THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

HONORABLE G.D. MORGAN

2020-CP-42-02799

JOHNNY CHAPMAN, SCDC# 382254

APPELLANT,

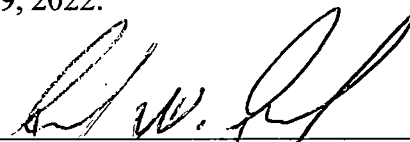
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Johnny Chapman appeals the denial of his Post-Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable G.D. Morgan, Circuit Judge on April 19, 2022 an Order issued on July 14, 2022 and filed on July 19, 2022. The Appellant received notice of the judgment on July 19, 2022.



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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Johnny Chapman, #382254, Applicant,	)	Case No.: 2020-CP-42-02799
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before this Court by way of Applicant's post-conviction relief application filed August 24, 2020. Respondent made its return on December 2, 2020, requesting an evidentiary hearing be convened. An evidentiary hearing was held on April 19, 2022, at the Spartanburg County Courthouse. Rodney W. Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Brendan Delaney also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In July 2019, the Spartanburg County Grand Jury indicted Applicant for two counts of second degree arson (2019-GS-42-04066 and -04067). Brendan Delaney, Esquire represented Applicant. Katherine Sieber prosecuted the case. On January 30, 2020, Applicant proceeded to trial before the Honorable R. Keith Kelly, circuit court judge, and a jury. Applicant was found guilty as indicted on both

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counts and Judge Kelly sentenced Applicant to five years' imprisonment on each count, sentences running consecutively. Applicant did not appeal his conviction or sentence.

Summary of Relevant Facts

Spartanburg County Sheriff's Detective Garrett Cash testified that he responded to two fires that morning, one at Abbotts Farm and another nearby at Welchel's Fruit Stand. (Tr. 55). Daniel Abbott, the owner of Abbot Farms, testified that he received a call that his business had been set on fire. (Tr. 47-49). The flames damaged the front wall, the windows, the sidewalk, and the vinyl siding on the building, and nearly ignited a fireworks display. (Tr. 50). Surveillance cameras at the business captured Applicant setting the fire. (Tr. 50).

After speaking with Mr. Abbott, Detective Cash went to Applicant's nearby residence to investigate. (Tr. 62). It was determined from Applicant's movements on the video that he would have likely been walking past the nearby Welchel's Fruit Stand at around the same time that fire was started. (Tr. 66). Detective Cash noted that Applicant was wearing the same clothing as seen in the surveillance video and placed him under arrest. (Tr. 63-66).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Involuntary plea.
2. Ineffective assistance of counsel:
   a. Counsel entering an insanity plea.
   b. Failure to call witnesses to testify.

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective Assistance of Counsel for:
   a. Brevity of time in consultation.
   b. Failure to pursue an insanity defense.
   c. Failure to investigate and call Applicant's witnesses for trial.
   d. Failure to review discovery.

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All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant stated he does not think Counsel properly represented him. Applicant stated that he showed Counsel his witness list before trial, but Counsel did not contact them. He stated Counsel saw the witness list but stated he could not do anything to subpoena the witnesses at trial. He stated that Counsel told him to plead guilty but mentally ill to time served. He stated the Court stated he was mentally ill but could be restored. Applicant testified that Counsel was not interested in representing him. He stated he would have won at trial but for Counsel's ineffectiveness.

Applicant stated he was unwilling to sign the sentencing sheets. Applicant stated Counsel never reviewed discovery with him. He stated he did not interact with Counsel prior to trial and stated he did not know he had Court on the day of trial.

On cross-examination, Applicant stated he decided to go to trial and that he thought that at trial he would be represented by a competent attorney. He stated he told Counsel to contact maybe more than two hundred witnesses. Applicant stated he never told the Judge he did not see any discovery because he was not well versed in court proceedings and did not know he could talk in court. He stated he had to testify because the Court swore him in.

Counsel Testimony

Counsel stated that Applicant's case was reassigned to him after Applicant's prior attorney left the public defender's office. Counsel testified he met with Applicant a week or two before trial. He stated that they discussed the discovery in the case. He testified that the

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discovery on the first arson charge was straight forward. He stated he advised Applicant to take the plea offer and Applicant declined to do so. Counsel testified that he received two sheets full of witness names from Applicant and names on the list included Michael Jordan, Oprah, and God. Counsel stated that the State had a strong case because there was surveillance footage on one of the arson charges and a passerby witness who observed Applicant concerning the second arson charge.

Counsel testified that he was concerned about Applicant's mental health, but he was informed that Applicant was mentally restored and fit to stand trial. Concerning the competency issue, Counsel testified that he would have done more to get him found unfit to stand trial, but the Department of Mental Health found him restored and, as a result, Counsel had to treat Applicant like a competent witness.

On cross-examination, Counsel testified that Applicant rejected the plea offers over the advice of Counsel. Counsel testified that he showed Applicant all of the discovery in the case. Counsel testified that all witnesses on the sheets provided to him by Applicant involved witnesses that were either impossible to compel to appear in Court, would have further harmed Applicant's case, or would have testified to something readily refuted by the evidence in the case.

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 and arguments presented at the PCR hearing. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This

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Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington.*

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland,* 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny

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of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Brevity of Time

Applicant alleges that Counsel was ineffective for failure to communicate with him sufficiently regarding the case. "[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating "how additional preparation or communication would have resulted in a different outcome." *Id. See Jackson v. State*, 329 S.C.

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345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); *Skeen v. State*, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

Applicant's allegation that Counsel did not contact him prior to trial is refuted by both Counsel's testimony and Applicant's testimony. Specifically, Counsel testified that he met with Applicant about a week or two before trial to go over discovery, the plea offer, and the witnesses Applicant wanted called at trial. Additionally, through his own testimony, Applicant indicated that he had discussed potential witnesses and the plea offer with Counsel prior to trial; indicating that he had had contact with Counsel prior to the trial date. Even if this Court were to assume Applicant was correct in his allegation of failure to communicate, Applicant has failed to show how Counsel's alleged failure to contact him had an impact at trial. He has failed to show what could have been discussed or brought out at trial that would have impacted the outcome. Thus, there has been no showing of prejudice. Accordingly, relief is denied on this ground.

Failure to Pursue Insanity Defense

Applicant claimed Counsel was ineffective for failure to pursue an insanity defense. Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure to explore the decision was a strategic decision. *Strickland*, 466 U.S. at 680. If there is only one line of defense, counsel must conduct a "reasonably substantial investigation" into that line of defense. *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1252). However, if there are several lines of defense, counsel may still be effective even if every single line is not

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explored. *Id.* "[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Id.* at 681 *Id.* (quoting *Washington v. Strickland,* 693 F.2d at 1255). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough,* 540 U.S. at 5 (citing *Strickland,* 466 U.S. at 690).

Regarding failure to alert the Applicant of a defense specifically, Counsel will not be found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at the time of trial, or another avenue of defense existed. *See McCray v. State,* 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing); *Arnette v. State,* 306 S.C. 556, 413 S.E.2d 803 (1992) (stating that failing to inform of a defense was not ineffective when there was no evidence at trial that supported the defense); *Robinson v. State,* 308 S.C. 361, 417 S.E.2d 361, 417 S.E.2d 88 (1992) (stating that Counsel was not ineffective when failing to state a defense that was not recognized by the Court until six years later and was just recently acknowledged by the scientific community).

Counsel credibly testified that Applicant underwent a competency evaluation and was ultimately found competent and fit to stand trial. Counsel credibly testified that he did not think he could pursue this avenue for defense once he was found competent. This Court agrees. An insanity defense was not available to Applicant because he was found competent, and Counsel was not deficient as a result. Further, because an insanity defense would have been inappropriate, no prejudice is found. Accordingly, relief is denied on this ground.

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Failure to Investigate and Call Witnesses

Applicant claims Counsel was ineffective for failing to call and present the witnesses written down on the papers he provided to Counsel. At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard. v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented, consistent with the rules of evidence. *Glover v. State,* 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." *Buckson v. State,* 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State,* 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State,* 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with

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the supposed witness's statement at trial); *Glover*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial). Further, to demonstrate prejudice, Applicant was required to present the evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

Counsel acted reasonably in determining that presenting these witnesses was not practicable. As Applicant testified, he provided Counsel with a list of over two hundred witnesses. Counsel credibly testified that among these witnesses were Oprah, God, and Michael Jordan. As Counsel testified, all witnesses on the sheets provided to him by Applicant involved witnesses that were either impossible to compel to appear in Court, would have further harmed Applicant's case, or would have testified to something readily refuted by the evidence in the case. Counsel is not expected to pursue all witnesses Applicant request he contact, no matter how unpracticable it may be. Counsel is only required to act reasonably in this regard; something he seemingly did when reviewing the lists and determining that none of the individuals on the paper

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would help at trial. Thus, Counsel was not deficient on this ground.

Applicant failed to call any witnesses on the paper at the PCR hearing to meet his burden of proof regarding the prejudice prong on the *Strickland* analysis. Accordingly, Applicant fails on both prongs of the *Strickland* analysis concerning this allegation and, thus, his claim of failure to investigate must be rejected.

Failure to Review Discovery

Applicant's claim that Counsel was ineffective for failure to review the discovery with Applicant is without merit. Specifically, Counsel credibly testified that he reviewed all discovery with Applicant a week or two before trial. Thus, this Court finds Applicant's argument to the contrary is without merit and denies relief as a result.

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<u>**Conclusion**</u>

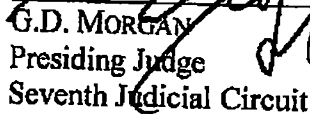
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 14th day of [illegible], 2022.



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Presiding Judge
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