RECEIVED

Sep 01 2021

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Circuit Court Judge

Lower Court Case No. 2019-CP-40-05591

Arthur W. Macon ..... Petitioner,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Arthur W. Macon appeals the order of the Honorable Brooks P. Goldsmith, dated June 29, 2021, and filed July 9, 2021, dismissing his application for post-conviction relief. This appeal is taken from the order of Judge Goldsmith, dated August 10, 2021, and filed August 17, 2021, denying Mr. Macon's Rule 59(e), SCRCP motion.

Respectfully Submitted,

By s/*E. Charles Grose, Jr*

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Arthur W. Macon

September 1, 2021
Greenwood, South Carolina

Other Counsel of Record:

Lindsey Ann McCallister, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
lmccallister@scag.gov
(803) 734-3737 (phone)
(803) 734-4113 (fax)

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	Case No. 2019-CP-40-05591
Arthur William Macon, Applicant	)	
vs	)	ORDER DENYING MOTION
State of South Carolina Respondent	)	

This matter comes before the court upon Applicant's Rule 59(e), Motion dated July 16, 2021. Applicant requests that this Court withdraw its order of dismissal, grant post-conviction relief and remand this case for a new trial.

Both parties submitted brief's supporting their respective positions. After reviewing the brief's I find no reason to reverse the prior order and grant the relief requested by Applicant.

Accordingly, Applicant's Motion is hereby DENIED.

August 10, 2021

Brooks P. Goldsmith
Circuit Judge

ALAN WILSON
ATTORNEY GENERAL

July 15, 2021

E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood, SC 29646

Re: **Arthur Macon, #304226 v. State of South Carolina**
2019-CP-40-5591

Dear Mr. Grose:

Enclosed is a copy of the **Order of Dismissal** in the above-captioned case signed by The Honorable Brooks P. Goldsmith and filed with the Richland County Clerk of Court.

Sincerely,

Lindsey A. McCallister
Assistant Deputy Attorney General

LAM/kw
Enclosure(s)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Arthur W. Macon, #304226, Applicant, v. State of South Carolina, Respondent.	)	C.A. No. 2019-CP-40-5591 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Arthur Macon (Applicant) on October 4, 2019, and amended through counsel on December 23, 2019. Respondent made its Return on June 15, 2020. An evidentiary hearing into the matter convened April 16, 2021, via Cisco WebEx Meetings in accordance with the Chief Justice's administrative memorandum, *Court Operations*, dated September 14, 2020.[1] E. Charles Grose, Jr., Esquire, represented Applicant. Assistant Deputy Attorney General Lindsey A. McCallister and Assistant Attorney General Michael Davidson represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Kristy Goldberg, and Deputy Assistant Solicitor Daniel Goldberg, also testified.[2] This Court had before it a copy of the Richland County Clerk of Court's records regarding the subject conviction,

---

[1] See S.C. Sup. Ct. Memorandum dated September 14, 2020 ("Judges . . . have discretion to determine whether it is appropriate to conduct a hearing using remote communication technology. *Consent of the parties or counsel is not required.* Please use WebEx, the conferencing platform supported by the Judicial Branch." (emphasis added)). Nonetheless, Applicant indicated his consent to the use of the WebEx platform.

[2] The assistant solicitor who prosecuted the case, Richard Cathcart, was also present for the hearing, but neither Applicant nor the State chose to call him as a witness.

Applicant's records from the South Carolina Department of Corrections, the application and amendment, Respondent's return, the trial transcript, and Applicant's appellate records. After a review of the record and all evidence presented, for the reasons set forth below, this Court finds Applicant has failed to meet his requisite burden of proof and denies relief.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections. Applicant was indicted at the January 2013 term of the Richland County Grand Jury for one count of armed robbery and four counts of kidnapping (2013-GS-40-0579). Applicant was represented by Kristy G. Goldberg (Counsel). Assistant Solicitors Richard C.R. Cathcart, Sr., and Jeremiah J. Shellenberg, Jr., prosecuted the case.

Applicant's case proceeded to a jury trial September 29 through October 3, 2014, before the Honorable DeAndrea G. Benjamin. The jury convicted Applicant as indicted on the armed robbery charge and acquitted him on all four counts of kidnapping. Judge Benjamin sentenced Applicant to a term of twenty-three years' imprisonment.

Applicant filed a timely notice of appeal from his conviction and sentence. Glen Walters, Sr., and R. Bentz Kirby of Glenn Walters & Associates, PA, represented Applicant on appeal. Applicant raised the following issues:

1. Did the Trial Court commit error when it allowed Ricky Woodberry to testify that Jason Colon was schizophrenic, had a lobotomy, was passive and had the mind of a thirteen (13) year old in order to bolster Colon's testimony against [Applicant]?

2. Did the Trial Court commit error when it allowed Ricky Woodberry to testify about Jason Colon's medical condition as the testimony was hearsay and Woodberry lacked the necessary special knowledge, skill, experience or training to testify on this issue?

The case was submitted on briefs to the Court of Appeals on December 12, 2017. Thereafter, on January 17, 2018, the Court of Appeals affirmed Applicant's conviction and sentence. State v. Macon, Op. No. 2018-UP-031 (S.C. Ct. App. filed Jan. 17, 2018). Applicant petitioned for rehearing on February 16, 2018. The Court of Appeals denied the petition for rehearing on March 22, 2018.

Thereafter, Applicant petitioned for a writ of certiorari to the South Carolina Supreme Court on May 1, 2018. The Supreme Court denied certiorari on October 18, 2018. State v. Macon, S.C. Sup. Ct. Order filed Oct. 18, 2018. The case was remitted to the circuit court on November 6, 2018.

Applicant timely commenced this PCR action on October 4, 2019.

SUMMARY OF TESTIMONY AT TRIAL

Applicant's charges stem from a bank robbery at a TD Bank in Richland County on August 30, 2012. Applicant's cousin, Jason Colon (Colon), actually performed the robbery, and absconded with $6000.[3] Applicant was also arrested in connection to the crime.

At trial, Diana Williams (Diana) testified that after noticing police cars surrounding the TD Bank parking lot, she saw a man (later identified as Colon) running from that parking lot through the woods towards the adjacent Hilton Garden Inn. Tr. p. 215. Thinking the man looked suspicious, Diana called 911 as she followed him in her car. Tr. p. 216. Once Colon reached the Hilton, Diana observed him conversing with another man (later identified as Applicant) who was wearing a yellow shirt. Tr. p. 217. Applicant gestured towards the back of the parking lot "as if he was

[3] Multiple witnesses from TD Bank testified and identified Colon as the robber. It was undisputed at trial that Applicant never entered the bank.

telling the [suspicious man] to go back that way." Tr. p. 217. Applicant then got into a black truck and drove away. Tr. p. 219.

As he backed out, he nearly struck Diana's vehicle, and she observed his face. Tr. pp. 2180-19. Diana remained on the phone with 911 during this time, relaying the details of what occurred and a description of the truck and its driver. Tr. p. 224. She was only able to give a partial plate number because the truck's tailgate was down. Tr. p. 219. However, based on her description of the truck and driver, officers eventually stopped Applicant. Tr. p. 227. Diana, who was still in her car, drove past the traffic stop and identified Applicant as the person she saw the Hilton parking lot. Tr. pp. 228, 261-63.

Colon was also detained in the area and arrested. Investigator Jason Williams (Williams) testified he interviewed Colon upon Colon's arrest. He explained Colon appeared distressed and explained the interview "took kind of a while because it seemed like he wasn't all the way there." Tr. p. 279. Williams noted, in his opinion, Colon was "a little mentally challenged," but he was eventually able to take Colon's statement, and Colon confessed to committing the robbery. Tr. p. 279. Williams also testified that he searched Applicant's truck after it was impounded, and he discovered a police scanner which was tuned to Richland County's frequency. Tr. p. 277. Specifically, the police scanner was tuned to broadcast transmissions in the TD Bank vicinity. Tr. p. 278.

The State then proffered Ricky Woodberry's testimony. Woodberry was Colon's father. Tr. p. 286. Counsel objected to Woodberry's testimony about how Colon sustained a childhood head injury as hearsay, arguing Woodberry was not present when Colon sustained the injury. Tr. p. 292. Counsel objected to the remainder of Woodberry's testimony, that Colon was "easily led"

and "passive," as irrelevant and as improper character evidence offered to bolster Colon's credibility. Tr. p. 293. After the proffer, the trial court ruled Woodberry could testify about Colon's head injury and passive demeanor, but it precluded testimony that Colon was "easily led" or usually went along with whatever others wanted to do. Tr. p. 299.

Woodberry then testified that Colon was shot in the head by a stray bullet when they lived in Brooklyn, New York. Tr. p. 301. Counsel renewed her previous objection, which the trial court overruled. Tr. p. 301. Woodberry went on to explain the bullet entered Colon's temple and penetrated his frontal lobe. Tr. p. 301. Woodberry testified Colon was subsequently diagnosed with schizophrenia. Tr. p. 302. Woodberry also testified that Colon began talking to himself and became passive after the head injury. Tr. p. 302. Finally, Woodberry stated that Colon's condition improved with medication, but Colon retained the cognitive ability of a thirteen-year-old. Tr. p. 302.

Colon testified at trial and explained that he went to the TD Bank intending to cash his unemployment check. Tr. pp. 305, 313. However, Applicant gave him a toy gun and told him to go in the bank and demand money. Tr. p. 306. Colon recalled that Applicant had colored in part of the toy gun to make it look real. Tr. p. 306. Colon testified that after the robbery, he was supposed to meet Applicant in front of the hotel and get into the bed of Applicant's truck. Tr. p. 307. Colon's testimony waivered as to when Applicant gave him the gun and instructed him to rob the bank. On cross-examination, Colon indicated that he and Applicant planned the robbery months prior, and that was when Applicant gave him the gun. Tr. p. 314. However, on redirect, Colon suggested Applicant gave him the gun the day of the robbery. Tr. p. 315.

Investigator Kerry Johnson testified he interviewed Applicant after Applicant was arrested. Johnson explained that initially, Applicant denied anyone was with him while he was driving around the day of the robbery. Tr. p. 325. However, after Johnson confronted Applicant that Colon had identified him as his cousin who dropped him off outside the bank, Applicant modified his statement. Applicant claimed Colon was with him earlier in the day because he wanted a ride to "his homeboy's house," but Applicant instead dropped Colon off at the bus stop near the TD Bank. Tr. p. 327. Applicant denied any knowledge or involvement in the robbery.

ALLEGATIONS

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

a. Conflict of interest:
    1. Counsel had a conflict of interest and failed to disclose to Applicant that her husband is a Deputy Solicitor for the Fifth Circuit Solicitor's Office; and
    2. Counsel had a conflict of interest as a result of the flat fee contract agreement with the Commission on Indigent Defense that provided an incentive for Counsel to not seek a mistrial when the jury was deadlocked.
b. Pretrial:
    1. Failing to investigate, develop, and present evidence to establish that Applicant is not guilty of armed robbery; and
    2. Failing to object to an irregularity in the indictment when the body of the indictment states the grand jurors met on January 16, 2013, and the face of the indictment states the grand jurors returned a "true bill" on July 16, 2014.
c. During trial:
    1. Failing to object to the prosecutor's closing argument calling Applicant "a liar" at (Tr.368, ln. 9.); and
    2. Failing to object to the prosecution and prosecution witness improperly vouching for Jason Colon, who was the co-defendant and material witness for the State.
d. During jury deliberations:
    1. When the jurors sent a note (Court's Exhibit 4) stating, "We are not unanimous on any of the charges yet, how do you want us to

proceed?" and the Solicitor agreed, "They are deadlocked," Counsel failed to object to the trial court instructing the jurors to continue deliberating when that instruction did not instruct the jurors that "the verdict should represent the opinion of each individual juror," not "a mere acquiescence in the conclusion of his fellow[]" jurors, and the jurors in the majority should listen to the minority juror and consider the "correctness of a judgement which was not concurred in by the majority," Allen v. United States, 164 U.S. 492, 501 (1896);

2. When the jurors sent a note (Court Exhibit 5) stating, "Still at a stalemate," trial counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330;
3. When the jurors sent a note (Court Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330;
4. When the jurors sent a note (Court Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to object to the trial court's Allen charge that singled out the sole juror that was holding out for acquittal. Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001); State v. Hughes, 336 S.C. 525, 521 S.E.2d 500(1999);
5. When the jurors sent a note (Court's Exhibit 12) stating, "We have deliberated for the past 8 hours and we are still in the same position. Fatigue has now set in and we need refreshing," and the foreman of the jury informed the trial court the jurors were at an "impasse" and two or three jurors wanted to terminate deliberations, Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330.

e. Cumulative error:
   1. The cumulative effect of Counsel's errors, as set forth in 11(a)–(d), entitles Applicant to a new trial. Williams v. Taylor, 529 U.S. 362 (2000); Kyles v. Whitley, 514 U.S. 419 (1995).

At the evidentiary hearing, Applicant proceeded on the allegations in his amended application, which encompasses and expands upon the allegations in his original application, with the exception of the claim of failure to investigate (numbered 11(b)(1) in the amended application). To the extent the allegations in Applicant's original application can be construed as separate

grounds for relief, this Court finds Applicant waived and abandoned those grounds, and they are dismissed with prejudiced.

SUMMARY OF TESTIMONY AT EVIDENTIARY HEARING

Counsel testified she graduated from law school in 2005, after which she worked at the Richland County Public Defender's Office for three years before going into private practice. Counsel stated in her private practice she handled mostly criminal defense, PCR, and family court cases. Counsel has been working at the firm of Wilson, Jones, Carter, & Baxley since 2019.

Counsel stated she accepted the representation of Applicant from another attorney, Prentiss Shealey, who had been appointed to the case but had a conflict. Counsel explained she had recently opened her solo practice at the time, so when Shealey emailed to ask if she wanted the case, she accepted and got a consent order assuming the representation. Counsel testified before agreeing to take the case, she emailed her husband, Dan Goldberg, who worked at the Richland County Solicitor's Office, to ensure he had not had any involvement in the case because she would not have agreed to represent Applicant if he had.[4] Counsel testified Goldberg called her back to confirm he had not had any involvement up to that point and would not have any going forward. Counsel stated she did not speak to Applicant before accepting the appointment and obtaining a signed order. Counsel further testified she did not have any written documentation explaining to Applicant that her husband was a solicitor and waiving the conflict.

Counsel stated although she did not have anything in writing from Applicant regarding the conflict, it was her practice at the time to tell clients that she was married to a solicitor, but they

---

[4] Emails between Shealey, Counsel, and Goldberg were introduced as Applicant's Exhibit 14. The signed appointment order was introduced as Applicant's Exhibit 10.

should not expect any favors. Counsel also testified if Applicant had told her he had a problem, she would have conflicted herself out of the representation and passed it on to someone else. Counsel testified, at that time, her case files were stored in her law office, which was separate from her residence. Counsel stated Applicant's file was kept at her office, and her husband did not have access to it. Counsel further testified she did not discuss the specifics of Applicant's case with Goldberg because he was not involved, and she had no reason to do so. She stated he would have been aware when it was coming up for trial, but she did not have any substantive discussions about the case, negotiations, or any defenses or strategy. Counsel testified the case was assigned to Richard Cathcart, which is who she dealt with on the case, and then J.J. Shellenberg became involved towards the end.

Counsel reviewed the payment voucher[5] she submitted to Indigent Defense and testified she bill $3604.00 for her work on the case. Counsel explained that although she did not have a contract with Indigent Defense at the time, they still paid her for her work on the case at an hourly rate. Counsel testified she did not receive a flat fee, and if the case had ended in a mistrial, she would have sought and received permission to bill above the statutory maximum and would have been paid again for her work the second time. Counsel stated payment was not a consideration in her decision as to whether to move for a mistrial.

Counsel testified Applicant was charged with armed robbery and four counts of kidnapping. She explained the State's theory of the case was that Applicant had convinced his cousin to rob a bank and supplied the cousin with a fake, then dropped him off near the bank and

---

[5] Applicant's Exhibit 11.

waited in the area to act as a getaway driver. Counsel further explained Applicant denied the allegations insofar as being involved in any planning or knowing his cousin would rob the bank when he dropped the cousin off, although he admitted to being in the area with the cousin around the time of the robbery. Counsel stated the State had circumstantial evidence tying him to the robbery, but the cousin, Jason Colon, was the witness who tied Applicant directly to the crime.

Counsel testified Colon's father, Ricky Woodberry, also testified at trial and described Colon's traumatic brain injury and the way Colon's behavior and personality changed as a result. Counsel confirmed Woodberry testified Colon essentially was lobotomized by a bullet and now functions with the capacity of a thirteen-year-old even though he was twenty-eight at the time of the robbery. Counsel testified she objected to Woodberry's testimony in its entirety, arguing it was "backdoor character evidence," and she succeeded in keeping parts of his testimony out. Counsel stated she renewed her objection in front of the jury, and the issue was preserved and raised on appeal. Counsel acknowledged the solicitor referred back to Woodberry's testimony in his closing argument, calling Applicant's actions "despicable" and asserting Applicant had lied in his statements to police. Counsel stated she did not object to those arguments, and she was not aware of any case law saying it is improper for a solicitor to call a defendant a liar.

Counsel further testified her general strategy in trying cases is for the jury to like her and think she is more reasonable than the State. Counsel stated she felt she could, and did, offer logical explanations for the discrepancies in Applicant's statement and that it was to her benefit to have the State take an extreme position because it makes them look like they are exaggerating. Counsel testified the solicitor was commenting on his version of the facts and evidence already presented to the jury. Counsel further explained she did not feel a motion for a mistrial based solely on the

solicitor's use of the word liar at that point would have been successful, and her strategy was to argue her view of why Applicant's statement was logical and not a lie.

Counsel testified that the case went to the jury on Wednesday morning, and the jury deliberated all day Wednesday and Thursday and into the early afternoon on Friday. Counsel stated she was aware of the contents of the note[6] the jury sent out around 1:00pm on Wednesday asking questions and requesting playback of some testimony, but the judges do not always show the attorneys the note itself. Counsel testified the judge called all of the jurors back into the courtroom, answered their questions as much as possible, and offered to play back any testimony the jury wanted to hear, as well as provided the requested instruction on reasonable doubt. Counsel stated the jury then sent in another note listing the testimony they wanted to hear,[7] which was played in the courtroom. Counsel testified, at that time, the parties all agreed the juror was still deliberating and looking for clarification on the factual issues in the case.

Counsel testified the jurors sent another out to the judge at approximately 3:00pm[8] on Wednesday afternoon stating they were not unanimous yet and asking what they should do. Counsel explained the exchange between the judge and the solicitor in the record as an agreement that an Allen charge was not appropriate yet, and the judge's only response would be to tell them to keep deliberating. Counsel stated the solicitor can be sarcastic or tongue-in-cheek, but he agreed with the judge that the jury was not indicating deadlock at that point, as did she. Counsel stated the jury then re-entered the courtroom, and the judge gave instructions directing them to keep

---

[6] Applicant's Exhibit 1.
[7] Applicant's Exhibit 2.
[8] Applicant's Exhibit 3.

deliberating, but she did not use the Allen charge language at that time. Counsel explained the jury did not say they were completely deadlocked, just that they had not reached a decision yet, so the judge simply told them to keep working on it, and she agreed that was an appropriate response.

Counsel explained the jury returned another note at 6:10pm[9] on Wednesday evening saying they were at a "stalemate," progress was slow, and it might help to return in the morning. Counsel also pointed out the note also requested clarification of the hand of one, hand of all concept, which, in her mind, indicated the jury wanted to keep deliberating, but just needed a break. Counsel stated the jury returned to the courtroom, and the judge first re-charged the hand of one, hand of all instruction as they requested, then addressed the second part of the note. Counsel testified the note made clear the majority of the jurors wanted to return in the morning, but she did not know what the rest of the jurors wanted to do. Counsel testified she did not think she could ask those kinds of questions of the jury and acknowledged it was possible the minority jurors did not want to deliberate any more at all.

Counsel testified on Thursday morning, the judge reviewed what happened the night before and provided the jury with a written copy of the hand of one, hand of all instructions and sent them back to continue deliberating. Counsel explained that around 10:50am, the jury sent out another note[10] requesting to hear the testimony of four witnesses. Counsel stated because there was a trial taking place in the courtroom next door, the attorneys and the judge decided to send the court reporter into the jury room to play the testimony, with instructions not to speak to the jury about the case or their deliberations.

---

[9] Applicant's Exhibit 4.
[10] Applicant's Exhibit 5.

At 1:02 pm on Thursday afternoon, Counsel testified, the jury sent out another note,[11] this time stating they were 11-1 and the one person was not going to change his or her mind. Counsel explained the parties and the judge did not know which way the jury was leaning, but they were aware of the count, and everyone agreed an Allen charge was appropriate at that time. Counsel testified she did not object to the charge because she felt there was nothing improper in the instruction given, and it did not single out the holdout juror.

Counsel testified that shortly after the judge gave the Allen charge, the jury requested[12] to be charged on reasonable doubt for a second time and then to hear Colon's testimony[13] again. Counsel explained, in her mind, this indicated the jury was continuing to work to reach a verdict, and she did not request a mistrial at that time because she felt the jury was still deliberating.

Counsel explained the next note[14] came around 6:00pm, saying fatigue had set in, so the parties agreed to bring in the jury foreman to clarify what the note was asking for or trying to convey. Counsel testified this was the first time since the jury indicated it was deadlocked that the foreman had been summoned without the rest of the jurors present. Counsel stated the foreman informed the judge that the majority of jurors wanted to be out of the room for the time being, but two or three wanted to be out "forever." Counsel agreed the foreman then spoke to the jury and reported back to the court that the majority had agreed to continue deliberations the next day, but he did not report what the minority wanted to do. Counsel testified the judge then summoned the full jury and informed them of what the foreman reported to her. Counsel stated she did not call

---

[11] Applicant's Exhibit 6.
[12] Applicant's Exhibit 7.
[13] Applicant's Exhibit 8.
[14] Applicant's Exhibit 9.

the judge's attention to the fact that some jurors apparently did not want to continue deliberating because the judge already knew that, and she did not move for a mistrial.

Counsel testified that on Friday, the jury did not come into the courtroom before resuming deliberations, and the judge summoned the foreman alone around 12:15pm to discuss ordering lunch, if needed. Counsel agreed the foreman reported the jury was close to a verdict, and the judge instructed him to let her know within twenty minutes if they needed to order lunch; shortly thereafter, the jury returned with a verdict. Counsel testified Applicant was acquitted of the four kidnapping charges, but convicted of the armed robbery.

Counsel stated she did not move for a mistrial on the basis of a hung jury at any time during deliberations. Counsel explained that she was thinking about the possibility of a mistrial during the course of deliberations, but she felt it was a good sign for Applicant that the jury was actively engaged and clearly looking closely at the issues. Counsel stated ultimately the jury deliberated longer than the trial took to complete and clearly had questions about the evidence and the issues, which she felt was favorable for Applicant. Counsel also testified she felt it would be better for Applicant if the judge declared the mistrial due to deadlock, versus her arguing for one, because that way the solicitor would know he had not proven his case to the jury. Counsel stated she felt that circumstance would result in a better offer or negotiating position for her client, and at the time, she felt the jury's decision or lack thereof would ultimately go Applicant's way.

Counsel further testified Applicant was present with her for much of the time the jury deliberated, and they discussed several issues. She stated if he had taken a strong position on arguing for a mistrial, she would have done it. Counsel reviewed the transcript and noted she asked for a few minutes to speak with Applicant before the judge gave the Allen charge. Counsel

explained that although the record reflects the solicitor stated he gave Applicant "an option," Counsel did not recall a plea offer being extended at that point, although she would not dispute Applicant's recollection. Counsel further testified, based on her memory and what the transcript says, their conversation at that time was about the Allen charge. She also testified that if she had known the breakdown of the jury was 11-1 against Applicant, it would have changed her advice about seeking a mistrial, and she would have advised him to do so at the time.

Regarding the indictment, Counsel testified the indictment was amended during the course of the case, and it appears there was a typo on the amended version[15] because the solicitor did not change the date of the grand jury from January to July. Counsel stated she did not investigate the issue and did not recall if she noticed it at the time. Counsel testified nothing in the amendment was new information; it did not change the charges, the factual allegations, or the date and time of the alleged incident. Counsel explained the amendment merely added the names of the kidnapping victims for each count, which was information she already had. Counsel testified the amended indictment did not change her preparation of the case in any way.

Applicant testified he was not aware he had ever been appointed another lawyer prior to Counsel. Applicant stated he was not aware Counsel was married to a solicitor, and he and Counsel never had any conversations about that, nor did Counsel ever ask him to sign a waiver. Applicant testified he was shocked when he read the emails because, in his opinion, they indicated some concern with Counsel representing him. Applicant further testified he did not find out Counsel was married to a solicitor until Goldberg came into the courtroom on a different matter during

---

[15] The original indictment was entered into evidence as Applicant's Exhibit 12; the amended indictment is Applicant's Exhibit 13.

deliberations, and Counsel told Applicant he was her husband. Applicant stated if he had known Counsel was married to a solicitor, he would have asked for someone else to represent him.

Applicant also testified he and Counsel never discussed whether she should ask the judge for mistrial, and he was not aware at the time that was something he could do. He explained he learned about moving for a mistrial while studying his case, and if he had known, he would have wanted Counsel to make the motion. Applicant further stated he and Counsel did not discuss the Allen charge, but rather discussed a plea offer from the State. Applicant stated the offer was worse than the original offer, and he did not want to accept it. Applicant further stated the offer was worse because the State knew the jury was 11-1, and Counsel informed him the vote was not in their favor because a bailiff had overheard the jury's count.[16]

Goldberg testified he has been practicing law for sixteen years and has done criminal work exclusively. He testified he started at the solicitor's office in 2003 as an intern and became an assistant solicitor in 2005; he was the deputy solicitor in 2013. Goldberg explained, as a deputy, he carried his own caseload and also performed some administrative and supervisory duties as assigned. Goldberg testified the office hierarchy ran from the elected solicitor to three deputies, then down to six team leaders who had between three and five attorneys on their teams. Goldberg explained the cases were divided up and assigned to the teams roughly by location within the county. He testified he generally received a stack of new cases every few days to review, and then he would assign them either to himself, to a specific solicitor, or give to a team leader to assign.

---

[16] Applicant testified regarding the discussion before the Allen charge over the State's objection, as both the State and Applicant's counsel had finished questioning, and Applicant asked address the court on his own.

Goldberg testified if an attorney had a question or problem in a case, he or she would first go to the team leader, and then up the chain if needed.

Goldberg testified he was married to Counsel at the time of Applicant's case, and his office had prosecuted cases where she represented the defendant in the past. He explained their usual process was for Counsel to inform him of the defendant's name, and he would review whether he had any involvement in the prosecution of that particular case. Goldberg stated if he had, Counsel would not accept the case, or, if she had already been appointed, she would substitute someone else, and if neither of those things could be done, he would cease his involvement, but he did not remember that ever happening.

Goldberg testified at the time he assigned the case to Cathcart, Counsel was not yet involved. Goldberg stated eventually Shellenberg was brought on to assist Cathcart. Goldberg explained Cathcart was the team leader for this case, and, at the time, he had almost twenty years of experience as a prosecutor. Goldberg testified he could not recall whether he specifically told Cathcart and Shellenberg not to come to him about this particular case, but it was his usual practice to do so. He also testified the other attorneys in the office were generally aware of his relationship with Counsel and knew not to come to him about cases which involved Counsel. Goldberg explained the office did not have a written policy about spousal conflicts; they just followed the standard rules of professional conduct. He stated occasionally new solicitors might bring him a case that involved Counsel, but he would stop them and ask them to go speak to someone else, and he testified that did not happen in this case.

Goldberg testified he did not speak to Cathcart or Shellenberg about this case, nor did he talk to Counsel about any substantive issue. He stated any conversations they had would have

been only about logistics and scheduling close to the time of trial. Goldberg testified he was not involved in this case in any way, other than possibly making the initial assignment to Cathcart prior to Counsel's involvement. Goldberg testified he did not have access to Counsel's file, and the State's file would have been kept by the solicitor working on the case in his or her own office. Goldberg testified the offices were not locked, and the electronic system the office has does not have the capability to keep individual people out of a case's file, so anyone with access to the system can see any case. Goldberg stated at the time of Applicant's case, it was standard practice to keep a physical file, and not all case files were uploaded to the system, so he was not sure whether Applicant's case was on it at the time or not.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony and evidence presented at the evidentiary hearing, observed the witnesses and evaluated their credibility, considered the arguments of counsel, and weighed these factors accordingly in its discussion below. Further, this Court has reviewed the Clerk of Court records regarding the subject conviction, the appellate records, and Applicant's original and amended applications, as well as the trial transcript. This Court finds the combined record from the criminal case and the testimony and evidence presented the evidentiary hearing establishes Applicant received effective assistance of counsel, and relief should be denied and this application dismissed with prejudiced. Set forth below are the relevant findings of fact and conclusion of law as required by section 17-27-80 of the South Carolina Code of Laws.

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.

This Court finds Applicant has failed to prove his trial counsel's performance was deficient in any way, nor was Applicant prejudiced by her performance. Counsel met with Applicant and

reviewed with him the evidence and discovery in the case, as well as Applicant's version of the facts and possible defenses. This Court finds Applicant ultimately chose to proceed to trial and contest the State's versions of events. This Court finds Counsel ably prepared and presented a defense centered around whether Applicant helped plan the robbery or merely dropped his cousin off not knowing what would happen inside the bank. Moreover, the Court notes Counsel's performance resulted in Applicant being acquitted of four counts of kidnapping, after lengthy jury deliberations.

1. Conflict of interest

Applicant alleges Counsel was constitutionally ineffective because she had a conflict of interest in two ways – first because she "failed to disclose to Applicant that her husband is a Deputy Solicitor for the Fifth Circuit Solicitor's Office," and due to "the flat fee contract agreement with the Commission on Indigent Defense that provided an incentive for Counsel to not seek a mistrial when the jury was deadlocked." This Court disagrees and finds Counsel did not have a conflict of interest as a result of either situation.

"An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). The South Carolina Supreme Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). Until a defendant shows his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). "The mere possibility defense

counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005).

In this situation, Applicant has failed to prove a conflict exists because of Counsel's relationship with Goldberg, who is a solicitor. Both Counsel and Goldberg testified Goldberg had no involvement in the prosecution of the case, he did not have access to Counsel's file, and they did not have any substantive conversations about the case. This Court finds this testimony credible and further finds Applicant has offered no evidence to establish Counsel actively represented an adverse interest. Goldberg did not personally represent the State in this prosecution and was not involved in the case except, possibly, to review the file and assign it to correct team. See SCRPC Rule 1.8(k) ("A lawyer related to another lawyer as parent, child, sibling or spouse shall not *personally* represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer unless the client gives informed consent.") (emphasis added).

Additionally, Counsel credibly testified she did not receive a flat fee for this case, but rather was paid hourly. The Court further finds credible Counsel's explanation that the issue of payment did not factor into her decision regarding whether to move for a mistrial, and if it had been necessary to try the case again, she could have sought to bill additional hours.

Therefore, this Court finds Applicant has failed to prove Counsel had a conflict of interest on either ground. Relief is denied as to both allegations, and they are dismissed with prejudice.

2. Indictment

Applicant also alleges Counsel was constitutionally ineffective for "failing to object to an irregularity in the indictment when the body of the indictment states the grand jurors met on

January 16, 2013, and the face of the indictment states the grand jurors returned a 'true bill' on July 16, 2014." This Court disagrees and finds Counsel was in no way deficient, nor was Applicant prejudiced, by Counsel's failure to challenge the indictment on this ground.

The indictment is a notice document. S.C. Code § 17-19-20. "The indictment must state the offense with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer, and whether he may plead an acquittal or conviction thereon." State v. Guthrie, 352 S.C. 103, 108, 572 S.E.2d 309, 311-12 (Ct. App. 2002). Further, the "test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." Id. Additionally, the South Carolina Code states in pertinent part:

> If (a) there be any defect in form in any indictments or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the court before which the trial shall be had may amend the indictment (according to the proof, if the amendment be because of a variance) if such amendment does not change the nature of the offense charged.

S.C. Code Ann. section 17–19–100 (2015).

Applying the above-recited statutory and case law to the facts of Applicant's case, this Court finds Applicant has failed to prove he was prejudiced by any deficiency arising from Counsel's failure to move to quash the indictment. This Court has reviewed both the original and amended indictments entered into evidence and finds the amended indictment contained a scrivener's error as to the date the grand jury met to consider it, which did not render the indictment, or the trial, invalid. The amended indictment cited to the correct statute such that Applicant knew the nature of the offense he was required to defend, and Counsel credibly testified

the only change was to add the names of the individual victims, which Counsel already knew. Moreover, Counsel testified this change did not affect her case strategy or trial preparation in any way.

Accordingly, this Court finds Applicant failed to establish either deficiency or prejudice as to this issue. Relief is therefore denied, and the allegation is dismissed with prejudice.

3. Solicitor's closing argument and vouching

Applicant next alleges Counsel was constitutionally ineffective for "failing to object to the prosecutor's closing argument calling Applicant 'a liar'" and "failing to object to the prosecution and prosecution witness improperly vouching for Jason Colon, who was the co-defendant and material witness for the State." This Court disagrees and denies relief as to this issue.

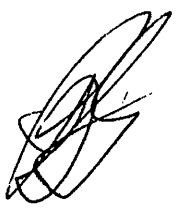
This Court finds Counsel was not deficient, nor was Applicant prejudiced, by Counsel's failure to object to the solicitor's closing argument calling Applicant a liar or characterizing his conduct as "despicable." Moreover, although Counsel admitted she was not aware of any case law to support an objection, she explained that an objection would have been contrary to her overall trial strategy. Counsel stated she felt she had a logical explanation for the inconsistencies in Applicant's statement, and she could make the State appear to be exaggerating and taking an extreme position, which she felt was helpful to Applicant.

It is well settled that "the solicitor must confine his arguments to the evidence in the record and its reasonable inferences." State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (internal citations omitted). The

relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009).

Additionally, Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland, 466 U.S. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Examples of such decisions include what evidence should be introduced, whether to object to the admission of evidence, and which motions to file. Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014). Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

Finally, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine



confidence in the outcome." Id. at 694. In the context of improper closing arguments, "[a] new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Tucker, 324 S.C. at 169, 478 S.E.2d at 267-68 (internal citations omitted). When making this determination, courts "review the 'alleged impropriety of argument in the context of the entire record.'" State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999) (quoting Brown v. State, 383 S.C. 506 (2009)).

Here, the argument Applicant complains about was limited to one instance in the record, and, as Counsel testified, the issue had already been raised to the jury through testimony and evidence presented during the trial. This Court therefore finds, even if Counsel had objected, the outcome of the trial was unlikely to have been different, as it is unlikely the trial court would have granted a mistrial, and Counsel was able to effectively explain the inconsistencies through her own argument.

Accordingly, because the Court finds neither deficiency in Counsel's performance nor any prejudice to Applicant, relief is denied, and these allegations are denied and dismissed with prejudice.

4. Jury deliberations and failure to move for a mistrial

Applicant alleges Counsel was constitutionally ineffective in her handling of the jury deliberations and failure to move for a mistrial at various times. This Court disagrees and denies relief as to this issue.

A. Failure to object to judge's instructions to jury after first note stating, "We are not unanimous on any of the charges yet, how do you want us to proceed?"

Applicant argues Counsel "failed to object to the trial court instructing the jurors to continue deliberating when that instruction did not instruct the jurors that 'the verdict should

represent the opinion of each individual juror,' not 'a mere acquiescence in the conclusion of his fellow[]' jurors, and the jurors in the majority should listen to the minority juror and consider the 'correctness of a judgement which was not concurred in by the majority,'" in accordance with Allen v. United States, 164 U.S. 492, 501 (1896). This Court disagrees.

First, Applicant argues the solicitor agreed with the trial judge that the jury was indicating deadlock. This Court has listened to Counsel's explanation and reviewed the relevant portion of the record and finds the opposite is true – the solicitor and the judge were in agreement that the jury was *not* deadlocked and Allen charge was not yet appropriate. Counsel credibly testified this was her reading of the situation as well. As the jury's note specifically stated, they were informing the court they had not reached a unanimous verdict *yet*, and simultaneously requested to rehear testimony of one of the State's main witnesses, Diana Williams, both of which indicate a continued willingness to deliberate. Accordingly, this Court finds the instruction given by the trial court to be appropriate and, as it was not an Allen charge, Counsel had no basis to object on the ground that the instruction did not comport with Allen's requirements.

Therefore, because Counsel was not deficient, nor was Applicant prejudiced, the Court denies relief as to this issue and dismisses the allegation with prejudice.

B. When the jurors sent a note stating, "Still at a stalemate," trial counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330

Applicant contends Counsel was constitutionally ineffective for failing to move for a mistrial pursuant to section 14-7-1330 of the South Carolina Code when the jury returned, after the court's instruction to keep deliberating and rehearing the requested testimony, with a note informing the court they were "still at a stalemate." After reviewing the text of the note, the relevant portions of the record, and listening to Counsel's credible testimony on this issue, this

Court finds Counsel was not deficient in not moving for a mistrial because the requirements of section 14-7-1330 had not been met.

Section 14-7-1330 states:

> When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law.

South Carolina case law interprets this section mean the jury must return twice into court and indicate it is deadlocked. See Buff v. S.C. Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000) ("Accordingly, when a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial. The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial judge's comments.").

As discussed above, this Court finds the jury's first note, stating it was not unanimous yet and requesting to rehear testimony, was not an indication of deadlock. Similarly, this Court finds the second note, informing the court the jury was "still at a stalemate," again does not indicate deadlock. The note goes on to request to be recharged on the hand of one, hand of all principle and states that the majority of the jurors feel progress could be made if they came back the next morning. As the record indicates, the judge assembled the jury and gave the requested instruction, then addressed the second part of the note regarding the "stalemate." When the judge informed the jury they would need to return the next day to continue deliberating, none of the jurors voiced disagreement or indicated that further deliberation would not be fruitful.

Thus, this Court finds, even if the note could be interpreted as indicative of deadlock, the jury impliedly gave consent to continue deliberating. Accordingly, because the requirements of section 14-7-1330 had not been met, Counsel cannot have been deficient for failing to move for a mistrial on that basis, and relief should be denied as to this allegation, and it is dismissed with prejudice.

C. When the jurors sent a note stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330

Applicant again contends Counsel was constitutionally ineffective for failing to move for a mistrial pursuant to section 14-7-1330 of the South Carolina Code when, the next day, the jury returned with a note stating they were divided 11-1 and the holdout had indicated he or she would not be persuaded to change his or her vote. However, as discussed above, this Court finds the requirements of section 14-7-1330 had not been met. The Court finds, based on its reading of the record and Counsel's credible testimony, this note was the first indication of deadlock from the jury, which properly triggered an Allen charge from the trial court.

Because this only the first indication of deadlock, not the second or more as required by the statute, this Court finds Counsel was not deficient for failing to move for a mistrial on that basis at this point. Therefore, the Court denies relief on this ground and dismisses it with prejudice.

D. When the jurors sent a note stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to object to the trial court's Allen charge that singled out the sole juror that was holding out for acquittal

Applicant contends Counsel was constitutionally ineffective for failing to object to the trial court's allegedly improper Allen charge given after the jury indicated the 11-1 split that it was unable to resolve. This Court has reviewed the relevant charge and finds it comports with language

approved by the South Carolina Supreme Court in other cases, and Counsel had no meritorious basis to object to the charge. Therefore, because Counsel was not deficient, the Court denies relief as to this issue.

The Court finds the situation in Applicant's case analogous to State v. Williams, 386 S.C. 503, 690 S.E.2d 62 (2010). In Williams, the Supreme Court approved both the giving of the charge and the language used, which was nearly identical to the language used by the trial court in Applicant's case.[17] Id. at 512-15, 690 S.E.2d at 66-68. The Court stated:

> In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel. Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict.

Id. at 66, 690 S.E.2d at 512 (quoting Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002)). In Williams, the judge charged the jury to "consult with one another, express your own views, and listen to the opinions of your fellow jurors. Tell each other how you feel and why you feel that way. Discuss your differences with open minds." Id. at 67, 690 S.E.2d at 514. The trial judge in Applicant's case used this exact language in her charge. Tr. pp. 439-440. Further, the judge in Williams, and the trial judge in this case, charged:

> Every one of you has the right to your own opinion, the verdict you agree to must be your own verdict, a result of your own convictions. You should not give up your firmly held beliefs merely to be in agreement with your fellow jurors. The minority should consider the majority's opinion and the majority should consider the minority's opinion. You should carefully consider and respect the opinions of each other and evaluate your position for reasonableness, correctness, and partiality. You

---

[17] Williams also addressed the issue of the jury disclosing the vote division. There, as in Applicant's case, the Court noted because the jury voluntarily disclosed the division, without any inquiry from the judge, and the judge promptly informed the parties and stated its intention to give an Allen charge, the trial judge committed no error. Id. at 509-510, 690 S.E.2d at 65.

must lay aside all outside matters and reexamine the question before you base[d][on] the law and the evidence in this case.

Id. at 67-68, 690 S.E.2d at 514; Tr. p. 440. Although the jury in Applicant's case was charged that the verdict must be unanimous, that portion was immediately followed by the reminder that each juror had a right to his or her own opinion, which should not be given up solely for the purpose of coming to an agreement with the others. Tr. p. 440.

This Court finds the trial judge's Allen charge was a correct statement of the law and was not coercive. Accordingly, Counsel had no basis to object to the charge, and she was not deficient. This Court therefore denies relief as to this issue and finds this allegation should be dismissed with prejudice.

E. When the jurors sent a note stating, "We have deliberated for the past 8 hours and we are still in the same position. Fatigue has now set in and we need refreshing," and the foreman of the jury informed the trial court the jurors were at an "impasse" and two or three jurors wanted to terminate deliberations, Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330

Finally, Applicant argues Counsel was constitutionally ineffective for failing to move for a mistrial when, after the trial judge gave the Allen charge, the jury returned with another note stating they were "still in the same position" and "needed freshness" because "fatigue" had set in. The Court disagrees and finds Counsel was not deficient.

After the court received this note, the trial judge summoned the foreman to clarify what the jury meant by needing "freshness." The foreman informed the court that they were not sure how much longer they could continue to deliberate, but they were "at [the court's] mercy." Tr. p. 445. The foreman continued to explain the biggest issue was that they "just want to get out of that room." Tr. p. 445. He then told the court that although two or three jurors wanted to be out of there

"forever," the jury was "willing to do what we need to do." Tr. p. 445. The foreman then consulted with his fellow jurors and ultimately stated, "we'll come back tomorrow." Tr. p. 447. The judge then assembled the entire jury and relayed what the foreman had said. None of the jurors indicated disagreement with returning in the morning to continue deliberating, again indicating implied consent to continue. Tr. pp. 447-48. Indeed, once the jury returned and resumed deliberating, it sent out no further notes and when the judge called in the foreman to inquire about lunch, he informed her they were close to a decision. Tr. p. 450. Finally, when the jury was polled after the judge announced the verdict, all indicated this was their verdict. Tr. pp. 454-56.

Accordingly, this Court finds that even if this note could be considered a second indication of deadlock, the jury, after consultation with the judge, consented to continue its deliberations.

Therefore, this Court finds the requirements of section 14-7-1330 had again not yet been met, and Counsel was not deficient for failing to move for a mistrial. Moreover, Counsel credibly testified she felt the jury's lengthy deliberations were beneficial to Applicant because it indicated the jury had questions about what happened. Additionally, this Court finds credible Counsel's testimony that had she known with certainty the split was 11-1 against Applicant, she would have changed her strategy pursued a mistrial. Accordingly, because the Court finds the conditions of section 14-7-1330 had not been met, and in any event, Counsel had a reasonable strategic explanation for declining to move for a mistrial, relief is denied as to this issue, and the allegation is dismissed with prejudice.

5. Cumulative error

Lastly, Applicant argues the cumulative effect of Counsel's entitles Applicant to a new trial. Because this Court has found Counsel committed no errors, relief must be denied as to this issue.

Importantly, appellate courts in South Carolina Court have not recognized the cumulative-error doctrine as a basis for post-conviction relief. See, e.g., Simpson v. State, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina"); Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324-25 (2002) ("Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina."). Other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative-error analysis of the prejudice prong of Strickland is inappropriate, and the correct analysis focuses upon each individual allegation of ineffective assistance. Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995). As the Fourth Circuit Court of Appeals explained in Fisher v. Angelone:

> Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel's actions could be considered constitutional error. . . it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of the Fourth Circuit individually to assess claims under Strickland v. Washington. . . . To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue.

Id. (citations omitted). Similarly, in Smalls v. State, 422 S.C. 174, 810 S.E. 2d 836 (2018), the South Carolina Supreme Court explained "the strength of the evidence must be considered along with the specific impact of counsel's errors. . . . In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the

outcome of the trial." However, because this Court has found neither deficiency nor prejudice, a cumulative-error analysis would be inappropriate on these facts.

Accordingly, this Court finds relief should be denied as to this issue, and the allegation is dismissed with prejudice.

CONCLUSION

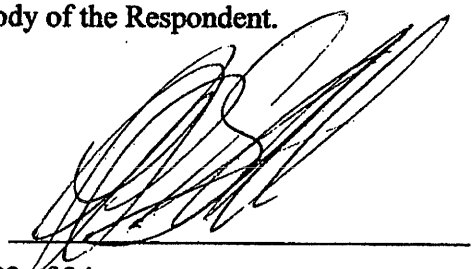
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by her representation. Therefore, this application for post-conviction relief must be 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; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.



BROOKS P. GOLDSMITH
Presiding Judge
Fifth Judicial Circuit

June 29, 2021

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

ARTHUR MACON, #304226 Applicant,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood, SC 29646

This 15th day of July, 2021.

Katie Wade
Legal Assistant for Respondent