THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

HONORABLE BRIAN M. GIBBONS

2022-CP-42-02253

MATTHEW BLACKWELL, SCDC# 380514

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Matthew Blackwell appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Brian M. Gibbons, Circuit Judge on October 17, 2022 an Order issued on December 16, 2022 and filed on December 22, 2022. The Appellant received notice of the judgment on January 12, 2023.

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Matthew Blackwell, #380514, Applicant, v. State of South Carolina, Respondent.	Case No.: 2022-CP-42-02253 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant's post-conviction relief application filed June 21, 2022. Respondent made its return on August 9, 2022, requesting an evidentiary hearing be convened. An evidentiary hearing was held on October 17, 2022, at Spartanburg County Courthouse. Rodney Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel William Norwicki, Esquire, 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 from the Spartanburg County Clerk of Court. During its August 2019 term, the Spartanburg County Grand Jury indicted Applicant for murder (count one) and possession of a firearm during the commission of a violent crime (count two) (2019-GS-42-04607), two counts of attempted murder (2019-GS-42-04608 and -04609), trafficking in methamphetamine (2019-GS-42-04610), and distribution of methamphetamine within one-half

mile of a school or park (2019-GS-42-04611). Applicant was represented by William J. Nowicki, Esquire. Assistant Solicitor Spenser Smith of the Seventh Circuit Solicitor's Office prosecuted the case. On August 27, 2021, Applicant appeared before the Honorable Grace Gilchrist Knie, circuit court judge, and pled guilty to a negotiated cap of forty years' imprisonment on the murder charge and to the maximum sentences on all other charges, running concurrently. The State dismissed the half mile charge connected to the trafficking charge. In accordance with the negotiations, Judge Knie sentenced Applicant to thirty-eight years' imprisonment on the murder charge, thirty years' imprisonment on each attempted murder charge, ten years' imprisonment on the trafficking charge, five years' imprisonment on the weapons charge, sentences running concurrently. Applicant did not pursue a direct appeal.

Summary of Relevant Facts

On June 12, 2018, Applicant was caught involved in a controlled buy with a confidential informant where he exchanged thirteen grams of methamphetamine for $350. (Tr. 17). During this buy, Applicant was armed and showing a weapon. (Tr. 17).

On January 28, 2019, officers responded to a drive-by shooting. (Tr. 17). Witnesses stated that they heard screeching tires, several gunshots, and saw Marcus Kirk fall and hit the floor. (Tr. 17-18).

Ms. Harris, who was the fiancée of Marcus, told law enforcement that Marcus left the residence with a Steve about an hour before the incident to buy weed from a man named Hank. (Tr. 18). Steve was known to make counterfeit money that Harris believed was used to pay Hank with counterfeit money. (Tr. 18). She explained that Hank would know where they live. (Tr. 18). Officers searched the residence and there was a bullet hole through the front window of the house. (Tr. 18). There was a hole through one of the windows that went into the bedroom.

There was another hole between the two windows that went into the siding. (Tr. 18). There was a hole in the garage door and a hole to the left of the front door. Inside the bedroom there was a hole in the TV and there was a hole in a mirror that was inside of the bedroom. (Tr. 18). The projectiles that went through the garage and the front door were not found but recovered both projectiles out of the TV and out of the mirror. (Tr. 18). Ballistics test later showed that the bullet in the TV was from a .40 caliber pistol and the bullet in the mirror was from a .380. (Tr. 18).

Officers contacted Mr. Hank Wright, Bobby Hank Wright, and he agreed to come in and speak with investigators. (Tr. 18-19). He admitted to selling drugs to Marcus the night before. He stated that there were two people with him but refused to provide names. (Tr. 19). He stated that he only got twenty dollars in counterfeit money and the rest was legitimate and he was not upset. (Tr. 19). The deal was for $550. (Tr. 19).

Officers spoke with Hank's wife, Yolanda Wright. She stated that Applicant, who is the brother of Austin Bailey, went over later. (Tr. 19). She said Hank was very upset about the counterfeit money and was talking about teaching Marcus a lesson. (Tr. 19). Mr. Bailey says he called Applicant because he knew he would back her up. (Tr. 19).

The defendants were arrested. Mr. Wright was arrested without incident. (Tr. 19). Mr. Bailey and Mr. Bright were arrested together in a car in Spartanburg County, and Applicant was spoken to at the Cherokee County Detention Center. (Tr. 19).

Mr. Bailey admitted to driving the car during the shooting. (Tr. 19-20). Tyler Bright admitted to being in the rear passenger side seat and was one of the people that fired at the house. (Tr. 20). Hank Wright admitted to being in the vehicle and to selling a gun to Applicant so he could rob him. (Tr. 20).

Bailey, Bright and Wright were all consistent as to who the two shooters were: Applicant

and Bright. (Tr. 20). Applicant attempted to give an alibi through his girlfriend, saying that he was at the lake. (Tr. 20). She was in jail and did not back up his version. (Tr. 20). She stated she did not see him on the day of the incident. (Tr. 20).

The defendants stated that the plan was initially to fight them but that, once they drove past the house, they went down to the bottom of the cul-de-sac, continued to talk, and then decided to shoot. (Tr. 20). However, statements about weapons being loaded prior to going were given. (Tr. 20). They contacted Applicant because he would be back up but because Applicant had a vehicle. (Tr. 20-21). They needed a different vehicle than the one that had just been involved in the drug deal because otherwise the victim would have been able to identify them. (Tr. 21).

Officers conducted cell phone examinations on all the defendants, and it appears that they all left their cellphones back at a house, which shows the premeditated nature of the crime and the idea that they were going to shoot. (Tr. 21). Austin Bailey, the driver, had a .40 caliber pistol. (Tr. 21). Tyler Bright had a .380 and Applicant had a .40 caliber that he purchased from Mr. Wright in the vehicle. (Tr. 21). Applicant was initially driving to Mr. Kirk's house. (Tr. 21). He indicated that he wanted to shoot at the house and that's why he purchased the gun from Mr. Wright and then Mr. Bailey and Applicant switched seats. (Tr. 21). Mr. Bailey stated that occurred at the cul-de-sac. (Tr. 21-22). Mr. Bailey took over driving the car. (Tr. 22). Applicant moved to the front passenger seat and fired at the house. (Tr. 22). The State argued that Applicant was the person that fired the fatal shot. (Tr. 22). Ms. Harris says that she and Mr. Kirk were basically playing video games on the TV sitting on the bed. (Tr. 22). Mr. Kirk was shot in the neck and the bullet that they came out of the TV, which would be consistent with him sitting in front of it, was a .40 caliber, which is what Applicant had. (Tr. 22). The .380 that Mr. Bright

was shooting penetrated into the bedroom, but went into the mirror, which is inconsistent with the possible trajectory of the fatal shot. (Tr. 22). Ms. Harris and her mother, Ms. Dorothy Harris, were present in the house at the time. (Tr. 22-23). Ms. Harris was sitting right next to Mr. Kirk and her mother was in another room. (Tr. 23).

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. Ineffective assistance of counsel:
   a. Erroneous advice to plead guilty.
   b. Did not know the charges against him.
   c. Failure to challenge the indictments/lack of service of indictments.
   d. Failure to challenge whether Applicant's gun matched the gunshot would that killed the deceased, as per the autopsy.
   e. Failure to challenge invalid arrest warrants.
   f. Failure to investigate.
   g. Failure to prepare defense for trial.
2. Involuntary plea:
   a. Failure to receive indictment.
3. Subject matter jurisdiction lacking because he was not duly served with an indictment.

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

1. Ineffective assistance of Counsel.
   a. Failure to review discovery.
   b. Failure to investigate alibi witness.
   c. Failure to mitigate the sentence.
   d. Brevity of time in consultation.
2. Involuntary Plea.
   a. Applicant was coerced into pleading because he was afraid, he would face more time at trial.
   b. Applicant only pled because he was misadvised by Counsel.
   c. Failure to ensure parents were present for the plea.
3. The Court lacked subject matter jurisdiction because he was not properly indicted.

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 testified that he was incarcerated for murder, attempted murder, trafficking methamphetamine, and a weapons possession charge. He stated that he only met with Counsel one time in person and spoke to him two times by phone. He stated that Counsel did not tell him much about his case. He stated he initially wanted to go to trial and that he told Counsel this multiple times. He stated he only pled because Counsel stated he would lose at trial. He stated that Counsel told him he was looking at a thirty- to forty-year sentence if he pled. He stated that he now thinks the plea was a bad idea. He stated that Counsel told him his plea was voluntary.

He stated he told Counsel he was not guilty of murder. He stated that the State said he shot someone outside a window when with multiple co-defendants. He stated he did not fire the gun.

Applicant testified that he was not present at the shooting but was with his girlfriend instead. He stated that his girlfriend could have been an alibi witness at trial. He stated he did not think Counsel properly investigated the case, specifically this alibi witness. He stated his girlfriend was not present at the PCR hearing.

He stated that his parents were not at the plea hearing because he told them not to come. He stated he did not discuss using them as mitigation evidence with Counsel. He stated that Counsel filed a discovery motion and that he knew the charges and the rights waived by pleading. Applicant claimed that the Court lacked subject matter jurisdiction because he was not properly indicted.

Counsel Testimony

Counsel testified that he represented Applicant on the underlying charges. He stated that

he did not think Applicant's girlfriend would serve as an alibi witness. He stated he discussed the discovery with Applicant and what made the State's case viable. He stated he talked to Applicant about what the girlfriend's testimony would be. He stated that Applicant told him he wanted to go to trial. He testified that the only evidence implicating Applicant was his co-defendant, who put Applicant on scene with the gun that killed the victim. He stated he talked to Applicant about this and how it would hurt his chances at trial. He stated that this case should not have proceeded to trial, given the facts and high likelihood of being found guilty. He stated he reviewed all the discovery with Applicant. He stated he discussed hand of one hand of all with Applicant and thought he understood those discussions. Counsel stated that he asked Applicant if he wanted his family at the plea hearing and informed his father of the hearing, but they were not present. He stated. Counsel stated he could not recall a special term of general sessions court occurring that week.

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 plea 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 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. *See 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 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.

Involuntary Plea

In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive.

Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a defendant "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "'[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.'" *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea." *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

This Court finds the plea was freely, knowingly, intelligently, and voluntarily entered. After the State called the case and put the charges and negotiations, including negotiations concerning credit for time served credits, on the record, Counsel and Applicant stated he agreed with what the prosecutor stated concerning the charges and agreements. (Tr. 3-7). The Court confirmed Applicant understood that he could communicate privately with Counsel concerning

any question he had regarding the plea hearing. (Tr. 8-9). Applicant stated he was pleading instead of going to trial. (Tr. 9). He stated he understood that by pleading he was waiving his right to a jury trial, to call and confront witnesses, and to remain silent. (Tr. 9-10). Applicant confirmed he wanted to waive these rights and plead. (Tr. 10). Applicant stated he was not under the influence of any drugs or alcohol, nor was he suffering from mental or physical disabilities impacting his understanding of the proceedings. (Tr. 10-11). Applicant stated he was satisfied with Counsel's services. (Tr. 11). The Court at the plea hearing went over all the charges with him in detail, including the charges, sentencing ranges, any violent, serious, and most serious distinction on all charges. (Tr. 11-14). The Court informed Applicant of the significance of a negotiated sentence, including that the Court is bound to the negotiations if the plea is accepted. (Tr. 14). Applicant stated he understood the sentencing ranges and fines on all charges. (Tr. 15-16). Applicant stated he was pleading guilty freely, knowingly, and voluntarily. (Tr. 16). He stated he understood he had ten days to appeal. (Tr. 16). Applicant agreed to the facts as recited by the prosecutor. (Tr. 16-23). He again confirmed he understood the Court was bound to the negotiations if the plea was accepted, that that did not impact his willingness to go forward with the plea, and that he wanted to continue with the plea. (Tr. 29-30). This Court finds the plea was freely, voluntarily, knowingly, and intelligently entered and cannot be withdrawn now.

Trial Tax

Applicant claims he was coerced into pleading because he was told if he did not plead, he would face more time in prison. Being informed that if he went to trial, he would face more time in prison does not rise to the level of coercion and is not enough to render the plead invalid. Accordingly, relief is denied on this ground.

Mis-Advice by Counsel

Applicant claims his plea was coerced because he relied on the mis-advice of Counsel. However, this is seemingly only substantiated by Applicant's current regret over his own decision made to plead. Wishing one decided to plead in retrospect is not sufficient to undermine the plea. Accordingly, relief is denied on this ground.

Brevity of Time

Applicant alleges that Counsel was ineffective for brevity of time spent in consultation. "[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. 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 claims that Counsel did not speak with him about the case enough. However, Applicant has failed to show how this brevity of time spent in consultation impacted Counsel's representation of Applicant. There is no indication that the results of the proceedings or the decision to plead would have been different had Counsel conferred with him more. Accordingly, Applicant has failed to establish ineffective assistance of counsel and this Court declines to grant relief.

Failure to Ensure Parents were Present at Plea

Applicant claims Counsel was ineffective for failure to ensure Applicant's parents were present for the plea. However, Applicant testified that he told his parents not to come and Counsel testified that he informed them of the plea hearing. Regardless, this issue has no bearing on Applicant's decision to testify or the outcome of the proceedings. Accordingly, relief is denied on this ground.

Failure to Review Discovery

Applicant claims Counsel was ineffective for failure to review the discovery. However, Counsel credibly testified that he reviewed and shared all discovery with Applicant and specifically told him what in the discovery made the State's case viable. Counsel presented the same to the Court at the plea hearing. (Tr. 25-26). Accordingly, this Court finds that Applicant's allegation is without merit and denies relief accordingly.

Failure to Mitigate the Sentence

Applicant claims Counsel was ineffective for failing to mitigate the sentence. Counsel may be found deficient for failing to sufficiently investigate and present mitigating evidence. *See Council v. State*, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008) (finding it unreasonable for counsel not to further investigate the defendant's background and present even minimal mitigating evidence obtained); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (finding it unreasonable when Counsel failed to investigate mitigating evidence beyond a couple retained records, including the presentence investigation report and social service records); *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (finding that Counsel was unreasonable for failing to evaluate the totality of available mitigation evidence). An applicant is prejudiced by this deficiency if there is a reasonable probability that a different sentence would have been imposed but for

Counsel's failure to investigate and present mitigating evidence. *Council v. State*, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2008).

Counsel's chosen mitigation strategy was reasonable. He informed the Court of Applicant's employment history, his prior drug addiction, and Applicant's remorse over what happened. (Tr. 27-29). He also informed the Court that Applicant has a very supportive family, despite Applicant's decision to tell them not to appear at the hearing. (Tr. 27-28).

Further, Applicant has failed to show what his family could have offered in mitigation or how that would have impacted the proceedings. Thus, he has failed to meet his burden of proof concerning prejudice and relief is denied accordingly.

Failure to Investigate Alibi Witness

Applicant claims Counsel was ineffective for failure to investigate his girlfriend as an alibi witness. 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). One component of the duty to reasonably investigate the case includes a "duty [] to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). 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*, 315S.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 the supposed witness's statement at trial); *Glover,* 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was not 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).

This Court finds Applicant has not met his burden of proof. He has failed to present

her testimony would have consisted of or how it would have resulted in a different outcome. This Court also finds Counsel credible in his assertion that he knew what Applicant's girlfriend would testify to and thought that what she had to offer did not constitute an alibi. Further, this Court finds Applicant has not met his burden of proof concerning prejudice for failure to call the alibi to testify at the PCR hearing. *See Glover,* 318 S.C. at 498-99, 458 S.E.2d at 540 (to show Applicant was prejudiced by counsel's deficiency for failure to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or the testimony must otherwise be presented, consistent with the rules of evidence). Thus, relief is denied on this ground.

Subject Matter Jurisdiction

Applicant is alleging he is entitled to PCR relief because there were flaws in the indictment process, as it pertains to the date on the indictment sheet and the court calendar not lining up. Challenges to the indictment must be raised before a jury is sworn in. S.C. Code Ann. § 17-19-90 (2003). If non-jurisdictional defects apparent on the face of the document are not raised before then, they are waived. *Hooks v. State.* 353 S.C. 48, 577 S.E.2d 211, (2003), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *State v. Young*, 243 S.C. 187, 133 S.E.2d 210 (1963). Sufficiency of indictment is found when the offense is stated with enough specificity that the court knows what judgement to announce and the defendant knows what he has to answer to and whether he can plead acquittal or conviction upon it and whether it apprises defendant of offense that is intended to be charged. *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) *citing State v. Wilkes*, 353 S.C. 462, 465, 578 S.E.2d 717, 19 (2003).

This Court finds that Applicant was properly indicted, and the General Sessions Court had subject matter jurisdiction over his criminal cases. Accordingly, this allegation is dismissed.

and relief denied.

Conclusion

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 _____ day of _____, 2022.

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BRIAN M. GIBBONS
Presiding Judge
Seventh Judicial Circuit

_____, South Carolina.

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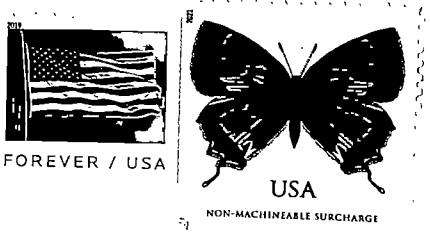

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