STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



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Certiorari to Aiken County

Courtney Clyburn Pope, Circuit Court Judge

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WILLIAM MCCLADDIE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001979

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# SUPPLEMENTAL APPENDIX

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ATTORNEYS FOR RESPONDENT

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| STATE OF SOUTH CAROLINA<br>COUNTY OF AIKEN | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE SECOND JUDICIAL CIRCUIT |
| William H. McCladdie, #364614,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | ) | 2015-CP-02-02458<br><br>**AMENDED RETURN** |

Respondent, making its amended return to the application for post-conviction relief filed October 19, 2015, would respectfully show this Court:

**I. Procedural History**

William McCladdie (Applicant) was indicted during the July 2015 term of the Aiken County Grand Jury for first –degree burglary (2015-GS-02-01103); possession of tools capable of being used in crime (2015-GS-02-0104); possession of a stolen vehicle (2015-GS-02-01105). Assistant Public Defender Michael B. McMillian represented Applicant. On July 8, 2015, Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III. Applicant was found guilty as indicted and Judge Early sentenced Applicant to a fifteen year term of imprisonment for first-degree burglary, a five year term of imprisonment for possession of tools capable of being used in a crime, and a ten year term of imprisonment for possession of a stolen vehicle with all sentences running concurrently.

Applicant subsequently filed a notice of appeal. On August 19, 2015, the South Carolina Court of Appeals dismissed the notice of appeal for untimely service. The remittitur was returned to the circuit court on September 28, 2015.

On October 19, 2015, Applicant filed an application for post-conviction relief alleging

the following grounds:

1. Ineffective assistance of counsel
    a. Failed to file appeal in time.
2. Subject matter jurisdiction
    a. Sham indictments
3. Illegal sentence
    a. Sentence exceeds and or does not coincide with charge.

Respondent made its return on December 18, 2015, and requested that an evidentiary hearing be held.

Respondent subsequently consented to Applicant's request for a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), and an order granting Applicant a White review and dismissing all other grounds with prejudice was signed by Judge Early, acting in his capacity as Chief Administrative Judge of the Second Judicial Circuit, and filed on August 22, 2016. No hearing was held.

Applicant subsequently filed a notice of appeal. Applicant then filed a Brief of Petitioner pursuant to White and a petition for writ of certiorari. In his petition, Applicant raised the following issues:

1. Whether the PCR court correctly granted Petitioner a belated direct appeal pursuant to State v. White, 263 S.C. 110, 208 S.E.2d 35 (1974), where the State consented to the request and the undisputed evidence showed that although trial counsel filed and served a notice of appeal, he failed to do so in a timely manner as required by Rule 203(b)(2), SCACR.
2. "Is Petitioner entitled to a remand for a determination of whether he knowingly, intelligently, and voluntarily waived his right to post-conviction relief claims independent of his request for a belated direct appeal."

Respondent made its return to the petition of writ of certiorari on July 26, 2017. The South Carolina Court of Appeals granted certiorari on September 24, 2018, and Applicant timely filed a brief on October 5, 2018.

On January 17, 2019, Respondent filed a motion for remand requesting the matter be

remanded back to the circuit court for a hearing to determine if Applicant knowingly, intelligently and voluntarily waived his other post-conviction relief claims. On March 21, 2019, the Court of Appeals issued an Order remanding Applicant's post-conviction relief case to the Aiken County circuit court in order to conduct a hearing to determine:

1) Whether [Applicant] knowingly, intelligently, and voluntarily waived his post-conviction relief claims other than his request for belated appellate review, and

2) Resolve any post-conviction relief claims the court determines were not knowingly, intelligently, and voluntarily waived.

Attached herewith and incorporated herein are Respondent's motion for remand, the return to petition of writ of certiorari, and the Order from the Court of Appeals remanding Applicant's case to the Aiken County circuit court. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

**II. Issues before the Court on Remand**

Pursuant to the order issued by the South Carolina Court of Appeals, the issues before the post-conviction relief court are as follows:

1. Whether [Applicant] knowingly, intelligently, and voluntarily waived his post-conviction relief claims other than his request for belated appellate review.

2. Resolve any post-conviction relief claims the court determines were not knowingly, intelligently, and voluntarily waived.

Respondent requests a hearing to determine whether Applicant knowingly, intelligently, and voluntarily waived the post-conviction relief claims other than his request for belated appellate review. If Applicant prevails on that issue, Respondent will request an evidentiary hearing into the other allegations in Applicant's post-conviction relief application be held at a later date.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JANELL H. GREGORY
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

April 9th, 2019

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF AIKEN<br><br><br>WILLIAM H. MCCLADDIE, #364614,<br><br>Applicant,<br><br>vs<br><br>STATE OF SOUTH CAROLINA,<br><br>Respondent. | IN THE COURT OF COMMON PLEAS<br><br>2015-CP-02-2458<br><br><br>AFFIDAVIT OF SERVICE BY MAIL |

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Amended Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Aimee J. Zmroczek, Esquire**
**A.J.Z. Law Firm, LLC.**
**Post Office Box**
**Columbia, South Carolina 29205**

DATED this the 9th day of April 2019.

Kaitlyn S. Slice, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF AIKEN

----------x

WILLIAM H. McCLADDIE,

Plaintiff,

vs.

STATE OF SOUTH CAROLINA,

Defendant.

----------x

Transcript of Record
2015-CP-02-2458

May 16, 2019

B E F O R E:

The Honorable J. Cordell Maddox, Presiding Judge

A P P E A R A N C E S:

Aimee J. Zmroczek, Esq.
Attorney for the Applicant

Janell H. Gregory, Esq.
Attorney for the State

Court Reporter: Bonnie Kelly

Transcribed by Bobbi Fisher, RPR, CET

I N D E X

WITNESS PAGE

E X H I B I T S

(None.)

P R O C E E D I N G S

(Whereupon, the following proceedings started at 1:12 p.m.)

THE COURT: This is McCladdie versus the State of South Carolina?

MS. GREGORY: Yes, Your Honor.

THE COURT: Okay. What's going on here?

MS. GREGORY: In July of 2015, Applicant was indicted for first degree possession of -- I'm sorry; burglary first degree, possession of tools capable of being used in a crime, and possession of a stolen vehicle.

July 8th, 2015, Mr. McCladdie proceeded to a jury trial before Judge Early and was found guilty as indicted. He was sentenced to 15 years on the burglary, five years on the possession of tools, and 10 years for possession of a stolen vehicle. He filed a notice of appeal, but that was dismissed for being filed untimely. And the remittitur was issued September 28, 2015.

On October 19th, 2015, Applicant filed a timely post-conviction relief application alleging the untimely appeal, subject matter jurisdiction, and the illegal sentence. We consented to the belated appellate review, and the order granting that dismissed his underlying PCR application, and Judge Early signed that in his capacity as Chief Administrative Judge on August 22, 2016.

Applicant filed a notice of appeal followed by a brief

from Petitioner pursuant to White v. State, and a petition for writ of certiorari. In his petition, Applicant raised the issue of whether he knowingly, intelligently, and voluntarily waived his right to the remaining post-conviction relief allegations.

Respondent filed a motion for remand on January 17th, 2019, requesting the issue be remanded back to determine whether an applicant knowingly, voluntarily, and intelligently waived his other PCR claims.

On March 21st, 2019, the Court of Appeals of South Carolina issued an order remanding Applicant's case. We are here today on that motion for this Court to determine whether he knowingly, intelligently, and voluntarily waived his PCR claims. And he is present and represented by Ms. Zmroczek.

THE COURT: Okay. Yes, ma'am.

MS. ZMROCZEK: Thank you, Your Honor. We would call Mr. McCladdie.

THE COURT: I tell you what. Just come on up. He's got to be sworn in, but y'all can just stand right there.

MS. GREGORY: Yeah, it will take a second.

THE CLERK: Place your left hand on the Bible and raise your right hand.

WILLIAM H. McCLADDIE,

the Applicant, after having been duly sworn, was examined and testified to as follows:

DIRECT EXAMINATION

BY MS. ZMROCZEK:

**Q** Mr. McCladdie, did you -- you and I talked about your PCR; right?

**A** Yes, ma'am.

**Q** And one of the issues was that the appeal was filed late; correct?

**A** Absolutely.

**Q** And when we -- when -- and we had numerous conversations, and I think through email with the then-Assistant Attorney General; right?

**A** Right.

**Q** And we had a -- they had agreed to grant that appeal. Was it your intention to waive the rest of your PCR claims at that time?

**A** No.

**Q** Okay. Thank you.

**A** I ain't trying to waive nothing. I -- no.

**Q** Okay. Thank you.

THE COURT: It appears, technically, what happened is you just got caught in a paperwork mess-up.

THE APPLICANT: Exactly, Your Honor.

THE COURT: So you never intended to waive your --

THE APPLICANT: None of that. Because my PCR issues was something serious. That's -- yeah, I didn't waive none of

that.

THE COURT: All right. Well, the Court of Appeals -- obviously, I just saw this order. I'm going to find that he did not knowingly and voluntarily waive his PCR pursuant to this -- I don't know how we're going to say that -- he's ordered from the Court of Appeals so we'll allow you to proceed with that.

THE APPLICANT: Okay. Because I got everything in my head. I know it.

MS. GREGORY: Well, that will be another day. We're not going to do that today.

THE COURT: Let me ask you this: Where are you -- this has nothing to do with your case. Where are you incarcerated at?

THE APPLICANT: Now, they got me at Broad River because -- I mean, at Kirkland because I was jumped on the last part of March by eight guys, inmates, because I'm not old enough to be with the old school, and I'm not young enough to be in no gangs. So I got jumped by eight -- boy jumped and hit me with a lock and broke my jaw in two places.

THE COURT: Really?

THE APPLICANT: Yes, sir. They did that.

THE COURT: How old are you?

THE APPLICANT: I'm 50. And I ain't never been in no trouble.

THE COURT: And I'm going to tell you, when I hit 50, that kind of feels old. So go ahead and tell them I said (indiscernible).

THE APPLICANT: Yes, sir.

THE COURT: All right. Good luck to you, man.

THE APPLICANT: And I appreciate you, Judge.

THE COURT: Sure. No, I gotcha.

MS. GREGORY: Thank you, Your Honor.

(At 1:15 p.m., the above hearing concluded.)

CERTIFICATE OF TRANSCRIBER

CASE/NO.: McCladdie vs. State

2015-CP-02-2458

DATE OF PROCEEDING: May 16, 2019

COURT REPORTER: Bonnie Kelly

I, Bobbi J. Fisher, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

Bobbi Fisher

Bobbi J. Fisher, RPR, CET

NCRA Registered Professional Reporter (RPR)

AAERT Certified Electronic Transcriber No. CET-1148

Prepared: August 11, 2020

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| STATE OF SOUTH CAROLINA<br>COUNTY OF AIKEN | ) | IN THE COURT OF COMMON PLEAS<br>SECOND JUDICIAL CIRCUIT |
| William McCladdie,#364614,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | ) | 2015-CP-02-02458<br><br>**ORDER OF GRANTING FULL POST-CONVICTION HEARING** |

This matter comes before the Court by way of a remand from the South Carolina Court of Appeals for this Court to determine whether Applicant knowingly, intelligently, and voluntarily waived his post-conviction claim other than his request for a belated appellate review regarding his PCR application filed on April 14, 2016. An evidentiary hearing was convened on May 16, 2019, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Aimee Zmroczek, Esquire. Respondent was represented by Assistant Attorney General Janelle H. Gregory, Esquire of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. The State did not present witnesses for this limited hearing. The Court had before it a copy of the Order from the South Carolina Court of Appeals, plea transcript, the records of the Aiken County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

## I. PROCEDURAL HISTORY



Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was indicted by the July 2015 term of the Aiken County Grand Jury for first-degree burglary (2015-GS-02-01103),

possession of tools capable of being used in a crime (2015-GS-02-01104), and possession of a stolen vehicle (2015-GS-02-001105). Assistant Public Defender Michael B. McMillian, represented Applicant. On July 8, 2015, Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III. Applicant was found guilty as indicted and Judge Early sentenced Applicant to a fifteen (15) year term of imprisonment for first-degree burglary, a five (5) year term of imprisonment for possession of tools capable of being used in a crime, and a ten (10) year term of imprisonment for possession for a stolen vehicle with all sentences running concurrently.

Applicant subsequently filed a notice of appeal. On August 19, 2015, the South Carolina Court of Appeals dismissed the notice of appeal for untimely service. The remittitur was returned to the circuit court on September 28, 2015. On October 19, 2015, Applicant filed an application for PCR. Respondent made its return on December 18, 2015, and requested an evidentiary hearing. Respondent subsequently consented to Applicant's request for a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), and an Order granting Applicant a White review and dismissing all other grounds with prejudice was signed by Judge Early, acting in his capacity as Chief Administrative Judge of the Second Judicial Circuit, which was filed on August 22, 2016. No hearing was held.

Applicant subsequently filed a notice of appeal which was the subject of the Order from the South Carolina Court of Appeals issued on March 21, 2019.

## II. SUMMARY OF RELEVANT TESTIMONY

At the evidentiary hearing, Applicant testified that when he signed the waiver that his understanding was he was still getting a hearing on all the additional issues raised in his original PCR application.

## III. 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 hearing. This Court has further had the opportunity to observe the witness presented at the hearing, closely pass upon their credibility and weigh his testimony accordingly. After hearing the testimony this Court makes the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985). Applicant testified that he did not intend to waive his post-conviction claim other than his request for a belated appellate review regarding his PCR application filed on April 14, 2016. Therefore, this Court finds Applicant's waiver to a hearing on the full application was not freely, voluntary, and intelligently made. Accordingly, a hearing is warranted on the original and full PCR application.

## IV. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant is entitled to a full hearing on his original PCR applicant and he is entitled to appointed counsel for a full hearing. Therefore, a full hearing on his post-conviction application is granted.

**IT IS THEREFORE ORDERED:**

1. That a hearing on the application for Post-Conviction Relief is granted; and

2. That Applicant be appointed Counsel from the Circuit Contract attorney for PCR in the Second Circuit.

**AND IT IS SO ORDERED** this 4 day of June, 2019.

J. CORDELL MADDOX, JR.
Presiding Judge
Second Judicial Circuit

Anderson, South Carolina

**STATE OF SOUTH CAROLINA**
**COUNTY OF AIKEN**

**COURT OF COMMON PLEAS**
**SECOND JUDICIAL CIRCUIT**

| | |
|---|---|
| William H. McCladdie # 364614,<br>Applicant<br>vs.<br>State of South Carolina,<br>Respondent. | Case No.: 2015-CP-02-02458<br><br>**AMENDMENT TO PCR APPLICATION** |

The Applicant, William H. McCladdie (McCladdie), amends his PCR Application filed in the above captioned case as follows:

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

McCladdie amends his response to item 10 to add the following:

a. Ineffective assistance of trial counsel

11. State concisely and in the same order the facts which support each of the grounds set forth in (10):

McCladdie amends his response to Item 11 to add the following:

a. Ineffective assistance of counsel

i. In his preliminary jury instructions (Tr. p. 50) and in his final jury instructions (Tr. p. 250), the trial judge emphasized the truth-seeking function of the jury. This was error. See, State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012) Trial counsel failed to object to these instructions, and the error in giving these instructions was not preserved for appellate

review. Trial counsel gave McCladdie ineffective assistance of counsel because trial counsel failed to object to the trial court's instructions emphasizing the truth-seeking function of the jury.

ii, Trial counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer that alerted the officer's suspicions. (Tr. p. 99)

iii. Trial counsel failed to object to hearsay testimony from a police officer Regarding what a witness told the officer concerning the ownership of property. (Tr. pp. 129-130)

iv. Trial counsel actually elicited hearsay testimony concerning missing property. (Tr. p. 146)

v. Trial counsel failed to object to hearsay from a witness regarding what another witness told her. (Tr. p. 187)

vi. Trial counsel did not object to a police officer testifying that pry marks found on a door "were lining up" with a pry bar recovered from the scene where the officer was not qualified as an expert to give such testimony. (Tr. p. 122)

vii. Trial counsel did not request an instruction on direct and circumstantial evidence and did not join in the State's request. (Tr. p. 251)

The above deficiencies prejudiced Seawright in that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

19. State clearly the relief you seek in filing this application:

McCladdie amends his response to Item 19 to state the following:

Order vacating convictions and sentences.

Furthermore, McCladdie requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues

arise during the hearing that have not been specifically addressed in the Application or this Amended Application.

Respectfully Submitted,

**AIKEN & HIGHTOWER, P.A.**

**BY:** A. K. Aiken

**ARTHUR K. AIKEN**
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Columbia, SC 29205
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Email: art@aikenandhightower.com
**ATTORNEYS FOR APPLICANT**

Columbia, South Carolina
September 27, 2019

| STATE OF SOUTH CAROLINA<br>COUNTY OF AIKEN | COURT OF COMMON PLEAS<br>SECOND JUDICIAL CIRCUIT |
|---|---|
| William H. McCladdie #364614,<br><br>Applicant,<br><br>vs.<br><br>State of South Carolina<br><br>Respondent. | Case Number: 2015-CP-02-02458<br><br>**CERTIFICATE OF SERVICE** |

I certify that on September 27, 2019, I served the Applicant's Amendment to Application in this case on the government by delivering a copy of the Amendment to the Office of the Attorney General by mail addressed to Assistant Attorney General Brianna L. Schill, PO Box 11549, Columbia, SC 29211 and by email addressed to briannaschill@scag,gov

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Columbia, South Carolina
September 27, 2019

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF AIKEN | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE SECOND JUDICIAL CIRCUIT |
| William H. McCladdie, #364614,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | ) | 2015-CP-02-02458<br><br>**SECOND AMENDED RETURN** |

Respondent, making its amended return to the application for post-conviction relief filed October 19, 2015, would respectfully show this Court:

**I. Procedural History and Current Allegations**

William McCladdie (Applicant) was indicted during the July 2015 term of the Aiken County Grand Jury for first-degree burglary (2015-GS-02-01103); possession of tools capable of being used in crime (2015-GS-02-0104); possession of a stolen vehicle (2015-GS-02-01105). Then-Assistant Public Defender Michael B. McMillian represented Applicant. On July 8, 2015, Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III. Applicant was found guilty as indicted and Judge Early sentenced Applicant to a fifteen year term of imprisonment for first-degree burglary, a five year term of imprisonment for possession of tools capable of being used in a crime, and a ten year term of imprisonment for possession of a stolen vehicle with all sentences running concurrently.

Applicant subsequently filed a notice of appeal. On August 19, 2015, the South Carolina Court of Appeals dismissed the notice of appeal for untimely service. The remittitur was returned to the circuit court on September 28, 2015.

On October 19, 2015, Applicant filed an application for post-conviction relief alleging

the following grounds:

1. Ineffective assistance of counsel
    a. Failed to file appeal in time.
2. Subject matter jurisdiction
    a. Sham indictments
3. Illegal sentence
    a. Sentence exceeds and or does not coincide with charge.

Respondent made its return on December 18, 2015, and requested that an evidentiary hearing be held.

Respondent subsequently consented to Applicant's request for a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), and an order granting Applicant a White review and dismissing all other grounds with prejudice was signed by Judge Early, acting in his capacity as Chief Administrative Judge of the Second Judicial Circuit, and filed on August 22, 2016. No hearing was held.

Applicant subsequently filed a notice of appeal. Applicant then filed a Brief of Petitioner pursuant to White and a petition for writ of certiorari. Respondent made its return to the petition of writ of certiorari and a Brief of Respondent pursuant to White on July 26, 2017. The case was transferred to the South Carolina Court of Appeals pursuant to Rule 243(j) SCACR. The South Carolina Court of Appeals granted certiorari on September 24, 2018, and Applicant timely filed a brief on October 5, 2018.

On January 17, 2019, Respondent, in lieu of filing a brief of respondent, filed a motion for remand requesting the matter be remanded back to the circuit court for a hearing to determine if Applicant knowingly, intelligently and voluntarily waived his other post-conviction relief claims. On March 21, 2019, the Court of Appeals issued an Order remanding Applicant's post-conviction relief case to the Aiken County circuit court in order to conduct a hearing to

determine:

1) Whether [Applicant] knowingly, intelligently, and voluntarily waived his post-conviction relief claims other than his request for belated appellate review, and

2) Resolve any post-conviction relief claims the court determines were not knowingly, intelligently, and voluntarily waived.

On May 16, 2019, Mr. McCladdie had a hearing before the Honorable J. Cordell Maddox, circuit court judge. During that hearing, Mr. McCladdie testified he did not intend to waive his post-conviction relief allegations when he signed the consent order granting him belated appellate review. At the conclusion of that hearing, Judge Maddox granted Mr. McCladdie a full evidentiary hearing on his previously filed post-conviction relief application.

On September 21, 2019, Applicant filed an amended PCR application asserting the following claims:

(1) Ineffective Assistance of Counsel

a. "In his preliminary jury instructions (Tr. P. 50) and in his final jury instructions (TR. P. 250) the trial judge emphasized the truth-seeking function of the jury. Trial counsel failed to object to these instructions, and the error in giving these instructions was not preserved for appellate review...."
b. Trial Counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer that alerted the officer's suspicions."
c. Trial Counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer concerning the ownership of property."
d. Trial Counsel actually elicited testony concerning missing property.
e. Trial Counsel failed to object to hearsay from a witness regarding what another witness told her."
f. Trial counsel did not object to a police officer testifying that the pry marks found on a door were "lining up" with a pry bar recovered from the scene where the officer was not qualified as an expert to give such testimony."
g. "Trial Counsel did not request an instruction on direct and circumstantial evidence and did not join in the state's request."

**II. Ineffective Assistance of Counsel, Generally**

In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [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, the 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." Id.

**III. Response to Allegation of Ineffective Assistance of Counsel 1(a)**

First, Applicant cites to State v. Daniels[1] to argue that Counsel was ineffective for failing to object to the trial judge's jury instructions in which, according to Applicant, the trial judge emphasized the truth-seeking function of the jury. Respondent submits this allegation is without merit for several reasons.

During the trial judge's opening comments, he stated:

"As I told you earlier, you'll be the judges of the facts of this case. So it will be up to you to determine and judge the credibility or believability of the witnesses who testify in this case. You're all grown and mature and you've dealt, over your lives, with husbands, wives, children, husbands, employees, employers, friends; you know how to judge when someone is telling the truth. Please don't leave that common sense out here when you go into the jury room to deliberate. Use that common sense to determine what the facts are in the case. As I said, you'll take those true facts and apply them to the law as I give it to you, and you'll be in a position to render a verdict at the conclusion of this case."

(Trial Tr. 50).

During the trial judge's jury charge, the judge stated:

"Your civic duty is to go back and consider the evidence, deliberate on the evidence, determine what testimony convinces you of its truth, apply those true facts to the law as I've given it to you to determine whether or not the State has proven their case to you beyond a reasonable doubt..."

(Trial Tr. 250).

In State v. Aleksey, 343 S.C. 20, 538 S.E.2d. 248 (2000), the South Carolina Supreme Court held that jury instructions on reasonable doubt which also charge the jury to "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant, but nonetheless found there was no reversible error in the charge given there because the "seek the truth" language was given in conjunction with the credibility charge, and not with either the reasonable doubt or circumstantial evidence charge.

[1] 401 S.C. 251, 737 S.E.2d 473 (2012).

Recently, the South Carolina Supreme Court again considered the use of "truth seeking" language by the trial court in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018).[2] The Beaty Court concluded:

> [A] trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt. Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal.

Id. The Beaty opinion signified the first time the Court issued a general and blanket admonishment to the bench and bar that such "truth-seeking" language should be avoided at any point during the trial, but nonetheless found a harmless error analysis applied if such charges or commentary was given by the trial court.

In both Aleksey and Beaty, the South Carolina Supreme Court determined that while the trial court's use of "truth seeking" language was improper, the error was not significant enough to warrant reversal of the convictions. The same holds true in Applicant's case. Initially, it is important to note that at the time of Applicant's trial in 2015, the trial court's opening charge included truth-seeking remarks that were widely-used by the bench and was similar to the approved charges as prepared by the Supreme Court and given to the bench for reference. To find that trial counsel was constitutionally deficient for failing to object to something that was

[2] Applicant's trial took place in 2015, well before Beaty.

standard practice at the time of Applicant's trial and which the our appellate courts had not expressly advised the bench and bar not to use goes against the principles of Strickland and its progeny that counsel's actions be evaluated based on a standard of reasonableness at the time of an applicant's trial. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law."); see also Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law . . . " (citing Thornes v. State, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); Thornes, 310 S.C. at 309–10, 426 S.E.2d at 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

Applicant's reliance on State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), to argue that our Supreme Court had advised the bench to stop using truth-seeking language in 2012, is not dispositive, as the Court's admonition in Daniels focused on the trial court's use of language that the jury's duty was to return a verdict that is "just" or "fair", a different scenario than Applicant's case. See Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) ("Although the issue is not preserved, we instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. Moreover, to a lay person, the "all parties

involved" in a criminal case may well extend beyond the defendant and the State, and include the victim.").

Moreover, here, when "truth seeking" comments are viewed in conjunction with the record as a whole, the trial court properly advised the jury of the State's burden of proof and did not impermissibly shift the burden to Applicant. Because the jury instructions as a whole were proper, Applicant cannot establish any resulting prejudice and this Court's findings otherwise are improper. See Brown v. Stewart, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Ct. App. 2001) ("In reviewing jury charges for error, we construe the court's charge as a whole in light of the evidence and issues presented at trial. If the instructions of the trial court, construed as a whole, correctly state the law, there is no reversible error. To entitle an appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial, and the enumeration of hypercritical exceptions will not suffice to overthrow a jury's verdict." (internal citations omitted)). Importantly, the trial judge's comments were mentioned in the context of the jury's duty to evaluate the credibility of the testimony from the witnesses, not in the context of the burden of proof, which is a key distinction emphasized in Aleksy and Beaty. See Aleksy, 343 at 27-29.

Additionally, trial counsel repeatedly and effectively reminded the jury in his closing argument that the State firmly held the burden of proof and must establish beyond a reasonable doubt that Applicant was guilty. (Trial Tr. 232-34). Based on this, in conjunction with the proper jury instructions on the State's duty to prove Applicant's guilt beyond a reasonable doubt, Applicant cannot establish deficiency of counsel or prejudice.

**IV. Response to Remaining Allegations of Ineffective Assistance of Counsel 1(b)-1(g)**

Applicant asserts several other allegations of ineffective assistance of counsel, primarily pertaining to alleged hearsay testimony. Respondent submits Applicant can satisfy neither requirement of the Strickland test for these allegations of ineffective assistance of trial counsel. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

**V. Any Future Amendments and Invocation of Discovery Process**

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to *Love v. State*, Op. No. 27921 (S.C. Sup. Ct. filed Oct. 2, 2019) (Shearouse Adv. Sh. No. 39 at 14), or, alternatively, the State will request a continuance in the matter. See Love, at 24 (Kittredge, J., dissent) ("If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.").

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be

sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

**VI. Response to All Other Allegations**

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

**VII. Request for an Evidentiary Hearing**

WHEREFORE, having made its Return, Respondent requests that an evidentiary hearing be held as to the allegations of ineffective assistance of trial counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

BRIANNA L. SCHILL
Assistant Attorney General

By: Brianna L Schill
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January 17, 2020

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF AIKEN<br><br><br>WILLIAM H. MCCLADDIE, #364614,<br><br>Applicant,<br><br>vs<br><br>STATE OF SOUTH CAROLINA,<br><br>Respondent. | IN THE COURT OF COMMON PLEAS<br><br>2015-CP-02-2458<br><br><br>AFFIDAVIT OF SERVICE BY MAIL |

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Second Amended Return** in the above-captioned matter on the following person via hand-delivery:

**Arthur K. Aiken, Esquire- via hand delivery**
**Aiken & Hightower**
**2231 Devine Street, Suite 201**
**Columbia, South Carolina 29205**

DATED this the 21st day of January 2020.

Brianna L. Schill, Assistant Attorney General
For Respondent

State of South Carolina )
)
County of Aiken )

In the Court of Common Pleas
Second Judicial Circuit
2015-CP-02-02458

William McCladdie,

Applicant,

vs.

State of South Carolina,

Respondent.

Transcript of Record

January 21, 2020
Aiken, South Carolina

B E F O R E:

The Honorable Courtney Clyburn Pope, Judge

A P P E A R A N C E S:

Arthur K. Aiken, Esquire
Attorney for Applicant

Brianna L. Schill, Assistant Attorney General
Attorney for Respondent

Maryann S. Nevers, CVR-M-CM, RVR-M
Circuit Court Reporter
Certified Verbatim Reporter - Master
Certificate of Merit
Realtime Verbatim Reporter - Master

# I N D E X

Proceedings . . . . . 4

TRIAL TESTIMONY - WITNESS

William McCladdie,

Direct Examination by Mr. Aiken. . . . . 11

M. Bradley McMillian, Esq.,

Direct Examination by Ms. Schill . . . . . 15

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E X H I B I T S

| NO. | DESCRIPTION | I.D. | EVID. |
|---|---|---|---|

No exhibits marked during proceeding.

TRANSCRIPT OF RECORD

(Whereupon, the proceeding was commenced at 1:04 p.m.)

THE COURT: All right. Yes, ma'am.

MS. SCHILL: May it please the Court, Your Honor. The next case is *William H. McCladdie v. the State of South Carolina*, Case No. 2015-CP-02-02458. Your Honor, the procedural history is quite long, so I apologize.

But applicant was indicted during the July 2015 term of the Aiken County Grand Jury for first-degree burglary, possession of tools capable of being used in a crime, possession of a stolen vehicle. Then-Assistant Public Defender Michael B. McMillian represented applicant. Then on July 8th, 2015, applicant proceeded to a jury trial before the Honorable Doyet A. Early, III. Applicant was found guilty as indicted. And Judge Early sentenced applicant to a 15-year term of imprisonment for first-degree burglary, a five-year term of imprisonment for possession of tools capable of being used in a crime, and a 10-year term of imprisonment for possession of stolen vehicle, with all sentences running concurrently.

Applicant subsequently filed a notice of appeal. On August 19th, 2015, the South Carolina Court of Appeals dismissed the notice of appeal for untimely service. The remittitur was returned to the circuit court on September 28th, 2015.

On October 19th, 2015, applicant filed an application for postconviction relief, alleging various allegations. Respondent made its return on December 18th, 2015, and requested that an evidentiary hearing be held. Respondent subsequently consented to applicant's request for a belated review of direct-appeal issues pursuant to *White v. State*. An order granting applicant a *White* review and dismissing all other grounds of -- all other PCR grounds with prejudice was signed by Judge Early, acting in capacity as chief administrative judge of the Second Judicial Circuit and filed on August 22nd, 2016. No hearing was held.

Applicant subsequent -- subsequently filed a notice of appeal. Applicant then filed a -- a brief of petitioner pursuant to *White* and a petition for writ of certiorari. Respondent made its return and a brief of respondent pursuant to *White* on July 26th, 2017. The case was transferred to South Carolina Court of Appeals pursuant to Rule 243 of the South Carolina Appellate Court Rules.

The South Carolina Court of Appeals granted cert on September 28th -- excuse me -- September 24th, 2018. And applicant timely filed a brief on October 5th, 2018.

On January 17th, 2019, respondent, in lieu of filing a brief of respondent, filed a motion for remand, requesting the matter be remanded back to the circuit court for a hearing to determine if applicant knowingly, intelligently,

and voluntarily waived his other postconviction-relief claims. On March 21st, 2019, the Court of Appeals issued an order remanding applicant's postconviction-relief case to the Aiken County circuit court in order to conduct a hearing to -- to make those determinations.

On May 16th, 2019, Mr. McCladdie had a hearing before the Honorable J. Cordell Maddox. During that hearing, Mr. McCladdie testified that he did not intend to waive his postconviction-relief allegations when he signed the consent order. At the conclusion of the hearing, Judge Maddox granted Mr. McCladdie a full evidentiary hearing on his previously-filed postconviction-relief application.

And on September 21st, 2019, applicant filed an amended application, asserting the following claims: In his -- quote, in his preliminary jury instructions and in his final jury instructions, the trial judge emphasized the truth-seeking function of the jury. Trial counsel failed to object to these instructions, and the error in giving these instructions was not preserved for appellate review.

Trial counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer that alerted the officer's suspicions. Trial counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer concerning the ownership of property.

The fourth allegation is trial counsel actually elicited testimony -- hearsay testimony concerning missing property. Five, trial counsel failed to object to hearsay from a witness regarding what another witness told her. The sixth allegation is trial counsel did not object to a police officer testifying that the pry marks found on a door were lining up with a pry bar recovered from the scene where the officer was not qualified as an expert to give such testimony. Seven, trial counsel did not request an instruction on direct and circumstantial evidence and did not join in the state's request.

And applicant is present today and represented by Mr. Art Aiken, Esq. And I would just ask that they clarify for the record what the allegations are that they're going forward with.

THE COURT: Okay. Yes, sir.

MR. AIKEN: There -- there's only one allegation in the original postconviction-relief application that we are pursuing, and that is sham indictments. So with that addition, those are the operative allegations.

THE COURT: All right. Before we begin, I'd like to -- before -- are you calling Mr. McCladdie as your first witness?

MR. AIKEN: I -- I am, Your Honor.

THE COURT: Okay. I'm going to let you go ahead and

call him. And I'll -- I'll question -- I have some questions for him.

MR. AIKEN: Would you ---

THE COURT: But ---

MR. AIKEN: --- like to do that before I do that?

THE COURT: Yeah. Let's -- let's swear him in. And I ---

MR. AIKEN: Okay.

THE COURT: I want to question him ---

MR. AIKEN: Come on, Mr. McCladdie.

THE COURT: --- on the record.

MR. AIKEN: You want him on the stand?

THE COURT: Yeah. We can place him on the stand. He'll ---

MR. AIKEN: Okay.

THE COURT: --- be there.

MR. AIKEN: Go ahead and go -- get up on the stand, Mr. McCladdie.

(Whereupon, the witness came forward.)

WILLIAM MCCLADDIE, having been first duly sworn, testified as follows:

DEPUTY CLERK OF COURT: Please take a seat in the witness box and state your full name for the Court.

THE APPLICANT: My name is William Herbert McCladdie.

THE COURT: Good afternoon, Mr. McCladdie.

THE APPLICANT: Yes, ma'am. Your Honor, I apologize for my appearance. But I've been actually drug through this. And I -- I hate that I come to your courtroom looking the way ---

THE COURT: No.

THE APPLICANT: --- I do.

THE COURT: Mr. McCladdie, no need to apologize. You're fine.

THE APPLICANT: Okay. Okay.

THE COURT: Okay? We just -- I need to ask you just a few questions for the record.

THE APPLICANT: Yes, ma'am.

THE COURT: Okay?

THE APPLICANT: Yes, ma'am.

THE COURT: All right. And when you answer -- because we want to take a good record of this. I want -- I want everyone to have the opportunity to hear that, what I'm asking you clearly and what your responses are. I don't want you to yell, but I want you to make sure that you are speaking into that microphone the same way. Because it's hard to hear you from the stand. You understand ---

THE APPLICANT: Yes.

THE COURT: --- Mr. McCladdie?

THE APPLICANT: Yes, ma'am. Yes, ma'am.

THE COURT: All right, sir. Let me first ask you:

You understand the purpose of a postconviction relief?

THE APPLICANT: Yes, ma'am.

THE COURT: All right. And that being said, I do know that you have an active sentence of 15 years; is that correct?

THE APPLICANT: Yes, ma'am.

THE COURT: Okay. And you indicated that you understand the purpose. But do you understand the full results of a PCR?

THE APPLICANT: Yes, ma'am.

THE COURT: Okay. So you understand that that will start your -- your case over in -- in its entirety?

THE APPLICANT: Yes, ma'am.

THE COURT: Okay. And so knowing that if the evidence that you present, that your attorney presents, is -- is persuasive enough to require me to permit to grant you a PCR, you still want to go forward with this PCR?

THE APPLICANT: Yes, ma'am.

THE COURT: All right. Okay. We just want to be clear of that. I ask -- I ask everybody who comes up here whether they understand the functions of the PCR. You've -- you've traveled quite a way, I -- is my understanding.

THE APPLICANT: Yes, ma'am.

THE COURT: Okay. But let me assure you that which way you go, we will have this full case, as it is your

constitutional right to have. Or if you say to us, "I've changed my mind; I wish to withdraw," no one will hold anything against you in that regard. These decisions are your own. You understand that, Mr. McCladdie?

THE APPLICANT: Yes, ma'am.

THE COURT: All right. And so you wish to proceed with your PCR hearing?

THE APPLICANT: Yes, ma'am.

THE COURT: All right. So we shall proceed. I will allow your attorney to begin questioning.

Yes, sir.

DIRECT EXAMINATION

BY MR. AIKEN:

Q Mr. McCladdie, just briefly, what the judge just went over with you, I have been over with you more than once; is that correct?

A Absolutely.

Q Okay. Now, in your original postconviction-relief application, you allege sham indictments. You were indicted on July the 2nd of 2015; is that correct?

A Yes, sir.

Q Okay. What -- what's the nature of your allegation about sham indictments?

A Well, I -- through me looking and reading and understanding the law -- because I didn't know anything

about the law until I got in here. But I read and looked it up for myself. I know that July 2nd was not a current term of court. And I don't see how they could -- they could've got a true-bill indictment on the 2nd. And then on Monday, on the 6th, they got another -- they saying that all the, you know, grand jurors are present upon their oath. I didn't understand that.

So -- and then, they wrote -- it was written it, not -- not stamped like everybody else's I've seen. It was written in, true-bill indictment. I didn't understand that. But ---

Q Now, the -- the judge will have these as part -- as part of the record in your case.

A Yes, ma'am.

Q Are you talking about the text on the back of the indictment?

A Yes.

Q Where it says: "At a court of General Sessions, convened on July 6, 2015, the grand jurors of Aiken County, present upon their oath"?

A Yes. And that ---

Q That ---

A --- was -- that was the same time that the judge was actually taking pleas that Monday.

Q All right.

A He'd asked me was I -- was I going to trial, what I was going do.

Q But the true-bill date was July the 2nd?

A Yeah, July the 2nd.

Q And -- and your issue is that was not during a term of general-sessions court?

A No, sir. Not in the -- in the Second Judicial Circuit. It's only January, May, and October that the general sessions and the grand jury is in. Any other time would've been unlawful me.

Q Did you check the court calendar or request ---

A Yes.

Q --- that the -- the ---

A I checked all that.

Q Court administration send you the court calendar?

A Yeah. I went -- I went -- I got that sent from the clerk of court. And then, I also was in the law library and I saw it from another -- well, I guess a inmate.

Q And that ---

A But I ---

Q --- that's how you confirmed there was no term of court during July the 2nd ---

A Yes, sir. And then ---

Q --- 2015?

A And then I -- I called also, because they would tell

you how much I've called them, how much I've written. They would know that. I called all over Aiken County. And nobody was working on July 2nd.

That's a couple days before the July 4th. Nobody was there. Nobody was -- no one answering no phones. So I just couldn't see a -- a -- a grand jury showing -- do a true-bill indictment.

MR. AIKEN: Your Honor, I have no further questions for Mr. McCladdie. The remainder of the allegations are founded upon what's in the actual transcript of the trial. So I don't see any need to go over all those with Mr. McCladdie. I'll go over this with you at the conclusion of the case.

THE COURT: Certainly.

MR. AIKEN: Or I can do it now, if you'd like for me to.

THE COURT: It's whatever your pleasure is.

MR. AIKEN: I -- I'll wait till the end, Judge.

THE COURT: Very good.

MR. AIKEN: Thank you.

THE COURT: Thank you.

Any cross-examination from the state?

MS. SCHILL: No, Your Honor.

THE COURT: All right. This witness may be excused. Thank you, Mr. McCladdie.

THE APPLICANT: I appreciate your time, Your Honor. And again, I apologize for the way I look.

(Whereupon, the witness exited the witness stand.)

(Off the record briefly.)

THE COURT: All right. Any further witnesses?

MR. AIKEN: Applicant rests, Your Honor.

THE COURT: Very good.

The state?

MS. SCHILL: Your Honor, the state would call Mr. McMillian.

THE COURT: All right.

(Whereupon, the witness came forward.)

BRAD MCMILLIAN, having been first duly sworn, testified as follows:

DEPUTY CLERK OF COURT: Please have a seat in the witness box and state your full name for the court.

THE WITNESS: My name is Michael Bradley McMillian, M-c-M-i-l-l-i-a-n.

DIRECT EXAMINATION

BY MS. SCHILL:

Q Hi, Mr. McMillian. Thanks for being here today. How long have you been practicing law?

A I was admitted in May of 2012.

Q Okay. And how much of your practice has been in criminal law?

A Exclusively criminal law.

Q All right. How did you become involved in the applicant's case?

A My first job after being admitted was with the public defender's office. I came to the public defender's office in Aiken in 2014. Mr. McCladdie's case -- I don't recall his arrest date. But he would've been one of the maybe first half-dozen to a dozen cases that I was appointed kind of shortly thereafter.

Q Okay. Do you recall the facts of Mr. McCladdie's case?

A I do. I -- I don't actually have access to the file anymore.

Q Okay.

A I'm not with the public defender's office. But to my recollection, Mr. McCladdie was charged with a burglary that occurred in Jackson. It's a -- a little house on Foreman Street or Foreman Drive. It was a house owned by the family. And an elderly lady there passed away. She had a grandson in town, a sister, I believe, who both were subpoenaed and testified at trial.

The night of burglary, officers responded to the house; found a car in the driveway that didn't belong. In searching the area around the house, they found Mr. McCladdie, I believe, laying on top of a pry bar.

Q Okay.
A And I think they found some -- think they found some stuff in the car that suggested that the car was Mr. McCladdie's. And they found some things from inside the house in the area of Mr. McCladdie.
Q Okay. Thank you. Could you -- this kind of goes hand in hand with the facts of the case. But could you kind of discuss for the Court the evidence that they had against Mr. McCladdie?
A Like I said, Mr. McCladdie was found -- my investigator -- my cocounsel and I went out to the house. The best I could tell, he was found out at the edge of the property line. The police described it as in the bushes. You know, I -- I didn't necessarily see where that could be the case.

But he was, they said, found laying on his stomach there. And he was laying on top of a pry bar. Like I said, they found the car in the driveway. There were some things from the victim that the victim's grandson or -- or son and sister identified as having come from inside the house in the car that was located in the driveway.

And I -- I don't recall offhand what the tie was to Mr. McCladdie. But there was some tie to -- between him and the vehicle as well.
Q Okay. Thank you. Did you discuss the elements and --

and your defenses with Mr. McCladdie?

A I did, at length.

Q Okay.

A Numerous times.

Q Okay. What was the defense's trial strategy in this case?

A I explained to Mr. McCladdie that I didn't think it was a particularly good idea to go to trial. We negotiated the case for a long time. The solicitor's office actually agreed to let him plead to burg-second, violent. Because there was some debate about whether the house was, in fact, a dwelling, because the occupant didn't actually live there.

Mr. McCladdie wanted to proceed to trial. Again, I -- I told him I didn't think that was necessarily the best plan. But we went to trial. I -- my biggest thought was that we would try to get this -- at a minimum, we would try to fight the -- the concept that this was a dwelling and let him be tried for burglary-second, violent.

We argued, you know, that he -- there was no evidence that he was inside the house, other than these things from inside the house that were arguably in his possession. There were some things -- like -- like I said, there were some things in his car and some things kind of in the neighborhood of where he was found.

Q Okay. And I -- I'm sure you heard a little bit about Mr. McCladdie's testimony regarding these indictments. Did you review the indictments?

A I did.

Q Did you see anything wrong with the indictments?

A I didn't. In particular, I looked back at the calendar. And the 2nd is a Thursday. And in Aiken County, the grand jury typically meets on a Thursday. And usually, it's the Thursday before the term of court.

So that would seem to fall right in line with -- with how they typically do the grand jury here. The indictments, like I said, we -- those indictments were presented the week before trial. We were aware of the allegations. We'd talked about the allegations.

We talked about them even that weekend when we met with him again. But those indictments went forward at the time because we were still actively negotiating the case.

Q Okay.

MS. SCHILL: Beg the Court's indulgence, Your Honor.

THE COURT: Certainly.

(Off The record briefly.)

MS. SCHILL: Those are the questions I have. Thank you.

THE COURT: All right. Cross-examination?

MR. AIKEN: Thank you, Your Honor. May it please the

Court.

CROSS-EXAMINATION

BY MR. AIKEN:

Q Hello, Mr. McMillian.

A Good afternoon. .

Q I'm Art Aiken. I represent Mr. McCladdie. I have some questions concerning the transcript. Have you reviewed the transcript of the trial?

A I did. I rushed up here after lunch. I didn't bring my copy.

Q I have one ---

A So if you've ---

Q --- right here.

A --- got some particular questions, I'd love to see it.

Q Yeah.

A But ---

Q I'll -- I'll show it to you.

A Yes, sir.

Q Here it is right here. Okay. Do you mind if I stand right here?

A No, not at all.

Q Okay. I don't -- I don't want to ---

A Well, I don't ---

Q --- invade ---

A --- want to ---

Q --- your space.
A --- get your -- I don't want to get your copy all out of order, so ---
Q Okay. Well, my first question is: On page 50 and 250 of the transcript, the judge emphasizes the truth-seeking function of the jury; is that correct? If you would look at 50. It should be the underlined part.
A He makes some mention of the truth. Yes, sir.
Q Okay. And go to 250, if you would.
A (Complied.)
Q Now, the -- the 50 was pretrial, right?
A Yes, sir.
Q Okay. Now, 250, I think, is -- is part of the final jury instructions; is that -- is that right?
A It certainly seems to be toward the end of this.
Q And if you could read what the judge said in that reference to the truth. You can start reading of the page before so you have the whole sentence.
A Yes, sir. Again, he -- he told him that it was their job to determine which testimony was the truth and apply those true facts to the law as I've given it to you.
Q All right. Now, those two charges about the truth were error, weren't they?
A I was unaware -- well, I had not read the end of the transcript, the -- the page 250, till today. I went back

and reread page 50 in preparation for this. I -- I didn't find the -- the -- the judge's instruction at -- instruction at page 50 to be error because it was -- it didn't seem to -- to follow that case exactly.

He just says that, you know, you deal with people in your everyday life. You know when you believe that they're telling the truth and when they're not. And it's your job to -- to decide that.

Q Well, what about 250, which is part of the final jury instruction? That -- that was error, wasn't it?

A I -- I don't know that it is. It doesn't seem much different. He simply tells them that they have to determine which testimony they believe and then to apply those facts to the -- the law as he gives it to them.

Q But you're aware of the cases that -- that counsel trial courts not to use instructions which emphasize the truth-seeking function of the jury. You're aware of those cases, aren't you?

A I am aware of those cases. Yes, sir.

Q All right. If you could go to page 99.

A Okay.

Q All right. And I'll help you with this. Excuse me. I'm not trying to crowd you here.

A Not at all.

Q Yeah, right -- right here. This is testimony from

Mike Hess, right?
A I believe so.
Q And he was the -- he was the main -- main investigating officer; is that right?
A Excuse me. I -- yes, sir. It looks like this is Mike Hess with Jackson Police Department. There were -- there were actually two. I think his son ---
Q There's a son ---
A --- Brent testified also. So ---
Q I see.
A But yes. This is -- this is Mike. This is ---
Q And in the -- the transcript -- in the transcript, in one of his answers, Mr. Hess says on page 99, "he -- he comes to me," referring to the -- a gentleman named Doug Clark; is that right?
A Correct.
Q And he says: "He comes to me and says, 'Officer Hess, I've got a vehicle at my deceased aunt's house that's backed up to the door and it's not supposed to be there.'" Right?
A Yes, sir.
Q Okay. That was hearsay, right?
A I -- I don't know that it is. I -- I don't know that it's necessarily offered for the truth of the matter asserted. I didn't object to it at the time because Doug

Clark was on their witness list and intended to testify.

A strategic decision on my part to -- to not object, I suppose, just because had they put Doug Clark up to say, "I went and told him that this car was at my aunt's house or grandmother's house and" -- that was -- that was a call on my part.

Q Did Doug Clark end up testifying?

A I don't recall that. But he was present in the courtroom for the majority of the trial.

Q Okay. If you could look at pages 129 at 130?

A 129?

Q 129 and 130.

A Okay.

Q Okay. Let's see. Yeah. Right -- right here on page 129, talking about State's Exhibit 43, which was a -- an exhibit in the trial, right?

A Yes, sir.

Q And then, it says the answer of the witness is: "This is the clock that Mr. Clark advised me that belonged to his grandmother, and it was inside the residence. We found this in the trunk of the vehicle."

Okay. That was hearsay, right?

A Again, I -- I don't necessarily know that it's offered for the truth of the matter asserted. So I -- I'm not sure that it qualifies there. But Mr. Clark was on the -- the

witness list, and it was a strategic decision not to object to kind of -- to keep the trial moving along.

Q Oh. You did -- but -- but you don't recall whether Mr. Clark actually did testify?

A I do not. But I know that -- I -- I know that he was on the state's witness list and -- and here in the courtroom.

Q Okay. Page 146?

A Okay.

Q Let's see here. It says -- this is your cross-examination, right? Isn't that your cross-examination?

A Yes, sir. That's what ---

Q Okay. And you were questioning Mike Hess, right?

A Right.

Q Okay. And in the course of questioning Mark -- Mike Hess, you actually elicited hearsay testimony of Ms. Clark, right?

A I asked: "Did you notice the missing -- missing washer?"

He answered, "I didn't. No sir. Not until" -- apparently, I asked: "I'm sorry?"

He answered: "Not until prior -- not until prior to." And then he said: "Yes, that -- that Ms. Clark came and told him that some other things were missing."

Q So -- so in the course of your questioning, you elicited hearsay testimony concerning what Ms. Clark said; is ---

A Well ---

Q --- that right?

A --- I didn't -- I didn't ask him what Ms. Clark said. That was just the answer -- his answer to my question.

Q All right. Page 187?

A One -- you said 187?

Q 187, yeah.

A This transcript goes from 186 to 193.

Q Okay. Well, maybe I'm missing that part. Huh.

THE COURT: Counsel, I have a full transcript, if you -- if you'd like ---

MR. AIKEN: If ---

THE COURT: --- to use ---

MR. AIKEN: If -- if you ---

THE COURT: --- that for ---

MR. AIKEN: --- don't mind ---

THE COURT: --- this purpose.

MR. AIKEN: --- Your Honor. I -- I don't know what happened to mine, that section of it. Thank you.

Q This is page 187 of the transcript. It's direct examination of Evelyn Clark.

A Right.

Q Right?

Okay. And if you look at lines 7 through 13, the witness says: "I remember that the phone rang and it was my grandma -- grandson, Doug. And he said, 'Grandma, you need to come down here. There's been a robbery at Nan's house.' He called her 'Nan.' I got dressed and started down there, and he was outside, waiting for me in the truck."

Okay? That information about what the other witness told Ms. Clark is -- is hearsay, right?

A He does certainly say -- or she does testify to what Doug told her.

Q Okay.

A Yes.

Q Okay. And you didn't object that?

A I didn't, because it -- the -- the way the question was phrased, I was essentially hearing it, not expecting her to say what Doug said. The question certainly wasn't designed to elicit a hearsay response.

Q Well, when that happens, you object after the testimony and you move to strike, right?

A Right.

Q So that was the logical thing to do under those circumstances. If the answer is unresponsive and is hearsay, after the answer is given, you object and move to

strike, right?
A Correct.
Q Okay. And you didn't do that?
A I didn't here.
Q All right. Page 122?
A Okay.
Q Lines 15 through 19?
A Okay.
Q This is Mike -- Mike Hess again, his direct examination?
A Right.
Q He says: "This is the entrance where he -- well, the pry marks itself were lining up." Is he referring to the pry bar and the marks on the door?
A Yes.
Q Okay. "I took the pry bar itself, went back to where the break-in was at, and lined the pry bar up with it and took a -- took a picture." Right?
A Right.
Q Okay. Now, Officer Hess wasn't qualified as an expert witness in toolmarks or anything like that, was he?
A No, sir.
Q Okay. Okay. 251 -- well, you didn't object to that testimony, right?
A Well, I didn't object to it because he's describing a

photo where the pry bar is -- I mean, it's zoomed in roughly the size of a page. And the pry bar is held up next to the frame of the door, where you could clearly see that the they -- they kind of matched up.

Q But you didn't object to it?

A I didn't.

Q All right. 251, please.

A Okay.

Q All right. You -- you did not request an instruction on direct and circumstantial evidence, did you?

A I did not.

Q All right. And the government -- government asked for one, right?

A Well, when I went back and reread this the other day, Ms. Hall had been with Judge Early in a number of trials and she thought that this charge was part of his typical charge. I -- I don't think that she actually requested one. But she just noticed that it was missing.

Q And she asked the judge to charge direct and circumstantial evidence, right?

A No, sir.

Q She didn't ask him to?

A Not from what I'm looking at right here.

Q Okay. Well, I think what you're looking at is the -- the -- the point at which you say you have no objections to

the charge, right?

Q No, sir. I'm -- I'm looking at Ms. Hall's response. (As read): "The only thing I noticed that wasn't part of your charge was the instruction on direct and circumstantial evidence. I thought that was part of your general charge, and that's why it wasn't requested."

Judge said: "I -- okay. I'll stand by it."

Q All right. And at that point, you didn't go -- come in and say, "Wait a minute. We want direct and circumstantial evidence too"?

A No, sir. In fact, I stood up said: "I don't have anything to add."

Q All right. So in other words, you didn't object to the judge's failure to give that charge?

A I didn't. Again, given the way that things -- the testimony had come out, I didn't know there was any distinct advantage to Mr. McCladdie by having the judge explain direct and circumstantial evidence. Like I said, the testimony that was presented was that he was found on the property, laying on top of the pry bar, having shown up in a vehicle that contained a bunch of things from inside that house. Having the judge highlight the direct and circumstantial evidence and how -- what inferences they could draw from that didn't seem to be to his benefit.

Q All right. Thank you, Mr. McMillian. I know that was

somewhat tedious, and I apologize for that.

MR. AIKEN: Judge ---

THE COURT: Thank you.

MR. AIKEN: --- thank you very much.

Q Thank you, sir.

A Certainly.

Q Thank you, Mr. McMillian. That's all I have.

THE COURT: All right. Any redirect?

MS. SCHILL: Yes, Your Honor.

REDIRECT EXAMINATION

BY MS. SCHILL:

Q Just to summarize, Mr. McMillian, do you object each and every single time you find something objectionable during a witness's testimony?

A No, ma'am.

Q Why not?

A Losing an objection, making a frivolous objection, plays in a negative light in front of the jury, especially the person's on their witness list or the testimony could be elicited another way. It's -- it's easier -- keeps everybody moving and doesn't -- doesn't have us arguing necessarily in front of the jury for no reason.

Q Okay.

MS. SCHILL: Beg the Court's indulgence, Your Honor.

THE COURT: Yes.

(Off the record briefly.)

MS. SCHILL: Those are all the questions I have. Thank you.

THE COURT: All right. Very well. Thank you, Mr. McMillian. This witness may be excused.

(Whereupon, the witness exited the witness stand.)

THE COURT: The state have any other witnesses?

MS. SCHILL: No, Your Honor. The state rests.

THE COURT: All right. All right.

MR. AIKEN: Just very briefly, Your Honor, I mean, our -- our -- our position as to what is in the transcript is -- is set forth in the amendment to the PCR application. The government has filed a second amended return in which they take the position that the law on -- the law prohibiting the trial judge from emphasizing the truth-seeking function of the jury is -- actually, according to their argument, was really decided after this trial in 2015.

Their position is that that law was really decided 2018 in a case called *State v. Beaty*, B-e-a-t-y. Our position is that before that, certainly going back to *State v. Aleksey* -- that's A-l-e-s -- e -- e-k-s-e-y -- that the Supreme Court had made it clear to trial judges -- and you would think, having made it clear in the case itself, made it clear to lawyers as well -- that it was objectionable

for the Court to give a charge the emphasizing the truth-seeking function of the jury. Really, the only reason why *Aleksey* did not result in the actual reversal of the conviction in that case is because the truth-seeking-function charge was given as part of the credibility charge and not part of the -- a reasonable-doubt or circumstantial-evidence charge.

This case is different than *Aleksey* in that the truth-seeking-function charge in this case, the most problematic one, was given during the final instructions to the jury. And that charge -- the charge says: "Your civic duty" -- on page 250 toward the top -- "your civic duty is to go back and consider the evidence, deliberate on the evidence, determine what testimony convinces you of its truth, apply those true facts to the law as I've given it to you to determine whether or not the state has proven their case to you beyond a reasonable doubt."

The problem with that, Your Honor, is you're telling the jury to find the truth. And then, in -- in the same breath, you're saying you've got to find -- you -- you have to determine whether this has been proven by proof beyond a reasonable doubt. That's the problem in a nutshell of the charges emphasizing the truth-seeking function of the jury.

It undermines the rest of the message you're trying to give to the jury, which is that you must find to find -- to

find this gentleman guilty, you must find him guilty by proof beyond a reasonable doubt. There's a difference between finding what's true, which suggests a preponderance-of-the-evidence-weighing approach, rather than a proof-beyond-a-reasonable-doubt-weighing approach.

So that's a long way to get around to this point. *Aleksey* established that it was not correct. Maybe in that case it wasn't significant enough of an error to result in reversal. But *Aleksey* makes clear in 2000 that you can't give those charges to the jury, certainly not in the final instructions to the jury.

The remainder of our argument, Your Honor, is encapsulated in the -- in the various allegations in the amendment to the PCR application. We just point out, Your Honor, that after a long period of uncertainty, our appellate courts have all but decided the issue of whether cumulative error can be relied upon to establish prejudice. And my position is that has been decided in favor of the applicant and that, in fact, cumulative error -- in other words, an aggregation of all the errors in a trial -- can -- can be used to determine whether the applicant has been prejudiced.

Thank you, Your Honor.

THE COURT: Thank you.

MS. SCHILL: Yes, Your Honor. The state takes the

position that the *Beaty* case is the case that says that judges in the charges cannot discuss the truth-seeking function of the jury. But even more than that, this is not like the *Daniels* case at all. The -- the -- the case in *Daniels* discussed a -- a, quote, fair a just verdict, a -- a blanket "your job is to find a fair and just verdict," not truth-seeking. There was no truth in this *Daniels* case. And I think that's a key distinction.

Also importantly, all -- as *Aleksey* and *Beaty* and, I think, even *Daniels* alluded to is that it -- it matters where in the instructions that you -- they use the truth-seeking aspect, or truth. And here, he's talking about the credibility of witnesses: Your job is to sit and listen to the testimony and see who you believe.

And he uses truth and -- and credibility there in that context, not in the burden of proof or anything like that. As was the case -- that's what happened in *Beaty*. And regardless, as *Aleksey* and *Beaty* found -- and they also found that although the comment was improper, that due to the overwhelming evidence and -- and other aspects of the case, they still found against the defendant.

And here, I think there's pretty overwhelming evidence. He was found on top of a crowbar outside of a home that was burglarized, a home which had the car backed into it that had items that clearly belonged to him. So I

think it's pretty clear there.

And also, *Aleksey* and -- and *Beaty* discussed the importance of the instructions as a whole. And -- and they had said that the judge's instructions generally were generally the generic ones that are used in these cases. And that's the case here as well. It seems to be they're pretty standard.

And so for those reasons, Your Honor, I don't think *Daniels* applies. It's -- it's not the case that said do not use the truth. As I said, it -- it's -- they've more talked about the just and fairness of finding a verdict in *Daniels*.

And I think -- and this was obviously before *Beaty*. So -- and as I said, the -- this isn't a general, blanket, truth-seeking comment. It was in the context of credibility. That's all, Your Honor.

THE COURT: All right.

MS. SCHILL: Well, I guess -- and also while I'm here -- as far as the -- the hearsay allegations, I don't think any of them, even in -- even combined in totality, are of any importance. And he has to -- applicant has to prove that the outcome of the case would've been different. And he simply has not alleged that and cannot allege that, frankly. Because at the end of the day, there was just overwhelming evidence.

And the objections would've been, as Mr. McMillian put it, very nitpicky. And I think he give very smart and strategic reasonings for not objecting every time there's something objectionable. Thank you.

THE COURT: All right. Thank you.

All right. I'll take some time to read over the transcripts and all the arguments located within the applicant's application and the returns. And I will let you know by the end of the week what my decision has been and who I need to submit an order, if I don't write one myself. Okay? All right.

MS. SCHILL: Thank you.

THE COURT: Thank you.

MR. AIKEN: Thank you, Judge.

(Whereupon, the proceeding was concluded at 1:53 p.m.)

**--- END OF TRANSCRIPT OF RECORD ---**

**CERTIFICATE**

I, the undersigned Maryann S. Nevers, CVR-M-CM, RVR-M, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Circuit Court for Aiken County, South Carolina, on the 21st day of January, 2020.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

Maryann S. Nevers, CVR-M-CM, RVR, RVR-M
Official Court Reporter

Columbia, South Carolina
July 1, 2020

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| STATE OF SOUTH CAROLINA<br>COUNTY OF AIKEN | IN THE COURT OF COMMON PLEAS<br>FOR THE SECOND JUDICIAL CIRCUIT |
| William H. McCladdie, #364614,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | 2015-CP-02-02458<br><br>**ORDER OF DISMISSAL** |

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed on October 19, 2015, by William McCladdie (Applicant). An evidentiary hearing into the matter was convened on Tuesday, January 21, 2020, at the Aiken County Courthouse. Applicant was present at the hearing and represented by Arthur Aiken, 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. Michael McMillian, former Assistant Public Defender of the Second Circuit Public Defender's Office (Trial 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.

## FACTUAL BACKGROUND

Six weeks before the crime occurred, Margaret McDaniel (McDaniel) passed away. (Trial Tr. 165.) In her will, McDaniel passed the title to her home to her sister, Evelyn Clark (Clark) (Trial Tr. 195-196.) The water and electricity were transferred into Clark's name (Trial Tr.170) and remained on and running at the house, and the yard continued to be cut and maintained after Clark took possession of the home. (Trial Tr. 165-166.) Although Clark had not yet moved into

the home on at least one occasion before the crime, Clark stayed the night at the house. (Trial Tr. 166-167; 170; 196.)

On February 20, 2015 at 11:55 p.m., Officer James Michael Hess (Officer Hess) of the Jackson Police Department responded to a call about an unauthorized vehicle parked at Clark's house. (Trial Tr. 99.) Upon arrival to the residence, Officer Hess noticed a vehicle parked in the driveway of the home with a warm engine, as if it had been freshly parked. (Trial Tr. 100.) He checked around the house for signs of forced entry and noticed a window that had been forced open. (Trial Tr. 101.) After calling for backup, Officer Hess parked his patrol car across the driveway so that the vehicle could not leave. (Trial Tr. 101.) When backup arrived, another officer spotted Applicant, who was found hiding in the bushes in the backyard of the home. (Trial Tr. 103-104.) The officers handcuffed and stood Applicant up, and beneath his body they found a crowbar. (Trial Tr. 104.) Officer Hess testified the house had been burglarized and the crowbar or "pry bar" lined up to the markings of the door that had been pried open. (Trial Tr. 106.)

In the pat-down and search incident to arrest of Applicant, the officers found in his pockets a flashlight, a pocketknife, and a key to the vehicle that was parked in the driveway of the house. (Trial Tr. 106-107.)[1] Upon an inventory search of the vehicle, officers found a wallet containing Applicant's driver's license, Social Security card, and credit card, as well as a butcher knife taken from the kitchen of the home, mail sent to the address of the burglarized home, and a checkbook that came from inside the home with the same address. (Trial Tr. 113.)

At trial, the State presented testimony from the investigating officers, as well as Clark, the owner of the home, and her grandson who called and reported the burglary to law enforcement. At

[1] The evidence showed the vehicle parked in the driveway was stolen from another property. Applicant was convicted at the conclusion of this trial to possession of a stolen vehicle.

the close of the State's evidence, Applicant moved for a directed verdict, arguing that the State failed to prove all the elements of first degree burglary because Clark did not live in the house at the time of the crime, so it was not classified as a dwelling. (Trial Tr. 201-208.) The trial court denied the motion, ruling the State presented sufficient evidence to allow a jury to determine the house was a dwelling under the statute. (Trial Tr. 211). The trial court ruled:

> [T]he person who owned the house had died, she has left it to Ms. Clark in her will, so Ms. Clark is at least the de facto owner of the house. The testimony was uncontradicted that she had spent at least one night in the house subsequent to her sister's death, which had occurred about six months [sic] prior to the burglary. The testimony was that she is, quote, working on it, unquote, about planning to move into the house at [redacted] Foreman Street. She said it's a slow process, I know, and there's some hang-ups but I want to be there; keep thinking maybe I'll feel her presence.
>
> She's maintained at her own expense the electricity and water since her sister's death, she pays for those bills. She maintains the yard through the help of a neighbor who continues to cut it and keeps it maintained. She maintains and continues to get mail, she or her sister, there at that house, checks on the mail daily. She's stayed there one night since the sister's death. She maintains personal items of clothes at [redacted] Foreman Street. In response to cross-examination, she admitted that she had personal belongings in that house and she is still considering moving into the house.

(Trial Tr. 213.)

## PROCEDURAL HISTORY AND ALLEGATIONS RAISED

Applicant was indicted during the July 2015 term of the Aiken County Grand Jury for first-degree burglary (2015-GS-02-01103), possession of tools capable of being used in crime (2015-GS-02-0104), and possession of a stolen vehicle (2015-GS-02-01105). Trial Counsel represented Applicant. Cassie Hall (Hall) and Jay Slocum (Slocum) of the Second Circuit Solicitors Office prosecuted the case. On July 8, 2015, Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III, circuit court judge. The jury found Applicant guilty as indicted and Judge Early sentenced Applicant to a fifteen year term of imprisonment for first-degree burglary, a five

year term of imprisonment for possession of tools capable of being used in a crime, and a ten year term of imprisonment for possession of a stolen vehicle with all sentences to run concurrently.

Applicant subsequently filed a notice of appeal. On August 19, 2015, the South Carolina Court of Appeals dismissed the notice of appeal for untimely service. The remittitur was returned to the circuit court on September 28, 2015.

On October 19, 2015, Applicant filed an application for post-conviction relief alleging the following grounds:

1. Ineffective assistance of counsel
    a. Failed to file appeal in time.
2. Subject matter jurisdiction
    a. Sham indictments
3. Illegal sentence
    a. Sentence exceeds and or does not coincide with charge.

Respondent made its return on December 18, 2015, and requested that an evidentiary hearing be held.

Respondent subsequently consented to Applicant's request for a belated review of direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), and an order granting Applicant a *White* review and dismissing all other grounds with prejudice was signed by Judge Early, acting in his capacity as Chief Administrative Judge of the Second Judicial Circuit, and filed on August 22, 2016. No hearing was held.

Applicant subsequently filed a notice of appeal. Applicant then filed a Brief of Applicant pursuant to *White* and a petition for writ of certiorari. Respondent made its return to the petition of writ of certiorari and a Brief of Respondent pursuant to *White* on July 26, 2017. The case was transferred to the South Carolina Court of Appeals pursuant to Rule 243(j) SCACR. The South Carolina Court of Appeals granted certiorari on September 24, 2018, and Applicant timely filed a brief on October 5, 2018.

On January 17, 2019, Respondent, in lieu of filing a Brief of Respondent, filed a motion for remand requesting the matter be remanded back to the circuit court for a hearing to determine if Applicant knowingly, intelligently and voluntarily waived his other post-conviction relief claims. On March 21, 2019, the Court of Appeals issued an Order remanding Applicant's post-conviction relief case to the Aiken County circuit court in order to conduct a hearing to determine:

1) Whether [Applicant] knowingly, intelligently, and voluntarily waived his post-conviction relief claims other than his request for belated appellate review, and

2) Resolve any post-conviction relief claims the court determines were not knowingly, intelligently, and voluntarily waived.

On May 16, 2019, Applicant had a hearing before the Honorable J. Cordell Maddox, circuit court judge. During that hearing, Applicant testified he did not intend to waive his post-conviction relief allegations when he signed the consent order granting him belated appellate review. At the conclusion of that hearing, Judge Maddox granted Applicant a full evidentiary hearing on his previously filed post-conviction relief application.

On September 21, 2019, Applicant filed an amended PCR application asserting the following claims:

(1) Ineffective Assistance of Counsel

a. "In his preliminary jury instructions (Tr. P. 50) and in his final jury instructions (Tr. P. 250) the trial judge emphasized the truth-seeking function of the jury. Trial counsel failed to object to these instructions, and the error in giving these instructions was not preserved for appellate review...."
b. "Trial Counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer that alerted the officer's suspicions."
c. "Trial Counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer concerning the ownership of property."
d. "Trial Counsel actually elicited testimony concerning missing property.
e. "Trial Counsel failed to object to hearsay from a witness regarding what another witness told her."
f. "Trial counsel did not object to a police officer testifying that the pry marks found on a door were "lining up" with a pry bar recovered from the scene where the officer was not qualified as an expert to give such testimony."

g. "Trial Counsel did not request an instruction on direct and circumstantial evidence and did not join in the state's request."

At the commencement of the trial, Applicant indicated they would also be going forward on an allegation of failing to object to "sham indictments."

## SUMMARY OF PCR TESTIMONY

*Applicant's Testimony*

Applicant testified he understood that he would start his case over if he were to be granted PCR relief. Applicant testified he read his indictments and believed the indictments were not legitimate because one of the indictments was dated July 2, 2015, and there was not a term of court held on July 2, 2015. Applicant testified he had contacted Aiken County and he believed that no one was in court that day, and therefore, the Grand Jury could not have met that day.

*Trial Counsel's Testimony*

Trial Counsel testified he has been admitted to practice law since 2012 and has practiced exclusively in criminal law. Trial Counsel testified Applicant's charges arose out of a car theft and burglary. Trial Counsel testified Applicant was found in the bushes on the edge of the property line of a home that was burglarized, and Applicant was found laying on top of a crowbar. Trial Counsel also testified items that belonged to Applicant were found inside of a stolen car that was backed in to the home that was burglarized.

Trial Counsel testified he discussed elements and defenses with Applicant extensively. Trial Counsel testified he did not think going to trial was a good idea, but Applicant wanted to pursue a trial. Trial Counsel testified he negotiated with the solicitor's office to get Applicant a guilty plea offer, but Applicant still wanted to take his case to trial. Trial Counsel testified he thought the best trial strategy was to prevent the jury from viewing Applicant's house as a dwelling due to the fact that the house was vacant at the time of the crime.

Trial Counsel testified he reviewed Applicant's indictments and did not see anything wrong with them. Trial Counsel testified he looked at the calendar and the July 2, 2015, date on the indictments was consistent with the fact that the Grand Jury typically meets on the Thursday before the term of court and the next week was a term of court. Trial Counsel testified he discussed this with Applicant.

After reviewing pages 50 and 250 of the jury trial transcript. Trial Counsel testified he did not believe the comments were error because the mention of the truth does not follow the "truth seeking cases" exactly, as the judge merely made a mention of the truth during his initial and final jury instructions.

PCR counsel then showed Trial Counsel the following excerpt from the trial transcript: "he comes to me and says, Officer Hess, I've got a vehicle at my deceased aunt's house that's backed up to the door, and it's not supposed to be there." (Trial Tr. 99). Trial Counsel testified he did not believe the testimony was given to prove the truth of the matter asserted, thus it was questionable as to whether the comment was hearsay. Trial Counsel testified that regardless, he made a strategic decision to not object to this statement because the declarant, Doug Clark (Doug), was going to testify at the hearing to the same facts.

PCR Counsel then showed Trial Counsel a portion of the trial transcript in which the State introduced State's Exhibit 43, a picture of a clock that belonged to the owner of the home; the same clock that was found in Applicant's vehicle on the night of the burglary. Regarding Exhibit 43, Officer Hess, testified, "This is the clock that [Doug] advised me that belonged to his grandmother and it was inside the residence. We found this in the trunk of the vehicle." (Trial Tr. 129). Regarding this testimony, Trial Counsel testified he did not believe the statement was offered to prove the truth of the matter asserted, so it was also questionable as to whether this

statement was actually hearsay. Trial Counsel testified that, regardless of whether the statement was offered to prove the truth of the matter asserted, he made a strategic decision not to object to the testimony because Clark was on the State's witness list and was going to testify about the clock that was missing from her home. Trial Counsel also stated he did not object to keep the trial "moving along," so as to not exhaust the jury.

PCR Counsel then questioned Trial Counsel regarding the testimony of Officer Hess:

Trial Counsel: Did you notice the missing dishwasher?

Officer Hess: I didn't [know], sir, not until prior.

Trial Counsel: I'm sorry?

Officer Hess: Not until prior to.

Trial Counsel: Not until prior to....

Officer Hess: Ms. Clark coming and telling me other things that were missing.

Trial Counsel: Okay. So there was a missing washer and a missing dry[er]?

Officer Hess: According to Ms. Clark, yes, sir.

(Trial Tr. 146).

Regarding the above testimony, Trial Counsel testified he did not purposefully elicit this testimony, but that the testimony given was simply the answer to his question. Trial Counsel testified that, once again, Clark was going to testify at trial anyway so he did not object to that statement.

Next, PCR Counsel questioned Trial Counsel regarding the following testimony of Clark on direct examination:

> "I remember the phone rang and it was my grandson Doug. And he said, Grandma, you need to come down here, there's been a robbery at Nan's house. He called her Nan. I got dressed and started down there, and he was outside waiting for me in his truck."

(Trial Tri. 187). Regarding this testimony, Trial Counsel testified he did not object because of the way the question was phrased. Trial Counsel testified he was not expecting her to say what Doug Clark said as the question was not designed to elicit a hearsay response. Trial Counsel testified he theoretically could have objected and moved to strike the testimony, but he did not.

Next, PCR Counsel asked Trial Counsel regarding the following testimony of Officer Hess:

> Hall: Okay. State's 16?
>
> Officer Hess: This is the entrance where he – well, the pry marks itself were lining up I took the pry bar itself, went back to where the break-in was at, and lined the pry bar with it and took a picture.
>
> (Trial Tr. 122).

Trial Counsel testified he did not object because Officer Hess was describing a photo that was zoomed in so far that the tool marks and the tool clearly matched up.

Trial Counsel testified the State initially asked for a charge on direct versus circumstantial evidence, but it was missing from the jury charge. Trial Counsel testified he did not request the jury charge himself because he did not want to highlight the fact that circumstantial evidence can be just as valuable as direct evidence, as the evidence in Applicant's case was circumstantial. Trial Counsel testified he thought a direct versus circumstantial charge would make it easier for the jury to convict Applicant. On re-cross examination, Trial Counsel testified that he generally does not object each time a witness testifies to something objectionable because, among other things, frequent objecting does not look favorable to a jury.

## 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 Aiken County Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the appellate records, 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 Object to "Truth" Comment in Jury Charges.*

Applicant alleges Trial Counsel was ineffective for failing to object to the following comments made during the preliminary and final jury charge:

> "As I told you earlier, you'll be the judges of the facts in this case. So it will be up to you to determine and judge the credibility or believability of the witnesses who testify in the case. You're all grown and mature and you've dealt, over you lives, with husbands, wives, children, husbands, employees, employers, friends; you know how to judge when someone is telling the truth. Please don't leave that common sense out here when you go into the room to deliberate..."

(Trial Tr. 50).

> "We're not here to punish any enemies or reward any friends. Your civic duty is to go back and consider the evidence, deliberate on the evidence, determine what testimony convinces you of its truth, apply those true facts to the law as I've given it to you to determine whether or not the State has proven their case to you beyond a reasonable doubt."

(Trial Tr. 250).

In *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d. 248 (2000), the South Carolina Supreme Court held that jury instructions on reasonable doubt which also charge the jury to "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant, but nonetheless found there was no reversible error in the charge given there because the "seek the truth" language was given in conjunction with the credibility charge, and not with either the reasonable doubt or circumstantial evidence charge.

Recently, the South Carolina Supreme Court again considered the use of "truth seeking" language by the trial court in *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018).[2] The *Beaty* Court concluded:

> [A] trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt. Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal.

*Id.* The *Beaty* opinion signified the first time the Court issued a general and blanket admonishment to the bench and bar that such "truth-seeking" language should be avoided at any point during the trial, but nonetheless found a harmless error analysis applied if such charges or commentary was given by the trial court. Trial Counsel testified the judge made "a mention of the truth" during his

[2] Applicant's trial took place in 2015, well before this *Beaty* decision.

jury charges. Trial Counsel testified he did not believe the comments were error because the mention of the truth does not follow the "truth seeking" cases exactly. This Court finds Counsel's testimony as to this issue very credible.

In both *Aleksey* and *Beaty*, the South Carolina Supreme Court determined that while the trial court's use of "truth seeking" language was improper, the error was not significant enough to warrant reversal of the convictions. This Court finds the same holds true in Applicant's case. At the time of Applicant's trial in 2015, the trial court's opening charge included truth-seeking remarks that were widely-used by the bench and was similar to the approved charges as prepared by the Supreme Court and given to the bench for reference. Once again, Applicant's trial took place in 2015, well before the blanket admonishment in 2018 from *Beaty*. To find that trial counsel was constitutionally deficient for failing to object to something that was standard practice at the time of Applicant's trial and which the our appellate courts had not expressly advised the bench and bar not to use goes against the principles of *Strickland* and its progeny that counsel's actions be evaluated based on a standard of reasonableness at the time of an applicant's trial. *See Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law."); *see also Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law . . . " (citing *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes*, 310 S.C. at 309–10, 426 S.E.2d at 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

This Court finds Applicant's reliance on *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), to argue that our Supreme Court had advised the bench to stop using truth-seeking language in 2012, is not dispositive, as the Court's admonition in *Daniels* focused on the trial court's use of language that the jury's duty was to return a verdict that is "just" or "fair", a fundamentally different scenario than Applicant's case. *See Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) ("Although the issue is not preserved, we instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. Moreover, to a lay person, the "all parties involved" in a criminal case may well extend beyond the defendant and the State, and include the victim.").

Moreover, here, when "truth seeking" comments are viewed in conjunction with the record as a whole, the trial court properly advised the jury of the State's burden of proof and did not impermissibly shift the burden to Applicant. Because the jury instructions as a whole were proper, this Court finds Applicant cannot establish any resulting prejudice. *See Brown v. Stewart*, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Ct. App. 2001) ("In reviewing jury charges for error, we construe the court's charge as a whole in light of the evidence and issues presented at trial. If the instructions of the trial court, construed as a whole, correctly state the law, there is no reversible error. To entitle an appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial, and the enumeration of hypercritical exceptions will not suffice to overthrow a jury's verdict." (internal citations omitted)). Moreover, the trial judge's comments were mentioned in the context of the jury's duty to evaluate the credibility of the testimony from the witnesses, not in

the context of the burden of proof, which is a key distinction emphasized in *Aleksy* and *Beaty*. *See Aleksy*, 343 at 27-29.

Additionally, Trial Counsel repeatedly and effectively reminded the jury in his closing argument that the State firmly held the burden of proof and must establish beyond a reasonable doubt that Applicant was guilty. (Trial Tr. 232-34). Based on this, in conjunction with the proper jury instructions on the State's duty to prove Applicant's guilt beyond a reasonable doubt, Applicant cannot establish deficiency of counsel or prejudice. Therefore, This Court denies and dismisses this allegation with prejudice.

2. *Failure to Object to Jury Charge/Request Circumstantial versus Direct Charge*

Applicant alleges Counsel was ineffective for failing to request a direct versus circumstantial 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 he did not request the direct versus circumstantial jury instructions because he did not want to emphasize to the jury that circumstantial evidence can be just as influential as direct evidence. Trial Counsel testified he believed such charge would make it more likely for the jury to convict Applicant as the evidence in Applicant's case was circumstantial.

This Court finds Counsel's testimony on this issue very credible. As Counsel testified, he strategically decided to not request the direct versus circumstantial evidence charge because it likely would have made the jury more likely to convict Applicant because the charge would have emphasized the fact that circumstantial evidence is just as valid as direct evidence. Additionally,

this Court finds Applicant's jury charge was overall legally correct. Accordingly, Applicant has failed to show this Court how Trial 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. *Failure to Object to Hearsay Testimony*

In his application for post-conviction relief, Applicant alleges Trial Counsel failed to object to hearsay testimony at various points throughout his trial.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Strickland*, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (quoting *Massaro v. United States*, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). *See also Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). Further, decisions primarily involving trial strategy and tactics may be made by trial counsel. *Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998). Examples of such decisions

include, "which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined." *Abney*, 408 S.C. at 48, 757 S.E.2d at 547 (Ct. App. 2014) (Pieper, J., concurring). What motions to file and "whether to put on evidence so as to preserve the final word in closing argument" are also strategic and tactical decisions to be made by trial counsel. *Id.*

**3(a) Trial Counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer that alerted the officer's suspicions**

Applicant alleges Trial Counsel was ineffective for failing to object to the following testimony from Officer Hess:

> "he comes to me and says, Officer Hess, I've got a vehicle at my deceased aunt's house that's backed up to the door, and it's not supposed to be there." (Trial Tr. 99).

Trial Counsel testified he did not believe the testimony was given to prove the truth of the matter asserted so it was questionable as to whether the comment was hearsay. Trial Counsel testified that regardless, he made a strategic decision to not object to this statement because the declarant, Doug Clark, was going to testify at the trial to the same facts. Trial Counsel testified that he generally does not object to everything that is objectionable because it could make his client appear unfavorable to the jury.

This Court finds Trial Counsel's testimony on this issue very credible. Even assuming the comment was objectionable hearsay, Trial Counsel gave a valid strategic reason for not objecting. Trial Counsel testified he does not object to every single objectionable statement as could make his client appear unfavorable to the jury. Trial Counsel also testified he knew Doug, was going to testify to the same information provided by Officer Hess.

Accordingly, this Court finds Applicant has failed to show how Trial Counsel was deficient in any way regarding his representation of Applicant. Applicant has also failed to establish any resulting prejudice from the alleged deficiency. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

**3(b) Trial Counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer concerning the ownership of property**

Applicant argues that Trial Counsel was ineffective for failing to object to the following testimony of Officer Hess: "This is the clock that Mr. Clark advised me that belonged to his grandmother and it was inside the residence. We found this in the trunk of the vehicle." (Trial Tr. 129).

Trial Counsel testified he did not believe the testimony was given to prove the truth of the matter asserted so it was questionable as to whether the comment was hearsay. Once again, Trial Counsel testified that regardless, he made a strategic decision to not object to this statement because the declarant, Doug Clark (Doug), was going to testify at the hearing to the same facts. As previously noted, Trial Counsel testified that he does not object to everything that is objectionable because it could make his client appear unfavorable to the jury.

This Court finds the testimony of Trial Counsel as to this allegation very credible. Trial Counsel Trial gave a valid strategic reason for not objecting to the testimony. Trial Counsel testified he does not object to every single objectionable statement as it could have a negative effect on his clients. Additionally, as Trial Counsel noted, Doug was expected to testify at trial regarding the missing items from Clark's home, and in fact did testify at his trial regarding the clock that was taken from Clark's home. (Trial Tr. 167). Accordingly, this Court finds Applicant has failed to show how Trial Counsel was deficient in any way regarding his representation of

Applicant. Applicant has also failed to establish any resulting prejudice from the alleged deficiency. Doug testified regarding the clock that was found in the stolen car Applicant was driving. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

**3(c) Trial Counsel actually elicited testimony concerning missing property**

Applicant alleges Trial Counsel was ineffective for eliciting hearsay testimony during Trial Counsel's cross-examination of Officer Hess, in which Officer Hess testified the following:

Trial Counsel: Did you notice the missing washer?

Officer Hess: I didn't [know], sir, not until prior.

Trial Counsel: I'm sorry?

Officer Hess: Not until prior to.

Trial Counsel: Not until prior to....

Officer Hess: Ms. Clark coming and telling me other things that were missing.

Trial Counsel: Okay. So there was a missing washer and a missing dry[er]?

Officer Hess : According to Ms. Clark, yes, sir.

(Trial Tr. 146).

Trial Counsel testified he did not purposefully elicit this testimony, but that the testimony given was simply the answer to his question. Trial Counsel testified that, once again, Clark, was going to testify at trial to the same information so he did not object to that statement. As previously noted, Trial Counsel testified that he does not object to everything that is objectionable because it could make his client appear unfavorable to the jury.

This Court finds Trial Counsel's testimony as to this allegation very credible. Trial Counsel gave a valid strategic reason for not objecting to the testimony. Trial Counsel testified he does not object to every single objectionable statement as it could have a negative effect on his clients. Additionally, as Trial Counsel noted, Clark was expected to give nearly identical testimony regarding the missing washer and dryer, and Clark did in fact testify regarding the washer and dryer. (Trial Tr. 193, 197). Accordingly, this Court finds Applicant has failed to show how Trial Counsel was deficient in any way regarding his representation of Applicant. Applicant has also failed to establish any resulting prejudice from the alleged deficiency as Clark testified to the same information regarding the missing washer and dryer. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

**3(d) Trial Counsel failed to object to hearsay from a witness regarding what another witness told her**

Applicant alleges Trial Counsel was ineffective for failing to object to the following testimony: "I remember the phone rang and it was my grandson Doug. And he said, Grandma, you need to come down here, there's been a robbery at Nan's house. He called her Nan. I got dressed and started down there, and he was outside waiting for me in his truck."
(Trial Tr. 187).

Trial Counsel testified he did not object because of the way the question was phrased. Trial Counsel testified he was not expecting her to say what Doug said as the question was not designed to elicit a hearsay response. Trial Counsel testified he theoretically could have objected and moved to strike, but he did not. As previously noted, Trial Counsel testified that he does not object to everything that is objectionable because it could make his client appear unfavorable to the jury.

This Court finds Trial Counsel's testimony as to this allegation very credible. Trial Counsel gave a valid strategic reason for not objecting to the testimony. Trial Counsel testified he does not object to every single objectionable statement because it could make his client appear unfavorable to the jury. Additionally, Doug testified to the same conversation and his own statements made when he told Clark about the burglary. (Trial Tr. 163). Fundamentally, the statements testified to by Clark and Doug merely articulate the basic premise of the trial - that Clark's home was burglarized - and the statements in no way implicate Applicant as the perpetrator. Accordingly, this Court finds Applicant has failed to show how Trial Counsel was deficient in any way regarding his representation of Applicant. Applicant has also failed to establish any resulting prejudice from the alleged deficiency as Doug testified to the same conversation as Clark testified to and the statements did not implicate Applicant as the suspect of the burglary. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

4. *Trial counsel did not object to a police officer testifying that the pry marks found on a door were "lining up" with a pry bar recovered from the scene where the officer was not qualified as an expert to give such testimony*

Applicant alleges Trial Counsel was ineffective for failing to object to the following testimony of Officer Hess:

> Hall: Okay. State's 16?
>
> Officer Hess: This is the entrance where he – well, the pry marks itself were lining up I took the pry bar itself, went back to where the break-in was at, and lined the pry bar with it and took a picture.
>
> (Trial Tr. 122).

Trial Counsel testified he did not object because Officer Hess was describing a photo that was zoomed in so far that the tool marks and the tool clearly matched up. This Court finds Trial Counsel's testimony on this issue very credible. This Court finds Applicant has failed to prove deficiency on behalf of Trial Counsel as he has failed to provide an expert at the evidentiary hearing showing the pry marks did not match.

Additionally, Applicant has also failed to establish any resulting prejudice from the alleged deficiency. As such, Applicant cannot meet his burden to show this Court that the outcome of his trial would have been different had Trial Counsel objected to Hess's testimony or had Trial Counsel utilized an expert witness at trial. *See* Rule 71.1(e), SCRCP (an applicant has the burden of proving the allegations in his or her application); *Caprood*, 338 S.C. at 109, 525 S.E.2d at 517 (an applicant has the burden of proving both deficiency and prejudice). *See also State v. Decker*, 275 Kan. 502, 507, 66 P.3d 915, 920 (2003) (internal citations omitted). Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Trial Counsel was constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

5. *Failure to Quash "Sham Indictments"*

Applicant alleges Trial Counsel was ineffective for failing to quash his indictments. Applicant testified he read his indictments and believed the indictments were not legitimate because one of the indictments was dated July 2, 2015, and there was not a term of court held on July 2, 2015. Applicant testified he had contacted Aiken County and he believed that no one was in court that day, and therefore, the Grand Jury could not have met that day. Trial Counsel testified he reviewed Applicant's indictments and did not see anything wrong with them. Trial Counsel testified he looked at the calendar and the July 2nd date on the indictments was consistent with the

fact that the grand jury typically meets on the Thursday before the term of court. Trial Counsel testified he discussed this with Applicant.

This Court finds Trial Counsel's testimony on this issue very credible, while also finding Applicant's testimony not credible. Trial Counsel testified he reviewed Applicant's indictments and believed they were valid indictments. This Court also does not see any irregularities in the indictments that would make them invalid. Accordingly, this Court finds Applicant has failed to show how Trial Counsel was deficient in any way regarding this allegation. Applicant has also failed to establish any resulting prejudice from the alleged deficiency. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, 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.**

Courtney Clyburn Pope

COURTNEY CLYBURN POPE
Presiding Circuit Court Judge
Second Judicial Circuit

March 6, 2020.