Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

M E D I A R E L E A S E
August 9, 2002

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the commission in writing of the seat for which the prospective candidate intends to apply. Correspondence and questions must be directed to the Judicial Merit Selection Commission as follows:

Michael N. Couick, Chief Counsel
Post Office Box 142, Columbia, South Carolina 29202
(803) 212-6630

The commission will not accept applications after **12:00 noon on Monday, September 9, 2002**.

The term of the office currently held by the Honorable Kaye G. Hearn, Chief Judge of the Court of Appeals, Seat 5, will expire on June 30, 2003.

A vacancy will exist in the office of Judge of the Court of Appeals, Seat 6, upon the retirement of the Honorable Jasper M. Cureton on June 30, 2003.

The term of the office currently held by the Honorable G. Thomas Cooper, Jr., Judge of the Circuit Court for the Fifth Judicial Circuit, Seat 3, will expire on June 30, 2003.

The term of the office currently held by the Honorable Larry R. Patterson, Judge of the Circuit Court for the Thirteenth Judicial Circuit, Seat 3, will expire on June 30, 2003.

The term of the office currently held by the Honorable Jackson V. Gregory, Judge of the Circuit Court for the Fourteenth Judicial Circuit, Seat 2, will expire on June 30, 2003.

The term of the office currently held by the Honorable Paula H. Thomas, Judge of the Circuit Court for the Fifteenth Judicial Circuit, Seat 2, will expire on June 30, 2003.

The term of the office currently held by the Honorable John M. Milling, Judge of the Circuit Court, At-Large Seat 1, will expire on June 30, 2003.

The term of the office currently held by the Honorable R. Markley Dennis, Jr., Judge of the Circuit Court, At-Large Seat 2, will expire on June 30, 2003.

The term of the office currently held by the Honorable Clifton Newman, Judge of the Circuit Court, At-Large Seat 3, will expire on June 30, 2003.

The term of the office currently held by the Honorable Gary E. Clary, Judge of the Circuit Court, At-Large Seat 5, will expire on June 30, 2003.

The term of the office currently held by the Honorable James E. Lockemy, Judge of the Circuit Court, At-Large Seat 6, will expire on June 30, 2003.

The term of the office currently held by the Honorable J. Cordell Maddox, Jr., Judge of the Circuit Court, At-Large Seat 7, will expire on June 30, 2003.

The term of the office currently held by the Honorable Kenneth G. Goode, Judge of the Circuit Court, At-Large Seat 8, will expire on June 30, 2003.

A vacancy exists in the office of Judge of the Circuit Court, At-Large Seat 9, upon the retirement of the Honorable L. Henry McKellar, whose term will expire on June 30, 2003.

The term of the office currently held by the Honorable James R. Barber, III, Judge of the Circuit Court, At-Large Seat 10, will expire on June 30, 2003.

The term of the office currently held by the Honorable Ray N. Stevens, Judge of the Administrative Law Judge Division, Seat 5, will expire on June 30, 2003.

The term of the office currently held by the Honorable Walter H. Sanders, Jr., Master-in-Equity for Allendale County, will expire on December 31, 2002.

The term of the office currently held by the Honorable Thomas Kemmerlin, Jr., Master-in-Equity for Beaufort County, will expire on June 6, 2003.

The term of the office currently held by the Honorable Thomas P. Culclasure, Master-in-Equity for Calhoun County, will expire on August 14, 2003.

A vacancy will exist in the office held by the Honorable Roger M. Young, Master-in-Equity for Charleston County, whose term will expire on December 24, 2004.

A vacancy exists in the office formerly held by the Honorable Ralph F. Cothran, Sr., Master-in-Equity for Clarendon County, which term will expire on June 30, 2004.

A vacancy exists in the recently created office of Master-in-Equity for Dillon County.

The term of the office currently held by the Honorable Charles B. Simmons, Jr., Master-in-Equity for Greenville County, will expire on December 31, 2003.

The term of the office currently held by the Honorable James S. Cross, Jr., Master-in-Equity for Horry County, will expire on July 31, 2003.

The term of the office currently held by the Honorable O. Davie Burgdorf, Master-in-Equity for Orangeburg County, will expire on August 14, 2003.

The term of the office currently held by the Honorable Joseph M. Strickland, Master-in-Equity for Richland County, will expire on April 30, 2003.

The term of the office currently held by the Honorable Roger L. Couch, Master-in-Equity for Spartanburg County, will expire on June 30, 2003.

A vacancy will exist in the office of Master-in-Equity for York County upon the retirement of the Honorable John B. Grier, Sr., on June 30, 2003.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/judmerit.htm.

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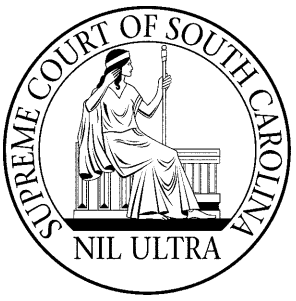

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

August 12, 2002

ADVANCE SHEET NO. 28

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Harold Broom, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Cherokee County
J. Derham Cole, Trial Judge
R. Markley Dennis, Jr., Post-Conviction Relief Judge

Opinion No. 25511
Submitted July 24, 2002 – Filed August 12, 2002

AFFIRMED

Chief Attorney Daniel T. Stacey, of S.C. Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Chief Capital and Collateral Litigation Donald Zelenka, Assistant Deputy Attorney General Allen Bullard

and Assistant Attorney General Douglas Leadbitter, all of Columbia, for Respondent.

PER CURIUM: Petitioner seeks a writ of certiorari following the denial of his application for post-conviction relief (PCR). We grant the petition, dispense with further briefing, and affirm the order of the PCR judge.

Petitioner was convicted of armed robbery. He contends that the circuit court did not have subject matter jurisdiction over the armed robbery charge because the indictment failed to allege that he intended to permanently deprive the owner of the property.

The armed robbery indictment alleged that petitioner did "while armed with a deadly weapon, to wit: a pistol, feloniously take from the person or presence of employees by means of force or intimidation goods or monies of Freidman's Jewelers . . . ."

Robbery is the felonious or unlawful taking of personal property of any value from the person of another, or in the person's presence, by violence or putting the person in fear. State v. Bland, 318 S.C. 315, 457 S.E.2d 611 (1995). Armed robbery is a robbery while armed with a deadly weapon or while the robber alleges, by actions or words, that he is armed with a deadly weapon which a person present during the commission of the robbery reasonably believes to be a deadly weapon. S.C. Code Ann. § 16-11-330 (A) (Supp. 2001).

There is no requirement that an armed robbery indictment contain an allegation of an intent to permanently deprive the owner of the property. In Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (1991), this Court stated that larceny is the felonious taking of the goods of another without the consent of the other. The Court went on to state that an intent by the offender to permanently deprive the owner of possession by converting the property to the offender's own use is implicit in the definition of larceny. Id. Similarly,

the intent to permanently deprive is also implicit in the definition of armed robbery.

The indictment in this case clearly defines armed robbery and apprised petitioner of the charge against him. Therefore, the circuit court did have subject matter jurisdiction over the armed robbery charge.

AFFIRMED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gene Tony Cooper, Jr., Respondent,

v.

Michael Moore,
Commissioner, South
Carolina Department of
Corrections, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Lexington County
William P. Keesley, Circuit Court Judge

Opinion No. 25512
Heard June 13, 2002 - Filed August 12, 2002

AFFIRMED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III; all of Columbia, for petitioner.

David I. Bruck, of Columbia; and Stuart M. Andrews, Jr., of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia, for respondent.

ACTING CHIEF JUSTICE MOORE: We granted this petition for a writ of certiorari to determine whether the post-conviction relief (PCR) court erred by finding S.C. Code Ann. § 16-3-28 (1985 & Supp. 2001), applies to non-capital crimes and whether the court erred by finding respondent was prejudiced by counsel's alleged deficient performance. We affirm.

FACTS

In the early morning of October 6, 1989, Kimberly Quinn (the victim) was discovered missing from her home. Her empty wallet was found in the yard of the home. At 9:17 a.m., the victim's forged welfare check was cashed at a bank.

The remains of the victim were discovered two days later. She had suffered shotgun wounds to the head, neck, and back. After her murder, the victim's hands and feet were severed with an ax and her body was set on fire with gasoline. The hands and feet were subsequently discovered in a nearby creek, along with an ax owned by respondent.[1]

Respondent was convicted of murder, kidnapping, armed robbery, and conspiracy to commit armed robbery. He was acquitted of forgery. He was sentenced to death. He was also sentenced to imprisonment terms of twenty-five years for armed robbery and five years for conspiracy to commit armed robbery. On direct appeal, we affirmed his convictions for armed robbery and conspiracy, reversed his murder conviction and death sentence, and remanded to the trial court. State v. Cooper, 312 S.C. 90, 439 S.E.2d 276

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[1]The fact the ax had been in respondent's truck at some point in time was stipulated to at trial.

(1994).[2] The Court concluded, after conducting an *in favorem vitae* review, that respondent's contention that the failure to obtain an on-the-record waiver of his right to personally address the jury mandated reversal of the murder conviction and death sentence. We denied respondent's petition for rehearing which stated all his convictions should have been vacated.[3]

Respondent's PCR application, raising issues concerning his right to make a guilt phase closing argument regarding his non-murder convictions, was granted by the PCR court.

ISSUES

I. Did the PCR court err by finding S.C. Code Ann. § 16-3-28 (1985 & Supp. 2001), applies to non-capital crimes?

II. Did the PCR court err by finding respondent was prejudiced by counsel's alleged deficient performance?

DISCUSSION
I

Respondent argued at his PCR hearing that he was entitled to a new trial on his non-capital convictions because he did not knowingly and intelligently waive his right to personally address the jury in the guilt phase of his trial. The PCR court granted him relief.

The State argues that because respondent's murder conviction was reversed on direct appeal, the PCR court erred in granting relief on

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[2] *Overruled in part by* Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 2332, ___ L.Ed.2d ___ (2002).

[3] The State has not retried respondent on the murder charge.

respondent's other convictions because he did not have the right to personally address the jury on those convictions.[4]

Section 16-3-28 provides that "in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument." S.C. Code Ann. § 16-3-28 (1985 & Supp. 2001) (emphasis added).

In respondent's direct appeal, State v. Cooper, 312 S.C. at 91, 439 S.E.2d at 277, n.2,[5] and in the case of State v. Charping, 313 S.C. 147, 150, 437 S.E.2d 88, 90 (1993),[6] the defendants' murder convictions were reversed

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[4]We found it unnecessary to address this question in Franklin v. Catoe, *supra*, because Franklin had failed to prove he was prejudiced by the lack of a knowing waiver of the right to make a closing statement in the guilt phase of his death penalty trial.

[5]In Cooper, *supra*, we reversed respondent's murder conviction because the trial judge failed to obtain an on-the-record waiver of respondent's right to personally address the guilt phase jury. 312 S.C. at 91, 439 S.E.2d at 277. We affirmed respondent's non-capital convictions on the basis that the error as to those convictions was not preserved for review. In footnote 1, we noted that, after Torrence, which abolished *in favorem vitae* review, errors that are not appropriate for direct appeal must now be raised in applications for post-conviction relief. *Id.* at 92, 439 S.E.2d at 277.

[6]*Overruled in part by* Franklin v. Catoe, *supra*. In Charping, *supra*, we reversed Charping's murder conviction because there was not a knowing and voluntary waiver of Charping's right to make the final argument to the jury in the guilt phase. Charping, at 149, 437 S.E.2d at 89. Since trial counsel failed to object to the lack of a waiver, Charping's other non-capital convictions were affirmed because they were "unaffected by trial errors raised for the first time on appeal." Id. at 149, 437 S.E.2d at 90. Because Charping was decided under *in favorem vitae*, we reversed only the murder conviction and

for the lack of a waiver of the statutory right to make a personal statement. The other convictions were deemed unaffected by trial errors raised for the first time on appeal, and were thus affirmed.

Because Cooper and Charping were decided under *in favorem vitae* review, we considered only the murder conviction. Issues raised regarding the non-capital convictions could not be raised for the first time on appeal. Although the end result in Charping and Cooper was that only the murder conviction was reversed, we did not hold that non-capital convictions could not be reversed in a situation such as respondent's where a capital defendant, who is also charged with non-capital crimes, is denied his right to make a guilt phase closing statement.

In any event, from the plain language of §16-3-28, it is clear the General Assembly never intended to limit that section to only those charges that carry a possible death penalty, but instead intended for the capital defendant to have the right to address the jury regarding all of his charges in a capital trial, whether all of the charges carry the death penalty or not.

The primary rule of statutory construction is that the Court must ascertain the intention of the legislature. Kerr v. State, 345 S.C. 183, 547 S.E.2d 494 (2001). Where the terms of the statute are clear, the court must apply those terms according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute's operation. *Id.*

Section 16-3-28 gives a defendant the right to address the jury "in any criminal trial where the maximum penalty is death." The plain language of the statute makes it clear that a defendant's right to address the jury during the guilt phase of his trial applies only if the defendant is facing a charge that carries the death penalty. However, section 16-3-28 does not limit the defendant's argument to only those charges that carry a possible death penalty but simply states "in any criminal trial where the maximum penalty is

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affirmed the non-capital convictions because the error as to those was not preserved for review.

death," meaning that the capital defendant has the right to address the jury regarding all of his charges, whether they carry the death penalty or not. From the plain language of § 16-3-28, we hold respondent had the right to make a guilt phase closing argument concerning not only the murder charge, but the non-capital charges as well.

Accordingly, the PCR court did not err by finding that § 16-3-28 applies to non-capital charges.

II

The State argues the PCR court erred by finding respondent was prejudiced by counsel's alleged deficient performance.

Before respondent's trial commenced, the judge informed the jury venire in respondent's presence that "[w]hen all of the evidence has been received by the court, counsel for the state and counsel for the defendant *and the defendant himself*, if he elects to do so, will state for the jury their respective positions in a summation or a final argument." (Emphasis added). Moments later, the trial judge reiterated to the jury venire that respondent himself had the right to make a final closing argument.

At the close of all the evidence, the trial judge explained to the jury that the next thing they would hear would be "arguments by the attorneys," without stating respondent had a right to make an argument as well.

After the jury found respondent guilty, the trial entered the sentencing phase. During this phase, the judge asked respondent if he understood he had the right to argue to the jury along with his attorneys. Respondent stated he understood that he had that right. The judge also ensured that respondent's decision not to address the jury at this stage was his decision alone.

In his PCR application, respondent alleged he was denied the effective assistance of counsel because he was not advised of his statutory right to

make a guilt phase closing argument to the jury.

At the PCR hearing, trial counsel, Jack Duncan, testified he did not discuss the right with respondent because he did not know of the right. Duncan stated if respondent had known about his right to address the jury during the guilt phase, respondent would have made a statement. He stated respondent did not testify at trial because of his prior criminal record and that respondent did not make a penalty phase statement because, at that point, he had lost interest in the trial after being found guilty of a crime he claimed he did not commit.

H. Patterson McWhirter, respondent's other counsel, testified that, although he was aware of the right to personally address the jury during the guilt phase, he did not remember whether respondent was informed of the right. McWhirter acknowledged respondent was capable of addressing the jury and that he would have made some good, logical arguments about the evidence.

Respondent testified he did not know and neither counsel nor the trial judge informed him he had the right to make a guilt phase statement. As for the trial judge's comments to the jury venire, respondent stated if the judge said anything about the right it did not register with him because the judge did not address him directly and discuss the right with him. He stated that, had he known of the right, he would have addressed the jury. Specifically, respondent stated he would have defended himself by discussing all the evidence the solicitor had presented in court. He testified he would have mentioned every charge and allegation and let the jury know he was not guilty of the crimes of which he was charged. He also wanted the jury to see he was not a "crazy person." Respondent indicated, while he knew of the right to make a statement during the penalty phase, he chose not to make a statement because he felt there was nothing to say after he had been convicted of a crime he did not commit.

The PCR court found respondent was denied the effective assistance of

counsel when he was not advised of and was denied his statutory right to make a guilt phase closing argument. Further, the PCR court found respondent was not required to show he was prejudiced in order to get relief;[7] however, the PCR court found, in any event, that respondent was prejudiced by the denial of his right to address the jury.

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), *cert. denied*, 474 U.S. 1094, 106 S.Ct. 869, 88 L.Ed.2d 908 (1986). As to allegations of ineffective assistance of counsel, an applicant must first show his counsel's representation fell below an objective standard of reasonableness and then show he was prejudiced by the substandard performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). In reviewing a grant of PCR, the Court is concerned only with whether there is any evidence of probative value to support the PCR court's decision. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). If any evidence of probative value is found, this Court must affirm the ruling of the PCR court. *Id.*

Here, counsel were deficient for failing to inform respondent of his statutory right to make a closing statement to the jury during the guilt phase of his trial. Therefore, the only issue is whether respondent was prejudiced by counsel's deficient performance.

In Franklin v. Catoe, *supra*, we found Franklin was not prejudiced by the failure to acquire a waiver of Franklin's right to make a personal argument to the jury during the guilt phase of his trial. Respondent's case is distinguishable. In Franklin, we found Franklin was not prejudiced by the

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[7]The State argues the PCR court erred by finding respondent was entitled to relief absent any proof he was prejudiced. Given our recent decision in Franklin v. Catoe, *supra*, we agree respondent must show prejudice.

lack of a waiver because the evidence of guilt was overwhelming[8] and because the jury had already heard him arguing for his innocence when Franklin testified and the jury had the opportunity to hear and consider his side of the story during that testimony. Franklin, 346 S.C. at 573-575, 552 S.E.2d at 724-725. However, in the instant case, respondent did not testify before the jury. Therefore, the jury did not have the opportunity to hear him argue for his innocence or to hear and consider his side of the story as occurred in Franklin. Further, the evidence against respondent was mostly circumstantial and not overwhelming.

The following facts were used by the State to attempt to show the jury respondent may have been involved in the crimes. A friend of the victim's testified when she came to the victim's house the morning after the victim disappeared she saw Budweiser beer cans in the living room. She stated these cans, which were not the victim's brand of beer, were not in the house the day before. On cross-examination, respondent's wife testified respondent drank Budweiser. Budweiser beer cans were also found in and around the area where the victim's body was found.[9]

The victim's friend testified a welfare check she had seen the afternoon before on top of the victim's television was missing. Another friend testified

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[8]The evidence of guilt was the following: (1) Franklin's own testimony placed him at the scene of the crime; (2) his bloody palm print was found on the fan that had been used to crush the victim's head; (3) his semen was on the victim's body; (4) necklaces belonging to the victim were found in his possession; and (5) blood on his pants matched blood found on the fan and the victim.

[9]*Compare* State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) (defendant entitled to directed verdict of not guilty based on lack of evidence where, among other things, nothing in evidence placed defendant at scene of crime and State could not establish that Marlboro cigarettes found at scene had been smoked by defendant).

the victim's wallet was found in the victim's driveway without any money in it. On October 6, at 9:17 a.m., someone forged the victim's signature and cashed her welfare check.[10]

While no blood was found inside respondent's truck, the interior of his truck, including the back window, had been freshly painted black. Respondent's wife testified respondent had discussed painting the truck around Labor Day, but did not paint it until October 8. She stated he painted it because he wished to cover up the Rebel Flag that was on the back windshield.

Respondent owned the ax that had been used to remove the victim's hands and feet following her murder. However, evidence was presented that Bo Southerland had the ax in his possession at the time of the crimes.

Two witnesses testified they saw a Mercury Cougar containing two male passengers acting suspiciously on October 5. The Cougar was seen in an apartment complex located across the street from the victim's home. One witness described the car's occupants but could not identify respondent as one of the occupants. The other witness identified respondent as the passenger of the Cougar. Evidence was presented that respondent owned the Cougar but had loaned it to Bo Southerland.

A friend of Bo Southerland's testified that, on the evening of October 5, Southerland was at his automobile repair shop and had parked the Cougar

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[10]Robert (Bo) Southerland was convicted of murder, kidnapping, armed robbery, and forgery in connection with the victim's murder. He was sentenced to death for the murder conviction. His convictions and sentences were affirmed on direct appeal. State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994), *cert. denied*, 513 U.S. 1166, 115 S.Ct. 1136, 130 L.Ed.2d 1096 (1995). Following the denial of his PCR application, the Court partially reversed the PCR court's denial and remanded the matter for a new sentencing hearing. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). Southerland has not been re-sentenced.

there. He stated, around 9:30-10:30 p.m., Southerland left with respondent in respondent's truck. Around midnight, the friend left the shop and noticed the Cougar was still there but Southerland was not. Another witness, who lived near the shop, testified he saw the Cougar at the shop around 7:00 p.m. and that Southerland was there. The next morning, around 7:00 a.m., he noticed the Cougar was still parked in the same spot. The witness indicated that Southerland lived about ¼ mile from the shop.

The only direct evidence of respondent's involvement in the crime of conspiracy came from respondent's alleged co-conspirator, Red Farmer. Farmer, who was incarcerated, testified he conspired with respondent to rob the victim. Farmer stated he called respondent at his house around 7:30 p.m. on October 4. He told respondent the victim would be receiving a $2800 check and that respondent could rob her. Respondent allegedly agreed. Farmer testified that, on October 6, he called respondent. During this phone call, respondent allegedly stated Farmer's intelligence was wrong, that "she did not have $2800," that he completed the construction job he was working on and had burned the excess material. Respondent said he was pleased with the job and did not see any complications. Farmer testified he understood this to mean that the robbery had been completed, the victim had been killed, and the body had been burned. The State introduced telephone records which supported Farmer's testimony.

The defense presented evidence that respondent did not have any financial problems and had recently received an insurance settlement in the approximate amount of $3,274.

If respondent had been given the opportunity to personally address the jury, there is a reasonable probability the result of his trial on the non-capital charges would have been different. Respondent wanted to tell the jury he was not guilty of the charged crimes and to show them he was not a "crazy person." Given that the evidence against respondent was not overwhelming, respondent's statement could have swayed the jury to find respondent not

guilty on his non-capital charges.[11] Respondent was entitled to argue his innocence to the jury and let them consider his side of the story. Had he been given this chance, there is a reasonable probability the result of his trial would have been different. *See* Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997) (to show prejudice, applicant must show, but for counsel's errors, there is reasonable probability result of trial would have been different).

Therefore, there was evidence of probative value to support the PCR court's conclusion that respondent was prejudiced by trial counsel's failure to advise respondent of his right to make a guilt phase closing argument. *See* Palacio v. State, *supra*.

CONCLUSION

We find § 16-3-28 applies to non-capital charges when a defendant is on trial for a capital charge and that respondent was prejudiced by his attorneys' failure to inform him of his statutory right to make a guilt phase closing statement to the jury. Therefore, the order of the PCR court is **AFFIRMED.**

WALLER, BURNETT, JJ., and Acting Justice George T. Gregory, Jr., concur. PLEICONES, J., concurring in a separate opinion.

[11]The jury deliberated over two days for approximately eight hours.

JUSTICE PLEICONES: I concur. In my dissent in Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001), I concluded that a capital defendant, denied his statutory right to address the jury at the close of the guilt phase of his trial, was not entitled to be retried on his non-capital charges. Id. at 579-580, 552 S.E.2d at 727. As the majority opinion persuasively demonstrates, I was wrong. I continue to believe, however, that a capital defendant "denied the opportunity to exercise a statutory right afforded him by our death penalty statutes[12]" is *ipso facto* entitled to a new proceeding, and therefore would not engage in a Strickland[13] prejudice analysis here.

I concur in the majority's decision to affirm the post-conviction relief judge's order granting respondent a new trial on the charges of kidnapping, armed robbery, and conspiracy to commit armed robbery.

[12] S.C. Code Ann. §§16-3-20 through – 28 (Supp. 2001).
[13] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John G. O'Day, Respondent.

Opinion No. 25513
Submitted July 2, 2002 - Filed August 12, 2002

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

Desa A. Ballard, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel entered into an agreement pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of an indefinite suspension as set forth in Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and indefinitely suspend respondent from the practice of law. However, the indefinite suspension is not retroactive to the date respondent was placed on interim

suspension.[1] The facts as admitted in the agreement are as follows.

Facts

I. Matter A

Respondent was employed by a law firm in South Carolina ten years ago, first as an associate, then as a partner, until June 2000. Approximately five years ago, partners of the firm discovered financial irregularities relating to funds paid to respondent by clients on behalf of the firm. The firm's practice was that all fees received by an employee from any client were to be deposited into the operating account of the firm. No employee was authorized to retain any portion of the fees.

Respondent acknowledged to the firm that he had retained money belonging to the firm. The firm estimated that respondent retained approximately $120,000 in fees.

The firm allowed respondent to continue partnership status in exchange for respondent agreeing to repay the firm a sum of $60,000. The parties agreed that this sum constituted full repayment of the loss to the firm due to respondent's retention of the client fees. Respondent repaid the entire amount. However, in the spring of 2000, the firm discovered more irregularities relating to respondent's mishandling of firm funds. The firm discovered that respondent retained approximately $30,000 of additional fees which respondent knew were the property of the firm. Thereafter, respondent resigned from the firm and started a law practice as a sole practitioner.

Respondent admits that he retained firm funds for his own use and does not dispute the firm's estimates of the amounts withheld. Respondent states that no client funds were misappropriated as all clients

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[1]Respondent was placed on interim suspension by order of this Court dated April 9, 2001.

were given credit against amounts owed to the firm for all fees paid to him. Disciplinary Counsel does not dispute that representation.

II. Matter B

Respondent agreed to represent client in a criminal matter in which the client was charged with fraudulently stopping payment on a check to Carolina Mobility. Respondent executed a fee agreement pursuant to which client would pay respondent $1,500 if the case went to trial, or $750 if the matter was settled prior to trial. Respondent informed client that he would file a discovery motion but failed to do so. However, in support of a motion for dismissal, respondent represented to the magistrate that the other party failed to respond to discovery. In addition, respondent mistakenly relied on the issue of whether Carolina Mobility had sent a certified letter to the client, thinking that, like a fraudulent check charge, written notice via certified mail was required before charges could be brought against the client.

After the parties settled, client filed a complaint against respondent. When he was informed of the complaint, respondent prepared, submitted, and had issued, an order for the presiding magistrate which stated that client "was pleased with the services of [respondent] in this matter." However, no such testimony was given. Respondent also told Disciplinary Counsel that he made an informal discovery request in the case when no such request was ever made. Finally, respondent charged client a fee of $1,500 even though the case settled prior to trial.

III. Matter C

Respondent was retained to represent client in a criminal matter. Respondent received notice where the case was to be heard and that a jury strike had been scheduled. However, respondent failed to inform client of the jury strike. Client obtained his file from the attorney appointed to protect clients' interest after respondent was placed on interim suspension and had to retain other counsel to represent him in the matter.

IV. Matter D

Respondent was retained to represent complainant's son in a criminal matter. The fee paid to respondent included representation through any potential plea or trial. Complainant's son pled guilty and the matter of restitution was held in abeyance. Respondent continued to represent complainant's son in the restitution issue.[2]

V. Matter E

In this matter, a court reporter seeks payment for a transcript ordered by respondent. Respondent states that the court reporter transcript and statement were received contemporaneous with the closing of his law practice when he was placed on interim suspension and that the statement was given to the attorney appointed to protect clients' interests along with the related client file. Respondent further states that another attorney is now handling the case and anticipates that the statement will be paid by that attorney at the conclusion of the case. Respondent is unable to pay the statement at the present time and acknowledges that he is ultimately liable for the cost of the transcript.

VI. Matter F

Respondent was retained to represent multiple clients on drug related offenses and was paid a fee to do so. However, respondent was placed on interim suspension and was unable to complete the representation. Respondent was financially unable to refund the unearned fees.

Law

Respondent admits that he has violated Rules 7(a)(1) (violating

[2]Although the facts as detailed above are included in the agreement, we find no misconduct on the part of respondent.

the Rules of Professional Conduct); 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute; engaging in conduct demonstrating an unfitness to practice law); and 7(a)(6) (violating the oath of office taken upon admission to practice law in this state) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. He also admits he has violated Rules 1.1 (failing to provide competent representation to a client); 1.2 (failing to abide by a client's decisions concerning the objectives of the representation); 1.3 (failing to act with reasonable diligence and promptness in representing a client); 1.4 (failing to keep a client reasonably informed and failing to promptly comply with requests for information); 1.5 (failing to charge reasonable fees); 1.15 (failing to safeguard a client's property); 3.3 (making a false statement to a tribunal); 4.1 (making a false statement of material fact or law to a third person); 8.4(a) (violating the Rules of Professional Conduct); 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); 8.4(c) (engaging in conduct involving moral turpitude); 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and 8.4(e) (engaging in conduct that is prejudicial to the administration of justice) of the Rules of Professional Conduct, Rule 407, SCACR.

Conclusion

We accept the Agreement for Discipline by Consent and find that the facts set forth in the agreement warrant an indefinite suspension from the practice of law. However, the suspension is not retroactive to the date respondent was placed on interim suspension. Prior to reinstatement to the practice of law, the burden of proof shall be on respondent to demonstrate that any and all amounts that might be due to his former clients in Matters A, B, C, D, E, and F have been fully paid. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

INDEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

James R. Standard, Appellant.

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 25514
Heard June 26, 2002 - Filed August 12, 2002

AFFIRMED

Katherine Carruth Link; and South Carolina Office of Appellate Defense, both of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor Druanne D. White, of Anderson, for respondent.

JUSTICE WALLER: Appellant, James R. Standard, was convicted of burglary in the first degree and grand larceny. Based upon a prior armed robbery conviction, he was sentenced to life imprisonment without parole (LWOP) pursuant to S.C. Code Ann. § 17-25-45 (2001), the Two-Strikes law.

FACTS

On July 5, 1995, approximately two months prior to his sixteenth birthday,[1] Standard committed an armed robbery. He was waived up to general sessions court where he pled guilty to armed robbery on October 17, 1996 (at age 17); he was given a youthful offender sentence not to exceed six years.[2]

Shortly after his release on the armed robbery charge, Standard and two co-defendants broke into a mobile home in Anderson County on October 9, 1999; they vandalized the residence and stole cash, jewelry and miscellaneous items valued at over $1000.00.[3] The victim testified that her home was completely destroyed, and that her dog was beaten so severely it had to be put to sleep; her son's cat was also killed. The jury convicted Standard of burglary in the first degree and grand larceny. Based upon his prior "most serious" armed robbery conviction, the trial court sentenced him to LWOP for burglary under the Two-Strikes law.

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[1] Standard was born on September 3, 1979.

[2] One of his cohorts during the 1995 robbery was Jeremy Jones, who was 14 years old at the time. Unlike Standard, Jones' case was handled as a juvenile adjudication in family court.

[3] Standard and his cohorts committed three other burglaries the same evening in Pickens county, to which Standard pled guilty prior to this case. These burglaries were not used to enhance Standard's present sentence.

ISSUE

Is Standard's sentence of LWOP for burglary unconstitutional?

DISCUSSION

Under the Two-Strikes Law, S.C. Code Ann. § 17-25-45(A)(1), upon conviction of a most serious offense, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has one or more prior convictions for a most serious offense. Armed robbery and first degree burglary are most serious offenses. S.C.Code Ann. § 17-25-45(C)(1).

Standard contends the Two-Strikes Law is unconstitutional as applied to him in that it a) violates the separation of powers doctrine by depriving the judicial branch of discretion to consider mitigating circumstances, b) violates due process because the triggering offense of armed robbery was committed when he was 15 years old and his plea was entered (at age 17) without any understanding of the consequences, and c) amounts to cruel and unusual punishment under the circumstances of this case.

We recently rejected Standard's separation of powers argument in State v. Jones, 344 S.C. 48, 56, 543 S.E.2d 541, 545 (2001), stating:

> Initially, this Court held in State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999), that Section 17-25-45 does not violate the separation of powers doctrine. We stated, "[u]nder the mandatory sentencing guidelines, the prosecutor can still choose not to pursue the triggering offenses or to plea the charges down to non-triggering offenses. Choosing which crime to charge a defendant with is the essence of prosecutorial discretion, not choosing which sentence the court shall impose upon conviction." 335 S.C. at 40-41, 515 S.E.2d at 528-529. Further, we found the matter of sentencing if convicted of a triggering offense to be a matter within the province of the legislature.

Standard asserts Jones and Burdette addressed the separation of powers issue only in the context of whether the Two-Strikes law intrudes upon the **prosecutorial** function, but that the Court has not addressed whether it intrudes upon **judicial** discretion to impose a certain sentence. Contrary to Standard's contention, we stated in State v. De La Cruz, 302 S.C. 13, 15, 393 S.E.2d 184, 186 (1990):

> If a defendant is convicted of one of the triggering offenses, the matter of sentencing becomes the province of the legislature. We have held in the past that the penalty assessed for a particular offense is, except in the rarest of cases, purely a matter of legislative prerogative, and the legislature's judgment will not be disturbed.

The De La Cruz Court specifically rejected the claim that "the mandatory sentence set forth by the legislature impermissibly intrudes into inherent judicial powers in that all judicial discretion in sentencing is removed." Id.[4] We find De La Cruz dispositive of Standard's claim regarding to judicial discretion.[5]

Standard next asserts a sentence of LWOP in this case constitutes cruel and unusual punishment because he was only 15 years old at the time he committed the triggering offense (armed robbery), and the Two-Strikes law permits no consideration of the individual facts of his case. We specifically rejected a "cruel and unusual punishment" challenge to the Two-Strikes law in State v. Jones, supra. However, we have not had occasion to address whether

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[4] De La Cruz involved S.C. Code Ann. § 44-53-370(e)(2)(c), which provides a mandatory term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, for trafficking between one hundred grams to two hundred grams of cocaine.

[5] Moreover, the United States Supreme Court has rejected the argument that mandatory penalties, including life imprisonment without parole (excepting capital punishment), are unconstitutional just because they prevent the consideration of mitigating factors. See Harmelin v. Michigan, 501 U.S. 957, 994-96 (1991).

a LWOP sentence is cruel and unusual if the triggering offense was committed at the time the defendant was a juvenile.

Recently, in State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), we held a juvenile adjudication is not a conviction, guilty plea, or plea of nolo contendere, such that it may not be used to invoke the mandatory LWOP provisions of the recidivist statute.[6] Unlike Ellis, however, Standard here was tried and adjudicated as an adult, such that his guilty plea to armed robbery in general sessions court **is** a conviction for purposes of sentencing under S.C. Code Ann. § 17-25-45(C)(3)(defining a conviction as any conviction, guilty plea, or plea of nolo contendere).[7]

The question remains, however, whether it is cruel and unusual to sentence a defendant to LWOP utilizing enhanced penalties for a burglary

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[6] The Court noted that S.C.Code Ann. § 20-7-7805(C) (Supp.2000)(the Children's Code) specifically provides "[n]o adjudication by the [family] court of the status of a child is a conviction." 345 S.C. at 180, 547 S.E.2d at 492.

[7] This is the distinguishing factor between Standard's sentence, and that of his cohort, Jones, who had a juvenile adjudication as the result of the armed robbery committed in 1995. Jones was also a participant in the 1999 burglary. As Jones had only a juvenile adjudication, and no prior conviction, he received a fifteen year sentence for the current burglary. There is no indication in the record before us as to the precise reasons Standard was tried as an adult in general sessions court for that offense. However, S.C. Code Ann. § 20-7-7605 (5)(Supp. 2001) provides that a family court having jurisdiction of a 14 or 15 year old juvenile who commits certain offenses may, "after full investigation and hearing, . . . determine it contrary to the best interest of the child or of the public to retain jurisdiction. The court . . . may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offenses if committed by an adult." Accordingly, nothing contrary appearing in the record before us, we must assume the family court in the armed robbery matter conducted an investigation and determined Standard's case was proper for waiver to general sessions court.

committed when he was 15 years old.[8] We find it is not.

In Thompson v. Oklahoma, 487 U.S. 815, 834 (1988), the United States Supreme Court addressed whether it was cruel and unusual punishment to sentence a defendant to **death** for a murder committed when he was 15 years old. The Court found imposition of a death sentence on one who committed a crime at the age of 15 would not serve the goals or deterrence or retribution inasmuch as a juvenile is less culpable, has more capacity for growth, and is not likely to have performed a cost-benefit analysis as to the consequences of his conduct. Id. at 836-37. However, the Court's opinion in Thompson was premised upon the fact that the great majority of jurisdictions imposing capital punishment have statutory schemes under which defendants may not be executed for crimes committed prior to age 16. The Court noted that the authors of the Eighth Amendment did not attempt to define the contours of cruel and unusual punishment but, instead, left it to generations of judges to be guided by "evolving standards of decency that mark the progress of a maturing society." Thompson, 487 U.S. at 821, citing Trop v. Dulles, 356 U.S. 86 (1958). Further, as noted by Justice O'Connor in her concurrence, "[u]nder the Eighth Amendment, the death penalty has been treated differently than other punishments." 487 U.S. at 856.[9]

Based upon sentences imposed in other cases, we find lengthy sentences or sentences of life without parole imposed upon juveniles do not violate

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[8] It is clear that LWOP for burglary is not, in itself, cruel and unusual. See State v. White, 349 S.C. 33, 562 S.E.2d 305 (2002)(holding life sentence without parole for first-degree burglary is not cruel and unusual punishment).

[9] The United States Supreme Court's recent opinion in Atkins v. Virginia, Op. No. 00-8452 (filed June 20, 2002)(holding execution of mentally ill defendants violates the Eighth Amendment), supports this analysis. Although the test remains whether "evolving standards of decency" prohibit a certain punishment, Atkins does not alter our holding with regard to the life sentence without parole imposed in this case.

contemporary standards of decency so as to constitute cruel and unusual punishment. See Hawkins v. Hargett, 200 F.3d 1279 (10th Cir. 1999), cert. denied 531 U.S. 830 (2000)(sentence of 100 years without parole for 13 year old defendant convicted of burglary, sodomy, rape, and robbery with a dangerous weapon); Harris v. Wright, 93 F.3d 581 (9th Cir. 1996)(15 year old defendant sentenced to life imprisonment without parole for murder); State v. Ira, 43 P.3d 359 (N.M. 2002)(sentence of 91&1/2 years imposed where defendant, at ages 14-15, committed 10 counts of criminal sexual assault against his step-sister); State v. Green, 502 S.E.2d 819 (N.C. 1998), cert. denied, 525 U.S. 1111 (1999)(mandatory life sentence imposed on 13 year old who committed first-degree criminal sexual conduct); State v. Taylor, 1996 WL 580997 (Tenn. Crim. App. 1996)(sentence of life without parole plus 60 years imposed on juvenile defendant who, at age 16, committed kidnapping, aggravated robbery, aggravated sexual battery, and felony murder); State v. Pilcher, 655 So. 2d 636 (La. App. 1995)(life without parole imposed on 15-year old defendant charged with two counts of murder).

As the Tenth Circuit recently observed in Hawkins, 200 F.3d at 1285,

> Moreover, there is apparently no societal consensus that a long sentence imposed on a defendant for serious crimes he committed at age thirteen offends evolving standards of decency. The North Carolina Supreme Court recently found that nineteen states allow adult penalties for thirteen-year-olds convicted of serious crimes. . . .The court determined that the growing minority of states permitting such punishment is evidence of changing public sentiment toward modern society's violent youthful offenders, and that "sentencing a thirteen- year-old defendant to mandatory life imprisonment ... is within the bounds of society's current and evolving standards of decency." Id. Thus, modern society apparently condones the severe punishment of individuals who commit serious crimes at young ages. We therefore cannot say that a punishment of a term of years for a violent crime, with the possibility of parole, violates "evolving standards of decency" simply because the defendant was thirteen years old at the time of

the offense.

We hold that an enhanced sentence based upon a prior most serious **conviction** for a crime which was committed as a juvenile does not offend evolving standards of decency so as to constitute cruel and unusual punishment.

Finally, Standard asserts that allowing his juvenile plea to serve as the first "strike" to support a mandatory life sentence is fundamentally unfair and deprives him of due process. Essentially, Standard's claim is that he pleaded guilty to the armed robbery without knowledge that the conviction could later be used to trigger a mandatory life sentence upon commission of a subsequent offense. This claim is, in reality, a challenge to the voluntariness of Standard's armed robbery plea, such that it is a matter for post-conviction relief which is not properly before this Court. State v. McKinney, 278 S.C. 107, 292 S.E.2d 598 (1982) (unknowing or involuntary nature of guilty plea properly addressed on post-conviction relief, absent timely objection to plea).

Moreover, in State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999), we recognized that South Carolina does not require a defendant be informed, even in the indictment, that he was eligible upon conviction to be punished more severely on the basis of previous convictions in his record. Accordingly, we find no due process violation.

Standard's sentence of LWOP does not violate the Eighth Amendment.

AFFIRMED.

TOAL, C.J., MOORE and BURNETT, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Roderick L. Green, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Georgetown County
Paula H. Thomas, Trial Judge
L. Henry McKellar, Post-Conviction Judge

Opinion No. 25515
Submitted April 17, 2002 - Filed August 12, 2002

AFFIRMED

Capers G. Barr, III, of Charleston, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General Douglas E. Leadbitter, all of Columbia, for respondent.

JUSTICE BURNETT: A jury convicted Roderick L. Green ("Green") of armed robbery of a restaurant. The court sentenced him to fifteen years imprisonment. He did not appeal.

Green filed an application for post-conviction relief ("PCR") alleging ineffective assistance of counsel and asking for a belated appeal. Although the PCR court denied the ineffective assistance of counsel claim after a hearing, it granted a belated review of his direct appeal issues.

This Court granted review pursuant to White v. State[1] and affirmed Green's conviction. We also granted certiorari to review the ineffective assistance of counsel issues. We affirm.

FACTS

An armed robbery was committed at a restaurant in Georgetown, South Carolina. The perpetrators were a woman and a man armed with a revolver. A restaurant employee identified the female robber, Sakina McKenith ("McKenith"), in a photographic lineup.

McKenith pled guilty to the armed robbery and an unrelated crack cocaine offense and received a State-recommended sentence.[2] In exchange, McKenith agreed to testify against Green, her accomplice.

At trial, a restaurant employee testified the female robber appeared to be the same person who ordered a sandwich at the walk-up window an hour before the robbery. Another employee confirmed McKenith, the mother of his son, ordered a sandwich at the walk-up window.

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[1] 265 S.C. 110, 208 S.E.2d 35 (1974).

[2] The State recommended a sentence of ten years for armed robbery and a concurrent sentence for possession of crack cocaine.

At the time, McKenith told him she was with "Donny." The employee testified he knew Donny, but Donny was not the male robber.[3]

McKenith testified she told the male employee she was driving Donnie's car, but stated at trial Green was her accomplice in the robbery. After giving an account of the robbery, McKenith further testified she and Green went to his aunt's mobile home after the robbery to count the money.

Latoya Williams ("Williams"),[4] a visitor of Green's aunt, corroborated McKenith's testimony of McKenith's and Green's return to the aunt's mobile home. Williams stated the two were in a room, with the door closed, and were heard saying "Yeah, yeah, we did it." She stated seeing Green and McKenith exit the room with a garbage bag.

Donny Green ("Donny"), petitioner Green's cousin, admitted Green borrowed his white car and drove with McKenith to the restaurant. Donny testified, however, Green returned alone around 10:00 to 10:15 P.M., before the time of the robbery. His testimony contradicted his previous statement to police which contained a time-frame of 10:30 to 11:00 P.M., the approximate time of the robbery.

Green did not testify, but called Katrina Yates ("Yates") as a witness. Yates testified to being incarcerated with McKenith at the county jail. Yates stated McKenith, before she agreed to a plea bargain, had told her Green was not the person who helped her commit the robbery.

At the conclusion of the presentation of evidence, but before closing arguments, Green's counsel moved to remove a juror because he was

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[3] According to the male employee's testimony, he was never able to view the female robber and only had direct contact with the armed male robber.

[4] Williams admitted, on cross-examination, she smoked crack cocaine earlier on the evening of the robbery.

Mayor of the City of Georgetown. Counsel asserted the Mayor would be unable to serve as an impartial juror in a case because he was responsible for hiring and firing members of the police department. The trial judge removed the Mayor from the jury.

Although instructed not to consider Green's exercise of his right not to testify, the jury, twenty minutes after deliberations began, sent the following note to the trial judge:

> Trial Court: Alright, we have received a question from the jury and it's as follows: "We were told we should not discuss the Defendant's choice not to testify. If that is discussed is it a mistrial? If so, how could our deliberations be" and I think the word is "renewed or revived?"

After discussion, the State and Green's counsel agreed to a curative instruction. The trial court then re-instructed the jury the State had the burden to prove Green's guilt and the jury was not to consider, in any way, his exercise of the right not to testify.

Approximately three hours after receiving the court's latest instruction, the jury sent a message stating "Hung." The judge, without objection from the Green's counsel, issued the following Allen[5] instruction to the jury:

> Its not always easy for even two persons to agree. Therefore, I understand when 12 persons must agree it becomes much more difficult, but it is important that litigation and this case's litigation be ended. In this case it is a General Sessions case. If it can be ended without a single one of you doing violence to your conscience, it's your duty as jurors to consult with one

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[5] Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

another and to deliberate with a view towards reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for himself or herself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced that your opinion is erroneous. No juror is expected to give up his or her opinion based on reasoning satisfactory to yourself merely for the purpose of being in agreement, and I want you to understand that and do not surrender your honest convictions as to the weight or the effect of the evidence solely because the opinion of your fellow jurors is contrary to your opinion or for the mere purpose of returning a verdict.
....

It has never been intended that the verdict of a jury should be the verdict of any one person. On the other hand, the verdict of the jury is the collective reasoning of all persons put together. The reason we have a jury is so that we might have the benefit of the collective thought and collective reasoning of the jury. It may help to tell the other jurors how you feel about the case and why you think as you do as I am sure that you have been doing.

On the other hand, it may help if other jurors exchange views with you and I ask that you listen to each other and give the other thought such meaning as you think they should have.
....

Now, I'm going to ask that you, again, retire to your jury room for further deliberations and see if you can write a verdict in this case, and let me close by reminding you again that while it's important that this case be ended, it should be ended in the form of a verdict without any juror doing violence to his or her own

> conscience. No juror is expected to give up an opinion based on reasoning satisfactory to himself merely for the purpose of being in agreement.

The jury returned a verdict nearly two hours following the Allen instruction. When asked by the court whether it had reached a verdict the foreman replied, "We have reluctantly, yes." The jury found Green guilty. Trial counsel did not ask the court to poll the jury.

ISSUES

I. Was trial counsel ineffective for failing to move for a mistrial after the jury advised the trial court it discussed Green's failure to testify during deliberations?

II. Was trial counsel ineffective in failing to object to the Allen charge?

III. Was trial counsel ineffective for failing to request the trial court poll the jury?

IV. Was trial counsel ineffective because of cumulative errors?

V. Did the PCR court err by not admitting a trial attorney's expert opinion on whether trial counsel's conduct fell below generally accepted standards of competency?

ANALYSIS/DISCUSSION

There is a strong presumption trial counsel provided adequate assistance. See Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). To prove ineffective assistance of counsel, the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at

trial would have been different. See Strickland v. Washington, supra; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is one sufficient to undermine confidence in the trial's outcome. See Strickland v. Washington, supra. This Court sustains the PCR court's factual findings and conclusions of law drawn from them as long as there is any probative evidence to support those findings. See Cherry v. State, supra.

I

Counsel's Failure to Move for a Mistrial

At his PCR hearing, Green asserted his trial counsel provided ineffective assistance because he failed to move for a mistrial after the jury sent its note referring to Green's failure to testify. The PCR court denied Green's contention finding, first, Green made the decision to select a curative instruction, and, second, counsel's advice was permissible trial strategy. We agree.

At the PCR hearing, Green's mother, Anita Brown ("Brown"), testified counsel informed her and her husband Green had grounds for a mistrial. However, trial counsel believed a mistrial was not necessary because Green had a "good" jury more likely to acquit. Brown's husband confirmed her testimony. Green testified trial counsel advised him to not request a mistrial because he had a good jury. Instead, counsel suggested a curative instruction because Green had a good chance at acquittal.

Trial counsel's testimony at the PCR hearing corroborated much of the Browns' and Green's statements. He stated he conferred with Green several times, questioning him about the decision to obtain a curative instruction, and talked with the Browns about their son's options.

Further, counsel informed Green and his family the State could seek enhanced punishment in a new trial. The State, apparently, was unaware Green had a prior robbery offense in Florida until the trial began. The State informed trial counsel during deliberations it would seek a sentence of life without parole due to Green's robbery record in Florida if there were a new trial. Due to the possibility of enhanced punishment and his belief Green had a good jury, trial counsel admitted he thought they should ask for a curative instruction.

Green, at trial, requested the curative instruction instead of a mistrial. Therefore, there is evidence in the record to support the PCR court's findings. See Cherry v. State, supra (this Court will sustain the PCR court's holding as long as there is any probative evidence in the record to support its findings). Further, the possibility of an enhanced punishment coupled with counsel's belief Green had a favorable jury constitutes reasonable trial strategy not to request a mistrial. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel).

Assuming, *arguendo*, trial counsel provided ineffective assistance, the error was not prejudicial. Green asserts the error undermines the confidence in the verdict because, if a mistrial were granted, this particular jury could not have found Green guilty, thus the error was prejudicial. Further, Green claims he would be in a significantly better position in a retrial because he would be able to have "more effective cross-examination and responsive argument to the State's case," and McKenith "would have been into the service of her ten year prison term, for which she had erroneously believed that she would have been paroled [earlier than what she was actually eligible for, making it] more likely than not that she would be a less than enthusiastic witness at retrial."

Although Green's trial strategy could be more effective in a retrial following a "trial run," his arguments are theoretical assumptions at best. They are not sufficient to cast doubt on the jury's verdict, especially

coupled with the relative strength of the case against him.

II

Failure to Object to an Allen Charge

Green argues trial counsel's failure to object to the Allen charge was ineffective assistance which prejudiced him by coercing the jury to render a guilty verdict. Green asserts this Court should adopt the standard articulated by the United States Court of Appeals for the Fourth Circuit in United States v. Burgos, 55 F.3d 933 (4th Cir. 1995). The PCR court found the trial court's Allen charge did not violate Green's rights. Additionally, the PCR court found any decision not to seek a mistrial was valid trial strategy. We agree.

The Burgos charge, applicable to federal courts in South Carolina, requires "a district court [to] incorporate a specific reminder both to jurors in the minority and those in the majority that they reconsider their positions in light of the other side's views." Id. at 941. While we do not adopt Burgos, this Court has continually mandated a neutral application of the Allen charge.

In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996). It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict. State v. Singleton, 319 S.C. 312, 460 S.E.2d 573 (1995).

The Allen charge given to the jury below was not "coercive

instruction, focused on the position of the minority juror," as Green suggests. To support his conclusion, Green argues each use of the word "you" in the charge was "terribly coercive" to the minority jurors.

A fair reading of the actual jury charge does not support Green's interpretation. The entire charge shows the trial judge adequately and correctly told the jurors they should listen to what the other side had to say; to be open to change one's mind; and to not change one's mind if it would do violence to one's conscience. The charge was neutral in its direction, not impermissibly aimed at the minority, instead suggesting members of each side examine their own position in light of the other view's position.

Assuming trial counsel was ineffective in failing to object to the Allen charge, there is nothing in the record to suggest the minority view was favorable to Green. Green submitted no evidence to suggest the minority wished to acquit him. One may speculate just as freely the minority view at that juncture of deliberations wished to convict Green. We acknowledge this is mere speculation, which is, at its heart, a fatal flaw in Green's argument. Even if the Allen charge were coercive toward the minority view, Green fails to show the minority wished to acquit. Additionally, he fails to show prejudice by counsel's failure to object. Johnson v. State, supra.

There is evidence in the record supporting the PCR court's ruling. See Cherry v. State, supra.

III

Failure to Poll the Jury

Green asserts "two red flags were waved in the face of trial counsel when the jury returned to the courtroom to report their verdict: a crying juror, and a foreman announcing they had reached a verdict 'reluctantly.'" Brown, Green's mother, testified at the PCR hearing to observing a juror crying when the jury returned with a verdict. Trial counsel testified he did not believe he had an obligation to poll the jury and he did not

observe any juror crying.

The PCR court, in finding trial counsel was not ineffective for failing to request the jury be polled, refused to speculate what the jury poll would be. The PCR court also found the foreman's statement the jury reached its verdict "reluctantly" was not indicative of any error. We agree.

A trial judge polls the jury to ensure the verdict is unanimous. State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). A trial judge is not required to conduct a jury poll if the court is satisfied the verdict is unanimous. Id. A trial judge must conduct a jury poll if requested by either party. Id.

Trial counsel had no affirmative duty to request the trial judge poll the jury. Further, Green desires this Court speculate what the foreman meant when he said "reluctantly." The foreman may have been expressing the jury's reluctance in finding Green guilty. The foreman may have been merely noting the jury had reached a verdict slowly after several hours of deliberations and becoming deadlocked at one point.

Green concedes he is unable to argue the outcome would be different if the court polled the jury, but argues trial counsel's failure to request a jury poll falls below an objective standard of competence. Assuming, *arguendo* trial counsel's failure to request a jury poll falls below an objective standard of competence, Green admits he is unable to show how he was prejudiced. The evidence supports the PCR court's findings. See Cherry v. State, supra.

IV

Cumulative Errors

Green argues the cumulative effect of trial counsel's errors, including accepting the Mayor as a juror, constitute ineffective assistance of counsel.

Although Green must ordinarily show actual prejudice, he may be relieved of that burden if counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary. Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988).

Green must show more than the fact trial counsel committed errors; he must show the errors adversely affected his right to a fair trial. State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999). Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina. Compare State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985) (cumulation of errors warranted reversal, but Court also found each individual error caused prejudice), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), with State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) (finding multiple errors, which were not prejudicial separately, could be prejudicial to deny an individual a right to a fair trial when they were viewed together). The facts of this case do not give this Court an opportunity to settle such a question.

The PCR court, addressing the Mayor-juror issue, noted the issue was moot since the juror was removed prior to deliberations. Additionally, the PCR court found Green, according to counsel's testimony, wanted to seat the Mayor over trial counsel's contrary advice. We accept the PCR judge's determination Green desired to seat the Mayor. See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999) (this Court gives great deference to a PCR judge's findings, especially where witness credibility is at issue, because we lack the opportunity to directly observe such testimony). Further, assuming trial counsel committed error, Green failed to show how he was prejudiced when the Mayor was removed before jury deliberations began.

While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors. Multiple errors do not exist in this case to form any

cumulative prejudicial effect.[6]

V

Admission of Expert Opinion Testimony at the PCR Hearing

At the PCR hearing, Green proffered opinion testimony from a criminal defense attorney as an expert on whether trial counsel's performance had been deficient. Green argues Rule 702, SCRE, obligates the PCR judge to admit expert opinion testimony by a trial attorney to assist the trier of fact, because, although the trier of fact may be an experienced trial judge, the judge may not be aware of considerations of criminal defense trial tactics and strategies. The PCR court found the testimony was not relevant and, even if relevant, would not have affected the judge's decision.

Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. An expert may testify if such "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702, SCRE; see also Knoke v. South Carolina Dep't of Parks, 324 S.C. 136, 478 S.E.2d 256 (1996).

The expert offered no factual evidence. He proffered his opinion, assuming certain facts, trial counsel's actions fell below acceptable legal standards of competence. The testimony was not designed to assist the PCR court to understand certain facts, but, rather, was legal argument why the PCR court should rule, as a matter of law, trial counsel's actions fell below

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[6] Green includes trial counsel's failure to file an appeal on his behalf as part of his cumulative error argument. However, because this Court granted Green a belated review this single instance of trial counsel error does not lend support to his argument. Cumulative prejudicial effect cannot come from one error.

an acceptable legal standard of competence. Such "testimony" falls outside of Rule 702, SCRE.

CONCLUSION

For the foregoing reasons, we AFFIRM.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.