STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Brian K. Spears, #340805,) Applicant,) v.) State of South Carolina,) Respondent.)	Case No.: 2019-CP-26-6129 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant's post-conviction relief application filed September 26, 2019. Respondent made its return on March 3, 2021, requesting an evidentiary hearing. An evidentiary hearing was held on September 6, 2022, at the Horry County Courthouse. Steven W. Fowler, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto, Esquire, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Trial Counsel Barbara Pratt and Appellate Counsel Taylor Gillam also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. During its August 2007 term, the Horry County Grand Jury indicted Applicant for three counts of Assault and Battery with Intent to Kill (hereafter "ABWIK") (2007-GS-26-3387, -3389, and -3390), and Murder (2007-GS-26-3388). Applicant was represented by Barbara W. Pratt. Assistant Solicitors Donna E. Elder and Lawrence R. Filiberto of the Fifteenth Circuit Solicitor's Office prosecuted the case.

On May 10-13, 2010, Applicant proceeded to a jury trial where he was ultimately convicted as indicted. The Honorable Larry B. Hyman, circuit court judge, presided over the trial. Judge Hyman sentenced Applicant to thirty years' imprisonment.

Applicant appealed his convictions and submitted a final brief on September 12, 2011. Oral argument was heard in the Court of Appeals on January 17, 2013. On April 17, 2013, the court issued an opinion remanding the case to the trial court for it to conduct an on-the-record balancing test under Rule 403, SCRE to determine whether the probative value of the prior bad act of a shooting was substantially outweighed by the danger of unfair prejudice.

On April 26, 2013, Respondent filed a petition for rehearing *en banc*. On May 2, 2013, Applicant filed a petition for rehearing. Both petitions for rehearing were denied on June 14, 2013.

Respondent filed a petition for writ of certiorari on July 12, 2013. Applicant filed a petition for writ of certiorari on July 15, 2013. On September 11, 2014, the South Carolina Supreme Court issued an order denying the petitions of both parties.

The rehearing on remand for the Rule 403, SCRE balancing test was not heard until December 8, 2016. On February 9, 2017, the Honorable Larry B. Hyman issued his amended order on remand for the Rule 403 hearing, finding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence, nor was there any undue tendency to suggest a decision on an improper basis brought on by a propensity argument.

Applicant filed his notice of appeal on February 23, 2017. Through Counsel Robert Pachak, Applicant raised the following issue:

> Whether the lower court in its order on remand was incorrect in ruling that the probative value of the prior similar bad act was not outweighed by the danger of unfair prejudice.

An opinion affirming the conviction was issued pursuant to Rule 220(b), SCACR. *State v. Spears*, Op No. 2019-UP-230 (filed June 26, 2019). The remittitur was issued on July 12, 2019.

Summary of Relevant Facts

On May 26, 2007, Applicant, along with Nathaniel "June" Douglas, Ishmael "Ish" Douglas,[1] and Thomas "T.C." Shaw (collectively Applicant's group), all of whom were affiliated with the gang 41-Curve, left Lumberton, North Carolina and went to Myrtle Beach over the weekend.[2] (Tr. 274-75, 288-289, 295-96, 360-61, 365, 439, 566-67, 584).

When they arrived, the group was joined by fellow 41-Curve member, Jeffrey "Bird" Bethea. (Tr. 289-90). Applicant was wearing a white t-shirt and a black t-shirt underneath a red t-shirt along with a black and red New York Yankees hat, while fellow gang member Nathaniel Douglas was wearing a red O.J. Simpson jersey. (Tr. 288-89, 299). Trial testimony showed that red was the color of the "East Side Bloods," a rival gang and that gang members often wear the color of a rival gang when intending to "go do something." (Tr. 279-280).

Shortly after Bethea's arrival, a member of Applicant's group stated they observed Aaron Hammonds (hereafter "Victim") walking down Ocean Boulevard. (Tr. 572). Victim was a high-ranking member of the East Side Bloods and served four years in prison for "accessory after the fact" in the murder of 41-Curve member Eric Floyd. (Tr. 225-26, 273-75, 289-291).

Victim, Lemark Irons, and other members of the East Side Bloods were walking together along Ocean Boulevard. (Tr. 192-193, 196-197). Irons left the group and approached Applicant's group to compliment them on their clothes and jewelry stating, "we need to stop beefing and get

[1] Ishmael "Ish" Douglas is also known as Wa-Gee. (Tr. 296).
[2] Applicant, along with June, was a member of 41-Curve, a Lumberton gang affiliated with Gangster Disciples and Folk Nation. (Tr. 274-75, 288, 289, 360-61, 365, 439, 584).

money together." (Tr. 195-96, 197-98, 271, 273, 277, 279-81, 301). Irons, whose right arm was in a sling, attempted to shake Bethea's hand with his left hand, which was considered disrespectful. (Tr. 301). In response, Bethea slapped Irons' hand and began cursing at him. (Tr. 301, 312). Irons left the group, crossed the road, and rejoined his group. (Tr. 301, 197-98).

Immediately thereafter, Bethea, a high-ranking member of 41-Curve, became angry and began talking to Applicant, a foot soldier in the gang who did not get along with Victim. (Tr. 290, 440, 302, 310, 447-49). Applicant told Bethea that he thought Irons and his group, including Victim, would kill someone in their group, unless they killed someone from the other group first. (Tr. 447-48). Thus, a shooting occurred resulting in Victim's death and three bystanders getting wounded. (Tr. 132, 156-57, 171, 189, 203-11, 216-18).

Eyewitness Brittney Maynor testified at trial that the shooter was a black male, about five-foot-seven, and was wearing a red shirt, a red bandana over his face, a red fitted hat, and another red bandana on his wrist. (Tr. 203-04, 209, 211). She noted that the shooter crossed the road and was right in front of her when he began shooting. (Tr. 194, 203, 206). Maynor told the jury that she turned and ran when she heard "five or six" shots. (Tr. 207, 210). She described the gun as a silver and black .380 that was small enough to fit in the palm of her hand. (Tr. 211).

At the crime scene, authorities interviewed multiple witnesses and produced a composite sketch matching Bethea's description. (Tr. 354-55). Eight shell casings were recovered from the crime scene and three bullets were recovered from Victim's body during the autopsy. (Tr. 161-63, 173-74). SLED Agent Suzanne Cromer testified that both the shell casings and bullets came from a .25 caliber automatic weapon. (Tr. 431-32).

After interviewing Bethea, authorities spoke with Applicant in Lumberton on June 4, 2007, where Applicant repeatedly denied being in Myrtle Beach on the date in question, instead

claiming he was in Lumberton all weekend and that he did not hang around Bethea. (Tr. 355, 358-59, 361). Following the first interview, Applicant was charged with one count of murder and three counts of ABWIK. (Tr. 363-64).

On June 7, 2007, Applicant was interviewed again. (Tr. 363-64). After waiving extradition, Applicant admitted to law enforcement that he was in Myrtle Beach on the date in question. Applicant insisted told law enforcement that he walked away after the altercation between Bethea and Irons, and then fled the scene when he heard gunshots. (Tr. 363-64, 367-68).

Applicant's co-defendants, Nathaniel Douglas and Jeffrey Bethea, also testified at trial. (Tr. 287-350, 437-99). Nathaniel Douglas said that after Irons' initial dispute with Bethea he walked off while Applicant remained with the rest of the group. Approximately ten minutes after he left the group, he heard gunfire and saw Applicant and the other members of his group running up the street. (Tr. 302, 304-05). Douglas also confirmed that Applicant had a handgun in his waistband that night and that Bethea did not appear to be carrying a gun. (Tr. 302-04). Bethea confirmed that Douglas left the group and explained that he and Applicant approached Irons' and Victim's group and attacked them. (Tr. 449). Bethea told the jury that Applicant pulled out a handgun and began shooting. (Tr. 450-51).

To corroborate Bethea's version of the shooting, the State also introduced rap lyrics written by Applicant which indicated he killed Victim to avenge Eric Floyd's death. (Tr. 293-95, 406-07, 415). There was also testimony from Applicant's former cellmate, Timothy Smith. Smith testified that Applicant said he would kill Bethea, his brother, his children and his whole family because he "snitched" on him, and he had pushed through the crowd and shot Victim because he believed Bethea would not. (Tr. 499-522). Smith testified that Applicant told him he received a phone call that Victim was in Myrtle Beach for bike week, prompting Applicant and

his friends to come to Myrtle Beach to "take care of him." (Tr. 505-07).

Alexis Brown, a member of Irons' and Victim's group that night, testified that the composite generated by authorities was Bethea, but confirmed that the shooter was wearing a red bandana over his face and pulled a gun from his waistband. (Tr. 544, 547-48, 550-51).

Finally, Applicant testified in his own defense. (Tr. 565-611). Specifically, Applicant explained he walked off following the dispute between Irons and Bethea, heard gunshots, and ran back to the K-Mart parking lot to meet with the rest of his group. (Tr. 575-76). He said he did not shoot anyone. (Tr. 566). On cross-examination, Applicant said he brought a gun to Myrtle Beach but left it in the car. He admitted he had previously owned a .380, but testified he had given it away. (Tr. 589, 600).

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. Defense counsel was ineffective because:

    a. "Trial counsel was ineffective for failing to call Officer Mark Jackson from his 'Investigative Report'."
    b. "Trial counsel was ineffective for failing to call a material witness . . . who did not pick Applicant out of a photo line-up."
    c. "Trial Counsel was ineffective for failing to object State's violation of Applicant's right to confrontation by adverse witness when evidence was produced by state that ABWIK victims were shot by an Applicant when ABWIK victims were not present at trial for cross-examination by Applicant."
    d. "Trial counsel was ineffective for failing to move for verdict in arrest of judgement on grounds that the court lacked jurisdiction to try Applicant's ABWIK offenses after amending the indictments during the charge to the jury."
    e. "Ineffective assistance of appellant counsel failure to raise on appeal applicant's ground that trial court lacked subject matter jurisdiction to convict him of murder and ABWIK offenses."

At the PCR hearing, Applicant proceeded forward on the allegations listed in the initial application. All other allegations raised in his initial application and amendments are deemed

waived and abandoned and, accordingly, will not be addressed in this order.

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 Horry County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, the PCR action records, and the direct appeal 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.

Officer Jackson

Applicant claims that Counsel was ineffective for failure to call Office Jackson to testify and for failure to enter his investigative report through him. Applicant argues that the victim's sister was interviewed by Officer Jackson and her credibility could have been impeached through Officer Jackson's testimony. He further testified that there was a discrepancy between the statement she made to Investigator Jackson and her testimony at trial. In her prior statement to law enforcement, she said that her friend told her about what happened. At trial, however, she testified that the decedent told her. Applicant testified that trial counsel's failure to call Officer Jackson to testify regarding the discrepancy was prejudicial to him and constituted ineffective assistance of counsel.

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

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular

witness against the identifiable risks." *Buckson v. State,* 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State,* 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State,* 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover,* 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State,* 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

This Court finds that the officer's investigative report was likely not admissible, as any statements the witness she made to the officer would have been hearsay. Additionally, Counsel

credibly testified that she did not think that this witness would be helpful. Instead, she testified that calling him would open the door to entry of further incriminatory evidence. This is a reasonable strategic reason for not calling him to testify. Additionally, Applicant has failed to meet his burden of proof in establishing prejudice. *See Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993) (Mere speculation regarding the witness's testimony is insufficient to establish prejudice).

Failure to Call Person that did not Identify Applicant from Lineup

Applicant claims Counsel was ineffective for failure to call Shakira Gordon as a witness. Applicant alleges Gordon was the only person who identified someone out of a photo lined, and she picked Bethea out of the lineup rather than him. Trial Counsel credibly testified that while this witness identified Bethea alone, that did not mean they would not identify Applicant as being involved in the shooting if called at trial. Trial Counsel testified her testimony could have been damaging to defendant's case. This Court agrees. Further, Applicant has failed to meet his burden of producing the witness before the PCR court to demonstrate what the witness would have testified to at trial and how that testimony would have changed the results of the proceedings. Accordingly, relief on this ground is denied.

Failure to Call Victims

Applicant claims Counsel was ineffective for failure to object to the State's failure to call the other three shooting victims to testify. Whether failure to object constitutes deficient performance generally hinges on whether a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C.

546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

This Court declines to find that the victims' absence violated the Confrontation Clause. *See Crawford v. Washington*, 541 U.S. 36, 54 (2004) (finding that a Confrontation Clause violation occurs if there is admission of testimonial hearsay statements admitted, the declarant is unable to testify, and there was no prior opportunity for cross-examination). The victims existence and absence from the trial does not, by itself, constitute a Confrontation Clause violation.

Counsel's decision to not call or request these witnesses' presence is reasonable because they could have hurt the defense's case. Additionally, Applicant has failed to show anything beneficial they could have offered that would have impacted the trial results. Accordingly, relief on this ground is denied.

Failure to Move for Directed Verdict – Indictments

Applicant claims Counsel was ineffective for failing to move for a directed verdict. Applicant testified at the PCR hearing that he believed the indictments in the case were faulty because they were not signed by the Solicitor and because the Grand Jury had not been convened during the General Sessions term of court. Applicants are not entitled to directed verdicts as a matter of law, and counsel will not be found ineffective for failure to move for a directed verdict if the motion would have been denied when viewed in the light most favorable to the State. Here, any attempts on Counsel's part to move for a directed verdict based upon the insufficiency of the indictments would have failed. This allegation is without merit and this Court denies relief accordingly.

Appellate Counsel – Indictments

Applicant claims Appellate Counsel was ineffective for failure to challenge the indictments. A defendant is constitutionally entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). "Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). Applicant must show appellate counsel's performance was deficient, and he was prejudiced by the deficiency. *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005); *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003); *Thrift v. State*, 302 S.C. 535, 537, 397 S.E.2d 523, 525 (1990).

Appellate counsel has a professional duty to choose among potential issues according to their merit. *Jones v. Barnes*, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. *Tisdale v. State*, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting *Jones v. Barnes*, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . .")).

When a claim of ineffective assistance of counsel is based upon neglecting to file a merits-based brief, Applicant must show that appellate counsel unreasonably failed to discover non-frivolous issues and file a merits brief raising them, and a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he or she would have prevailed on his appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Applicant must show that a reasonably

competent attorney would have found one non-frivolous issue warranting a merits brief, and that the issue identified would have won on appeal. *Id.* at 288.

Appellate Counsel credibly testified that Applicant would not have succeeded on appeal by challenging the indictments. This Court agrees. Challenging the indictments is a frivolous issue and the allegation of failure to raise this issue does not constitute deficiency or prejudice. Accordingly, relief is 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 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 6th day of June, 2023.

KRISTI F. CURTIS
Presiding Judge
Fifteenth Judicial Circuit

Sumter, South Carolina.