Vol. III of III

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

KEENAN COAKLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002156

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

BENJAMIN LIMBAUGH
Assistant Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

Pages 1001-1076

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JKS20100904944

WITNESSES

TYRONE SIMMONS
Mt. Pleasant Police Department

AGENCY CASE NUMBER

2010P12283

ARREST WARRANT NUMBER

K674464

DATE OF ARREST

September 16, 2010

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: APR 5 2011

VERDICT

Guilty

12-5-13

Foreperson of Petit Jury *Date:*

INDICT

DOCKET NO. 2011GS1002078

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

KEENAN COAKLEY
DOB: [redacted]
B/M

Indictment for

Armed Robbery

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on April 4, 2011 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about September 15, 2010, in Charleston County, South Carolina, the Defendant, KEENAN COAKLEY, while at [redacted], Mt. Pleasant, South Carolina, by use of force, threats or intimidation and while armed with a deadly weapon, or while alleging, either by action or words, was armed while using a representation of a deadly weapon or other object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, did take and carry away goods and/or monies from the person or immediate presence of Phone Smart employees with the intent to permanently deprive the victims of possession thereof, in violation of Section 16-11-330(A) of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

JENNIFER KNEECH SHEALY
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Charleston)
STATE VS.)
Keenan Coakley)
AKA:)
Race: BLACK Sex: M Age: 22)
DOB: [redacted] SS# [redacted])
Address: [redacted])
City,State,Zip: MT PLEASANT, SC 294660000)
DL#: [redacted] SID#: SC01882657)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS1002078
A/W#: K674464
Date of Offense: 9/16/2010
S.C. Code § : 16-11-0330(A)
CDR Code #: 0139

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS
TO: ARMED ROBBERY

in violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [signature]
Kneece Sheely, Jennifer | 7919 SC Bar# | Defendant | Attorney for Defendant | SC Bar#

WHEREFORE, the Defendant is commited to the ☑ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 16 ~~days/months~~/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. July 5, 2011
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$ 133.90

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk [signature]
Court Reporter: Deborah Garrison
Presiding Judge [signature]
Judge Code: 2560
Sentence Date: 12/6/13

SCCA/217 (03/2011)

FORM 5

STATE OF SOUTH CAROLINA)
) 2015-CP-10-5902
County of Chas.) IN THE COURT OF COMMON PLEAS
)
Keenan Coakley)
Full name and prison number (if any) of Applicant)
)
v.)
) APPLICATION FOR
State of South Carolina) POST-CONVICTION RELIEF
)

FILED
2015 NOV -2 PM 2:55
JULIE J. ARMSTRONG
CLERK OF COURT

INSTRUCTIONS – READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention BROAD RIVER CORRECTIONAL INSTITUTION
4460 BROAD RIVER ROAD, COLUMBIA S.C. 29210

2. Name and location of Court which imposed sentence CHARLESTON COUNTY, GENERAL SESSIONS, 9TH JUDICIAL CIRCUIT

3. Name(s) of co-defendant(s) (if any) JARRETT GRADDICK, KEVIN SMALLS

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) 11-GS-10-2078 – ARMED ROBBERY
   (b) _____

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) DECEMBER 6th 2013, 16 YEARS

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. SC COURT OF APPEAL

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. SENTENCE WAS AFFIRMED

ii. _____

iii. _____

(c) the date of each such result:

i. AUGUST 12, 2015

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: APPLICANT WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

(a) AND BY ARTICLE I, SECTION 3 AND 14 OF THE S.C. CONSTITUTION DURING HIS CRIMINAL TRIAL

(b) _____

(c) APPLICANT BELIEVES HE HAS MORE VIABLE ISSUES AND NEEDS COUNSEL TO ASSIST WITH ISSUES

11. State concisely and in the same order the facts which support each of the grounds set out in (10): TRIAL COUNSEL'S PERFORMANCE DURING TRIAL WAS BOTH UNREASONABLE AND PREJUDICIAL. SEE STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984). COUNSELS ACTS OR OMISSIONS

(a) INCLUDE BUT ARE NOT LIMITED TO, THE FOLLOWING (CONTINUED ON BACK) →

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? NO

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? YES

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

NO

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. WILLIAM RUNYON JR.
1 S GAMECOCK AVE, STE. 303, CHARLESTON, SC 29407

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. TRIAL

ii. APPEAL

iii. _____

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

VACATION OF CONVICTION AND SENTENCE

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Charleston)

I, Keenan Coakley, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Keenan

SWORN to and subscribed before me this 28th day of October, 2015.

Andrew H. Jago (L.S.)
Notary Public
My Commission Expires
March 5, 2018

My Commission Expires:

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Kenan Coakley, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Kenan
Applicant

SWORN or affirmed to and subscribed before me this 28th day of October, 2015.

Susan N. Frye
Notary Public

My Commission Expires: March 5, 2018

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Keenan Coakley, #358058, Applicant, v. State of South Carolina, Respondent.	)	2015-CP-10-5906 **RETURN**

In response to the post-conviction relief application filed on November 2, 2015, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's orders of commitment. The Applicant was indicted by the April 2011 term of the Charleston County Grand Jury for Armed Robbery (2011-GS-10-2078). William Runyon, Jr., Esquire, represented him. On December 6, 2013, the Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable R. Markley Dennis, Jr. sentenced the Applicant to confinement for sixteen (16) years.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v California 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Coakley, Op. No. 2015-UP-412 (filed on August 12, 2015). The Remittitur was issued on August 28, 2015.

II.

In his application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reason:

1. "Ineffective Assistance of Trial Counsel"

For the purpose of this Return, the Respondent incorporates the Clerk of Court records, and the South Carolina Department of Corrections' records, the record on appeal and Court of Appeals opinion. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent construes Applicant's allegation as alleging ineffective assistance of counsel. The Respondent asserts that the Applicant's allegation of ineffective assistance of trial counsel is without merit. The Respondent also asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115,

386 S.E.2d 624 (1989).

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. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, the Respondent requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective and whether the Applicant's appellate counsel was ineffective.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Deputy Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

June 9, 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
	)	2015-CP-10-5906
	)	
KEENAN COAKLEY, #358058	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

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 Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

James K. Falk, Esquire
Falk Law Firm, LLC
Post Office Box 1058
Charleston, South Carolina 29402

DATED this 9th day of June, 2016.

Brianna Arnone

Brianna Arnone, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE 9th JUDICIAL CIRCUIT
	)	
Keenan Coakley	)	
Applicant	)	2015-CP-10-5906
Vs.	)	
State of South Carolina	)	Amendment to PCR Application
Respondent,)		

Applicant by counsel hereby amends his November 2, 2015 PCR application to add the following grounds for relief, namely that trial counsel provided ineffective assistance by:

1. Failing to move that Applicant be tried separately from his co-defendants.
2. Failing to object to the Court's use of the phrase "searching for the truth" in its charge on reasonable doubt. (TR. 862 l. 8).
3. Failing to object to the Court's circumstantial evidence charge. (TR 867 l. 25 – 868 l. 10).
4. Failing to request Jury Charges on the lesser included offense of Strong Armed Robbery.
5. Filing to request an adequate charge regarding multiple defendants similar to the following: *There are [two, three, etc.] defendants in this case. Each is charged with Armed Robbery or its lesser included offense. Whatever verdict you find, it does not have to be the same as to [both] [all] defendants. You take each defendant, consider the evidence as to him, and write your verdict in accordance and in conformity with the evidence in the case and the instructions that I have given you and will hereafter give you. Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other, or you may acquit both, or you may convict both. It will depend upon your view of the testimony and evidence, which you alone are to pass upon.*

   See South Carolina Request to Charge-Criminal, Ralph King Anderson, Jr. § 1-27.

CERTIFICATE OF SERVICE

Undersigned certifies that on July 18, 2017 a copy of the above was mailed to Kelly Oppenheimer, Esq. at the address listed above.

James Falk
Counsel for Applicant

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF CHARLESTON	)	**2015-CP-10-05906**
KEENAN COAKLEY,	)	
Applicant,	)	**Transcript of Record** (PCR Hearing)
vs.	)	
STATE OF SOUTH CAROLINA,	)	October 2, 2018
Respondent.	)	

B E F O R E:

Honorable Michael G. Nettles
Charleston County Courthouse
Charleston, South Carolina

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

James K. Falk, Esquire
Attorney for Applicant

Kelly Oppenheimer, Esquire
Attorney for Respondent

Kay H. Richardson
Circuit Court Reporter

INDEX

OCTOBER 2, 2018 Pg.

EXHIBITS

No.	ID	EV

(No exhibits were marked or admitted.)

OCTOBER 2, 2018 - 1:23 P.M.

BY THE COURT:

THE COURT: Yes, ma'am, you're recognized.

MS. OPPENHEIMER: May it please the Court, Your Honor. This is Keenan Coakley versus the State of South Carolina, docket number 2015-CP-10-5906. During its April 2011 term, the Charleston County Grand Jury indicted Applicant for armed robbery. William L. Runyon, Jr. represented him on this charge. Assistant Solicitors, Jennifer Sheeley and Emanuel Ferguson both with the Ninth Circuit Solicitor's Office, prosecuted the case.

On December 2nd through the 6th, 2013, applicant and his two co-defendants, Jarret Graddick and Kevin Smalls, proceeded to a jury trial before the Honorable R. Markley Dennis, Jr. Upon deliberations, the jury convicted both Applicant -- both Applicant and Mr. Graddick as indicted and Judge Dennis sentenced Applicant to a term of imprisonment of 16 years. Applicant filed a timely notice of appeal and Mr. Runyon again affected an appeal on his behalf.

On appeal, Applicant raised the following the issue. It was reversible error to allow the alleged statement as it introduced other alleged acts in violation of Rule 404(b) of the South Carolina Rules of Evidence. Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence with unpublished opinion on August

12th, 2015. The remittitur was issued on August 28, 2015.

On November 12, 2015, Applicant filed an application for post-conviction relief alleging ineffective assistance of counsel for failing to request an insubstantial circumstantial evidence jury charge. The state made its return on June 9th, 2016 requesting an evidentiary hearing be held. Thereafter on July 18th, 2017, through his counsel, Applicant amended his application to include various additional grounds of ineffective assistance of counsel.

Applicant is present today and represented by Mr. Falk.

THE COURT: Mr. Falk, you're recognized. If you could delineate your specific grounds for the post-conviction relief that you intend on going forward with today?

MR. FALK: I plan on going forward with the grounds set forth in the amended PCR application. The first one being that this was a case with -- this was a multiple co-defendant case, which I think there were different levels of culpability there. Counsel did not move for a severance, and so a failure to even try and seek a severance is our first issue.

The second issue is during the part of the Court's charge to the jury, the Court used the searching for the truth language as part of the charge and we believe that that is a burden shifting language to use as part of the charge and should've been objected to by trial counsel.

And then we're going -- Mr. Coakley discussed the issue

of his circumstantial evidence charge and we think that trial counsel was ineffective for failing to ask for a strong-arm lessor included offense charge as it would apply to Mr. Coakley.

And finally, there was a charge that we think would've been appropriate in this case and especially in light of the fact that there were multiple co-defendants, and I've set forth the charge on this amended application. But basically, this is a case where we had three co-defendants, and I believe, and I'm using a charge from Ralph King Anderson's charge to jury book. And we think that charge should've read something to the effect that if there are two defendants, or more than two defendants in this case, each is charged with armed robbery or its lessor included offense, whichever verdict you find, it does not have to be the same as to all defendants. You take each defendant, consider the evidence as to him and write your verdict in accordance and in conformity with the evidence in the case, any instructions that I have given you and will hereafter give you. Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit another, or you may acquit both, or you may convict both, will depend upon your view of the testimony and the evidence, which you alone must pass on. So, there was no kind of charge, which I think is appropriate in a multiple co-defendant case that the jury had to make a

determination as to each defendants' culpability.

THE COURT: All right.

MR. FALK: So, that's what we choose to go forward on.

THE COURT: Very good. You may call your first witness.

MR. FALK: We call Mr. Runyon to the stand.

THE COURT: Yes, sir. Take your time there and I'm going to ask you, if you could, to place your left hand on the Bible and raise your right hand as the clerk administers the oath.

WILLIAM L. RUNYON, JR., HAVING BEEN DULY SWORN TESTIFIES AS FOLLOWS:

MR. RUNYON: Thank you.

CLERK: Have a seat. If you will, state your name for the record and spell your last name, please, sir.

MR. RUNYON: William L. Runyon, Jr., R-U-N-Y-O-N.

DIRECT EXAMINATION OF WILLIAM L. RUNYON, JR. BY MR. FALK:

Q: Mr. Runyon, were you retained in this case?

A: I wasn't directly retained, but I was retained counsel.

Q: Okay.

A: I, I came into the case initially with the associate counsel, Ms. Ameika. This was a multi-charge case and at some point in time, there was some differences of opinion between Ms. Ameika and Mr. Coakley, and Mr. Coakley wanted to go forward with just me as counsel.

Q: Okay. Did you have an opportunity to kind of familiarize yourself with the facts of the case before today?

A: Actually, briefly. What occurred was, I tried the case and I took the case up on appeal and then after the affirmation and the state dismissed the other three charges, I was asked to turn over Mr. Coakley's file to his father for, I think for the purpose of giving it to Mr. Coakley, which we did and, and his father came by and signed a receipt and picked up the entire file. So, I haven't read anything, like the transcript or the record on appeal.

Q: Okay. Do you have -- do you have a recollection that there were multiple co-defendants in this case?

A: Yeah, and I have a very good recollection there were multiple co-defendants in this case.

Q: And one of them was Jarret Graddick?

A: That -- that's correct, yes, sir.

Q: And do you recall who the other co-defendants were?

A: I don't recall them by name, quite frankly.

Q: Did they have different levels, sort of, of responsibility for the crime in this case?

A: Three out of four did, yes, I think.

Q: Okay. And this was tried -- this was a joint trial, was it not?

A: It was a joint trial.

Q: Okay. Was there a discussion about -- did you ever consider trying to get this trial severed so that he would be tried separately?

A: Did I consider it, yes; did I move for it, no.
Q: And what was the basis for your consideration; did you think it was a ---
A: Well, you -- and I know you're familiar with the facts of the case. One of the primary problems for Mr. Coakley was -- and it was a small part but essential circumstance in the case -- when the police fell in behind them and they, they stopped the car, so to speak, during that process, Mr. Coakley allegedly said, keep going, I'm not going back to jail. As I said, there were multiple charges that he had. He'd been in jail and had gotten out and, I mean, that's kind of an incriminating statement. It doesn't prove he did this crime, but he raises the issue of other crimes and I thought that -- I considered whether or not I -- we could -- we could -- how we were gonna to handle that one of those ways to handle it would be if we could possibly sever it, but under the whole -- but I made a decision in talking with Mr., Coakley that I didn't think we could get it severed, and I didn't make that motion.
Q: Okay. So, the decision not to sever was based on the fact that you just didn't think it made sense because you didn't think it would be granted?
A: Basically, yes, sir.
Q: Okay.
A: Basically, I, I -- I mean there's some lawyers who they'll

make every motion in the book; I'm not one of those lawyers.
Q: I just want to clarify that it wasn't necessarily a trial strategy decision that you thought he would be better off trying together, did you?
A: Well, that's not an accurate statement. If you -- if you read the transcript, as I recall, we -- the state had a witness, who saw three people get out of the car and go to through this undeveloped area which ultimately led to the site of the armed robbery. And that witness, under oath, said that he could recognize Mr. Keenan Coakley and that Keenan Coakley was not one of those three people. You know, so, so frankly, we had the situation where if -- if he was tried by himself, he was not gonna be subject to be viewed by the jury as being taller or shorter or what have you than the other three. How does this person who supposedly can recognize Coakley, you know, compare him to the other three? That was part of the -- that was part of the strategy.
Q: Somewhat ---
A: I say part of the strategy; let me say that was part of the consideration of the strategy.
Q: So, the witness said that he knew Coakley and that he was not part of -- one of the three; is that what you said?
A: That's my recollection of the transcript.
Q: All right. And you -- did you, at some point in the jury charge, I can show it to you, Line -- on Page 862. If I may

approach the witness?

THE COURT: Yes.

BY MR. FALK:

Q: I've highlighted a sentence from the Court's charge to the jury, that's -- what is that, Page 862, Line 7 or Line 8?

A: 7, 8 and 9, yes, sir.

Q: Okay. And could you just read that language?

A: Who searching for the truth in the case, they hesitate to act or to take some action.

Q: Okay. So, that was part of the Court's charge. Did you consider whether or not that language is burden shifting, because obviously client is under no obligation to -- this really isn't the matter of what the truth was is whether or not the state could prove beyond a reasonable doubt that Mr. Coakley was guilty?

A: Well, frankly, I think, I, I couldn't agree with your characterization. I still -- I don't think it shifted any burden, and I did not object to it.

Q: Okay. Now, what was -- what's your recollection of the testimony about whether or not there was a gun or that there was a weapon?

A: My recollection is that at least one of the clerks in the telephone store said there was a weapon.

Q: Okay.

A: And of course, we're saddled with the hand of one is the

hand of all, which is a frustrating concept for a criminal defendant in South Carolina, and I did not ask for any lessor included charge even though I don't recall whether or not there was any description that Mr. Coakley was the one who had the gun. I think someone else had the gun. I could be mistaken about that, but ---

Q: I mean, the record shows that you did not ask for a lessor included of strong arm, and was that a trial strategy decision?

A: That was a, a -- it was a decision made based upon the facts of the -- of the case, the testimony in the case, and the -- to a certain extent when you -- and yes, the arguments to the jury. I mean, as a practical matter, you can -- you can stand up there and argue to a jury that there was no weapon in this case, find him guilty of, of -- of strong arm, but if you're arguing a fact which, you know, there was some testimony about, I mean, the problem with that is, is, you know, the jury is gonna go back in the jury room -- and in November of 1999, I served on the jury, so I know what goes on in the jury room. They're gonna -- they're gonna call into question whether or not you've taken leave of your senses. I think you got to have a coaching argument based upon the testimony of the case if you're gonna ask the jury and a juror to consider to find -- I mean, in this case, there was a question of whether or not he was one of the three people that

went in there, whether he did it, not whether it was an armed robbery or not.

THE COURT: Mr. Falk, was there -- is there anything in the record that you can point to that would seem to indicate that there was not a gun? Was it uncontroverted that there was a gun?

MR. FALK: It would take me a minute to point to that.

THE COURT: Okay. I mean, I'm not sure you can point to it if it's not there, but are you saying there is some indication there was not a gun?

MR. FALK: Yes, I believe so.

THE COURT: Okay.

MR. FALK: Let me just get on to my last point.

BY MR. FALK:

Q: Now, I -- I've read a charge, a suggested charge, that said that -- a charge to the jury in Ralph King Anderson's book. I'm not sure if there's other charges with similar language, but was there consideration about a charge to the jury so that the defendants -- so that would make the Court -- remind it of the fact that they have to make an individual determination of the facts of the case as it related to each of the codefendants and so that they had to make a determination and that they could find Mr. Coakley not guilty and find the other defendants guilty?

A: My recollection of the charge to the jury from Judge

Dennis was that, yes, he made that clear that they didn't have to convict everybody or acquit everybody, that there was an individual -- it was not a King -- there was not a Judge Ralph King Anderson charge, however.

Q: Okay.

A: And I didn't -- and I didn't request that and if you want to -- if you're looking at that, I handled the appeal and I didn't raise that on appeal.

Q: You couldn't have raised it on appeal unless you asked for it at the -- at the trial?

A: Well, actually ---

BY THE COURT:

THE COURT: I tell you what we're gonna do. Why don't you look in the transcript and see if you can find any testimony that would establish -- that would lead one to believe that there might not have been a gun and I'm gonna read the jury charge.

MR. FALK: Thank you, Your Honor.

THE COURT: Mr. Falk, what page in the transcript does the jury charge start?

MR. FALK: Your Honor, I've got that.

THE COURT: Apparently, they took a witness -- okay, very good. I found it. I found it.

What page again, apparently there's -- they started the charge and then took another witness. I think I'm getting

closer. Hang on a minute. This is very convoluted.

MS. OPPENHEIMER: Your Honor, Page 858 is where ---

THE COURT: Pardon me?

MS. OPPENHEIMER: 858.

THE COURT: Okay. Very good.

MS. OPPENHEIMER: They start the jury trial, or charge, excuse me.

THE COURT: Mr. Falk, I'm gonna allow you to continue to look for that. Two things that I would mention, I think what you're talking about is shifting of the burden of proof in the search of the truth. It's a whole different thing than what took place here. I think Judge Russo was reversed on that and it was, it was an obligation -- saying that they have an obligation to seek the truth to do what's right and to do what's fair and they have an obligation to essentially convict, is kind of what the language of it, but what he says here is not that at all. It says, and you will evaluate each piece of evidence and decide what you find to be credible and believable and decide what you find to be credible and believable. And, in so doing, you will determine the truth of the evidence and both the state, Mr. Graddick, Mr. Coakley and Mr. Smalls. The attorneys expect that you will perform that consistent with your oath and I'm confident that you will.

MR. FALK: Your Honor, that's the case that I was referring to.

THE COURT: Is the one that Russo ---

MR. FALK: Yes, sir.

THE COURT: That's a lot different than what's in this one; don't you agree?

MR. FALK: Yes, Your Honor.

THE COURT: I don't think that applies here. This, essentially, this is very fair and it doesn't say that the defendants have to prove anything. It doesn't essentially tell the jury they've got an obligation to find somebody guilty is essentially what you could construe Judge Russo's opinion to be.

The other thing that I think is important, if you look at the charge, 859, it says but it's important also to realize that there are three separate indictments, three separate defendants, and three separate determinations that you will have to make, and each party is entitled to a fair and impartial determination based on your assessment of the evidence. That's exactly what you're saying that should've been asked for. He didn't object to it because it was already in there.

MR. FALK: Well, except that the language that they're free to convict one and acquit another.

THE COURT: It says that. It says, three separate defendants, three separate indictments, and each party is entitled to a fair and impartial determination based on your

assessment of the evidence. That's as plain as you can get. But you disagree with that?

MR. FALK: I think he needed to add the other statement that they can all be found guilty, one can be found guilty, or one can and the other can't.

THE COURT: Well, all right. Hang on just one second. Well, it goes on to say, each defendant has entered a plea of not guilty to the indictment pertaining to him, which places then upon the state the burden of proving him guilt. Because as I mentioned to you, persons accused of a criminal offense are never required to prove or disprove or explain anything at all, and they certainly are not required to prove their innocence. It goes on to say, and each of you -- I don't know where Judge Dennis -- he must've wrote this himself; it's not typically what, what a jury -- what a judge charges. I mean, it's not what's been prescribed the Supreme Court. It says, and each of you, under your oath, must actively presume that each of these defendants are innocent and can only change that when and if you are persuaded beyond a reasonable doubt of his guilt. It goes on to say, and the state has to prove each defendant's guilt beyond a reasonable doubt.

Mr. Runyon, is that your understanding and your recollection of the charge?

MR. RUNYON: That's my understanding and recollection of the charge and not to answer any questions that I haven't been

asked, but Judge Dennis did prepare the charge in advance of giving the charge, he did give it to all counsel, and he did in fact author this charge to fit the fact that it was a multi-defendant case.

THE COURT: Yeah. If you read it carefully, I think that's ultimately clear.

Ms. Oppenheimer?

MS. OPPENHEIMER: Yes, sir.

THE COURT: Do you know of anything in the record that would seem to indicate that there is testimony or any kind of evidence that would indicate that there was not a gun?

MS. OPPENHEIMER: Your Honor, based on my review of the record, I recall the victims testifying that each masked man, each robber came in with a gun. The fourth co-defendant, Brian Mazyck did testify that there was a gun involved and law enforcement did find a gun in the car after searching it. I think where we might be getting caught up is there is a suggestion that there were two guns and they never found the second gun; they only found one gun. But they did find a till in a ditch that was thrown by one of these defendants.

THE COURT: So, your review of the record would seem to indicate there's not anything that would indicate that there was not a gun used by -- there's no evidence that's been put forward that there was no gun used in this robbery?

MS. OPPENHEIMER: Right, Your Honor. And to quote, I

guess one of the victims in this case is the owner of a gun store, he did say that he turned and saw two men wearing hats, masks, and coming into the store waving a gun.

THE COURT: I think there were a number of, of cases where the defendants are convicted of similar type charges and they say, well, you know, we ought to be entitled to a lessor included charge, but the Court's almost universally say that if there's no evidence to indicate that there was not a gun, then it would be improper to charge, and it's not reversible error not to do that.

MS. OPPENHEIMER: Yes, Your Honor.

THE COURT: That's what I think.

MR. FALK: I don't have -- I can't point to it right now the evidence that I was ---

THE COURT: Okay. I'll give you some more opportunity to do that and you can continue your questioning.

MR. FALK: Your Honor, with that -- I believe we've talked about my points, whether or not that it was a trial strategy decision to seek a severance, and by not moving for a severance that there was no way to review it on appeal. And then if I -- if I had more time, I could find the evidence I was pointing to as far as ---

THE COURT: You don't have any more questions of Mr. Runyon?

MR. FALK: I guess I'm saying, I'm otherwise done.

THE COURT: Okay. Very good.

All right. Cross examination?

Did -- I might not have understood you correctly, but with regard to the motion for severance, you thought that as a practical matter, it would not be granted and that there was some advantage to giving a witness the ability to compare the size and the heights and the difference in their physical characteristics, if they were tried jointly; is that correct?

MR. RUNYON: That's correct, Your Honor. These -- this is a multi-defendant case. If he's standing there alone, how does the person who allegedly knows Keenan Coakley in height, weight, and things of that sort, how does he know that's not him.

THE COURT: He would just be -- they always point to the person sitting at the defense table and there's only one?

MR. RUNYON: Yeah.

THE COURT: That's what you're saying.

MR. RUNYON: And -- excuse me. Yes, Your Honor.

THE COURT: All right.

MR. RUNYON: I didn't mean to say yeah. And the, the, the circumstances were such that did I make a -- did I make a conscious decision not to move for severance and I did.

THE COURT: Okay. Very good.

MR. RUNYON: Based upon the fact that there were multiple defendants. Now, of course, the problem we had in all candor

was on the day of the trial, I believe the driver, maybe it was Mr. Graddick -- I'm not sure of his name -- but the driver of the vehicle rolled over on the rest of them. And that, that -- I did not have that information when I moved -- when I did not move -- when I made the decision not to move for a severance. That could have changed my mind had we had that -- that rollover then, but that wasn't done until much, much later.

THE COURT: All right. Ms. Oppenheimer, you're recognized.

CROSS EXAMINATION OF WILLIAM L. RUNYON JR. BY MS. OPPENHEIMER:

Q: Mr. Runyon, I kind of want to go back to the very beginning of your representation of Mr. Coakley. Do you recall how many times you met with Mr. Coakley prior to trial?

A: We met with Mr. Coakley several times. I met with him, Ms. Ameika met with him, I met with him jointly with Ms. Ameika, and then I met with him after he indicated he did not want Ms. Ameika to be involved. Numerous times -- and it wasn't always about this particular case, because there was -- the state hadn't given us notice as to which armed robbery they were planning on trying, although this was the best case they had I think, as I recall.

Q: And you made the statement, this was the best case they had. What evidence did the state have against Mr. Coakley?

A: Well, they had -- they had the capture, if you want to

call it that, shortly after the armed -- shortly after the robbery. And they had the, the alleged statement that Mr. Coakley made about he wasn't going back to jail, keep going. He was -- all four of them were caught in the car. I don't know how far it was from the telephone store, but it was in the Mount Pleasant area. The police were pretty Johnny on the Spot when it came to setting up an intercept locations, what have you, apparently.

Q: And was there any forensic evidence linking Mr. Coakley to this crime?

A: I haven't read the transcript, quite frankly. But there was forensic evidence, there was physical evidence, there was one gun at least, and there was, you know -- I'm not sure whether or not there was film or not.

Q: Do you recall if DNA swabs were taken from the various items of the clothing from the car?

A: Yes, as I recall, there was, and I think it was some DNA evidence that connected some clothing to Mr. Coakley but, of course, Mr. Coakley was in the car so it wasn't a question of whether or not his DNA should not have been there, I mean, he ---

Q: This was not his car, correct?

A: It was not his car, but he was in the car when they -- when they stopped it, so his DNA would have been found on items.

Q: And do you recall the fourth co-defendant, Ryan Mazyck testifying against Mr. Coakley at trial?
A: Oh, yes.
Q: And did he place a gun in the car and having been involved in these crimes?
A: Yes, absolutely.
Q: And do you recall if one or more of the victims testified that these robbers had a gun?
A: I recall there was testimony from the people that worked in the store that there was in fact at least one gun, if not two, and that they certainly thought there was a weapon, and it was not a bottle or anything, that it was in fact a firearm.
Q: And so, based on those facts, did you see any need to request a strong-arm robbery charge?
A: No, and that was -- if you -- if you request a strong-arm robbery charge, and even if you get it, if you stand up there and argue to a jury -- I mean, that's part of your trial strategy. If you argue to a jury or a juror that there wasn't a gun when the evidence is people said there was a gun, they might not want to believe you on other things either.
Q: I believe we've gone over this fairly thoroughly, but you didn't move for a severance based on some type of trial strategy?
A: You know, it's fairly difficult to answer that question.

Yes, it's part of the trial strategy. You sit there and you -- you determine whether or not you're going to move for a severance, how are you gonna question these witnesses. When we went to -- when we went to trial, it was -- when we approached the courthouse, it was under the circumstances of -- of this was the evidence. When we got into the trial that day, they had one of the co-defendants at least, roll over. So, that was -- that altered the, the trial strategy somewhat, but you have to make those alterations on the fly, so to speak.

Q: All right. And the evidence that we just discussed, did you go over the discovery material with Mr. Coakley prior to trial?

A: Yes, ma'am.

Q: And did you discuss the elements of the charges?

A: Absolutely, on all of the charged cases. You got to remember, there's multiple armed robbery charges. The balance of the charges were dismissed after the appeal was affirmed.

Q: Do you remember how many initial charges there were?

A: I think there were four.

Q: Did you see any reason to object to the circumstantial evidence charge?

A: No, not -- not particularly. Under the circumstances of this case, I mean, once -- once again, I mean, when you're trying cases with a -- with a Circuit Judge -- there's one

thing I remember from early on in my career when Judge Rosen pointed out to me while we were waiting for a jury, that he -- he noted that I didn't make all the -- all the objections, and I said but, Judge, when I do make an objection, you're not granting them. He says, I didn't say I would grant them, I just said I would listen to you. And, and so, as a practical matter, it's part of your trial strategy to -- when you're dealing with the bench as to, if you want the bench to consider a motion that you're gonna make and it's pretty crucial to you, then you got to consider whether or not the Judge is even gonna listen to you and not just dismissed it out of hand, so that's part of the trial strategy. I mean, you've got to -- the colloquy that you have with the Court -- as a matter of fact, one of the primary things that concerned me about this case was this statement that he allegedly made about keep going, I'm not going back to jail, which raises the specter of other charges. I thought was more, in the minds of a juror, could be more of a -- of an incriminating statement than, than, than other types of evidence in the case, and I didn't want them to think that he was a, a multiple offender, because jurors will in fact -- they're not stupid. And so, anyway, that's, that's -- you weigh those things and you consider what, what the bench is gonna do when you make -- when you make a motion. And sometimes it's -- you make the decision, as part of your trial strategy, not to make a

motion.

THE COURT: Where is the -- what page is the circumstantial evidence charge on?

MS. OPPENHEIMER: Your Honor, it's on Page 868.

BY THE COURT:

THE COURT: While we're talking about the circumstantial evidence charge, Mr. Falk, what is your -- what is your contention with regard, I've read what he charged, what is your contention that it was not proper?

MR. FALK: Your Honor, it's my client's contention that no, that's not the *Grippon* charge. That's not the charge -- that's not the language that they suggest to use from *Logan*.

THE COURT: Well, *Logan* says that -- *Logan*, *Logan* proved that particular one, but didn't say that's the one that you have to do; isn't that correct?

MR. FALK: It's my understanding *Logan* said that that was the charge that the Court should use.

MS. OPPENEHIMER: If I may ---

THE COURT: Yes.

MS. OPPENHEIMER: --- quote from *Logan*, Your Honor. It does say this holding does not prevent the trial court from issuing the circumstantial evidence charge, provided in *Grippon* and *Cherry*, however the trial courts may not exclusively rely on that charge over a defendant's objection. So, they said that *Grippon* was the correct charge as well.

They're now suggesting this new language, but the ---

THE COURT: If they ask for it, you probably should give the other charge.

MS. OPPENHEIMER: That's correct.

THE COURT: But if it's not asked for, the other ones are proper and not reversible error, I would assume.

MS. OPPENHEIMER: That's correct, Your Honor.

MR. FALK: Yes, Your Honor.

THE COURT: All right. You may go and make your statement.

MS. OPPENHEIMER: May it please the Court, Your Honor.

BY MS. OPPENHEIMER:

Q: And do you recall, while we're talking about the jury charge, do you recall multiple instances of Judge Dennis informing the jury that the state must prove beyond a reasonable doubt?

A: Yeah, he -- his, his charge which he authored during the course of the trial, made it very, very clear that the state had to prove each element of the defense as to each defendant. Was it precisely what I would want? No, I -- I still like that old circumstantial evidence charge that, that our State Supreme Court threw out, so to speak. But the simple fact is, is that he made it very clear that they had to convict each defendant, at least in my mind, and ---

Q: And do you recall after the jury had deliberated, at some

point, they came back with verdicts as to Mr. Coakley and Mr. Graddick but not the third co-defendant?

A: Yes.

Q: And they continued to deliberate at that time about that third co-defendant?

A: That's correct.

Q: And so that was very clear that they clearly understood that these were separate indictments, correct?

A: Well, at least they were considering each, each defendant separately. Although, I would've preferred Mr. Coakley be the man who, who got the benefit of the doubt. That didn't happen.

MS. OPPENHEIMER: Your Honor, I have no more questions.

THE COURT: Any redirect, Mr. Falk?

REDIRECT EXAMINATION OF WILLIAM RUNYON BY MR. FALK:

Q: When James Bane (spelled phonetically) testified, he said that somebody came in waving a gun. There was no further description of what that gun looked like; is that correct? Bane is the owner of the store. Well, excuse me, it's, yeah, Blaine (spelled phonetically) is the manager of the store?

A: Mr. Falk, if you say that's what the transcript says, that's what the transcript says because you -- you wouldn't misquote -- wouldn't mis-state it. I mean, I have no independent recollection of each fact of the transcript, but what you say sounds reasonable, based upon my recollection of

the case, yes.

MR. FALK: I have nothing further, Your Honor.

BY THE COURT:

THE COURT: You may step down. Thank you, sir.

MR. RUNYON: Thank you.

MR. OPPENHEIMER: Your Honor, we'd ask that Mr. Runyon be excused from his subpoena?

THE COURT: Yes. You can just leave that right there.

MR. RUNYON: That's Mr. Falk's.

THE COURT: Mr. Runyon, watch your step.

MR. RUNYON: Yes, sir.

MR. FALK: I knew I had a copy of the whole -- forgot I gave it to Mr. Runyon.

THE COURT: You need some help, Mr. Runyon?

MR. RUNYON: No, I can get it, Judge.

THE COURT: Be careful. Go slow. Why don't we -- if we could help him.

MR. RUNYON: It's just a little bit low.

THE COURT: Yes. There you go.

MR. RUNYON: Thank you.

THE COURT: All right.

MR. RUNYON: Thank you. Thank you, Judge.

THE COURT: Good to see you.

You may call your next witness.

MR. FALK: We have no further witnesses.

THE COURT: I'll be glad to hear from you, Mr. Falk, first and then we'll hear from Ms. Oppenheimer.

ARGUMENT BY FALK:

MR. FALK: Your Honor, the reason I thought there was some issues with the gun was because when -- it's my recollection in looking at the transcript when Mr. Blaine testified, the owner of the store, and then I believe when Ms. Lynn testified, there's just a reference to a gun without any type of -- is it a silver gun and is it a black -- just a further description of the gun. And I think somebody else yelled that there's an armed robbery going on. Whether or not that person knows exactly what an armed robbery was. I think there was sort of an assumption that the gun might've been -- but there was really no testimony from those two witnesses as to what the gun looked like. And so, from that basis, I thought there would be enough to at least argue for a strong-arm charge.

THE COURT: Very good. Anything further on any of the issues, Mr. Falk?

MR. FALK: Well, Your Honor, I still believe the charge, the King charge was the right charge as far as the multiple defendants, and I would accept that the search for the truth as set forth in -- that Russo, Judge Russo's case is probably a little bit different than the language used in this case.

THE COURT: Right.

MR. FALK: But I still -- you know, I still maintain that the fact that failure to move for a severance and then leave it so that you can't even address the issue on appeal whether severance was proper, we believe that that was error. There certainly is testimony about whether there's relevant culpability between these defendants, whether Mr. Coakley had a gun or not, some testimony about whether or not ---

THE COURT: Let me -- let me ask this question about severance. You know, I don't think that there's been anything established here that he was prejudiced by the fact they were tried together. If he was tried by himself, all of the evidence that was presented in this case would've come against him and he'd have just been sitting there by himself. And there was no issue, *Bruton* issues, there was no issue with regard to statements and I just don't see how it would've been any different.

MR. FALK: Because nobody testifies that he was there with a gun.

THE COURT: Pardon?

MR. FALK: Because of lack of testimony from any of the witnesses at the store that he was the one with the gun.

THE COURT: Okay. Anything else?

MR. FALK: It was not -- the car that they were in was not his car. I'm not sure he was the -- I'm not sure he was identified as one the two people coming into the store. So, I

mean, I -- Your Honor, we would maintain that that was -- that he would've been better off being tried individually.

THE COURT: Okay. Anything further about any of the issues?

MR. FALK: As far as the circumstantial evidence charge, no, Your Honor, I don't think we can argue prejudice as far as the charge that Judge Dennis used. As far as the one he did use, I still believe that the King charge with the multiple defendants would've been more appropriate language than that that Judge Dennis used.

THE COURT: Okay.

All right. Ms. Oppenheimer, I'll be glad to hear from you.

ARGUMENT BY OPPENHEIMER:

MS. OPPENHEIMER: May it please the Court, Your Honor? With regards to the strong-arm robbery charge, there's no evidence that the gun was not used in this crime. The co-defendant placed Mr. Coakley at the scene, getting back into the car from running through the path that led directly from the store to the Coakley property at the end of this local road, I believe. And so you have the co-defendant's testimony saying that there was a gun involved. A gun was found in the car. The victim did testify that the robbers came in waving a gun. There is some discrepancy whether or not there were two guns or one gun. However, under the hand of one is the hand

of all, even if Mr. Coakley were not the one with the gun, assuming that one single gun were used, he would still be guilty of armed robbery under the accomplice liability theory.

As I expressed earlier, the circumstantial evidence charge, the trial court here gave the charge as provided in *Grippon*. There's nothing that says that the *Grippon* charge is not correct, just that if trial counsel were to request it that a trial court cannot deny the defendant that right to that particular language.

Also, with regards to the severance, Mr. Runyon testified that he had a trial strategy in wanting Mr. Coakley to be tried with his two co-defendants based on the eye witness, who allegedly says he knows Mr. Coakley, and so Mr. Runyon wanted Mr. Coakley up there with multiple people to see if he could identify him.

Also, there is no prejudice from trying these jointly. A defendant does not have -- is not entitled to separate trials from his co-defendants. You have to show that there is prejudice and you have to show that, in order to grant a severance, that it should only be granted when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant. There's been no testimony to that effect today. There were no statements from the co-defendants he was tried with. So, we would argue that a severance would not have been granted even if Mr. Runyon had

moved for it.

And with regards to the multiple defendants, there's no particular verbiage that is required by the Courts on any charge as long as it is substantially the correct charge on the law. The trial court made it very clear that these were three separate indictments, three separate defendants and three separate decisions that the jury needed to make, and the state would argue that that was highlighted by the fact that the jury came back on verdicts of guilty for those -- for both Mr. Coakley and Mr. Graddick, but not on the third co-defendant, Mr. Smalls, and they continued to deliberate. So, clearly they knew that these were three separate defendants, three separate indictments.

I believe that's it, Your Honor.

THE COURT: Okay. Anything further, Mr. Falk?

MR. FALK: No, Your Honor.

RULING OF THE COURT:

THE COURT: Very good. All right. Ms. Oppenheimer, I'm going to ask that you prepare an order denying the post-conviction relief. And with regard to the severance, I think we've talked about it in great detail here and, essentially, the, the granting of a severance is something that's within the sound discretion of a trial judge, and in all likelihood it probably would not have been granted. But most importantly, there has been no showing that he was prejudiced

by the fact that he was tried with the other co-defendants.

And also, there is some legitimate trial strategy to have other co-defendants at the defense table, which would make it more difficult for an eyewitness to identify them. I think that's a legitimate trial strategy.

The -- just the mention of search for the truth, it was done in connection with a definition of what right prior to proof beyond a reasonable doubt charge. It goes, what is reasonable doubt? A reasonable doubt is the doubt that would make an honest, sincere, conscientious juror who is searching for truth in the case, hesitate to act or to take some action. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of defendant's guilt. I think that's what he's talking about. And I think taking that in, in its entirety, is different than the case -- and I don't even know what the name of the case is but Judge Russo was the one who tried it -- and that language is different than what's been prohibited in that case. Do you know the name of that case?

MR. FALK: Yes, Your Honor.

MR. OPPENHEIMER: I think I have it. *State v. Bailey;* is that it?

MR. FALK: *Bailey.*

THE COURT: *State v. Bailey.* I'm gonna ask, if you could, to have some discussion in the order about how this language is different than that.

MS. OPPENHEIMER: It's not ---

THE COURT: But at any rate, it's the one that Judge Russo was reversed on. We all know what we're talking about, I just don't have it before me right now. I -- in taking the jury charge in its entirety, I don't think it was ineffective to him to object to that, nor do I think the charge was prejudicial.

Circumstantial evidence charge was proper. The Supreme Court said it's proper. Had -- and I don't think that it's ineffective given what was charged here today, it's ineffective not to request a different circumstantial evidence charge.

The strong-arm robbery, I don't think there was any -- any reasonable assessment of the evidence as presented -- been presented in this case that would warrant a strong-arm robbery charge.

The charge with regard to multiple defendants, I think we've read from the actual jury charge itself that talks about how there were multiple indictments and multiple defendants, and they each need to be considered separately and distinctly. If you read the whole jury charge in its entirety, it becomes imminently clear that that's the law and the jury seemed to take, take that to heart because of their questions and concerns concerning one particular defendant.

Have I addressed all of the issues?

MS. OPPENHEIMER: I believe so, Your Honor.

THE COURT: I'm going to ask if you could prepare that within the next 30 days and send a copy of it to Mr. Falk to ensure that your order reflects what I've ruled here today.

MS. OPPENHEIMER: Yes, Your Honor. Would you like that by electronic mail or copy.

THE COURT: Well, I'm kind of old fashioned. I believe I'd like a hard copy. How about that?

MS. OPPENHEIMER: Yes, Your Honor.

THE COURT: And send to my office there in Florence. I think PCRs are not subject to e-filing, are they?

MS. OPPENHEIMER: That's correct, Your Honor.

THE COURT: Okay. That's what I want. I want a hard copy with a self-addressed stamped envelope, so I can send it here to be filed. Let's do it that way.

MS. OPPENHEIMER: Yes, Your Honor.

ADJOURNED - 2:25 P.M.

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Keenan Coakley v. State of South Carolina, held in the Court of Common Pleas for Charleston County, Charleston County Courthouse, Charleston, South Carolina, on October 2, 2018.

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

Kay H. Richardson
Official Court Reporter

February 26, 2019.

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Keenan Coakley, #358058, Applicant, v. State of South Carolina, Respondent.	Case No. 2015-CP-10-5906 **ORDER OF DISMISSAL**

FILED
2018 NOV 27 PM 3:39

This matter comes before the Court by way of an application for post-conviction relief filed November 2, 2015, by Keenan Coakley (Applicant). The State (Respondent) made its Return on June 9, 2016, requesting an evidentiary hearing be held. Thereafter, through his counsel, Applicant filed an amendment to the application for post-conviction relief on July 18, 2018. An evidentiary hearing was convened on October 2, 2018, at the Charleston County Courthouse before the Honorable Michael G. Nettles. Applicant was present at the hearing and represented by James K. Falk, Esquire. Respondent was represented by Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its April 2011 term, the Charleston County Grand Jury indicted Applicant for armed robbery (2011-GS-10-02078). William L. Runyon, Jr., Esquire (Counsel),

represented Applicant on this charge. Assistant Solicitors Jennifer Shealy and Emmanuel Ferguson, both of the Ninth Circuit Solicitor's Office, prosecuted the case. On December 2-6, 2013, Applicant proceeded to a jury trial with his two co-defendants, Jarret Graddick and Kevin Smalls, before the Honorable R. Markley Dennis, Jr. Following deliberations, the jury convicted Applicant and Graddick as indicted.[1] Judge Dennis sentenced Applicant to a term of imprisonment of sixteen years.

Applicant filed a timely notice of appeal, and Counsel perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issue:

1. It was reversible error to allow the alleged statement as it introduced other alleges [sic] acts in violation of Rule 404B of the South Carolina Rules of Evidence.

Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence by unpublished opinion. *State v. Coakley*, Op. No. 2015-UP-412 (S.C. Ct. App. Filed August 12, 2015). The Remittitur was issued on August 28, 2015.

CURRENT APPLICATION

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

1. Ineffective Assistance of Counsel:
   a. "Trial counsel was ineffective for failing to request an insubstantial circumstantial evidence jury charge be given to the jury in Applicant's criminal trial."

In his amendment to the application for post-conviction relief, Applicant raises the following additional grounds for relief:

1. Ineffective Assistance of Counsel:
   a. "Failing to move that Applicant be tried separately from his co-defendants;"

[1] At the time the jury reached a verdict for Applicant and Graddick, it had not reached a verdict for co-defendant Smalls. Tr. 905.

b. "Failing to object to the Court's use of the phrase 'seeking the truth' in its charge on reasonable doubt. (TR. 862 l.8);"
c. "Failing to object to the Court's circumstantial evidence charge. (TR 867 l. 25 – 868 l. 10);"
d. "Failing to request Jury Charges on the lesser included offense of Strong Armed Robbery;" and
e. "Filing [sic] to request an adequate charge regarding multiple defendants similar to the following: *There are [two, three, etc.] defendants in this case. Each is charged with Armed Robbery or its lesser included offense. Whatever verdict you find, it does not have to be the same as to [both] [all] defendants. You take each defendant, consider the evidence as to him, and write your verdict in accordance and in conformity with the evidence in the case and the instructions that I have given you and will hereafter give you. Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other, or you may acquit both, or you may convict both. It will depend upon your review of the testimony and evidence, which you alone are to pass upon.* See South Carolina Request to Charge-Criminal, Ralph King Anderson, Jr. § 1-27." (emphasis in original)

At the hearing, Applicant proceeded forward on the claims in his amendment to the application for post-conviction relief.

STATEMENT OF FACTS ADDUCED AT TRIAL

Two men, wearing cloths over their faces and ball caps, entered a cell phone store on September 15, 2010, and stole the cashbox containing approximately $1,000. At least one of the men had a gun. The men entered and exited through a back door, and the store owner saw them run into a field behind the store. The owner testified there was a uniquely marked $100 bill in the cashbox. Tr. 147-69.

The store employees ran out of the store when the men entered, and yelled for someone to call 911 because they were being robbed. A woman in the parking lot called 911, and noticed a man "looking very nervous" standing next to a red and black car. After the employees ran out,

the man got into the car and drove off. As the car backed up, the woman got the license tag number and gave it to police. Tr. 226-31.

A man ("Davis") who lived on a dead end road (Sam Edwards Road) near the shopping mall testified he saw a red and black car drive down the road twice on the day of the robbery. The first time there were four people in the car, but when the car drove out, two of the passengers were on foot. About half an hour later, the car came back, and the two men who left on foot earlier ran out on the road. One of the men was carrying something under his coat, and Davis saw him throw it in a ditch as he ran. The men got into the red and black car, which left very fast. When police arrived a short time later, Davis showed them where the man threw the item, which was subsequently identified as the cashbox from the cell phone store, in the ditch. Tr. 294-308, 349-50.

Officer Joseph Zeitner of the Mount Pleasant Police Department testified he heard the dispatch regarding an armed robbery, with a description and license tag number of the red and black car. He almost immediately saw the car cross an intersection in front of him and initiated a traffic stop after he was able to verify the license tag number. There were four men in the car, and he ordered them to put their hands up. Tr. 362-66.

After a back-up officer arrived, Zeitner started getting the occupants out of the vehicle, beginning with the driver (Kevin Smalls). While he was getting Smalls out, the two males in the back seat, subsequently identified as Applicant and co-defendant Graddick were moving around. Graddick, who was seated behind the driver, dropped down out of Zeitner's sight three times, and Applicant, seated behind the front passenger seat, tried to get into the front seat of the car. The officers ordered Graddick out of the car, and had Applicant slide across the backseat and

exit on the driver's side. They then got the front seat passenger (Brian Mazyck) out of the car. Tr. 366-75.

A police supervisor who assisted in the traffic stop testified that after the occupants were removed from the car, officers moved it out of the roadway into a parking lot to secure it and wait on the crime scene technicians. When she looked into the car, she saw a Glock handgun on the passenger side, and money in the back seat arm rest. Tr. 386-97.

The crime scene/evidence technician testified he recovered some shirts turned inside-out, a black pair of pants, a belt, and gloves from inside the car. He also recovered cash ($1,095) from the backseat's center console, and a forty-five caliber Glock handgun from under the back of the front passenger seat. Tr. 426-45, 449-55. The cash included the uniquely marked bill described by the store owner. He then responded to the location where the cashbox was found, photographed the location, and retrieved the cashbox as evidence. Tr. 454-59.

Mazyck testified for the State, and recounted the events on September 15, 2010, leading up to the traffic stop. He stated he was in the car with Smalls in the shopping mall parking lot when the store owner yelled the store had been robbed, but Smalls told him not to "get involved." Smalls then drove out of the parking lot at "a nice little speed," went to Sam Edwards Road, went to the end of Sam Edwards Road and turned around. Mazyck saw Applicant and Graddick come out of a path and wave Smalls down. They were wearing gloves and had something covering the lower part of their faces, and one of them threw the cashbox down before they got in the car. Applicant got in the backseat behind Mazyck, and Graddick got in the backseat behind Smalls. Tr. 485-510.

Mazyck testified Applicant and Graddick started taking off the clothes they had on when they got in the car, and putting on clothes laying on the backseat, and he saw a gun under the

backseat armrest. After Zeitner stopped the car and ordered them to get out, Applicant said: "Go! I'm not going back to jail." Tr. 518-21.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant presented the testimony of Counsel. This Court also had before it a copy of Applicant's trial transcript, the records of the Charleston County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

Counsel testified he was not directly retained by Applicant to represent him, but he was brought on by Applicant's first attorney as associate counsel. He explained at some point in time, there was a difference of opinion between Applicant and his first attorney, and Applicant wanted to proceed with just Counsel. Counsel further testified he tried the case and handled the case on appeal; but after the appeal, he was asked to turn over Applicant's file to Applicant's father, who signed a receipt indicating he had gotten the file.

He testified he met with Applicant several times, both with Applicant's first attorney and individually. He further testified he reviewed the elements of the charges for each case. He explained at the time, Applicant was charged with four counts of armed robbery. Counsel also testified he reviewed the discovery materials with Applicant.

Counsel further testified this armed robbery was the strongest case the State had of the other armed robbery charges. He testified Applicant was apprehended shortly after the robbery took place. He explained all four co-defendants were caught in the car in the surrounding area. He further explained at the time of his capture, Applicant stated: "I'm not going back to jail." He testified there was both forensic evidence and physical evidence found in the car. He explained at least one gun was found, and there was DNA from the clothing in the car. He

further explained the DNA connected Applicant to the clothing in the car, and the car was not Applicant's.

He also testified this was a case involving multiple co-defendants, and three of the four co-defendants had different levels of responsibility in this crime. He testified three of the co-defendants were tried jointly. He further testified although he considered moving for a severance, he ultimately did not. He explained he made the decision not move to sever the cases after speaking with Applicant and explaining he did not think he could get the cases severed. He further explained the primary problem with Applicant's case was the statement Applicant made when law enforcement officers started following their car. He testified this was an incriminating statement that raised the issue of other crimes and might have been handled through a severance.

Counsel also testified he does not make "every motion in the book." He testified the State had a witness who saw three people get out of the car through an undeveloped area leading to the crime scene. He further testified this witness could recognize Applicant, but he did not identify Applicant as one of the three people. Counsel explained if Applicant were tried alone, the jury could not view Applicant's physical characteristics in comparison to the other co-defendants. He testified this was part of his trial strategy. Counsel explained if Applicant were tried separately, he risked the witness who knew him pointing to Applicant as the person he saw. He further testified he made a conscious decision not to move for a severance. He also testified on the day of trial, one of the co-defendants decided to testify against the other co-defendants, which was information he did not have when he decided not to move for a severance. He explained the co-defendant's testimony altered his strategy.

He further testified at least one of the store clerks testified there was a weapon, so Applicant could have been liable under the theory of the hand of one, hand of all. He explained

there was testimony at least one gun was used, if not two. He further explained the victims believed the robbers were using a firearm. He did not recall whether there was a specific description of Applicant having a gun at the time of the crime. He testified he did not ask for a charge of a lesser-included offense. He explained he made this decision based on the facts, testimony, and arguments made to the jury. He further testified there was no need for a charge on strong arm robbery, as an argument there was no gun involved when there was testimony indicating a gun was involved might not be beneficial.

Counsel also testified the trial court prepared the charge in advance and provided a copy to counsel. He testified he did not believe the court's "seeking the truth" language in its charge on reasonable doubt shifted the burden, so he did not object. He also testified the trial court indicated it was the State's burden to prove to the jury beyond a reasonable doubt multiple times in its charge. He explained it was very clear the State had the burden as to each defendant. He further testified the charged from the trial court made it clear to the jury Applicant and his co-defendants were individual defendants. He also testified the trial court altered his charge to reflect multiple defendants. He testified the trial court did not give the King charge, nor did he request it be charged. Counsel also testified he did not raise that issue on appeal. He testified it was apparent the jury considered each defendant separately, as they reached verdicts for Applicant and one of his co-defendants before reaching a verdict for the third co-defendant. Counsel also testified he did not have any reason to object to the circumstantial evidence charge under these circumstances. He explained the circumstantial evidence charge given was not error and was, in fact, a correct charge on the law. He further explained part of his strategy was considered when to tactfully make objections, indicating if he wanted the trial court to consider a crucial motion, he needed to consider whether the trial court would have listened.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. This Court finds Counsel's testimony is very credible, whereas Applicant's testimony is not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant's allegations of ineffective assistance of counsel are as follows: (1) failing to move for a severance; (2) failing to object to the trial court's use of the phrase "searching for the truth" in its charge on reasonable doubt; (3) failing to object to the trial court's circumstantial evidence charge; (4) failing to request a charge on the lesser-included offense of strong arm robbery; and (5) failing to request an adequate charge regarding multiple defendants.

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant 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 the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsel's alleged failure to move for severance

Applicant alleges Counsel was ineffective for failing to argue for severance of his trial from that of his co-defendants, Jarret Graddick and Kevin Smalls. Criminal defendants who are jointly tried are not entitled to separate trials. *State v. Kelsey*, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (citing *State v. Holland*, 261 S.C. 488, 201 S.E.2d 118 (1973); *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972). Motions for severance are within the discretion of the trial court. *Id.* "A severance should be granted only when there is a serious **risk that a joint trial would compromise a specific trial right of a co-defendant** or prevent the jury from making a reliable judgment about a co-defendant's guilt." *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001) (citing *State v. Dennis*, 337 S.C. 275, 523 S.E.2d 173 (1999)) (emphasis in original). In order to reverse a conviction on the basis of an allegation that a defendant was improperly

tried jointly, a defendant must show prejudice. *Dennis*, 337 S.C. at 281, 523 S.E.2d at 176 (citing *Crowe*, 258 S.C. 258, 188 S.E.2d 379). Such prejudice is established by a showing the defendant would have obtained a more favorable result at a separate trial. *Hughes*, 346 S.C. at 559, 552 S.E.2d at 317. In order to ensure no prejudice results from a joint trial, a cautionary instruction may help protect the individual right of each defendant. *Id.* (citing *State v. Holland*, 261 S.C. 488, 494, 201 S.E.2d 118, 121 (1973)).

Moreover, "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, 505 (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). "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, 122, 417 S.E.2d 529, 531 (1992) (citing *Goodson v. United States*, 564 F.2d 1071 (4th Cir. 1977)).

Here, Counsel testified with Applicant being tried with two of his co-defendants, it would be difficult for the eyewitness, who was familiar with Applicant, to specifically identify Applicant as being one of the individuals he saw. He explained it would be to Applicant's benefit having other defendants at the defense table with him, so that he could be physically compared to those co-defendants and to shift some of the focus to Applicant's co-defendants. He further explained had Applicant been tried alone, he risked having all of the focus on him. Therefore, this Court finds Counsel's performance was reasonable under the circumstances, as he articulated a valid trial strategy in not moving for a severance. This Court further finds Applicant has wholly failed to establish any deficiency on the part of Counsel.

Moreover, Applicant has failed to establish any resulting prejudice from this alleged deficiency. Counsel specifically testified he did not think he would be successful on a motion for a severance. As aforementioned, the State's witness who was familiar with Applicant testified at trial he did not see Applicant, or any members of Applicant's family, go towards the crime scene or return from the crime scene. *See* Tr. 315. Moreover, no statements from Graddick or Smalls to law enforcement implicating themselves or Applicant were ever introduced at trial. *Compare Bruton v. United States*, 391 U.S. 123 (1968) (finding the introduction of a co-defendant's confession, which implicated not only the co-defendant but also the appellant, "added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination.") *with State v. McDonald*, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012) (finding a co-defendant's statement, which was introduced at trial, containing "the neutral phrase 'another person'" in place of the other co-defendants' names did not violate *Bruton*). Consequently, Applicant cannot establish any prejudice from this alleged deficiency. Based on the foregoing, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to "searching for the truth" language during the trial court's charge on reasonable doubt

Applicant alleges Counsel was ineffective for failing to object to the trial court's use of "searching for the truth" in its charge on reasonable doubt. Applicant contends such language shifted the burden of proof from the State to Applicant.

When analyzing the propriety of jury instructions for error on appeal or on collateral review to determine whether counsel should have objected to a purportedly impermissible charge, the reviewing court must view the jury charge as a whole and in light of the evidence and issues from trial. *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); *see Todd v. State*, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated."); *see also Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) ("[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."). The appropriate test for reviewing a jury charge involves determining whether there is a reasonable likelihood the jury applied the charge in an unconstitutional manner. *Estelle v. McGuire*, 502 U.S. 62, 71 (1991). "In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution." *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) (citing *Todd*, 355 S.C. at 399, 585 S.E.2d at 306).

One of the fundamental functions of the trial process in both criminal and civil cases is to discover the truth. *See State v. Wren*, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996) ("A trial is a search for the truth[.]"); *see also Portuondo v. Agard*, 529 U.S. 61, 73 (2000)

(stating "the central function of [a] trial . . . is to discover the truth"); *see generally Carella v. California*, 491 U.S. 263, 265 (1989) (explaining burden-relieving jury instructions "subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases"); *Gardner v. Florida*, 403 U.S. 349, 360 (1977) ("[T]he debate between adversaries is often essential to the truth-seeking function of trials[.]").

As part of this truth-seeking process, the State is constitutionally required to prove a criminal defendant's guilt for every element of a criminal offense beyond a reasonable doubt while a defendant is ordinarily not required to prove anything at all. *In re Winship*, 397 U.S. 358, 364 (1970); *see Burr v. Florida*, 474 U.S. 879, 880 (1985) ("[T]he beacon of the truth-seeking process in criminal cases is not absolute certainty, but the 'reasonable doubt' standard[.]"); *see also State v. Brewer*, 411 S.C. 401, 408, 768 S.E.2d 656, 659 (2015) (reiterating a criminal defendant has no duty to prove his or her own innocence); *see generally State v. Attardo*, 263 S.C. 546, 552, 211 S.E.2d 868, 871 (1975) (recognizing the burden may be on the defendant to establish a defense to a criminal charge only in limited circumstances). In *State v. Daniels*, however, the Supreme Court instructed trial courts "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" when the trial court charged the jury "it was his 'confirmed opinion' that the verdict would represent 'truth and justice for all parties.'" 401 S.C. 255-56, 737 S.E.2d 473, 475 (2012). The Supreme Court further cautioned "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 guilty beyond a reasonable doubt." *Id.* at 256, 737 S.E.2d at 475.

Here, unlike in *Daniels*, the trial court never indicated to the jury they had an obligation to seek the truth. Indeed, the trial court never instructed the jury Applicant had to prove anything. Rather, the trial court merely stated: "A reasonable doubt is a doubt that would make an honest, sincere, conscientious juror, who's searching for the truth in the case to hesitate to act or to take some action." Tr. 862. Such an instruction does not indicate there is an obligation to seek the truth. Accordingly, this Court finds Applicant has failed to establish any deficiency on the part of Counsel.

Similarly, this Court finds Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency. Although, the Supreme Court has repeatedly cautioned trial courts to avoid using language that instructs the jury to "seek the truth" due to the risk such language could **potentially** shift the burden of proof to the defendant in an unconstitutional manner,[1] it has specifically declined to hold any mention of "the truth" to a jury automatically constitutes reversible error or is *per se* unconstitutional. *See Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) (citing *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998) ("Trial courts should avoid using 'seek' language in instructing the jury because such language is unnecessary and runs the risk of unconstitutionally shifting the burden of proof."); *State v. Aleksey*, 343 S.C. 20, 27-28, 538 S.E.2d 248, 251 (2000) (quotations omitted) (noting jury instructions on reasonable doubt that charge the jury to "seek the truth" are disfavored because

[1] Recently, in *State v. Beaty*, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018), decided nearly five years after Applicant's trial, the Supreme Court again stated "trial judge[s] should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict" because "[t]hese phrases could 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 the jury believes best serves its perception of justice." The Supreme Court further stated, "We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt." *Id.* Notably, although finding the trial court's instruction was improper, this Court found the error harmless, "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.*

they the risk of unconstitutionally shifting the burden of proof to a defendant.); *State v. Hoffman*, 312 S.C. 386, 395, 440 S.E.2d 869, 874 (1994) (holding a reasonable doubt jury charge that included "seeking the truth" language constituted a correct definition of reasonable doubt when read as a whole and did not shift the burden of proof to the defendant). Indeed, in *Aleksey*, the Court noted: "Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of 'the truth' in jury charges is unconstitutional." 343 S.C. at 28, n. 2, 538 S.E.2d at 252. Furthermore, the Court has declined to hold such language was reversible error when the trial court instructs the jury numerous times throughout its charge that the State has the burden of proving a defendant guilty beyond a reasonable doubt. *See Needs*, 333 S.C. at 154, 508 S.E.2d at 867 (finding the trial court's use of the "seeking the truth" language constituted harmless error when the trial court instructed the jury twenty-six times that the State had the burden of proving a defendant guilty beyond a reasonable doubt).

Here, the trial court instructed the jury **thirteen** times that the State had the burden of proving Applicant guilty beyond a reasonable doubt. *See* Tr. 860, l. 5-6; 861, l. 24-25; 869, l. 3; 872, l. 17-20; 873, l. 2-3; 873, l. 15-17; 875, l. 8-11; 876, l. 1-4; 876, l. 18-20; 877, l. 8-11; 877, l. 13-14; 879, l. 21-22; 880, l. 6-7. Moreover, Mazyck testified shortly after leaving the cellphone store parking lot and proceeding down Sam Edwards Road, Applicant and Graddick were coming out of the path that led to the cellphone store shopping center, wearing gloves, sunglasses, hats, and something to cover their faces. Tr. 505-08. Mazyck also testified either Applicant or Graddick had a black gun. Tr. 508. Applicant was also apprehended shortly after the armed robbery took place and near the crime scene. Tr. 364-65, 369, 375. Additionally, while being pulled over by law enforcement, Applicant stated: "Go! I'm not going back to jail.

Go!" Tr. 520. Still further, Applicant's DNA was found on gloves and clothing in the car, which Applicant and his co-defendants were in when apprehended. *See* Tr. 680-94. Based on the foregoing, it is unlikely the result of the proceeding would have been different had Counsel objected to the "search for the truth" language. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to the circumstantial evidence charge

Applicant alleges Counsel was ineffective for failing to object to the trial court's charge on circumstantial evidence. "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (2003) (internal citations omitted). In *State v. Grippon*, the Supreme Court recommended the following jury instruction on circumstantial evidence be given once a proper reasonable doubt instruction is given:

> There are two types of evidence which are generally presented during a trial-direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

327 S.C. 79, 83-84, 489 S.E.2d 462, 464 (1997). Thereafter, the Court held the aforementioned recommended language "is the sole and exclusive charge to be given in circumstantial evidence cases in this state." *State v. Cherry*, 361 S.C. 588, 601, 606 S.E.2d 475, 482 (2004). Recently,

however, the Court recommended language differing from that prescribed in *Grippon*. *See State v. Logan*, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013). In *Logan*, the Court explicitly found its "holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* and *Cherry*. However, trial courts may not exclusively rely on that charge over a defendant's objection." *Id.* at 100, 747 S.E.2d at 452-53.

Here, the trial court gave the following charge on circumstantial evidence:

> Now, evidence in a case such as this, there are two types of evidence, which you generally consider. Quite frequently, they consist of both types. Sometimes one more than the other, but it really doesn't matter because it's customary to use both types of evidence.
>
> One would be direct evidence. And direct evidence is typically testimony regarding a sensory perception. I saw something, I heard something, I felt something or the like. And if you are firmly convinced as to the truthfulness of that testimony, then it would establish that particular fact and circumstance.
>
> The other would be circumstantial evidence. And that, unlike direct evidence, is when a person testifies of a number of facts. And if you're firmly convinced as to the reliability and the truthfulness of each of those facts and you link them, then either through deductively, deductive reasoning, you reach another conclusion, you reach another conclusion, that, likewise, if you're firmly convinced of that conclusion, it would establish that particular fact or conclusion.
>
> I will tell you that it is quite common to use both and the law makes no distinction between the value or the weight to be given either to direct or circumstantial evidence. Nor is there any greater degree of certainty required of circumstantial evidence and direct evidence. Rather, you should weigh all of the evidence and decide what you find to be credible and believable.

Tr. 867-68. The language given by the trial court contains the correct definition and adequately covers the law as outlined in *Grippon*. Furthermore, Counsel testified he had no reason to object to the circumstantial evidence charge as given. Given the fact the *Grippon* language is still good

law and Counsel believed he had no reason to request the language in *Logan*, this Court finds Applicant has wholly failed to meet his burden. Accordingly, this allegation is denied and dismissed with prejudice.

Counsel's alleged failure to request a charge on strong arm robbery

Applicant further alleges Counsel was ineffective for failing to request a charge on the lesser-included offense of strong arm robbery. "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. *Gentry*, 540 U.S. at 8 (quoting *Massaro*, 538 U.S. at 505). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith*, 386 S.C. at 567, 689 S.E.2d at 632. *See also Ingle*, 348 S.C. at 470, 560 S.E.2d at 402 (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "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*, 308 S.C. at 122, 417 S.E.2d at 531. When counsel articulates a valid, strategic reason for failing to request a jury instruction on a lesser-included offense, trial counsel cannot have been ineffective for failing to do so. *Abney v. State*, 408 S.C. 41, 46-47, 757 S.E.2d 544, 547 (Ct. App. 2014).

Here, Counsel testified at least one of the store clerks testified a weapon was involved during this robbery, although there was no specific description of the gun by the clerk. Counsel further testified he did not request a lesser-included offense, and his decision was based upon the

facts, testimony presented at trial, and the arguments made to the jury. Based on the foregoing, this Court finds Counsel employed a valid strategic reason in failing to request a charge on the lesser-included offense of strong arm robbery. This Court further finds Applicant has wholly failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. A trial court is required to charge a jury on the lesser-included offense "if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996) (emphasis added). If, however, there is no evidence the defendant committed the lesser rather than the greater offense, the trial court should refuse to charge the lesser-included offense. *State v. Smith*, 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994).

Armed robbery is defined as the commission of a: "robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon." S.C. Code Ann. § 16-11-330 (2003). Strong arm robbery, however, is defined "as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." *State v. Rosemond*, 356 S.C. 426, 430, 589 S.E.2d 757, 758 (2003).

Here, the owner of the cellphone store testified he turned and saw two men wearing hats and masks come into the store, waving a gun. Tr. 154. Mazyck also testified when he and Smalls picked up Applicant and Graddick on Sam Edwards Road, one of them had a gun. Tr. 508. Furthermore, a gun was found in the car in which Applicant and his co-defendants were

apprehended. Tr. 392. Based on the foregoing, it is apparent a gun was used during this robbery and there was no evidence to support a charge of strong arm robbery. This allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to request an adequate charge on multiple defendants

Applicant further contends Counsel was ineffective for failing to request an adequate charge on multiple defendants. Specifically, Applicant contends the following charge should have been given:

> There are [two, three, etc.] defendants in this case. Each is charged with armed robbery or its lesser-included offense. Whatever verdict you find, it does not have to be the same as to [both] [all] defendants. You take each defendant, consider the evidence as to him, and write your verdict in accordance and in conformity with the evidence in the case and the instructions that I have given you and will hereafter give you. Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other, or you may acquit both, or you may convict both. It will depend upon your view of the testimony and evidence, which you alone are to pass upon.

Amendment to PCR Application (citing South Carolina Request to Charge-Criminal, Ralph King Anderson, Jr. § 1-27).

A jury charge is correct if, when it is read as a whole, it contains the correct definition and adequately covers the law." *Adkins*, 353 S.C. at 318, 577 S.E.2d at 464. A jury charge which is substantially correct and covers the law does not require reversal. *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996). Furthermore, "the substance of the law is what must be charged to the jury, <u>not</u> any particular verbiage." *Adkins*, 353 S.C. at 318-19, 577 S.E.2d at 464 (emphasis added).

Here, the trial court charged the jury: "[I]t's important to realize that there are three separate indictments, three separate defendants and three separate determinations that you will

have to make. And each party is entitled to a fair and impartial determination based on your assessment of the evidence." Tr. 859. The trial court further charged the jury: "To assist you . . . in recording the verdict, I've prepared three verdict forms. That is necessary because there are three separate cases, as we have discussed." Tr. 878. The trial court made the jury very aware there were three separate indictments and three separate defendants, and the jury was to render verdicts for each defendant individually. As no particular verbiage is required, this Court finds the charge given adequately covered the law. Moreover, Counsel testified he did not request the particular language laid out in the King charge, as the trial court's charge made it very clear these were three individual defendants. Based on the foregoing, this Court finds Applicant has wholly failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Following deliberations, the jury came back with verdicts for two defendants—Applicant and Graddick. Tr. 899-901, 905-06. The jury, however, had not rendered a verdict as to the third defendant, Smalls, so they returned to their deliberations. Tr. 910, 651. Based on the mere fact the jury reached verdicts on Applicant and Graddick prior to reaching a verdict on Smalls, the jury was aware they were to consider each case separately. Accordingly, this allegation must be denied and dismissed with prejudice.

CONCLUSION

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

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 19 day of November, 2018.

MICHAEL G. NETTLES
Presiding Judge
Ninth Judicial Circuit

Florence, South Carolina