). Factors that may be considered include: (1) whether the charge was specifically directed at minority jurors; (2) whether the charge included any mandatory language about the necessity to return a verdict; (3) whether the trial judge made any inquiries into the jury's numerical division; and (4) how long the jury's deliberations lasted. Tucker v. Catoe, 346 S.C. 483, 493-494, 552 S.E.2d 712, 717-718 (2001). Significantly though, it is not coercive for the trial judge to instruct the jury that every juror has a right to their own opinion, that no juror needs to surrender their opinion merely to reach an agreement, or that the failure to reach a verdict will result in additional costs. See State v. Singleton, 319 S.C. 312, 316, 460 S.E.2d 573, 575-576 (1995) ("It is not coercion when a trial judge instructs the jury that failure to reach a

verdict will require a new trial at additional expense, or states that every juror has a right to his own opinion and need not give it up merely for the purpose of reaching agreement." (footnotes omitted)); Ayers, 284 S.C. at 269, 325 S.E.2d at 581 ("It is not coercive to charge that failure to reach a verdict will require a new trial at additional expense.").

In the present case, the trial court instructed the jury that an agreement is not always easy to reach, that absolute certainty cannot be reached or expected in most cases, that the jurors had a duty to make every reasonable effort to reach a verdict, that they should listen to one another's opinions and discuss their differences, that they each had a right to their own opinion and should not give up that opinion merely to be in agreement with the others, and that both the majority and minority should carefully and respectfully consider each other's positions and re-evaluate their own opinions. When considered as a whole and in the proper context, those supplemental instructions were even-handedly delivered to both the minority and majority jurors, did not convey to the jury that reaching a verdict was mandatory, and constituted a correct statement of the law. Cf. Green v. State, 351 S.C. 184, 195, 569 S.E.2d 318, 323-324 (2002) ("The entire charge shows the trial judge adequately and correctly told the jurors they should listen to what the other side had to say; to be open to change one's mind; and to not change one's mind if it would do violence to one's conscience. The charge was neutral in its direction, not impermissibly aimed at the minority, instead suggesting members of each side examine their own position in light of the other view's position."). As a result, the trial judge committed no error in fulfilling his duty to encourage the jury to reach a verdict in Applicant's case. See State v. Middleton, 218 S.C. 452, 457, 63 S.E.2d 163, 165 (1951) (instructing that a trial judge has the duty "to admonish the jury as to the desirability and importance of trying to reconcile their differences and agreeing upon a verdict" when a jury is unable to agree). Therefore, because this

Court finds the Allen charge was properly given, trial counsel was not ineffective for failing to object to it.

Despite the apparent propriety of the Allen charge itself, Applicant argues the instruction was nonetheless impermissible because the jury did not state on the record that it was deadlocked or otherwise unable to reach a verdict. However, this argument is without merit, as there is no such requirement before the trial court can give an Allen instruction. See Darr, 262 S.C. at 587, 206 S.E.2d at 870 ("It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them."); Ayers, 284 S.C. at 269, 325 S.E.2d at 581 ("The trial judge has a duty to urge the jury to agree on a verdict, so long as he is not coercive."). Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation: Failure to file Notice of Appeal

Applicant asserts counsel was ineffective for failing to file a direct appeal on his behalf following the denial of his motion to reconsider his sentence. By the time Applicant's motion to reconsider his sentence was denied, he had already filed an application for post-conviction relief.

"Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (internal citations omitted). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967)." Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (internal citation omitted). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Simuel, 390 S.C. at 271, 701 S.E.2d at 740 (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (internal citation omitted).

In the present case, this Court finds Applicant made a knowing and intelligent decision to

forego a direct appeal and proceed directly to post-conviction relief remedies. Once his motion to reconsider his sentence was denied, Applicant proceeded forward with filing a second post-conviction relief application and did not request his counsel file a direct appeal on his behalf. This Court finds Applicant has failed to meet his burden of proof and denies this allegation.

IV. CONCLUSION

Based on the foregoing, this Court finds 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 PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

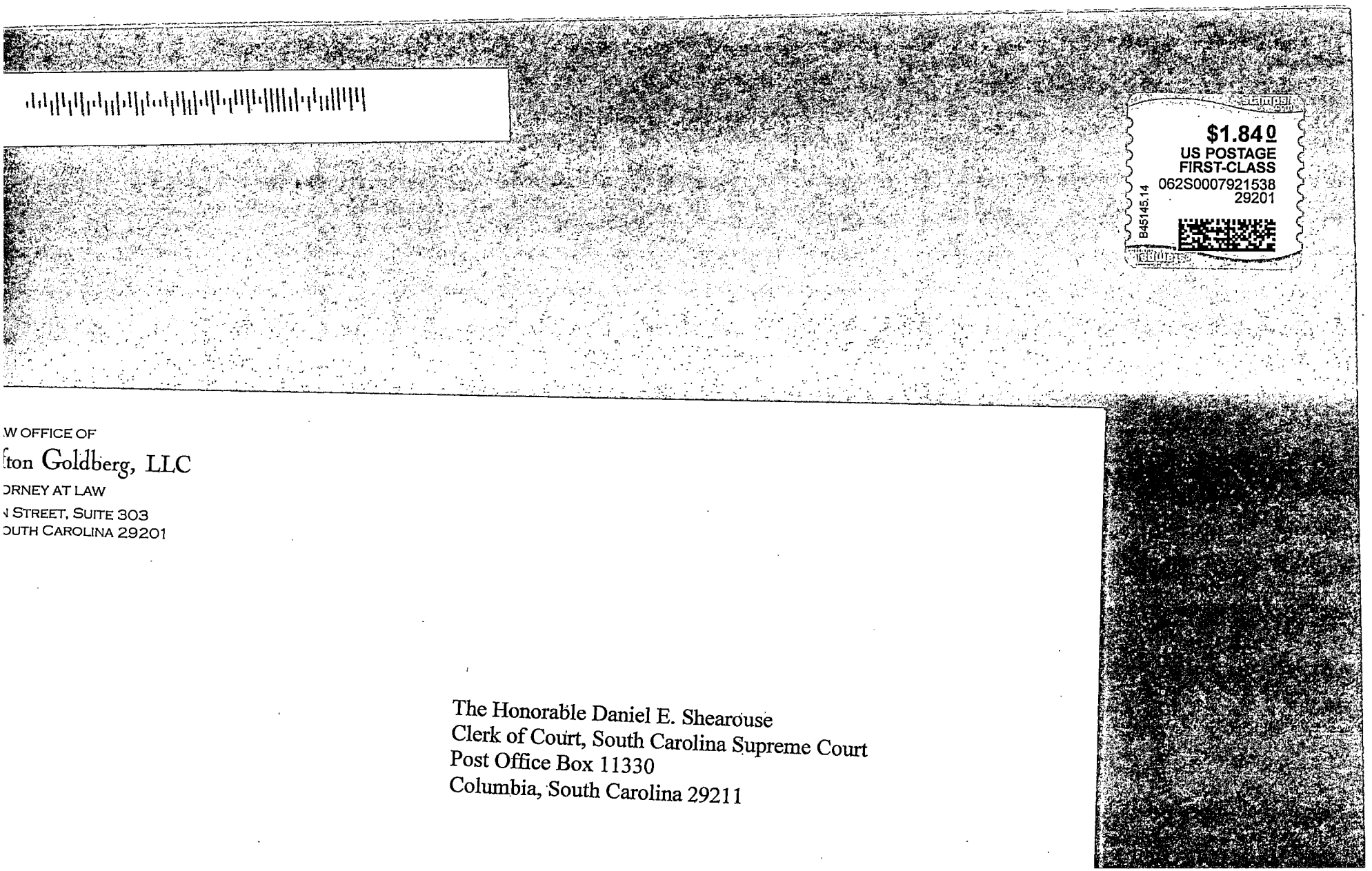
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 12 day of April, 2018.

G. Thomas Cooper

G. THOMAS COOPER, JR.
Presiding Judge - Fifth Judicial Circuit

Camden, South Carolina



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