RECEIVED
DEC 15 2023
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Debra R. McCaslin, Circuit Court Judge

2019-CP-21-01634

Cory Nettles Allen, # 367495,

Appellant,

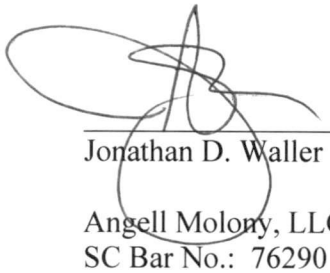
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Cory Nettles Allen, # 367495, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed November 13, 2023, issued by the Honorable Debra R. McCaslin, Presiding Judge, Twelfth Judicial Circuit.



Jonathan D. Waller

Angell Molony, LLC
SC Bar No.: 76290
210 Newberry Street NW
Aiken, SC 29801
803-335-1449 (phone)
jonathan@angellmolony.com
ATTORNEY FOR PETITIONER

December 7, 2023

Other Counsel of Record:
D. Russell Barlow, II, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT
Cory N. Allen, #367495, Applicant, v. State of South Carolina, Respondent.	CASE NO. 2019–CP–21–1634 **ORDER OF DISMISSAL WITH PREJUDICE**

Presiding Judge:	Hon. Debra R. McCaslin
Applicant's Attorney:	Jonathan D. Waller, Esq.
Respondent's Attorney:	D. Russell Barlow, II, Esq.
Trial Counsel:	Rose Mary Parham, Esq.
Date of Hearing:	June 13, 2023
Court Reporter:	Julie A. Kevish

This matter comes before the Court by way of Cory N. Allen's (Applicant) application for post-conviction relief (PCR) filed on June 19, 2019. Respondent, the State of South Carolina, filed its Return on July 20, 2020, requesting an evidentiary hearing to resolve the claims set forth in the application.

On June 13, 2023, an evidentiary hearing was held at the Florence County Courthouse before the Honorable Debra R. McCaslin. Applicant was present and represented by Jonathan D. Waller, Esquire. Assistant Attorney General D. Russell Barlow, II, represented Respondent. Applicant proceeded forward on the second claim set forth in his original application. In support of these claims, Applicant testified on his own behalf, and Respondent presented testimony from Rose Mary Parham, Esquire (Trial Counsel).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish

any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted at the December 2014 Florence County Grand Jury term for Murder, Accessory to Murder Before the Fact, and Accessory to Murder After the Fact (2014–GS–21–1340). Applicant was represented by Rose Mary Parham, Esquire, of the Parham Law Firm, LLC. Twelfth Circuit Solicitor E. L. Clements, III, prosecuted the case.

Applicant's case proceeded to a jury trial on March 21–23, 2016, before the Honorable R. Knox McMahon. The jury convicted Applicant of Murder. Judge McMahon sentenced Applicant to forty years imprisonment.

Applicant filed a timely Notice of Appeal. Chief Appellate Defender Robert M. Dudek perfected Applicant's appeal by filing a brief to the Court of Appeals presenting the following issue:

> I. Whether the court erred by refusing to redact the portion of the 911 call where Coe speculated about the motive for the shooting being a prior incident, since this speculation was no longer an excited utterance or present sense impression, and it should have been excluded given its tendency to confuse the jury, and its extremely prejudicial effect

The Court of Appeals affirmed Applicant's conviction and sentence. State v. Allen, Op. No. 2019–UP–152 (S.C. Ct. App. filed May 1, 2019). The Remittitur was returned to the lower court on May 23, 2019.

FACTS GIVING RISE TO THE CONVICTION

The State's theory of the case was clear: Applicant waited years to seek revenge on Edward

Windham (Windham), the man who killed Applicant's brother. Applicant finally succeeded on June 4, 2014, after he spotted Windham riding his moped through the neighborhood on the same street where Applicant's brother was killed years before. (Trial Tr. p. 108, l. 21 – p. 110, l. 10; p. 118, ll. 18-21). In contrast, Applicant argued he was terrified of Windham after Windham killed his brother, so he obtained his concealed weapons permit to protect himself and his family from Windham in the future. (Trial Tr. p. 115, ll. 5-14[1]). Applicant argued his encounter with Windham that night was purely coincidental. (Trial Tr. p. 110, ll. 18-23.)

On June 4, 2014, officers responded to a 911 call about a shooting in the Tara Village neighborhood. (Trial Tr. p. 142, ll. 2-14). Windham was lying in the middle of the street near an overturned moped. Blood surrounded him on the pavement. The pathologist found seven gunshot wounds on Windham's body. (Trial Tr. p. 365, ll. 5-7). The wound to the back of Windham's neck was fatal. (Trial Tr. p. 365, ll. 12-20). The pathologist believed the Windham was shot from at least two to four feet away. (Trial Tr. p. 367, ll. 1-9). Most of the wounds showed the bullets entered Windham from the left and traveled to the right side of his body or from his back to front. (Trial Tr. pp. 367-378). One wound to his arm could have resulted from being shot while driving the moped or raising his arm. (Trial Tr. p. 383, l. 10 – p. 384, l. 19).

Applicant and his brother were standing on the curb near the victim. (Trial Tr. p. 142, ll. 5-24). Dispatch advised the officer that the suspect would remain with the victim until law enforcement arrived. (Trial Tr. p. 143, ll. 10-16). When he arrived on the scene, he asked Applicant and his brother to show him their hands and to get on their knees. (Trial Tr. p. 143, ll.

[1] Trial Counsel argued in her opening, "Yeah, he had a concealed weapons permit which you will see in evidence, but my client has no criminal history. He got the concealed weapons permit after the jury acquitted Mr. Windham of killing his brother, because he was terrified that Mr. Windham was going to kill him and his other brother." (Trial Tr. p. 115, ll. 5-10.)

17-24). Applicant then removed a pistol from his waistband, set it on the ground, and complied with the officer's request. (Trial Tr. p. 143, l. 22 – p. 144, l. 3). The officer handcuffed Applicant, read him his Miranda[2] rights, and then escorted him to his patrol car. (Trial Tr. p. 144, ll. 10-23).

Applicant told the officer numerous times that he shot Windham in self-defense because Windham pulled a gun on him. Applicant also told officers he attended a concealed weapons class. (Trial Tr. p. 145, ll. 18-24, p. 150, ll. 11-17). Multiple officers arrived on the scene because some of the onlookers in the crowd became disorderly. (Trial Tr. p. 151, ll. 2-19).

There were two weapons at the crime scene: the first was the Ruger nine-millimeter owned by Applicant, and the second was a .25 caliber Lorsin handgun. (Trial Tr. p. 288, ll. 5-16; p. 298, ll. 3-5). Investigators discovered nine-millimeter shell casings lying on the ground at the crime scene. (Trial Tr. p. 170, ll. 4-18, p. 190, ll. 7-19). Crime scene investigators found three PMC 25 caliber unfired bullets in a magazine. (Trial Tr. p. 191, ll. 2-8). The Ruger nine-millimeter handgun clip was full, but a partial clip was lying nearby. (Trial Tr. p. 193, ll. 2-25). Law enforcement located the Lorsin handgun close to the moped. There were unfired 25 caliber rounds on the ground, but no spent casings from the .25 millimeter. (Trial Tr. p. 194, ll. 5-23.) During the firing of the Lorsin handgun, SLED analysts discovered that it would not engage another round into the chamber after firing. The analyst had to manually push the slide for the next round to enter the chamber. (Trial Tr. p. 291, ll. 10-21).

THE 911 CALL

During the pre-trial motions, the Solicitor asked the trial court to proffer the testimony of witness Debra Coe (Coe), who was under subpoena but refused to testify against Applicant because she was afraid. (Trial Tr. p. 47, ll. 11-22). Coe was an eyewitness to the murder, called 911, and

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

gave a statement to police at the scene. (Trial Tr. p. 48, ll. 1-5). Trial Counsel objected to the introduction of the 911 call, saying, "So I would object to the 911 conversation because it gets into a lot of extraneous stuff that is not actually accurate as to date and time." (Trial Tr. p. 61, ll. 22-24). The Solicitor acknowledged the shooting of Applicant's brother happened approximately eight years before the instant case and not "last year," as Coe indicated in her call. (Trial Tr. p. 62, ll. 4-10). Trial Counsel argued:

> We don't object to the earlier portion of the nine one one tape but toward the latter part she starts talking and telling the nine one one operator, no, I think this shooting must have been because his brother got shot last year and they really hate this guy. Anyhow, I think the opinion she gave as to why this shooting happened is too prejudicial and not admissible.

(Trial Tr. p. 62, ll. 13-19.)

During the proffer, Coe said Windham was killed in the street in front of her house. (Trial Tr. p. 51, ll. 13-20). Coe also testified Windham was the alleged shooter in a prior killing that also occurred in front of her house. (Trial Tr. p. 51, l. 21 – p. 52, l. 2). Coe testified she saw the victim riding past her home on a moped, and she spoke to him, and then she saw Applicant approach. (Trial Tr. p. 53, l. 12 – p. 54, l. 10). Coe heard shots, ran to the front yard, saw Windham lying in the street, told Applicant she was calling 911, and then placed the call. (Trial Tr. p. 54, l. 1 – p. 57, l. 16). Similarly, in the 911 call, Coe tells the operator she saw Windham ride down her street on the moped, saw Applicant walk to the corner to wait for Windham to return, and then saw Applicant shoot Windham. (State's Exhibit 2.)

The Solicitor informed the trial court he intended to call Coe as a witness and introduce her 911 call because she answered many of his questions during the in-camera hearing. (Trial Tr. p. 61, ll. 4-14). The Solicitor argued the statements on the 911 call were made as excited utterances and present sense impressions. (Trial Tr. p. 62, ll. 2-5). Applicant objected to introducing the 911

call through Coe because portions of the call referred to the earlier shooting of Applicant's brother. The Solicitor urged the trial court to listen to the 911 call because Coe's excited tone was clear from the recording. (Trial Tr. p. 63, ll. 1-5).

The trial court advised Coe she was under subpoena and informed her she would be held in contempt if she refused to testify. The trial court then asked an attorney with the Florence County Public Defender's Office to talk to Coe about the consequences of her refusal to testify. (Trial Tr. p. 64, l. 6 – p. 67, l. 21).

The trial court did not rule on the admissibility of the tape before trial but instead heard arguments from the State and the defense when the State attempted to introduce the tape during the testimony of the 911 operator. (Trial Tr. pp. 119-123).

The court found any discrepancies between what Coe said she saw on the 911 call and what she testified to was a matter for the jury to decide in weighing the credibility of the testimony. (Trial Tr. p. 125, ll. 2-9). The trial court also found that the testimony was relevant and not unfairly prejudicial to Applicant, as long as the jury heard the correct information about when the prior shooting occurred. (Trial Tr. p. 124, ll. 14-23, p. 125, ll. 2-16). Applicant objected preliminarily to the admissibility of the 911 call because Coe was potentially unavailable to testify, and Allen could not cross-examine her on the statements she made in the call. (Trial Tr. p. 125, l. 17 – p. 126, l. 1). The trial court told Applicant it could only rule on the issue before it. (Trial Tr. p. 126, ll. 7-20). The recording, marked State's Exhibit #2, was published to the jury. (Trial Tr. p. 127, ll. 1-2.)

The State rested its case without calling Coe as a witness. (Trial Tr. p. 389, l. 14.) Applicant moved for a mistrial because the 911 call should not have been admitted where the recording contained inadmissible hearsay and because Applicant did not have the opportunity to

confront Coe. (Trial Tr. p. 391, ll. 1-23). The Solicitor informed the trial court Coe was still available for the defense to call as a witness, but he declined to call her because he was unsure if she would tell the truth. (Trial Tr. p. 393, ll. 16-25).

The trial court found there was no gap in the tape where it could be easily redacted. (Trial Tr. p. 394, ll. 11-20). The trial court then went on to make an extensive analysis of the Confrontation Clause and the applicability of Supreme Court case law:

> In this case, the statements were made to a nine one one emergency operator by Ms. Debra Coe who called in to report an emergency, that an individual had been shot; that he was dead in the road in a particular location in Florence County. That the shooter was still in the area, and the nine one one operator was not interrogating Ms. Coe for purposes of future presentation in Court or at trial, but was responding to a citizen emergency complaint. Obviously, in the excited state and stress of the moment, the operator knowing no history whatsoever, Ms. Coe relates that history to the operator and the operator then properly and correctly and professionally follows up on it because law enforcement officers were responding to the scene of a shooting. Now, whether the individual was responsible for the shooting or not, he was still at the scene. So I would find that it is non-testimonial, that Ms. Coe is available, number one, although not presented by the State, and, number two, [Applicant] has had the opportunity to cross-examine Ms. Coe during the in-camera hearing. So with those two prongs, the clause would not apply. Therefore, it then goes to State evidentiary law, and that evidentiary law, as I ruled previously, under 803 one, a hearsay exception. The availability of declarant – the following is not excluded by the hearsay rule even though the declarant is available to be a witness. One, present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. Two, excited utterance – a statement relating to a startling event or condition, and I emphasize a statement relating to a startling event or condition, made while the declarant was under the stress of the excitement following the crime, the event or the matter at issue.

(Trial Tr. p. 397, l. 21 – p. 399, l. 5). Finding no constitutional prohibition against the earlier

admission of the call, as well as no state evidentiary considerations, the court denied Applicant's motion for mistrial. (Trial Tr. p. 399, ll. 6-7).

EVIDENCE OF APPLICANT'S MOTIVE TO KILL WINDHAM

Pete Farnum (Farnum) employed Applicant at his automotive body repair business. (Trial Tr. pp. 304-305). Applicant worked at the body shop for about six months, and Farnum described him as "very smart." (Trial Tr. p. 306, ll. 8-23). One day, Farnum realized Applicant was carrying a handgun and confronted him about it. (Trial Tr. p. 307, ll. 1-3). Applicant told Farnum he had a concealed weapons permit because a man killed his brother. The man was in prison, but not for the murder of his brother. (Trial Tr. p. 307, ll. 9-14). Applicant told Farnum he would kill the man eventually, and Farnum tried to talk him out of it. (Trial Tr. p. 307, ll. 15-23). When Farnum later heard Applicant killed Windham, he regretted not talking to the police about Applicant's plan. (Trial Tr. p. 308, ll. 6-9). Farnum said Applicant eventually stopped coming to work. (Trial Tr. p. 309, ll. 7-11).

Trial Counsel made a motion *in limine* to exclude the testimony of Mr. Farnum as too remote in time to be relevant and as unfairly prejudicial. (Trial Tr. p. 94, l. 18 – p. 96, l. 22). The trial court denied the motion, finding the statements to Farnum met the threshold test of admissibility for relevance. (Trial Tr. p. 97, ll. 14-16).

To corroborate and clarify the charges against Windham involving the death of Applicant's brother, the Florence County Clerk of Court testified about the indictment of Windham for the murder of Robert Allen, Applicant's brother. The Clerk told the jury Windham was acquitted of the murder charge and found guilty of the weapons charge. (Trial Tr. p. 128, l. 14 – p. 130, l. 12). The jury also learned Windham received five years' imprisonment for the weapons charge related to the brother's death. (Trial Tr. p. 130, ll. 2-4).

Windham's wife, LaSheia Windham, testified her husband discussed the Allen brothers with her following his release from prison. (Trial Tr. p. 132, l. 13 – p. 133, l. 13). Ms. Windham described her husband's behavior in the months leading to his death as nervous and restless. (Trial Tr. p. 133, ll. 20-25).

Applicant's Opportunity to Kill Windham

Vonquell Pittman (Pittman) lived with his brother on the street where the murder occurred. (Trial Tr. p. 314, l. 23 – p. 316, l. 3). His house was two houses away from where Windham was shot. (Trial Tr. p. 318, ll. 3-9). On the night of the incident, Pittman arrived home from work and found Applicant, who was friends with Pittman's brother, cooking out with some friends at Pittman's house. (Trial Tr. p. 318, l. 13 – p. 319, l. 23). Another witness testified Windham visited the neighborhood on his moped almost every day. (Trial Tr. p. 340, ll. 8-22). Windham had lived next door to Debra Coe with his grandmother years before. (Trial Tr. p. 341, ll. 3-20). The same witnesses testified it was not usual to see Applicant in the neighborhood. (Trial Tr. p. 342, ll. 10-22).

Applicant's Version of Events

Applicant told the jury his version of what happened that night. According to Applicant, his family and friends lived in Tara Village. (Trial Tr. p. 414, ll. 2-24). On the day of the shooting, Applicant said he went with his brother to a cookout and to help a friend with his car in Tara Village. (Trial Tr. p. 415, ll. 15-18). Applicant brought his Ruger nine-millimeter and an extra clip with him. (Trial Tr. p. 415, ll. 19-22, p. 417, ll. 3-7). Applicant said he obtained his concealed weapons permit after his brother's death because he and his family received threats. (Trial Tr. p. 416, ll. 12-24). While at the cookout, a friend called Applicant and asked him to walk down to his house and help him with an old car that needed work. (Trial Tr. p. 418, ll. 6-17). Applicant

claimed that as he was walking, he saw Windham riding a moped, pointing a gun at him. (Trial Tr. p. 419, ll. 1-7). Applicant said that he fired once he saw Windham raise his gun until Windham "went down." (Trial Tr. p. 419, ll. 14-25). Applicant claimed he asked Ms. Coe to call 911 and stayed at the scene despite his brother's efforts to convince him to leave. (Trial Tr. p. 420, l. 9 – p. 421, l. 12). While waiting for the police, he reloaded his weapon because he feared repercussions from Windham's friends in the neighborhood. (Trial Tr. p. 422, ll. 3 – 20).

On cross-examination, Applicant denied telling his former employer he had the gun because he intended to kill Windham, but he acknowledged he may have mentioned "something connected with [his] brother." (Trial Tr. p. 427, ll. 6-21). Applicant denied knowing Windham was frequently in the neighborhood. (Trial Tr. p. 433, ll. 13-21).

CURRENT ACTION BEFORE THIS COURT

In his application for post-conviction relief, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:[3]
   a. Failing to argue any mitigating circumstances during the sentencing phase that may have reduced Applicant's sentence;
   b. Failing to object to the same evidence that was already admitted by other witnesses;
   c. Failing to object to the trial court not waiting the twenty-four hours period that the statute requires before sentencing Applicant; and
   d. Failing to adequately argue issues regarding the indictment.

Applicant requests relief in the form of a new trial.

[3] At the call of the case, Applicant withdrew allegations 1(a), 1(c), 1(d), and proceeded on allegation 1(b) only. (PCR Tr. pp. 5 – 6).

Before this Court is the Florence County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the trial transcript, and the records of this PCR action.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[4] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

> 1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
> 2. That the court was without jurisdiction to impose sentence;
> 3. That the sentence exceeds the maximum authorized by law;
> 4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> 5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
> 6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a

[4] S.C. Code Ann. §§ 17-27-10 to -160.

question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384

(1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be

substantial, not just conceivable." Richter, 562 U.S.at 112.

Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

As a matter of general impression, this Court finds Trial Counsel's testimony at the evidentiary hearing **credible** and **persuasive**, where she presented well-recollected testimony of relevant background, facts, and discussions leading up to and during the trial. This Court finds Applicant's testimony at the evidentiary hearing generally **not credible or persuasive**. This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant, she rendered adequate assistance and exercised reasonable professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689, 104 S.Ct. 2052; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS ON THE MERITS

Allegation: Trial Counsel Failed To Object To The Evidence That Was Already Admitted By Other Witnesses

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to evidence that had been admitted by other witnesses. Specifically, Applicant avers Trial Counsel should have objected to the following: 1. 911 call being entered into evidence, and 2. Farnum's testimony regarding what Applicant told him. This Court disagrees and finds the record refutes Applicant's allegations and finds these allegations are without merit.

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

This Court finds the record wholly refutes Applicant's allegations. At the evidentiary

hearing, Trial Counsel **credibly** testified that during the trial, she objected to the 911 call on the grounds that the later portion of the 911 call was prejudicial. The trial judge overruled Trial Counsel's objection and allowed the 911 call into evidence. (Trial Tr. p. 61-62; 120-126). Also, Trial Counsel **credibly** testified that she filed a motion *in limine* and objected to the introduction of Applicant's employer's testimony. (Trial Tr. pp. 94-98). The trial court denied the motion, finding the statements to Applicant's employer met the threshold test of admissibility for relevance. (Trial Tr. p. 94-98). The trial court further cited case law on the record to substantiate its findings. Id. This Court finds any further objection to either issue would not have been meritorious, and Trial Counsel cannot be deficient for failing to make a non-meritorious objection, nor can Applicant be prejudiced by this failure.

Accordingly, Applicant's allegation that Trial Counsel failed to object to evidence that other witnesses had admitted is **DENIED** and **DISMISSED.**

Allegations Raised At The PCR Evidentiary Hearing But Not In Applicant's Application

Allegation: Trial Counsel Failed To Interview And Call Witnesses To Testify

Applicant alleged Trial Counsel was constitutionally ineffective for failing to speak with and call witnesses to testify for him. Specifically, Applicant avers Trial Counsel should have called the daughter of one of his friends and the one he did not know, but his brother knew him.[5] (PCR Tr. p. 18). This Court finds this allegation is without merit.

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)

[5] Applicant later testified that it was three witnesses. (PCR Tr. p. 19).

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).

At the evidentiary hearing, Applicant averred that Trial Counsel did not call two or three witnesses to testify for him. This Court finds Applicant's testimony **not credible**. Furthermore, Applicant did not present any of those witnesses or any evidence to this Court of what those witnesses would have testified to that would have changed the outcome of his trial. Thus, Applicant has failed to overcome his burden, and this Court finds Trial Counsel was not deficient and Applicant has shown no prejudice from this alleged deficiency.

Accordingly, Applicant's allegation that Trial Counsel failed to interview and call witnesses to testify for him is **DENIED** and **DISMISSED**.

Allegation: Trial Counsel Failed To Explain Self-Defense And Prepare Applicant For Trial

Applicant alleged Trial Counsel was constitutionally ineffective for failing explain what they would have to show to be able to claim self-defense and prepare Applicant for trial. (PCR Tr. p. 18). This Court finds this allegation is without merit.

This Court finds that the record refutes Applicant's allegations. Applicant testified and was able to present his side of the story to the jury. Importantly, Applicant did not present any testimony or evidence of how additional preparation would have changed the outcome at trial. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial.). Thus, Applicant has failed to overcome his burden, and this Court finds Trial Counsel was not deficient and Applicant has shown no prejudice from this alleged

deficiency.

Accordingly, Applicant's allegation that Trial Counsel failed to explain self-defense and prepare Applicant for trial is **DENIED** and **DISMISSED**.

|CONCLUSION PAGE FOLLOWS|

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 application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE**.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the 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 a right to an appellate counsel's assistance in seeking a review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

FILED
2023 NOV 13 PM 3:20
DORIS POULOS O'HARA
CCP & GS
FLORENCE COUNTY, SC

AND IT IS SO ORDERED this 1 **day of** Nov **, 2023.**

Debra McCaslin

THE HONORABLE DEBRA R. MCCASLIN
Presiding Judge
Twelfth Judicial Circuit

Florence, South Carolina

CERTIFIED: A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

FORM 4

FILED

2023 NOV 13 PM 3:27

DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2019CP2101634

Cory Nettles Allen		**South Carolina State Of**	
PLAINTIFF(S)		**DEFENDANT(S)**	

Submitted by: | **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge | **Judge Code** | 11/13/2023 **Date**

For Clerk of Court Office Use Only

This judgment was entered on **November 13, 2023**, and a copy mailed first class or placed in the appropriate attorney's box on **November 14, 2023**, to attorneys of record or to parties (when appearing pro se) as follows:

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

CERTIFIED A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Jonathan D Waller 210 Newberry Street, NW Aiken, SC 29801

D Russell Barlow II PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.