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Nov 22 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
The Honorable William McKinnon, PCR Action Judge
2024-CP-28-00547

TIMOTHY NEWMAN, #392951,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Timothy Newman appeals the denial of his post-conviction relief application. The post-conviction relief action was heard and denied by the Honorable William McKinnon, circuit court judge, on September 24, 2024, and was denied by written order issued filed on November 1, 2024. Applicant received notice of the judgement on November 2, 2024.

/s Chelsey F. Marto
Chelsey F. Marto, Esquire
Attorney for the Applicant
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Russ Barlow, Esquire
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dismisses this action with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined with the South Carolina Department of Corrections (SCDC) pursuant to the Lee, Berkeley, and Georgetown County Clerks of Courts' orders of commitment.

GEORGETOWN COUNTY CONVICTION

In September of 2022 in Georgetown County, Applicant was directly indicted for Aggravated Breach of Peace (2022-GS-22-00845). Brett A. Perry, Esquire, represented Applicant on this charge. Fifteenth Circuit Deputy Solicitor Alicia A. Richardson prosecuted the case. On September 7, 2022, Applicant appeared before the Honorable Michael S. Holt and pled guilty as indicted. Judge Holt sentenced Applicant to five (5) years' imprisonment and suspended to three (3) years' probation. Applicant was given credit for eight hundred eighty-four (884) days.

Applicant did not appeal his convictions or sentences.

BERKELEY COUNTY CONVICTION

In February of 2023 in Berkeley County, Applicant was directly indicted for Aggravated Breach of Peace (2023-GS-08-00170). Applicant was represented by Brett A. Perry, Esquire. Ninth Circuit Assistant Solicitor Rachel Janowski, Esquire, prosecuted the case. On January 18, 2023, Applicant appeared before the Honorable Bentley Price and pleaded guilty as indicted. Judge Price sentenced Applicant to five (5) years' imprisonment and suspended to three (3) years' of probation concurrent to the Georgetown County conviction. Applicant was given credit for twenty-eight (28) days. Judge Price also ordered that Applicant be monitored in Kershaw County.

Applicant did not appeal his convictions or sentences.

PROBATION REVOCATION

On December 15, 2023, Applicant appeared before the Honorable Robert E. Hood for a probation revocation hearing. Judge Hood found Applicant violated his probation conditions numbers 6, 8, 10, and his special conditions. Judge Hood partially revoked Applicant's suspended sentence and ordered Applicant to serve three (3) years' imprisonment. Applicant was given credit for nine hundred forty (940) days.

Applicant filed an untimely notice of appeal on May 2, 2024. On May 17, 2024, the South Carolina Supreme Court dismissed Applicant's appeal by filed Order. The Remittitur was returned to the lower court on June 6, 2024.

LEE COUNTY CONVICTION

During its December 2023 term, the Lee County Grand Jury indicted Applicant for Disturbing Schools (2023-GS-31-00193). Matthew Hicks, Esquire, represented Applicant. Third Circuit Assistant Solicitor Irma P. Brooks prosecuted the case. On February 23, 2024, Applicant appeared before the Honorable R. Ferrell Cothran, Jr., and pleaded guilty as indicted. Judge Cothran sentenced Applicant to six (6) months' imprisonment to run concurrent to the sentences he was already serving with SCDC.

Applicant did not appeal his convictions or sentences.

CURRENT ACTION BEFORE THIS COURT

On July 1, 2024, Applicant filed this application for post-conviction relief, in which Applicant alleges he is being held in custody unlawfully based on the following:

1. "Time served plea, still here probation termination as a [sic]."
2. "Judge Cothran's signature on sentencing sheet – time served = Lee County Clerk should have and Rieber was Judge/[sic] [sic]."

Applicant requests relief as follows:

"1. Release and damages at \$200/day for loss of salary since 2/23/24 = \$20,000. 2. Hearing by the SC Court of Appeals 3. Appointment of counsel by Appellate Div SC Indigent counsel [sic]."

At the PCR evidentiary hearing, Applicant proceeded on the following amended allegations:

1. Ineffective assistance of counsel for:
 - a. Failure to effectuate the appeal.
 - b. Failure to properly communicate with and meet with Applicant enough.
 - c. Failure to ensure Applicant was appropriately afforded the correct amount of credit for time served.
 - d. Failure to effectively argue that Applicant should be afforded the same number of days' credit on each offense.
 - e. Failure to develop an effective defense at the probation hearing.
2. Prosecutorial misconduct for making derogatory comments about Applicant and the allegedly fraudulent nature of his business.

Before this Court is the Berkeley, Georgetown, and Lee County Clerks of Court records regarding the subject's convictions and sentences, Applicant's records from the SCDC, Applicant's transcripts from his guilty pleas in Berkeley, Georgetown, and Lee Counties, Applicant's probation revocation transcript, and the records of the current PCR action.

SUMMARY OF EVIDENTIARY HEARING TESTIMONY

APPLICANT'S TESTIMONY

Applicant testified that PR Counsel spoke with him five minutes before the hearing on the day of the hearing. Applicant testified that PR Counsel did not know anything about him or the case when he was handling the hearing because of the lack of communication. Applicant claimed that PR Counsel's defense of him at the probation violation hearing was lacking because of the lack of preparation.

Applicant stated that PR Counsel did not inform him that he had a right to an appeal and

did not file one on his behalf. Applicant claimed that this caused the notice of appeal he filed to be dismissed as untimely.

Applicant claimed that PR Counsel was ineffective for failure to ensure he had the correct amount of credit for time served applied on each sentence. Applicant stated that the number of days applied should equal all the days he served on each sentence added together. Applicant claimed that this was the only proper way to calculate his time because he was afforded a concurrent sentence for all charges.

Applicant claimed that the probation agent engaged in misconduct by putting derogatory comments about Applicant and his business on the record. Specifically, the agent claimed that Applicant's non-profit was a sham that was being used to conduct fraudulent activity. Applicant stated that this rhetoric was uncalled for and negatively impacted the results of his probation hearing.

PR COUNSEL'S TESTIMONY

PR Counsel testified that he only talked with Applicant the day of the hearing, though he disputed Applicant's assertion that it was only a five-minute-long conversation. PR Counsel stated that he did not file a notice of appeal or advise Applicant of his right to appeal. PR Counsel said that when Applicant contacted him asking about an appeal, he informed Applicant that the ten-day deadline had passed but that he could pursue a post-conviction relief action if he wanted to. PR Counsel stated that there were no extenuating circumstances in the case that would have warranted an appeal.

PR Counsel testified that the defense at the hearing was that Applicant's actions were born out of significant mental health issues that Applicant was currently being treated for. PR Counsel also highlighted that Applicant had a supportive family and a successful career. PR Counsel stated

that there was no defense he could have presented that he did not present that he thought would have led to a different outcome.

PR Counsel stated that he argued to the PR court that Applicant should be afforded the same number of days credit on each offense to the Court. PR Counsel noted that this was shut down by the PR judge very quickly and he did not think it would benefit Applicant to belabor the point.

PR Counsel stated that the prosecutor did mention the validity of Applicant's non-profit organization but he was not concerned about this issue because the PR judge clearly stated at the hearing that he was not considering the allegedly fraudulent nature of the charity when making his ruling. PR Counsel stated that he did not believe any allegedly defamatory rhetoric by the prosecutor impacted the proceedings.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act¹ (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based on 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

¹ S.C. Code Ann. §§ 17-27-10 to -160.

under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a 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 to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. Strickland v. Washington, 466 U.S. 668 at 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; 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 "[without 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)).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty

plea. Hill v. Lockhart, 474 U.S. 52 (1985), extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel. See Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (recognizing that the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). The analysis of counsel's performance under the first prong of Strickland remains unchanged, the applicant must show that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. Hill, 474 U.S. at 58-59; accord Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000).

An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the range of competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56. The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 58-59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

A probationer's right to counsel arises as a matter of due process rather than under the Sixth Amendment, but "the same analysis for [violations of the Sixth Amendment right to counsel] ... appl[ies] in PCR proceedings involving claims against probation counsel." Turner v. State, 384 S.C. 451, 454-55, 682 S.E.2d 792, 793-94 (2009). Under this analysis, the PCR applicant must prove "(1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." Speaks v. State, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of PR 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. See, e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

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

This Court finds applicable the strong presumption that at all stages of PR Counsel's representation of Applicant, he rendered adequate assistance and exercised reasonable professional judgment in his 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; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF PLEA COUNSEL ALLEGATIONS ON THE MERITS

Allegation 1a: PR Counsel failed to effectuate an appeal.

Applicant alleges PR Counsel was constitutionally ineffective for failing to effectuate an appeal. This Court finds this allegation to be without merit.

The South Carolina Supreme Court has previously held that "probation counsel is not required to inform a probationer of his right to an appeal absent extraordinary circumstances. This holding is in accord with counsel's duties at a plea hearing." Turner v. State, 384 S.C. 451, 456-57, 682 S.E.2d 792, 794-95 (2009) (citing Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)). The Court added that "a probationer should not be afforded additional protections in a probation revocation hearing, a proceeding that is not a stage of criminal prosecution and that occurs after sentencing, which are not constitutionally mandated in a guilty plea hearing. In other words, probation counsel is not held to a higher performance standard than that imposed upon plea counsel." Id. The Court has also held that there is no right to a belated appeal in the context of a guilty plea where there is neither extraordinary circumstances nor a clear indication that a defendant requested an appeal be filed on his behalf. Turner, 384 S.C. at 225, 682 S.E.2d at 374.

Findings

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving PR Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. PR Counsel **credibly** testified that Applicant never asked him to file an appeal and there were no extraordinary circumstances that would have warranted an appeal.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that PR Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that PR Counsel committed either errors or omissions to prove the second prong of Strickland as laid out in Hill—that but for PR Counsel's deficient performance, Applicant's appeal of his probation revocation would have been successful.

Accordingly, this Court finds Applicant has failed to establish any deficiency by PR Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1b: Failure to properly communicate and meet with Applicant enough.

Applicant alleges PR Counsel was constitutionally ineffective for failing to properly communicate and meet with Applicant enough. This Court finds this allegation to be without merit.

Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. Campbell v. Polk, 447 F.3d 270, 279

fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency); United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with his client twice before trial as long as counsel devoted sufficient time to ensure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.).

South Carolina case law has established that even if counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter) ("First, there is no question that counsel met with [Applicant] on several occasions prior to the first trial. Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation."). Mere speculation and conjecture are insufficient to substantiate the allegation that counsel's deficient performance was prejudicial. See Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Applicant must show evidence indicating "how additional preparation or communication would have resulted in a different outcome." Id.; see Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective

assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

Findings

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving PR Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. PR Counsel **credibly** testified that he only spoke with Applicant on the day of the hearing, though he testified that he thought he discussed the case and hearing with Applicant for longer than five minutes. PR Counsel **credibly** testified that, in retrospect, he did not think he could do anything at the hearing that would have led to a different result. Barring vague generalities, Applicant has failed to specifically show what could have been presented to the Court at the probation hearing had PR Counsel met with him more, which would have led to a more positive outcome.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that PR Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that PR Counsel committed either errors or omissions to prove the second prong of Strickland as laid out in Hill—that but for PR Counsel's deficient performance, Applicant's probation would not have been revoked.

Accordingly, this Court finds Applicant has failed to establish any deficiency by PR Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1c: PR Counsel failed to ensure Applicant received credit for time served.

Applicant alleges PR Counsel was constitutionally ineffective for failing to ensure he received credit for time served. This Court finds this allegation to be without merit.

S.C. Code Ann. § 24-23-40 provides, in pertinent part: "In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing and be given for any time spent under monitored house arrest." The South Carolina Supreme Court has defined "time served," as it is used in S.C. Code Ann. § 24-13-40, as "the time during which a defendant is in pre-trial confinement and charged with the offense for which he is sentenced (so long as he is not serving time for a prior conviction)." State v. Higgins, 357 S.C. 382, 384, 593 S.E.2d 180, 181 (Ct. App. 2004) (citing Blakeney v. State, 339 S.C. 86, 88, 529 S.E.2d 9, 10-11 (2000)).

Findings

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving PR Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. According to Applicant's own exhibit, Applicant was afforded more time than he was entitled to – not less. See Applicant's Exh. 2. This clearly benefited Applicant and is in no way a deficiency on PR Counsel's part.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that PR Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that PR Counsel committed either errors or

omissions to prove the second prong of Strickland as laid out in Hill—that but for PR Counsel's deficient performance, Applicant's probation would not have been revoked.

Accordingly, this Court finds Applicant has failed to establish any deficiency by PR Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1d: PR Counsel failed to argue that Applicant should receive the same amount of credit on all offenses.

Applicant alleges PR Counsel was constitutionally ineffective for failing to argue that Applicant should receive the same amount of credit on all offenses. This Court finds this allegation to be without merit.

See S.C. Code Ann. § 24-23-40, *supra*.

Findings

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving PR Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds the record refutes the basis of Applicant's argument and that PR Counsel did argue to the PR court that Applicant should receive the total time served credits across all violations. PR Counsel was unsuccessful in his argument, but that does not mean PR Counsel's representation was deficient. Furthermore, this Court finds the PR court rendered a decision that was not counter to the laws governing time-served issues. Applicant is simply upset about a particular result from a proceeding because it was unfavorable to him.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient

evidence to prove the first prong of the Strickland test—that PR Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that PR Counsel committed either errors or omissions to prove the second prong of Strickland as laid out in Hill—that but for PR Counsel's deficient performance, Applicant's probation would not have been revoked.

Accordingly, this Court finds Applicant has failed to establish any deficiency by PR Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1e: PR Counsel failed to present a proper defense.

Applicant alleges PR Counsel was constitutionally ineffective for failing to present a proper defense. This Court finds this allegation to be without merit.

Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure to explore the decision was a strategic decision. Strickland, 466 U.S. at 680. If there is only one line of defense, counsel must conduct a "reasonably substantial investigation" into that line of defense. Id. (quoting Washington v. Strickland, 693 F.2d at 1252). However, if there are several lines of defense, counsel may still be effective even if every single line is not explored. Id. "[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." Id. at 681 (quoting Washington v. Strickland, 693 F.2d at 1255). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough, 540 U.S. at 5 (citing Strickland, 466 U.S. at 690).

Findings

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving PR Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court further finds from the record and PR Counsel's credible testimony that he presented the best defense available to him at the PR hearing. Specifically, PR Counsel focused on how Applicant's crimes were committed because of underlying mental health issues that Applicant was receiving treatment for at the time of the PR hearing. Additionally, PR Counsel highlighted how Applicant had a successful career and a supportive family. Moreover, Applicant failed to clearly articulate what defense he wanted presented and how that would have led to a better outcome.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that PR Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that PR Counsel committed either errors or omissions to prove the second prong of Strickland as laid out in Hill—that but for PR Counsel's deficient performance, Applicant's probation would not have been revoked.

Accordingly, this Court finds Applicant has failed to establish any deficiency by PR Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2: Prosecutorial Misconduct

Applicant alleges the State engaged in misconduct by allegedly making derogatory

comments about Applicant and his business on the record.

As an initial matter, this Court finds prosecutorial misconduct is not an issue for post-conviction relief; instead, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b).

However, out of an abundance of caution, this Court addresses this allegation and finds from the record that the PR court specifically indicated that the legitimacy of Applicant's business was not considered in the PR proceedings. (PR Tr. 23). Therefore, Applicant has failed to meet his burden of proof in establishing that these allegedly derogatory comments impacted the results of the proceedings.

Accordingly, this allegation must be **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 review of the denial of PCR. Rule 71.1(g), SCRPC, 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.

AND IT IS SO ORDERED this 29 day of October, 2024.

Keistan W.A.
[Signature]
South Carolina

2761
WILLIAM A. MCKINNON
Presiding Judge
Fifth Judicial Circuit