THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable Debra R McCaslin, Circuit Judge

Case No.: 2021-CP-26-5156

Charles E. Adams 309187.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Charles E Adams appeals the Honorable Debra R McCaslin's March 22, 2023 Order of Dismissal. Undersigned counsel received notice of entry of the order on April 5, 2023. A copy of the order on appeal is attached hereto.

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STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Charles Adams, #309187, Applicant, v. State of South Carolina, Respondent.	Case No.: 2021-CP-26-05156 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant's post-conviction relief application filed August 9, 2021. Respondent filed its return on October 11, 2021. An evidentiary hearing was held on Tuesday, January 3, 2023, at the Horry County Courthouse. Applicant was represented by James K. Falk, Esquire, and Respondent was represented by Assistant Attorney General Chelsey F. Marto of the South Carolina Attorney General's Office. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to prove that he is entitled to post-conviction relief and denies the application with prejudice.

Procedural History

Applicant is presently incarcerated in the South Carolina Department of Corrections. During its December 2018 term, the Horry County Grand Jury indicted Applicant for breaking and entering a motor vehicle, failure to stop for a blue light, three counts of burglary first degree, and grand larceny over $10,000 (2018-GS-26-06818; -06819; -06820; -06821; -06848; -06849). Applicant was subsequently indicted for an additional count of breaking and entering a motor vehicle, four counts of burglary first degree, and grand larceny over $10,000, by the Horry County Grand Jury at its April 2019 term. (2019-GS-26-01965; -01966; -01968; -01970; -01973; -01974). Applicant was represented by Attorneys Clay W. Pinkerton and Scott A. Graustein. Assistant

Solicitors Christopher D. Helms and Nancy R. Livesay, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial on April 19, 2021, before the Honorable Steven H. John. After a jury was selected, the State informed the Court that a plea agreement had been reached. Applicant entered a guilty plea, as indicted, to one count of grand larceny over $10,000, one count of breaking and entering a motor vehicle, and three counts of burglary first degree, pursuant to recommendations made by the State for a sentence of twenty-five years' imprisonment. All other charges were dismissed, *nolle prosequi*. The Court accepted the plea and sentenced Applicant to ten years' imprisonment for the larceny, five years' imprisonment for the breaking and entering a motor vehicle, and twenty-five years' imprisonment for the burglaries, with all set to be served concurrently. Applicant did not file a direct appeal of his conviction or sentence.

Summary of Relevant Facts

On August 1, 2018, Applicant burglarized at least three homes during nighttime hours. (Tr. 42-43). He stole a gun in one of the homes. (Tr. 43). Applicant also stole a Cadillac, in which he placed the stolen gun. (Tr. 43). The police determined the car was stolen, followed him, and a chase ensued. (Tr. 43). Police were unsuccessful in apprehending him that night, even after wrecking the car, fleeing on foot, running onto a golf course, and being chased by police dogs. (Tr. 43). Applicant lost certain garments in his flee that were used to conceal his identity. (Tr. 43-44). Applicant's DNA came back matching samples taken from these garments. (Tr. 43-44). The State made clear that these facts concerning charges pled to are only pertaining to a subset of charges stemming from the same night. (Tr. 44).

Current Action Before this Court

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

1. Ineffective assistance of counsel.
    a. Counsel provided ineffective assistance where petitioner would have accepted the State's prior more favorable plea offer of 15 years, had petitioner's counsel informed him of the damaging nature of petitioner's incriminating statement, and was ultimately not made aware of it until the first day of trial.
2. Failure to investigate alibi witness, exculpatory evidence.
    a. Counsel failed to investigate (by not filing any requested motions, i.e. supplemental discovery, motions to compel discovery) prior to trial which would have allowed the petitioner the opportunity to make an informed decision about the weight of the State's evidence, and not proceed (refuse the favorable prior plea) with misrepresentations about material evidence the State possessed.
    b. Counsel failed to investigate exculpatory and impeachment evidence which would have revealed that the State's version of events was inaccurate/ fabricated.
3. Coercive tactics to induce plea.
    a. Counsel employed subterfuge and coercive tactics to induce petitioner into accepting an unfavorable plea instead of proceeding with trial despite knowing the inherent weakness of the State's case and that the State relied heavily on petitioners tainted confession.

Applicant made his amended application on November 23, 2022, alleging:

1. Ineffective assistance of counsel:
    a. Failure to fully investigate and advise Applicant concerning the strength of the State's case, causing him to reject the 15-year plea offer.
        i. Providing Applicant incorrect advice that his statement did not incriminate him on the burglary charge but would only incriminate him regarding the grand larceny charge.
        ii. Failing to obtain CSU officer report detailing that the DNA evidence was found near the stolen vehicle.
        iii. Failing to investigate possible inculpatory evidence found on Sgt. Beam's body-worn camera.
    b. Counsel's deficient performance during the trial forced Petitioner to cut his losses by entering a 25-year plea.
        i. On the first day of trial and prior to jury selection counsel advised Applicant that the statements given to the police inculpated him on the burglary charges.
        ii. On the second day of trial, Counsel relayed the State's 25-year offer and misadvised Applicant concerning applicable SC precedent challenging the lawfulness of the State's search warrant.

iii. Counsel failed to file pre-trial suppression motion for petitioner's incriminating statement.
iv. Counsel failed to notify the State of possible alibi defense.
v. Counsel was ineffective for failing to challenge the DNA search warrant when petitioner was arrested for burglary.
vi. Counsel was ineffective for failing to investigate meritorious 4th amendment violation, instead of focusing on an unnecessary *Jackson v. Denno* hearing.
vii. Counsel failed to obtain impeachment evidence favorable to Petitioner, even after Petitioner repeatedly insisted such evidence existed and specifically requested counsel to obtain the specific documents.
viii. Counsel utilized alleged inside information obtained from the court's law clerk to pressure Petitioner into pleading guilty, informing Applicant that the judge had already decided on a 40-year sentence should petitioner be found guilty of burglary, stating "25 years is better than 40."

c. Applicant entered an involuntary guilty plea because it was made without the knowledge of exculpatory evidence in the prosecutor's possession.
d. The State failed to disclose all material evidence prior to trial in violation of *Brady v. Maryland.*
e. Counsel was deficient for recommending State's 25 without first arguing for the fairness of the State's original 15-year offer.
f. Counsel failed to object to victim impact statements from victims of offense for which Petitioner was not on trial for or pleading guilty, after assuring the defense that no victims wished to address the Court.

At the PCR hearing, Applicant proceeded forward on the allegations raised in the amended application and a claim of ineffective assistance of counsel for telling Applicant to reject the first offer based upon the mis-advisement that he had to proceed to trial to sue for Fourth Amendment damages. 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 was represented by Clay Pinkerton about ninety percent of the time and Scott Graustein became involved at the plea. Although he was originally offered fifteen years, he turned it down because he thought he could only sue because of a Fourth Amendment violation

if he proceeded to trial. Regarding the burglaries, he testified that he knew he was arrested in connection with a string of burglaries at the Grand Dunes; he was aware that there was surveillance footage of the burglaries; he was simply trying to visit his girlfriend; law enforcement made contact with guns drawn before searching the house; and although he would admit to the grand larcenies, he would not admit to the burglaries.

He further testified that he thought the search warrants were faulty for the following reasons: (1) they were served too late; (2) there was no video evidence or identification regarding the cash and diamond rings; and (3) he contested that the shirt the police found on the ground after a chase was his. Additionally, he claimed that there were numerous pieces of evidence with exculpatory value. Namely, these include the fact that a K-9 Unit missed him despite running a loop directly around him; that the State did not obtain DNA evidence until after the arraignment; that the original suspect's name was left on his DNA swab; a clip of body camera footage from the seizure of fallen clothing items; and a K-9 report Applicant obtained after his conviction via a Freedom of Information Act request.

Regarding Counsel's performance, Applicant claimed that Counsel attempted to redact a statement Applicant had given to the police, in part, because the statement implicated him in the burglaries. He also claimed that Counsel told him to go to trial; that Counsel did not call Sierra Clayton as an alibi witness; that Counsel only showed him the police statement on the second day of trial despite having sent an investigator to the jail to review discovery with him; that Counsel did not contest the admission of his statement to police on all possible grounds; that Counsel told him he would likely be convicted at trial; that the judge's law clerk had informed Counsel that the judge would accept a negotiated 25-year sentence for a plea but would sentence Applicant to 40 years after a trial; and that he, therefore, pled guilty for a 25-year sentence even though he wanted

the earlier 15-year offer back. Part of the reason he wanted the 15-year offer back is because he claimed that he had not been presented with any DNA reports before that offer expired. Nonetheless, he took the 25-year offer to "cut [his] losses." Applicant also complained about the victim impact statements that were allowed during the sentencing phase, particularly those which pertained to charges that were being dropped in exchange for the plea. He claimed that those charges were, instead, dropped because they were "baseless."

On cross-examination, Applicant stated that he reviewed a large amount of discovery with Counsel Pinkerton but not the statement he made to police. He received transcripts of these statements the second day of trial. He testified that he pled in part because he saw the statement and because of the strength of the State's case against him. He did not talk to Counsel about the initial 15-year offer very much, and at the time it was extended, he thought he could only be found guilty of grand larceny, not burglary.

Sierra Clayton Testimony

Clayton stated she dated Applicant between 2017 and 2022. She testified that they were dating at the time of the incident and spent nights together and would have testified the same. She claimed that she was at her mother's home the night Applicant was arrested. The State subpoenaed her to testify at trial; however, the State did not call her as a witness because Applicant elected to plead. She testified that she did not tell the prosecutors that she was with Applicant that night.

Counsel Clay Pinkerton Testimony

Counsel, who works at the public defender's office, stated that he discussed the stolen gun, the charges, the plea offers, the discovery, and Applicant's statement with him prior to the arraignment. Counsel was aware that the initial offer lapsed before Applicant decided to plead. He stated the State had video surveillance of the stolen car and various houses, DNA evidence within

proximity, body camera footage, and recovered stolen goods. He advised Applicant that his initial plea offer was a good offer, but Applicant rejected the offer. He was offered a twenty-five-year deal after the jury was picked. Counsel and Applicant's trial strategy was to admit to the car chase, but not the burglaries. They crafted this strategy after discussing pre-trial matters and all discovery with Applicant. Counsel tried to get the fifteen-year offer back but made no promises. The State declined to put the fifteen-year offer back on the table. He stated that he did not object to victim impact statements because they pertained to the charges pled to. He discussed with Applicant about calling Clayton as a potential witness, but he determined she was a state witness, not an alibi witness. He stated that the Judge's law clerk told him prior to the plea that he would impose a twenty-five-year sentence.

On cross-examination, he stated that he thought Applicant's police statement could have been used against him in the burglary cases. He had told Applicant that the fifteen-year offer was good, but he was prepared to go to trial if Applicant elected to do so. He did not recall getting the documents in the FOIA request. He thought the warrants were supported by probable cause. He advised Applicant that to sue for Fourth Amendment violations, Applicant had to get a civil lawyer and wait until his criminal matter was resolved. He stated he typically waits until the day of trial to pursue pre-trial matters. He did not talk to Judge John before the plea hearing, just the law clerk. He testified that he would have objected to victim impact statements if they did not relate to the charges pled to and did not consider objecting to the statements made by victims.

Upon this Court's questioning, Counsel stated that the initial offer lapsed at the arraignment. He was not surprised the offer was higher the day of trial. Applicant had twenty-three other charges resolved as a part of the plea negotiations. Counsel recruited an investigator to work on this case. He did not file any formal pre-trial motions, just told the court what they were. He

did not recall discussing an alibi defense. The DNA on the hat and shirt came back to match Applicant. He did not see anything in the FOIA materials that would change his recommendation as to the plea. He did not have concerns regarding competency. Applicant told the plea court that he understood and was waiving his constitutional rights and was satisfied with Counsel. He explained to Applicant he would have to serve 85% of his sentence. He stated that Applicant's burglary charges did not qualify for LWOP but was eligible for a life sentence if the sentences were run consecutive.

Prosecutor Christopher Helms Testimony

Prosecutor stated that Applicant had twenty-eight different charges. He believed that the evidence presented at trial would show that multiple homes in the Grand Dunes were burglarized, a vehicle was stolen, a police chase ensued, and everything was recorded through video surveillance. He and Prosecutor Livesay spoke with Clayton, who identified Applicant from the video. Clayton was found in possession of the stolen items. Prosecutor shared all discovery with defense. He stated that he had almost thirty opportunities to convict him and told Applicant this at the arraignment. The fifteen-year offer lapsed when it was rejected in front of the Judge on the record. The State provided the defense with a transcript of his and Clayton's police statements. He stated Applicant confessed to everything. Applicant decided to plead when given a transcript of his police statement. The remaining charges were dropped not because they were not supported by the evidence, but because the charges pled to all stemmed from the same night.

On cross-examination, Prosecutor stated he did not recall seeing the FOIA documents but remembered seeing the police narrative somewhere. However, he did not believe this was exculpatory because it did not negate Applicant's guilt. He saw the narrative in another document because they are typically repeated in different documents.

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 Applicant's records from the Clerk of Court's office, the South Carolina Department of Corrections, the plea transcript, and the current application for post-conviction relief. 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.

Invalid 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 Applicant entered his plea freely, voluntarily, knowingly, and intelligently. The court engaged Applicant in a colloquy where Applicant indicated that he understood what he was doing, was informed of his rights, and admitted his guilt. (Tr. 36-55). Applicant expressly stated to the court that he was not threatened or forced into entering the plea. (Tr. 41). The plea court found that Applicant had the advice of competent counsel with whom he was satisfied. (Tr. 46). Thus, this Court finds the plea valid and cannot be withdrawn now.

Misadvising Applicant to Reject the Initial Plea Offer

Applicant claims Counsel erroneously advised Applicant to reject the fifteen-year plea offer for several reasons, including lack of evidence of commission of the burglaries, potential exculpatory evidence available, and his decision to pursue a civil action against the police department. This Court finds these allegations are not credible. Instead, this Court finds Counsel credible in his testimony that Applicant was initially not entertaining plea offers, despite Counsel telling him he was given a good offer. Additionally, Prosecutor was credible in stating that at the arraignment, he told Applicant he should plead because he has thirty chances to find him guilty at trial. Counsel was credible in stating that Applicant did not entertain pleading until he was personally provided with a transcript of his own police statement, which Applicant acknowledged was highly inculpatory. Accordingly, this Court finds that Counsel did not discourage Applicant

from taking the plea and denies relief accordingly.

Failure to Obtain all Discovery Prior to Arraignment

Applicant claims Counsel was ineffective for failure to obtain all discovery prior to the arraignment. Counsel credibly testified that he had most of the discovery prior to the arraignment and that it is not uncommon for subsequent discovery to come in after the arraignment. Specifically, Counsel credibly testified that he discussed Applicant's police statement with him prior to the arraignment, which was the main piece of evidence Applicant cited in explaining why he decided to plead. Counsel also stated he reviewed other discovery with Applicant, including DNA evidence, video footage, and stolen goods recovered. He stated he recruited an investigator to meet with Applicant to review all discovery. This Court finds that Applicant is not entitled to have every piece of discovery available to him prior to the arraignment and declines to finds any failure on Counsel's part for failure to review discovery with Applicant in a timely manner. Accordingly, relief is denied on this ground.

Failure to Investigate Bodycam Footage

Applicant claims Counsel was ineffective for failing to investigate Officer Beam's body camera footage for exculpatory evidence. Applicant has failed to show that this footage was not included in the video footage Counsel and the investigator reviewed with him. Additionally, Applicant failed to show that there was anything exculpatory on the video or anything Counsel did not review and analyze. Accordingly, relief is denied on this ground.

Misadvising Applicant to Take 25-Year Offer

Applicant claims Counsel erroneously advised him to take the twenty-five-year plea deal. However, Counsel credibly testified that Applicant came to this rationalization on his own upon reviewing the transcript of his police statement and determining it was very inculpatory. Thus, this

Court finds this claim is without merit and denies relief accordingly.

Failure to File Pre-Trial Suppression Motion

Applicant claims Counsel was ineffective for failure to file a pre-trial motion suppressing the statement. However, Counsel did pursue a *Jackson v. Denno* hearing. This Court fails to find how a written pre-trial motion would have produced a different outcome than the oral motion conducted. Additionally, this Court finds that this motion and defense was waived through entry of an otherwise valid plea. Thus, relief is denied on this ground.

Failure to Pursue Alibi Witness

Applicant claims Counsel was ineffective for failure to pursue an alibi defense. 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 in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

On the other hand, 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 have corroborated 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).

The alleged alibi witness, Sierra Clayton, was subpoenaed to testify by the State because she identified Applicant has the perpetrator of the burglaries based on the video surveillance. This is the opposite of an alibi witness and would have been damning to Applicant if the case proceeded to trial. Thus, this Court finds this witness not helpful to the defense, let alone an alibi witness, and

relief is denied accordingly.

Failure to Raise Fourth Amendment Violation and Move to Suppress Search Warrants and Resulting Evidence

Applicant claims Counsel was ineffective for failure to raise Fourth Amendment violation argument and move to suppress the search warrants and resulting evidence. Counsel credibly testified that he thought that the warrants were supported by probable cause and Applicant's alleged Fourth Amendment Violation argument was not plausible. He also acknowledged Applicant was seemingly seeking to pursue a civil action. Additionally, these defenses were foreclosed by entry of a valid plea. Accordingly, relief is denied on this ground.

Discussion with Law Clerk

Applicant claims Counsel was ineffective for discussing with the judge's law clerk the sentences that would be imposed at trial and the plea, respectfully. This Court finds Counsel's actions to be prudent. Specifically, regardless of the offer or lack thereof made by the State, Counsel could inform Applicant of a specific sentence he would receive before the plea, mitigating the risk of entering the plea without firm sentencing negotiations in place. This led to Applicant entering a more informed plea than he otherwise would have. This Court finds nothing inappropriate about this approach, nor does this Court find that this discussion did anything besides aid Applicant in his decision-making process. Accordingly, relief is denied on this ground.

Brady Violation

Applicant alleges there was a *Brady*[1] violation. *Brady* violations occur if four conditions are met: "the evidence was favorable to the accused", "it was in the possession of or known to the prosecution", "it was suppressed by the prosecution", and "it was material to guilt or punishment."

[1] *Brady v. Maryland,* 373 U.S. 83 (1963).

Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Whether a *Brady* violation is material and, thus, sufficient to warrant relief, is contingent on where there is a "reasonable probability that, but for the government's failure to disclose *Brady* evidence, the defendant would have refused to plead guilty and gone to trial." *Id.* at 325. Further, whether a mistrial is warranted remains contingent on "'(1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant's guilt; and (3) the curative actions taken by the court.'" *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011) (quoting *United States v. Anwar,* 428 F.3d 1102, 1112 (8th Cir. 2005)).

Applicant has failed to establish that this documentation was in the prosecutor's possession or that he failed to turn it over. Regardless, this Court finds that this documentation is not exculpatory. Prosecutor credibly testified he did not recall ever seeing the document before and stated he did not think it was exculpatory. Counsel testified that he did not think it would change his recommendation as to the plea. Thus, this Court finds that the claim that a *Brady* violation occurred is without merit and declines to grant relief accordingly.

Failure to Get Initial Plea Offer Back on Table

Applicant had no constitutional right to a plea offer, nor was the State required to keep the offer open in this case. "Prosecutors have broad powers in the plea bargain process[.]" *Reed v. Becka*, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999). *See Collins v. State*, 422 S.C. 250, 261, 810 S.E.2d 871, 877 (2018) ("[T]the decision whether to revive the expired plea offer rested exclusively with the solicitor."); *State v. Langford*, 400 S.C. 421, 436 n.6, 735 S.E.2d 471, 479 n.6 (2012) (stating "[u]ndoubtedly, the solicitor has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain"); *see also Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (finding "there is no

constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial").

Further, absent a showing of detrimental reliance on the plea agreement by the defendant, a prosecutor may withdraw a plea offer at any time prior to an actual entry of the guilty plea. *Reed*, 333 S.C. at 688-90, 511 S.E.2d at 402-04. Detrimental reliance exists when a defendant takes a "substantial step or accepting serious risk of an adverse result following acceptance of the plea offer." *Id.* at 689, 511 S.E.2d at 403. Detrimental reliance is often found if the defendant performed some part of the bargain, such as providing beneficial information to law enforcement. *Custodio v. State*, 373 S.C. 4, 11, 644 S.E.2d 36, 39 (2007). "Reliance may not be shown 'by the mere passage of time,'" "where the defendant stopped preparing his defense absent a showing of specific prejudice," nor "by the prospect of a longer sentence." *Reed v. Becka*, 333 S.C. 676, 511 S.E.2d 396, 403 (1999) (quoting *State v. Therriault*, 485 A.2d 986, 991, n.7 (1984)).

This Court finds that the 15-year offer was on the table initially but lapsed when Applicant rejected it on the record. Applicant testified that he knew the offer lapsed then. Counsel credibly testified that he knew the offer lapsed and attempted to get it back on the table when Applicant decided to plead, but this was unsuccessful. Prosecutor testified that he was not willing to put the offer back on the table. This Court finds Applicant's allegation is without merit because Counsel attempted to get the offer back for Applicant, but the State was unwilling to concede. The State has no duty to offer a specific deal. Thus, relief is denied on this ground.

Failure to Object to Victim Impact Statements

Applicant claims Counsel was ineffective for failure to object to the impact statements. Even if this Court were to find Counsel deficient, no prejudice is established because it only had the potential to impact sentencing. It did not impact sentencing because the Court informed Counsel of what sentence Applicant would receive if he pled before the plea hearing or know what

victims would speak to what information and did not deter from that sentence after the statements were given. Accordingly, because no prejudice was established, relief is denied on this ground.

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 22 day of March, 2023.

FILED
HORRY COUNTY
2023 MAR 27 P 2:17
RENEE N. DAVIS
CLERK OF COURT
HORRY COUNTY, S.C.

Debra McCaslin

DEBRA R. MCCASLIN
Presiding Judge
Fifteenth Judicial Circuit

Horry, South Carolina.