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S.C. SUPREME COURT

February 19, 2020

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

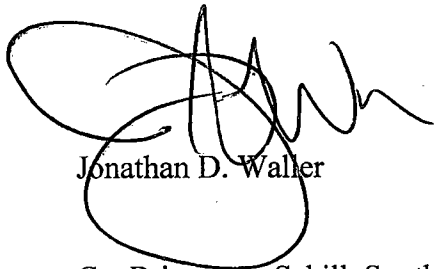
Re: Jonathon Phillips vs. State of South Carolina
C/A No: 2018-CP-46-01805

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. Phillips 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: Brianna L. Schill, South Carolina Office of Attorney General

Enclosures

Waller Law Group
1116 Blanding Street, Suite 2B
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803-520-7278
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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Michael G. Nettles, Circuit Court Judge

2018-CP-46-01805

RECEIVED

FEB 21 2020

S.C. SUPREME COURT

Jonathon Phillips, # 355313,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Jonathon Phillips, # 355313, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed February 13, 2020, issued by the Honorable Michael G. Nettles, Presiding Judge, Sixteenth Judicial Circuit.



Jonathan D. Waller

Waller Law Group
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1116 Blanding Street
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ATTORNEY FOR PETITIONER

February 19, 2020

Other Counsel of Record:
Brianna L. Schill, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 21 2020

APPEAL FROM YORK COUNTY
Michael G. Nettles, Circuit Court Judge

S.C. SUPREME COURT

2018-CP-46-01805

Jonathon Phillips, # 355313,

Appellant,

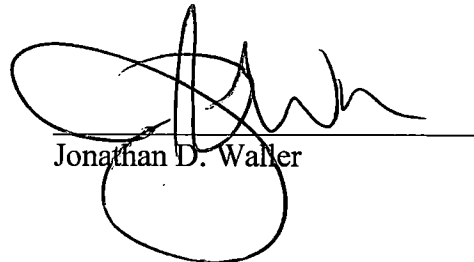
v.

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, Brianna L. Schill, 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.



Jonathan D. Waller

February 20, 2020

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2018CP4601805

Jonathon A Phillips	355313	South Carolina State Of	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by: The Court	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (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. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- 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: (formal order to follow) Statement of Judgment by the Court:

ORDER OF DISMISSAL

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/ Michael G. Nettles

2140

2/5/2020

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on **February 13, 2020**, and a copy mailed first class or placed in the appropriate attorney's box on **February 13, 2020**, to attorneys of record or to parties (when appearing pro se) as follows:

Jonathon A Phillips F3B 2220 Lee Correctional Institution
990 Wisacky Hwy Bishopville, SC 29010
Jonathan D Waller 1116 Blanding Street Suite 2B
Columbia, SC 29201

Janell H Gregory Attorney General's Office P.O.Box 11549
Columbia, SC 29211
Brianna Lynn Schill 1000 Assembly Street SC Office Of The
Attorney General Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
Jonathon A. Phillips, #355313,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-46-01805

ORDER OF DISMISSAL

DAVID HAMILTON
C.O.C. # 1808
CLERK OF COURT

2020 FEB 13 PM 2:06

FILED-RECEIVED

This matter comes before this Court by way of an application for post-conviction relief filed on June 18, 2018, by Jonathon A. Phillips (Applicant). The State (Respondent) filed a Return on September 25, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on Tuesday, January 7, 2020, at the Moss Justice Center. Applicant was present at the hearing and represented by Jonathan Waller, Esquire (PCR Counsel). Assistant Attorney General Brianna L. Schill of the South Carolina Attorney General’s Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. Deputy Public Defender Melissa Inzerillo of the Sixteenth Circuit Public Defender’s Office (Counsel) also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted during the November 2015 term of the York County Grand Jury for one count of armed robbery (2015-GS-46-03438). Counsel represented Applicant. Assistant Solicitors Thomas Blaine Pleming and

Daniel Porter of the Sixteenth Circuit Solicitor's Office prosecuted the case.

On February 10, 2016, Applicant proceeded to a jury trial before the Honorable Daniel D. Hall. After a two day trial, the jury convicted Applicant of armed robbery and Judge Hall sentenced Applicant to fifteen years imprisonment. Applicant was given credit for one-hundred and seventy-six days.

Applicant filed a direct appeal after his conviction stating the lower court erred by admitting the store clerk's out-of-court and in-court identification of Applicant and the admission of such evidence was a violation of Applicant's due process rights. The South Carolina Court of Appeals affirmed the lower court's decision on September 1, 2017. *State v. Jonathon Alexander Phillips*, Op. No. 2017-UP-392, (S.C. Ct. App. filed October 18, 2017).

FACTUAL HISTORY

In the early morning hours of August 13, 2015, Applicant entered the Murphy Express – a convenience store located in Lake Wylie – and grabbed a beer from the cooler. Applicant brought the beer to the clerk and handed him five dollars. When the clerk opened the cash register, Applicant handed the clerk a note that stated, “Give me all the money.” The clerk then observed Applicant raise his shirt to reveal a firearm tucked in the waistband of his pants. The clerk complied and handed Applicant all of the money from the till. Applicant then fled the scene. The clerk called the police immediately. (TT. 36-37.)

During the police investigation, the clerk described the perpetrator as a black male in his mid-twenties, 5'9", approximately 145 pounds, with “short-shaved” hair wearing a brown shirt and camo shorts. The clerk also noted the perpetrator had a “bloodshot eye.” The clerk was able to provide law enforcement with surveillance video of the incident. Several days after the robbery, officers showed the clerk a photograph of Applicant and he identified him as the perpetrator who

robbed the store. (TT. 40-43.)

Lieutenant Rick Thomasson (Thomasson) of the York City Police Department testified Applicant's mother, who is married to Thomasson's cousin, contacted him after she heard about the robbery. After speaking with her, Thomasson viewed the store surveillance video and recognized Applicant as the suspect. Thomasson and other officers took a still photo from the surveillance video to Applicant's mother and she also identified Applicant as the suspect. Several days later, Applicant turned himself in to Thomasson. At that time, Thomasson noted one of Applicant's eyes was very bloodshot. (TT. 46-56.)

In a pretrial hearing, Applicant moved to suppress the out-of-court identification, and any subsequent in-court identification, made by the store clerk because he believed law enforcement's procedure was unduly suggestive. After hearing arguments, the circuit court found the out-of-court identifications by Applicant's mother and Thomasson were based on their personal familiarity with Applicant, the video and photograph at issue were not unduly suggestive, and their identification testimony was admissible. The court then heard additional testimony regarding the store clerk's identification, and found the clerk's out-of-court identification was reliable based on the amount of time he interacted with the suspect, and the photograph was not unduly suggestive. The clerk's identification testimony was also found to be admissible. (TT. 56-69.)

ALLEGATIONS RAISED

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

1. Ineffective Assistance of Counsel
 - a. "No evidence, verbal or physical[,] pointing to me."
 - b. "No evidence of or to convict or armed robbery."
 - c. "The victim failed to identify me / no photo line-up or reliable statement."

As requested relief, Applicant asked to be “resentenced to either be found not guilty or resentenced under a lesser and non-violent offense.”

On November 7, 2019, Applicant filed an amended application asserting the following claims:

- (1) Counsel was ineffective for failing to properly investigate the facts and circumstances of his case;
- (2) Counsel was ineffective for failure to request or properly object to the jury charge; and
- (3) Counsel was ineffective for failure to move for a mistrial after impermissible comments made during the solicitor’s closing argument.

An evidentiary hearing was held on January 7, 2020. At the outset of the hearing, PCR Counsel indicated Applicant would be going forward on the allegations set forth in Applicant’s amended application.

SUMMARY OF PCR TESTIMONY

Applicant’s Testimony

Applicant testified he was held at the local detention center the entire time his charges were pending. Applicant testified he first met with Counsel a month or two after he was arrested. Applicant testified that during his first meeting with Counsel, they discussed a five-year plea offer, but Counsel advised him not to take it because she could obtain a better plea offer.

Applicant testified Counsel did not talk about the possible penalties for his offenses. Applicant testified he and Counsel discussed his right to a jury trial, but did not discuss any of his other constitutional rights. Applicant testified he and Counsel did not discuss defenses to his case. Applicant testified he told Counsel he had been at the store at some point that day, and what he did while in the gas station. Applicant testified he maintained his innocence throughout Counsel’s representation of him.

Applicant testified he and Counsel went over some of the evidence, including the surveillance video. Applicant later testified he could not recall specifically what evidence they discussed, but that not a lot of information was given to him. Applicant testified he was shown a written statement from the store clerk. According to Applicant, he did not personally listen to the 911 call, but Counsel discussed the call with him and told him what was contained in the recording. Applicant testified the store clerk did not mention the perpetrator's bloodshot eye in the 911 call, and that he and Counsel did not discuss the differences between what was contained in the store clerk's written statement and the 911 recording.

Applicant testified he gave Counsel information to investigate, but could not specify what he wanted Counsel to investigate that she failed to investigate. Applicant testified he did not give Counsel the name of any witnesses to investigate. When asked if there was anything Applicant wanted Counsel to do but Counsel did not do, Applicant testified he wanted Counsel to get him a plea offer back on the table. Applicant testified Counsel did not have time to prepare for trial because a new solicitor was assigned to the case and wanted to try his case "immediately."

Applicant testified he saw Counsel three times prior to his trial. According to Applicant, Counsel merely viewed the surveillance video with Applicant in preparation for trial. Applicant testified Counsel did not discuss "the ins and outs" of a trial with Applicant. Applicant testified he and Counsel did not talk during the breaks at his trial.

Counsel's Testimony

Counsel testified she was appointed to represent Applicant due to her employment at the Sixteenth Circuit Public Defender's Office. Counsel testified Applicant's charges arose from an alleged armed robbery at a convenience store, but there was a factual issue as to whether there was a gun involved in the robbery. Counsel testified Applicant admitted to being in the store, but

claimed there was no gun. Counsel testified her strategy was to get a charge of strong-armed robbery to reflect that there was no gun involved based on Applicant's claim.

Counsel testified she spoke to Applicant about his bloodshot eye as the store clerk eventually indicated the perpetrator had a bloodshot eye. Counsel testified Applicant told her he got the bloodshot eye from a fight. Counsel testified that as a part of her investigation she interviewed the female passenger in Applicant's vehicle and Applicant's mother. Counsel testified law enforcement used still shots from the robbery and sent them to Crimestoppers to help identify the robbery suspect. Counsel testified Applicant's mother identified Applicant from the media and called law enforcement because she was concerned for his safety. Counsel testified Applicant's mother testified at trial and identified Applicant as the robbery suspect.

Counsel testified the trial began approximately six months after his arrest. Counsel testified her trial strategy was two-fold: (1) get a strong-armed robbery jury instruction, and (2) attack the discrepancy in the store clerk's statements. Counsel testified the State's evidence regarding the weapon consisted of a portion of the surveillance video where Applicant was standing at the counter and made a motion consistent with the State's theory that Applicant revealed a firearm. After this movement, the store clerk's demeanor changed and the store clerk proceeded to open the cash register. Counsel testified the video was "pixelated" but the video was clear enough to see the movement of Applicant's jacket. Counsel testified the store clerk testified to the presence of a gun.

Counsel testified there must have been a charge conference at some point because the judge ultimately charged strong-armed robbery, which is what Counsel wanted for her client. Counsel testified, however, this charge conference was not on the record.

Counsel testified she objected to a comment made by the Assistant Solicitor on page 204 of the trial transcript. Counsel testified the court overruled her objection and she did not move for a mistrial because the court overruled her objection.

On cross-examination, Counsel testified she has been practicing law since 2001, and specifically has been practicing criminal law exclusively since 2002 or 2003. Counsel testified she met with Applicant approximately four-to-five times in person prior to his trial. Counsel testified Fleming was the only solicitor ever assigned to Applicant's case. Counsel testified Fleming initially offered ten-years suspended upon a five year active sentence and restitution, but was forced to change the offer to an eight-year active sentence for attempted armed robbery. Counsel testified she discussed this offer with Applicant several times, but Applicant wanted to plead to a non-violent charge. Counsel testified she asked Fleming for a plea offer involving strong armed robbery, but he would not make such a plea offer. Counsel testified Applicant was not interested in any of the plea offers extended by the State because they all involved violent offenses.

Counsel testified she reviewed all discovery with Applicant. Counsel testified her investigation consisted of reviewing the surveillance video, interviewing the female passenger who was in the car with Applicant, and interviewing Applicant's mother. Counsel testified the female passenger was adamant that she did not want to get involved in Applicant's case and opposed the subpoena to testify in court. Counsel testified she was concerned about what the female passenger would say on the stand based on her opposition to the subpoena, so she opted not to have the female passenger testify at trial. Counsel testified Applicant did not give her any leads to investigate.

Counsel testified she did not have any objections to the jury charge at the time of Applicant's trial or at the time of the PCR hearing. Counsel testified she believed she had adequate

time to prepare for trial. Counsel testified she discussed the elements of the charges and the possible sentence. Counsel testified she discussed her trial strategy and defenses with Applicant at length. Counsel testified she discussed the State's evidence with Applicant as well as his constitutional rights. Counsel testified she does not typically move for a mistrial after the court overrules an objection. Counsel further testified that she did not think a mistrial would have been warranted after the comment made by the solicitor on page 204, and she did not think the Court would have granted a mistrial had she asked for one because the standard for warranting a mistrial is high.

APPLICABLE LAW

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "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. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. *Id.* at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's

performance was deficient. *Id.* Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." *Id.* (quoting *Strickland*, 466 U.S. at 688 (1984)). 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.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. 668.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

1. *Failure to Investigate*

Failure to Investigate, Generally

“[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” *Walker v. State*, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014)). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

Failure to Investigate Applicant’s Case

Applicant alleges Counsel was ineffective for failing to sufficiently investigate Applicant’s case.

As mentioned above, Counsel testified she reviewed the evidence the State had against Applicant, including but not limited to, witness statements and surveillance video. Counsel also testified she interviewed the applicable witnesses including Applicant’s mother and the female passenger. Applicant testified he generally did not think Counsel did an adequate job at investigating his case, but could not identify what specifically Counsel failed to do regarding her investigation.

This Court finds Counsel’s testimony on this issue credible, while also finding Applicant’s testimony not credible. Counsel credibly testified she investigated Applicant’s case. Additionally,

Applicant has not provided any testimony or evidence showing what Counsel would have uncovered by way of additional investigation. Accordingly, Counsel was not deficient.

This Court further finds Applicant failed to meet his burden to show any resulting prejudice, which requires Applicant to show this Court what further information Counsel would have uncovered through additional investigation, and how any additional investigation would have changed the outcome of his trial. Accordingly, this allegation is denied and dismissed with prejudice.

2. *Failure to Object to Jury Charge*

Applicant alleges Counsel was ineffective for failing to object to the jury charge.

The standard of review for appellate purposes is to consider jury instructions as a whole, and “if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.” *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). Counsel testified she did not have any complaints about the jury charge at the time of Applicant’s trial, nor did she have any complaints about the jury charge after reviewing them prior to the PCR hearing. Although a charge conference was not held on the record, Counsel testified she received a strong armed robbery charge which is what she ultimately wanted for Applicant.

This Court finds Counsel’s testimony on this issue credible. As Counsel testified, the jury charge appears to be a standard jury charge and is legally correct. Counsel was able to obtain the strong armed robbery charge she sought for Applicant. Additionally, there is no legal obligation to hold a jury charge conference on the record. Accordingly, Applicant has failed to show this Court how Counsel was deficient.

This Court further finds Applicant failed to meet his burden to show any resulting prejudice, which requires Applicant to show this Court that an alleged deficiency regarding the

jury charge changed the outcome of his case. Accordingly, this allegation is denied and dismissed with prejudice.

3. *Counsel was ineffective for failure to move for a mistrial after impermissible comments made during the solicitor's closing argument.*

Applicant alleges Counsel was ineffective for failing to move for a mistrial after she objected to the following statement made by Fleming:

“I ask you to return a verdict that speaks the truth to [Applicant] and to anyone else out there who would bring a deadly weapon into a place of business threatening the safety and lives of clerks and customers.”

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Cooper*, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. *State v. Beckham*, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). “A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons.” *State v. Patterson*, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct.App.1999). “Whether a mistrial is manifestly necessary is a fact specific inquiry. ‘It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.’ ” *State v. Rowlands*, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct.App.2000) (quoting *Gilliam v. Foster*, 75 F.3d 881, 895 (4th Cir.1996)). The trial court should exhaust other methods to cure possible prejudice before aborting a trial. *State v. Council*, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).

This Court finds Counsel's testimony as to this issue very credible. Counsel testified she objected to the solicitor's statement, but the judge overruled her objection. Counsel testified she typically does not move for a mistrial when the court overrules her objection. Counsel testified she did not believe the comment warranted a mistrial and she did not believe the court would grant a mistrial had she asked for one. This Court finds Counsel was not deficient as she appropriately objected to the solicitor's comment and the court overruled her objection. This Court further agrees with Counsel that the comment did not rise to the high threshold warranting a mistrial. Accordingly, Counsel was not deficient for failing to request a mistrial.

Furthermore, this Court finds Applicant has failed to meet his burden of proof as to prejudice, as Applicant has not shown how any alleged deficiency regarding Counsel's alleged failure to request a mistrial changed the outcome of his trial. Accordingly, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief pursuant to the Uniform Post Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10 to -160. Counsel was not deficient in any manner regarding her performance before or during trial, nor was Applicant prejudiced by Counsel's representation. Accordingly, all allegations are denied and dismissed with prejudice.

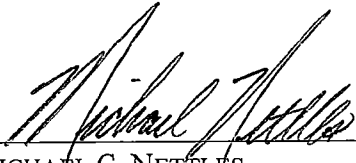
Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v. State, 305 S.C. 453, 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. Further, 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 Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED.



MICHAEL G. NETTLES
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

2-5-, 2020.

\$1.80⁰
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Clerk of Court
Supreme Court of South Carolina
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Columbia, SC 29211