

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Post Conviction Relief

WILLIAM P. KEESLEY, Circuit Court Judge

Lower Court Case No.: 2017-CP-04-02505

KYNDRA L. HOWELL #342120,..... Petitioner

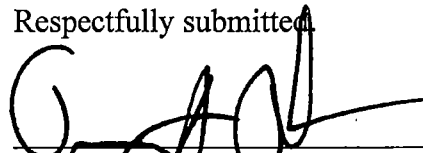
vs.

State of South Carolina,Respondent.

NOTICE OF APPEAL

The Appellant, Kyndra L. Howell, appeals the Order of Dismissal signed by the Honorable William P. Keesley on August 11, 2022 and filed on August 15, 2022. Appellant received written notice of entry of this order on August 18, 2022.

Respectfully submitted,



Tommy A. Thomas
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August 31, 2022

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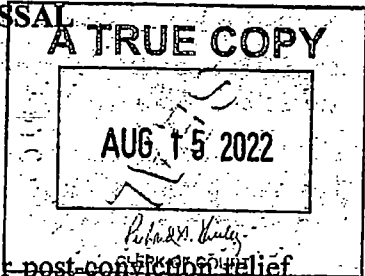
STATE OF SOUTH CAROLINA)
 COUNTY OF ANDERSON)
)
 Kyndra L. Howell, #342120,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2017-CP-04-02505

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 And 2022 SC CDC, CP/GS

ORDER OF DISMISSAL



This matter comes before this Court by way of an application for post-conviction relief filed by Kyndra L. Howell ("Applicant"), through counsel, on December 5, 2017. The State's ("Respondent") return to the application was served on March 15, 2018. An evidentiary hearing in this matter was held before the undersigned via the WebEx virtual platform on March 3, 2022. Everyone who participated did so virtually. Applicant was present and was represented by Tommy A. Thomas. Taylor-Zane Smith of the South Carolina Attorney General's Office represented Respondent. Following a thorough review of the record in its entirety and the evidence presented at the hearing, this Court finds that Applicant has failed to prove that she is entitled to post-conviction relief, and denies the application with prejudice.

PROCEDURAL HISTORY

Applicant is presently imprisoned in the South Carolina Department of Corrections. During its November of 2012 term, the Anderson County Grand Jury indicted her for armed robbery (2012-GS-04-02396) and possession of a weapon during the commission of a violent crime (2012-GS-04-02397). The Grand Jury later indicted her for kidnapping (2012-GS-04-02537) and murder (2012-GS-04-02538). On February 23-25, 2015, Applicant proceeded to a jury trial with the Honorable R. Lawton McIntosh ("the trial court") presiding. M. Scott McElhannon ("trial

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Ander v. Campbell, Blalock Haigler
S.C. App. Ct. Case No. 2017-UP-020

counsel”), who has since been elected to the bench of the South Carolina Family Court, represented Applicant at trial. Rame Lambert Campbell (“Campbell”) and Brantly Blalock Haigler (“Haigler”) who were, at the time, of the Tenth Circuit Solicitor’s Office, prosecuted Applicant. At conclusion of trial, the jury acquitted Applicant of murder, but found her guilty of the remaining offenses. The trial court sentenced her to imprisonment as follows: for kidnapping, for thirty years; for armed robbery, for fifteen years; and for possession of a weapon, for five years; with all sentences running consecutively. Trial counsel moved for the trial court to reconsider and to vacate the sentence. After a hearing on the motions, the trial court denied the motion to vacate the sentence and defer sentencing until after Applicant’s co-defendants had been sentenced, but granted the motion to run Applicant’s possession of a weapon sentence concurrently, which reduced Applicant’s aggregate sentence to forty-five years’ imprisonment.

Trial counsel filed a timely notice of appeal. Appellate Defender Lara M. Caudy (“appellate counsel”) of the South Carolina Commission on Indigent Defense represented Applicant on appeal. Appellate counsel filed a motion to be relieved as counsel as a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), arguing that the trial court erred in denying trial counsel’s motion for a directed verdict. Applicant did not file a *pro se Anders* brief. The South Carolina Court of Appeals granted appellate counsel’s motion to be relieved and dismissed the appeal. *State v. Howell*, Op. No. 2017-UP-020 (Ct. App. filed January 11, 2017) (per curiam). The remittitur was issued on January 27, 2017.

CURRENT PROCEEDING

In her application for post-conviction relief, filed on December 5, 2017, Applicant raised multiple claims, which this Court interprets as follows: (1) trial counsel was constitutionally ineffective for not meeting with Applicant on an adequate number of occasions before trial;

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- (2) trial counsel was constitutionally ineffective for not adequately preparing Applicant for trial by failing to discuss with her the discovery, the evidence against her, or the theory of her defense;
- (3) Applicant's co-defendants received information in their discovery that she did not receive;
- (4) trial counsel was constitutionally ineffective for not presenting an effective defense by failing to call witnesses and by improperly advising Applicant that she should not testify;
- (5) trial counsel failed to point out adequately that there were inconsistencies in the witnesses' statements; and
- (6) law enforcement officers threatened to have the South Carolina Department of Social Services take a witness's children unless she testified against Applicant.

At the beginning of the March 3, 2022, hearing before this Court, Respondent stated that Applicant had said previously that these claims were the only ones upon which Applicant would proceed. Applicant agreed that Respondent's statement was correct, and that these were the only claims before the Court. This Court finds that Applicant has abandoned and waived all claims other than these, and will address only these in this order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Before this Court are: the records of the Anderson County Clerk of Court for Applicant's convictions and sentences; Applicant's records from the South Carolina Department of Corrections; Applicant's direct appeal records, including the notice of appeal, appellate counsel's *Anders* brief, the record on appeal, the Court of Appeals' letter to Applicant informing her that she could file a *pro se Anders* brief, the Court of Appeals' dispositive opinion, and the remittitur; and all filings in this matter. Set forth below are the relevant findings of facts and conclusions of law with regards to the claims that Applicant advanced at the evidentiary hearing, as required by S.C. Code Ann. §17-27-80 (1985).

Applicant's claim that trial counsel was constitutionally ineffective for not meeting Applicant on an adequate number of occasions before trial, and for not adequately preparing her for trial by failing to discuss with her the discovery, the evidence against her, or the theory of her defense.

Applicant argues that trial counsel was constitutionally ineffective for not meeting with her on an adequate number of occasions before her trial, and for not adequately preparing her for trial by failing to discuss with her the discovery, the evidence against her, or the theory of her defense. Although these are raised as two distinct claims in the application, this Court will consider them jointly because there is much overlap between the facts relevant to Applicant's arguments and to this Court's findings.

Applicant testified before this Court that she was held at the detention center in Anderson County for thirty months after her arrest until her trial. She testified that trial counsel was appointed to represent her during that time and that he visited her on only four or five occasions during those thirty months. She testified that trial counsel reviewed the discovery with her a little, but not as much as she would have liked. When asked if she had understood the evidence against her, she "guessed" that she had. She admitted that trial counsel had gone over with her the video recording and her co-defendants' statements.¹ She testified that she did not think that trial counsel had a defense because they had never discussed one. She testified that she had known that Zachary Gantt ("Gantt"), one of her co-defendants, would testify against her at trial, and that she and trial counsel had discussed a little that Gantt's testimony would affect her case, but that they had not discussed trial counsel's strategy to address that testimony. She testified that she told trial counsel that the

¹ When speaking with Applicant's former landlord during the course of their investigation, law enforcement officers learned that the house in which Applicant had lived at the time of the victim's disappearance had been equipped with security cameras that stored their video recordings on a device secured inside a wall of the house. Officers seized the device, and the recordings were admitted into evidence at Applicant's trial. Trial Tran. 211. The witnesses referred to the recordings throughout the course of the hearing before this Court.

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victim picked her up and was going to take her with him to the home of Kimberly Lomax ("Lomax"), but that, when they were not able to go to Lomax's home, she and the victim returned to her house, and that she called Gantt beforehand to ask him to leave her house while the victim was present. She testified that she had known that Lomax would testify at trial and that she had discussed that fact with trial counsel. She testified that trial counsel had known that Applicant did not take the victim to her home in order to rob him, and she was surprised that trial counsel had done more to bring that out at trial. She testified that she and trial counsel had known before trial that the solicitors would argue that she would have been able to hear her co-defendants and the victim, but said that they had not discussed a way to refute the argument. She testified that trial counsel told her that it would not be a good idea for her to testify at trial. She testified that she had had access to all of the discovery that trial counsel provided to her. She testified that trial counsel told her that she would get no more than thirty years' imprisonment if she were to be acquitted of murder. She testified that trial counsel did not really ask her if she had any witnesses or leads that he could look into.

Trial counsel testified before this Court that he had been appointed to represent Applicant not long after she was arrested. He testified that he met with Applicant at the detention center on at least fourteen occasions, and had also communicated with her through multiple phone calls and letters, and had met with her parents. He testified that he visited Applicant at the detention center each time he received a letter from her. He testified that he reviewed the discovery and evidence with Applicant, and had even taken his computer to the detention center so that she could watch the video recordings. He testified that Applicant gave him no reason to believe that she did not understand the significance of the evidence. He testified that he asked Applicant for the names of any witnesses or information about any leads that he could look into, but that she did not provide

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him with any. The only person she named was someone whom he cross-examined at trial. He testified that he had always thought that Applicant was hiding information from him because she had not been forthcoming. He testified that she rejected a plea offer against his advice. He testified that Applicant kept denying that her co-defendant Ezra Williams ("Williams") had been at her home. He testified that, at one point, she had claimed to be in a relationship with Williams and said that she was pregnant with Williams' child. He testified that Applicant admitted to him that she knew the victim. He testified that he thought that the victim had been at Applicant's home to have sexual intercourse with Applicant, although Applicant maintained that she had been merely setting up a sexual arrangement between the victim and Lomax. He testified that his main objective at trial was to have Applicant acquitted of murder, an objective that he achieved; he knew it would be difficult to clear Applicant of the other crimes in light of the applicability of the theory of accomplice liability and the video recordings from Applicant's house. He testified that Applicant alleged that she had not known what her co-defendants were doing to the victim in her house, but said that it seemed unlikely to him that Applicant would not have been able to recognize that Applicant was being tortured.² He testified that he discussed all aspects of the case with Applicant extensively, and that Applicant gave him no reason to believe that she did not understand what would happen at her trial. He testified that he discussed with Applicant whether or not she should testify.

² The prosecution's forensic pathologist testified at trial that the victim's hands had been bound behind his back, that he had suffered multiple cut injuries, ranging from four to six inches in length, to each leg, that he had suffered either a second- or third-degree burn on his lower abdomen, and that he died from a single gunshot wound to the face, which was fired from a close distance. Trial Tran. 80-93. Gantt testified that the co-defendants wrestled the victim to the ground, tied him up, beat him to the extent that he was making noises, sprayed him with insecticide, stuck a hot blade to the his body such that he began screaming, and then killed him with a gunshot. Trial Tran. 142-52..

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On cross-examination, trial counsel testified that he knew from the discovery what ever aspect of the prosecution's case would be, including the fact that Gantt would be its star witness. He testified that he discussed every bit of evidence with Applicant multiple times. He testified that he did not think that Applicant was being honest with him about Williams' presence in her home while the crimes were taking place. He testified that he found it hard to believe that Applicant had been present in her home when the crimes were taking place without knowing what was happening.

All defendants have a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). A post-conviction relief applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that his lawyer was constitutionally ineffective, he must prove that the conduct of his lawyer "so undermined the proper functioning of the adversarial process that [that conduct] cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the post-conviction relief court applies the two-pronged test outlined in *Strickland*. First, the applicant must prove that the performance of his lawyer was deficient. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). In order for a post-conviction relief applicant to successfully prove that his defense attorney's performance was deficient, the applicant must prove "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quotation omitted). "The proper measure of counsel's performance remains whether he has provided representation within the range of

competence required of attorneys in criminal cases.” *Id.* (citations omitted). The “preponderant authority for all” courts when they are considering an applicant’s claim of constitutional ineffectiveness requires that the courts be highly deferential to a defense lawyer’s performance because:

[I]t is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.

Id. at 444-45; 334 S.E.2d at 815-16 (quoting *Strickland*). An applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. “The burden of rebutting this presumption rests squarely on the defendant, and it should go without saying that the absence of evidence cannot overcome it. In fact, even if there is reason to think that counsel’s conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.” *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (quotation omitted).

Second, the deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for [the lawyer’s] unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. “Representation is an art, and an act or omission that is unprofessional in one case may be sound of even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.” *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (quotation omitted).

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The standards do not establish mechanical rules; the ultimate focus of inquiry must be the fundamental fairness of the proceeding whose result is being challenged. A court need not determine whether a lawyer's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. at 697. Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief applicant to prove that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. *Id.* at 690.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to his pre-trial meetings and discussions with Applicant. Applicant's testimony about the number of meetings that she had with trial counsel is not credible, but trial counsel's testimony about meeting with Applicant on at least fourteen occasions and communicating with her outside of those meetings is credible. Applicant's testimony that trial counsel did only a little trial preparation with her is not credible, but trial counsel's testimony that he reviewed the discovery evidence and anticipated witness testimony extensively with Applicant is credible. Applicant even admitted that she discussed some of the evidence with trial counsel, although she, unconvincingly, tried to downplay the frequency and extent of those discussions. Applicant's testimony that trial counsel did not discuss a trial strategy with her is not credible, but trial counsel's testimony that he discussed his main objective and trial strategy with Applicant is

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credible. Some of Applicant's own testimony indicates that she and trial counsel would have discussed trial strategy, undermining her credibility. Applicant's testimony that trial counsel did not ask for leads or witnesses to look into is not credible, but trial counsel's testimony that he asked Applicant for evidence to support her version of events, but received none, is credible. Trial counsel's credible testimony proves that he had no reason to believe that Applicant did not understand the significance of the evidence of her guilt, that she was not forthcoming in her statements to him, that she rejected a plea offer against his advice, that her testimony before this Court differed from her statements to him during the course of the representation, and that he had no reason to doubt that she understood the strategy that he would pursue at trial. Additionally, Applicant's testimony before this Court is undermined by her affirmations to the trial court. Applicant has not proven that trial counsel did something that he should not have done or that he failed to do something that he should have done. Thus, Applicant has not satisfied the first prong of *Strickland*.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different but for the alleged deficiency in trial counsel's performance. Applicant has not offered any credible evidence that additional meetings or discussions would have yielded any benefit to her defense such that the jury's verdict would have been altered. Therefore, Applicant has not satisfied the second prong of *Strickland*.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not meeting with Applicant on an adequate number of occasions before trial or for not preparing Applicant for trial adequately because Applicant has failed to prove that there was any deficiency in trial counsel's performance and because she has failed to prove that there was any resulting prejudice. This claim is denied and dismissed with prejudice.

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Applicant's claim that her co-defendants received information in their discovery that she did not receive.

Applicant raises a claim that her co-defendants received information in discovery that she did not receive, but she presented no argument in support of this claim at the hearing before this Court. Applicant testified that one of her co-defendants told her parents that he had evidence in discovery that Applicant did not receive, but Applicant's testimony was hearsay within hearsay.

"Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule" provided in the South Carolina Rules of Evidence. Rule 805, SCRE. Applicant conceded that the testimony was hearsay and did not attempt to offer an exception; therefore, this Court will not consider that inadmissible testimony.

This Court finds that Applicant has failed to prove that any of her co-defendants received something in discovery that she did not because she has not presented any evidence to support the claim. As the claim is entirely unsupported, Applicant has failed to meet her burden. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not presenting an effective defense by failing to call witnesses and by improperly advising Applicant that she should not testify.

Applicant raises a claim that trial counsel was constitutionally ineffective for not presenting an effective defense due to his failure to call witnesses at trial and for improperly advising Applicant that she should not testify in her own defense. Applicant argues that the prosecution's argument about her guilt was not refuted because trial counsel did not introduce evidence and relied only on his cross-examination of the witnesses. She argues that trial counsel should have called Applicant as a witness at trial because he knew that Applicant could have refuted the testimony from the prosecution's witnesses.

Applicant testified that trial counsel did not present any facts or evidence to support his argument to the jury that things are not always as they seem. She testified that she told trial counsel that the victim had picked her up and was going to take her with him to Lomax's home, but that, when they were not able to go there, she and the victim had returned to her house, and that she had called Gantt beforehand to ask him to leave her house while the victim was present. She testified that trial counsel had known that she had not taken the victim to her home to rob him and that she thought that trial counsel would let her take the stand so that she could tell her side of the story. She testified that she thought at the time that trial counsel knew what was best for her. She testified that trial counsel did not try to prove that she had been ignorant of her co-defendants' crimes. She testified that trial counsel did not call any experts to testify about the acoustics in her house, even though one of the prosecution's witnesses testified that Applicant would have been able to hear what was going on. She testified that trial counsel told her that she should not testify, even though she had only a very minor criminal record. She testified that trial counsel did not want her to testify because she had told someone named William Jeffrey ("Jeffrey") during a phone call that she loved him. She testified that she believes that trial counsel's advice that she should not take the stand was incorrect. Applicant agreed that she had told the trial court that she was making the decision that she would not testify of her own free will. She testified that she thinks that she only had two convictions on her record, which she described as misdemeanors. Applicant testified that she told her story to trial counsel, and that that story was the same one she gave before this Court.

Trial counsel testified that he asked Applicant to give him the names of witnesses or leads that he could investigate, and that she did not do so, save the one who testified for the prosecution at trial. He testified that he always thought that Applicant was withholding information from him. He testified that he had not thought there was much credibility to Applicant's assertion that she

had not known what was going on. He testified that he thinks it unlikely that the victim would have suffered through the torture that he did while keeping silent. He testified that he had not seen any evidence that the co-defendants were holding Applicant hostage inside her house. He testified that Applicant had been trying to access the victim's bank accounts. He testified that Applicant never told him that Johnson had forced his way into her house. He thought that it would have been a waste of money to hire an expert in acoustics because it did not take expert qualifications for someone standing in Applicant's house to know whether or not he or she could hear the sounds coming from another room. He testified that Applicant did not have an explanation for her actions. He testified that Applicant never expressed to him that she had had any curiosity about what the men were doing in her bedroom. He testified that, when he reviewed the recordings with Applicant, she did not appear to be distraught or upset.

Trial counsel testified that he discussed with Applicant that she had to decide whether or not she would testify at trial. He testified that they discussed the advantages and disadvantages of her testifying. He testified that she had multiple convictions on her criminal record. He testified that he did not tell Applicant not to testify, but left the decision to her. He testified that the advantage of her testifying would be that she could tell her side of the story; however, she would have been subject to cross-examination, which would have given the prosecution a chance to question her about her actions as recorded on the security video. He testified that he had thought that there would be no benefit to her defense for her to testify, but left the decision to her. He did not remember the exact conversation that he had with Applicant about her testifying, but he explained his customary advice to clients about their right to testify and the consequences of that decision. He testified that he would have performed a risk and benefit analysis with Applicant

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concerning her right to testify. He testified that he had no reason to think that Applicant was struggling with her decision about whether or not to testify.

Campbell testified before this Court that Lomax called law enforcement officers' phone number that was set up to take tips and said that Applicant had told her that the victim was tied up at her house, that she was driving around in the victim's car, and that she was trying to decide what to do. He testified that officers spoke to Applicant when they located her at a gas station while the victim was still missing, and that Applicant told the officers that she had not seen the victim in over a month. He testified that the officers later seized the video recording from the security cameras at Applicant's house, which verified that Applicant and the victim had been together at her house on the night that the victim went missing. He testified that Applicant's phone was used to attempt to access the victim's bank account. He testified that the video recording shows that Applicant had the freedom of movement at her house while the victim was being tortured there, and was holding her mobile phone, and that Applicant had made no attempt to leave or get help. He testified that Applicant had criminal convictions that could have been used to impeach her credibility at trial, and that they were not merely misdemeanors. He testified that Applicant declined to cooperate with the investigating officers when they offered to give her witness protection.

Applicant testified before this Court in reply that she was never more than a few feet from Johnson and that she fled as soon as she was able to do so. She testified that she sat on a porch behind her house until the co-defendants left her house with the victim. She testified that she did not go to the ATM to try Applicant's debit card by herself because Johnson was with her. She testified that she was afraid of him and that he had the ability to hurt her. She said that he had a

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crazy look in his eye. She agreed, though, that she could have said all of the aforementioned things if she had testified at trial.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to his advice to Applicant about her right to testify. Applicant's testimony that trial counsel advised her not to testify is not credible, and trial counsel's testimony that he advised Applicant of the potential benefits and risks to her testifying, but left the ultimate decision to her without telling her what she should do, is credible. Applicant affirmed to the trial court that she understood her constitutional right to silence, that she was making her own decision about whether or not she would testify, that she understood that the solicitor could try to impeach her credibility if she testified, and that she had no questions for trial counsel or the trial court about her right to testify. Trial Tran. 237-40. The trial court gave Applicant a chance to think about the issue overnight in the middle of trial, and she affirmed to the court on the following day that she had had plenty of time to discuss the decision with trial counsel. Trial Tran. 240, 252. Ultimately, Applicant told the trial court that she did not want to testify. Trial Tran. 252. Applicant's testimony about her criminal record is not credible. Trial counsel's testimony, which was corroborated by Campbell's credible testimony, that the video recording showed Applicant enjoying the freedom of movement at her house with her phone in her hand is credible. Applicant's testimony that she had had no idea that the victim was being held against his will, robbed, or tortured in her house is not credible in light of trial counsel's credible testimony and because her testimony on that point contradicts her other testimony that she felt that she had to escape from the home but was too afraid to do so. Furthermore, Applicant's admitted role in trying to access the victim's financial accounts proves, at the very least, that she had knowledge of the victim's circumstances and the co-defendants' actions. Applicant's testimony that she was essentially being held against her will in

her home and was powerless to take any action to help the victim due to her fear is not credible because the more credible evidence proves that Applicant had the freedom to move in and out of the home freely and to communicate with others through her phone.

This Court finds that, even if Applicant had proven that trial counsel advised her that she should not testify and that that advice was deficient, Applicant has failed to prove that there is a reasonable likelihood that the outcome of her trial would have been different but for the alleged deficiency. Applicant's testimony before this Court about the actions that she and her co-defendants' took towards the victim, which is the testimony that she alleges she would have given had she testified at trial, is not credible. Applicant's testimony that she did not know the victim is not credible, and trial counsel's testimony that Applicant told him that she did know the victim is credible. Applicant's testimony that she had no idea what her co-defendants were doing to the victim, despite the fact that she and they were all under the same roof, is just not believable in light of the circumstances, which included the extended presence of multiple men in a room in Applicant's house, the evidence that the co-defendants subjected the victim to brutal and prolonged torture in Applicant's house, Lomax's testimony about Applicant's statements to her, and the evidence that Applicant attempted, or aided her co-defendants in their attempts, to access the victim's financial accounts. Applicant's insistence that she had no knowledge of her co-defendants' actions was contradicted by her testimony that she was afraid of Johnson, was never more than a few feet away from Johnson, could not stop Johnson, and protested up until the point at which she was in danger herself. Applicant's testimony that she was captive to or paralyzed by her fear of Johnson was contradicted by the evidence from the video recording that she had the freedom of movement in and out of her house and the freedom to use her phone, and by her refusal to share what she knew with the investigating officers in exchange for witness protection.

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Additionally, Applicant's testimony overall was undermined by her false testimony before this Court about her criminal record. Due to the complete lack of credibility in Applicant's testimony about the night of the victim's death, Applicant has failed to satisfy the second prong of *Strickland*.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to his not calling any witnesses for the defense. Applicant has not identified any witnesses whom trial counsel should have called. Trial counsel credibly testified that he asked Applicant for names of people whom he should speak to, and that she did not give him anyway. Applicant has failed to satisfy the first prong of *Strickland*.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different but for trial counsel's alleged deficiency in not calling witnesses. An "applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' [sic] failure to testify at trial." *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); *see also Dempsey v. State*, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2015) (holding that the PCR court's finding that Dempsey was prejudiced by trial counsel's failure to call an expert at trial to rebut the State's expert was merely speculative when Dempsey failed to have an expert testify at his PCR hearing), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). An applicant's "mere speculation" as to what a witness's testimony at trial would have been "cannot, by itself, satisfy the applicant's burden of showing prejudice." *Glover v. State*, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995). Applicant did not produce the testimony of any witness for this Court's consideration. Applicant merely speculated that testimony from witnesses could have helped her defense at trial, but has not satisfied the prejudice prong of *Strickland*.

22 AUG 15 AM 11:57:51
Arden on 8/15/06

This Court finds that Applicant has failed to prove that trial counsel was constitutional ineffective for not calling witnesses at trial and for allegedly advising Applicant that she should not testify in her own defense because Applicant has failed to prove that there was any deficiency in trial counsel's performance and because she has failed to prove that there was any resulting prejudice. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for failing to point out adequately that there were inconsistencies in the witnesses' statements.

Applicant argues that the prosecution's case was built on Gantt's testimony, and that Gantt had a self-serving reason to testify against Applicant. Applicant testified that Gantt was the only one of her co-defendants who testified at her trial. She testified that she had discussed with trial counsel the fact that Gantt would testify against her and the anticipated effect of his testimony on her case. She testified that trial counsel did not sufficiently address the inconsistencies in Gantt's testimony, as Gantt had given multiple statements to the investigating officers.

Trial counsel testified before this Court that Gantt gave different statements to officers, upon which he cross-examined Gantt at trial. Campbell testified before this Court that Gantt pleaded guilty to his role in the underlying crimes, and testified against Applicant, Williams, and Johnson. He testified that, at an officer's suggestion, he subsequently allowed Gantt to plead guilty to voluntary manslaughter in exchange for his helpful testimony. He testified that Gantt gave three different statements to officers, which were all different to an extent. He testified that, in Gantt's first statement, Gantt denied having any involvement in the crimes; that in his second statement, he admitted to having some involvement; and that in his third, he confessed to his involvement and took officers to the victim's body.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to alleged inconsistencies in witnesses' statements. The only

22 AUG 15 AM 11:57:58
Andersson, CCDC/PP/RES

inconsistencies that Applicant has addressed in her argument or testimony were those in Gantt's statements to officers; to the extent that Applicant's claim is meant to refer to any other witness, she has wholly failed to meet that burden, and has abandoned and waived those allegations. Gantt gave multiple statements to law enforcement officers while the investigation was ongoing, and those statements were all different, but they progressed in their admission of Gantt's, and his co-defendants', culpability; Gantt also testified at Applicant's trial. Trial Tran. 129-75, 198-204. Trial counsel cross-examined Gantt on his multiple statements, and elicited testimony from Gantt that he had been under the influence of marijuana when he gave his first statement and had included false details in that statement. Trial Tran. 164-175. Trial counsel argued in closing that Gantt was testifying falsely in order to get a better sentence for himself, and that he had given conflicting statements to law enforcement officers. Trial Tran. 304. Applicant has not proven that there was anything additional that trial counsel should have done that he did not do or that there was anything that trial counsel did that he should not have done. Therefore, Applicant has not satisfied the first prong of *Strickland*.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different but for the alleged deficiency in trial counsel's performance. As already mentioned, the jury heard testimony about Gantt's multiple statements to officers and still found his testimony and statements, or at least the parts that constituted evidence of Applicant's guilt, credible. Applicant has not proven that any further argument or cross-examination from trial counsel would have had an effect on the jury's verdict.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective in his handling of inconsistencies in the witnesses' statements because Applicant has failed to prove that there was any deficiency in trial counsel's performance and because she has

22 AUG 15 AM 11:58:04
Bridges, SC COC, PHS

failed to prove that there was any resulting prejudice. This claim is denied and dismissed with prejudice.

Applicant's claim that law enforcement officers threatened one of the witnesses that they would have the South Carolina Department of Social Services take her children if she did not testify against Applicant.

Applicant raises a claim that law enforcement officers threatened to have the South Carolina Department of Social Services ("DSS") take Lomax's children if Lomax did not testify against Applicant. If that claim were to be cognizable under the Uniform Post-Conviction Procedure Act ("the Act"), S.C. Code Ann. §§ 17-27-10 to -160,³ she has failed to prove that trial counsel's performance was deficient or that she was prejudiced by it.⁴

If this is considered as a claim that trial counsel was ineffective with respect to the allegation that law enforcement officers threatened Lomax with DSS' involvement, Applicant testified before this Court that she did not have personal knowledge as to any threats made against Lomax and presented no argument in support of the claim. All of the evidence that Applicant put before this Court concerning the claim came through her cross-examination of trial counsel. Trial counsel testified that he learned of the alleged threat to Lomax at trial and cross-examined the witnesses on it. When questioned about Lomax's testimony at trial, trial counsel testified that there is no indication from the transcript that Jeffrey, whom Lomax testified had threatened her, had been a law enforcement officer, or that he had said anything about DSS or Lomax's children. He testified that he was not aware of any threats by an officer involving DSS.

³ Post-conviction relief is not the proper avenue for Applicant to raise a standalone claim that a witness testified against her solely, or principally, because the witness was being threatened by DSS' involvement. See *Williams v. State*, 378 S.C. 511, 662 S.E.2d 615 (Ct. App. 2008); *Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37 (2019);

⁴ Although with regard to a threat made against Lomax by Jeffrey, and not the threat alleged in this claim by Applicant, trial counsel did cross-examine the prosecution's witnesses and discuss the matter in his closing argument to the jury. Trial Tran. 126-27, 230-31, 233-36, 306.

22 AUG 15 AM 11:58:12
Hinderstein, SC ODC, CP/GS

Campbell testified before this Court that Lomax had provided information to officers that led them to Applicant. He testified that Applicant (falsely) tried to use Lomax as her alibi witness with the officers. He testified that officers never suspected Lomax of having had any involvement in the underlying crimes. He testified that he was not aware of any testimony from Lomax that an officer had threatened to report her to DSS if she did not testify against Applicant. He testified that Applicant's counsel and trial counsel are likely confusing Lomax with Martha Everett ("Everett"), the mother of Williams' child, whom Williams was trying to use as an alibi witness. He testified that an officer told Everett that Williams was in jail, and that she needed to think about her children because they would charge her with a crime if they caught her lying to them about Williams' whereabouts on the night of the murder. He testified that Everett kicked the officers out of her home and refused to make a statement on the record, and was upset that the officers had threatened her with her children. The transcript from Williams' trial was admitted as an exhibit, and Campbell pointed out the part of trial wherein the issue was discussed with respect to Everett. He testified that he probably did not discuss the threat against Everett with trial counsel because it was made against Everett during the officers' investigation into Williams and had nothing to do with Applicant's case.

Haigler testified before this Court that he was the second-chair prosecutor at Applicant's trial. He testified that he had no knowledge of any threats from officers that they would have DSS take Lomax's children. He remembered that Jeffrey made threats to Lomax, and when asked at trial if anyone else had threatened her, she answered in the negative.

This Court finds that Applicant has failed to prove that a law enforcement officer threatened Lomax that DSS would take her children if she did not testify against Applicant. Applicant did not present any evidence in support of the claim except through trial counsel. Trial

counsel had some knowledge that an officer had allegedly threatened someone, but when pressed on the matter, he revealed that he was not sure of the particulars. Campbell's credible testimony, which was corroborated by the transcript from Williams' trial and by Haigler's credible testimony, proves that it was actually Everett, not Lomax, whose children had been the subject of a comment from officers, which was in the context of their investigation into Williams' involvement in the crimes. Everett did not testify at Applicant's trial. Lomax testified that Jeffrey went to her home and threatened her with a gun to stop talking to the officers, but she also testified that no one but Jeffrey had threatened her. Trial Tran. 126-27. There was apparently connection between Jeffrey and Applicant, as officers had recordings of Applicant talking to Jeffrey on the phone and knew that he had deposited money into Applicant's account at the jail. Trial Tran. 235. Applicant testified before this Court that, on one of her recorded phone calls with Jeffrey, she told Jeffrey that she loved him. This Court finds that it is more credible that Everett, not Lomax, was the subject of the threat that Applicant brought up. Since some time has passed since Applicant's trial and there is some passing similarity between the threats made against Lomax and Everett, any confusion of the two issues on trial counsel's part is understandable and does not establish any proof entitling the Applicant to relief.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance. Applicant has presented no argument that trial counsel did something that he ought not to have done or that he failed to do something that he should have done. The officers' threat against Everett gave trial counsel no basis upon which to object or move before the trial court during Applicant's trial. Applicant has, therefore, failed to satisfy the first prong of *Strickland*. Likewise, Applicant has presented no argument that there is a reasonable likelihood

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Hinderson, SC COC, TB/SS

that the outcome of trial would have been different but for an alleged deficiency in trial counsel performance, thereby failing to satisfy the second prong of *Strickland*.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective with regard to Applicant's allegation that Lomax testified against Applicant after having been threatened by law enforcement officers because Applicant has failed to prove that there was any deficiency in trial counsel's performance and has failed to prove that there was any resulting prejudice. This claim is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds that Applicant has not proven any constitutional violations or deprivations that would require this Court to grant her application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 11TH day of AUGUST, 2022.

William P. Keesley
William P. Keesley
Presiding Judge

EDGEFIELD, South Carolina

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A TRUE COPY
AUG 15 2022
Richard M. Kates
CLERK OF COURT