

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY S.C. SUPREME COURT
Court of Common Pleas

Heath P. Taylor, Circuit Court Judge


2022-CP-42-02810

Dominick A. Thompson..... Appellant,
v.
The State, Respondent.

NOTICE OF APPEAL

Dominick A. Thompson appeals the Honorable Heath P. Taylor's Order of Dismissal filed December 16, 2024.

This 18 day of December 2024.


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Attorney for Appellant

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Attorney for Respondent

Following a thorough review of the trial transcripts, the record on appeal, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to meet his requisite burden of proof, denies relief, 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 Spartanburg County Clerk of Court. During its June 2017 term, the Spartanburg County Grand Jury indicted Applicant for possession of a firearm or ammunition by a person convicted of a violent crime (2017-GS-42-02886) and attempted murder (2017-GS-42-02889). During its June 2018 term, the Spartanburg County Grand Jury indicted Applicant for first-degree burglary (count one) and possession of a weapon during a violent crime (count two) (2017-GS-42-02885). During its August 2018 term, the Spartanburg County Grand Jury indicted Applicant for first-degree assault and battery (2017-GS-42-02887) and armed robbery (2017-GS-42-02888).

Applicant proceeded to his first trial on August 6–9, 2018, before the Honorable Lee Alford, circuit court judge, and a jury. Applicant was represented by Trial Counsel. Seventh Circuit Assistant Solicitors Sara B. Bozarth and Spenser H. Smith prosecuted the case. Judge Alford declared a mistrial due to a hung jury.

On June 10, 2019, Applicant proceeded to his second trial before the Honorable J. Derham Cole, circuit court judge, and a jury. Applicant was represented by Trial Counsel. Seventh Circuit Assistant Solicitors Lauren Brown and Spenser H. Smith prosecuted the case. Applicant was found guilty as indicted on all counts. Judge Cole sentenced Applicant to life imprisonment for

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first-degree burglary and armed robbery, assault and battery of a high and aggravated nature¹, and ten years' imprisonment for first-degree assault and battery.

Applicant filed a timely notice of appeal on June 25, 2019, that was perfected by Deputy Appellate Defender Wanda H. Carter, Esquire, through filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Thompson, Op. No. 2022-UP-154 (S.C. Ct. App. filed Mar. 30, 2022). The Remittitur was returned to the lower court on April 25, 2022.

FACTS GIVING RISE TO THE CONVICTION

At trial, Summer Hall Donahue (Summer) testified that she was at a hotel in Spartanburg County on November 23, 2016, along with her husband Russell Donahue, her sister-in-law Christine Richard (Christine), and brother-in-law Brandon Logan (Brandon) when Christine received a message from Makayla Richard (Makayla) requesting marijuana. Shortly after that, Makayla arrived at the hotel, and Christine went downstairs to meet her. When Christine and Makayla came up to the hotel room, three men appeared and entered the hotel room with Makayla and Christine. Summer stated that the men had guns, and Applicant put a gun to her head and went over to her husband to search his pockets. The men began pistol-whipping Brandon, and the gun fired/discharged, and a stray bullet struck Christine, who was later transported to the hospital. The men asked about it and looked for the marijuana. Summer added that before the men left, they took money from her husband's wallet and her phone. (ROA pp. 73–88).

Christine testified that after she left the hotel room to meet Makayla and they were headed to the hotel room, three black men with guns came running toward her. Christine stated that

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Applicant was found guilty of ABHAN under the attempted murder indictment because the jury was only permitted to consider the lesser-included offense of ABHAN.

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Applicant was one of the gunmen who took her necklace and phone and that the men ordered her to take them and Makayla to the hotel room. Christine added that the men pistol-whipped Brandon until the gun fired and struck her body. (ROA pp. 101–11).

Makayla testified that she and Applicant and two other guys rode out to the hotel to get marijuana from Christine and that there was no intent to pay for the marijuana. Makayla stated that the men entered the room with guns and that they all left when the gunshot was fired. (ROA pp. 139–63).

CURRENT ACTION BEFORE THIS COURT

In his *pro se* PCR application, Applicant alleges he is detained unlawfully for the following reasons (excerpts verbatim):

1. Malicious prosecutions:
 - a. ". . . the photo lineup that the State use[d] to identify me by Makayla Richard to receive a[n] arrest warrant for me, Makayla who was clearly charge[d] with the crime refused to sign the photo she chose which was my picture and she also refuse[d] to sign the 'affidavit of photo identification' which is strongly supported in my Rule 5 [] Brady motion."
2. Violation of my due rights:
 - a. "The prosecutor violated my due rights and made a[n] action of misconduct by tak[ing] my criminal record to the jur[y] while they were deliberating for a verdict."
3. Violation of my 5th, 6th amendment
 - a. "I was violated by prosecutors showing my criminal record to the jury paint them a picture of character, the reason I remain silent and didn't testify on my behalf is to avoid by record being presented to the jury."
4. Inconsistent statements
 - a. "[E]veryone of testify on me at my first trial, they statement wasn't consistent with the statement that they gave during the second trial, not only that but it was also multiple statements by only one person that was inconsistent."
5. Prosecutorial misconduct
 - a. "[G]overnments knowing of false testimony was abused discretion; defendant were entitled to a new trial if false testimony of prosecutor witness, which was known by the government and not corrected could in reasonable likelihood

2024 DEC 16 AM 11:34
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have affected the judgment of the jury which in my case the prosecutor's witnesses in by case gave and written multiple statement that the prosecutor knew was false but still use them against me to convict me, knowing that his witnesses were taking the stand under oath to fabricate[] a story and to make false allegations against he still chose to follow through with the knowledge of know they were lying to use them to testify on me."

6. Falsely Identified

- a. "[T]he whole time I was being held in jail until the point of my trial I was never identified until the day of my trial 2 ½ years later. Everyone that identified me the day of my trial never once when to the police or sheriff office to give no identification of me. Also, there's police bodycam strongly supporting my claim and also pervious statement form the same witnesses who testify hey saw my face in my Rule 5 Brady motion they stated that they couldn't see no one face."

On May 20, 2024, Applicant, through retained Counsel, amended his PCR application with the following allegations:

1. Ineffective Assistance of Trial Counsel

- a. Failure to explain the plea offer.
- b. Failure to effectively utilize transcript and cross-witnesses on inconsistent testimony in the prior trial.
- c. Failure to effectively argue SCRE 403 and 609 allowed impeachment of witnesses Summer Hall and Christine Richard with prior record and failed to object to the judge's ruling. ROA pp. 65–72; p. 365, l. 8; p. 397.
- d. Failure to effectively address witness identification of Applicant through Facebook and where testimony was improbable. p. 106, l. 12; p. 86; p. 110.
- e. Misadvising Applicant not to testify due to his prior record when prior burglaries came in any way because the State was not required to stipulate to prior burglaries. ROA p. 260.
- f. Failure to take exception to the jury instructions regarding the 'hand of one' and accomplice liability when the testimony and State's theory of the case was the Applicant was the principal. ROA p. 410, l. 11; p. 421. l. 19. p. 106. l. 17, p. 345.
- g. Recalling State witness Danielle Krind. ROA p. 327.

Before this Court is the Spartanburg County Clerk of Court records regarding the subject's

convictions and sentences, Applicant's records from the South Carolina Department of

Corrections, the complete trial transcript, Applicant's complete appellate records, the records of

the current PCR action, and Applicant's amended PCR application.

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2024 DEC 16 AM 11:11

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STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act² (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 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. 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).

²S.C. Code Ann. §§ 17-27-10 to -160.

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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. at 687. 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

ALINDO COUNTY
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2024 DEC 16 AM 11:36

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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.

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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 Trial 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.,

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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), SCRPC (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 Trial 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

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S.E.2d 529, 531 (1992).

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INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS

Allegation (1a): Trial Counsel failed to explain the plea offer.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to explain the plea offer. This Court finds this allegation is without merit.

A defendant has the right to effective assistance of counsel during the plea-bargaining process. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)). "The United States Supreme Court has held that 'defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.'" Collins v. State, 422 S.C. 250, 261, 810 S.E.2d 871, 876 (2018) (quoting Missouri v. Frye, 566 U.S. 134, 145 (2012)); see also Lafler v. Cooper, 566 U.S. 156, 169–70 (2012) (rejecting proposition that a fair trial wipes clean any deficient performance by defense counsel during plea bargaining). Generally, defense counsel provides deficient performance when he or she does not communicate such an offer to the defendant. Frye, 566 U.S. at 145. Also, misadvising a defendant such that he rejects a plea offer and instead proceeds to trial may constitute deficient performance. See, e.g., Lafler, 566 U.S. at 161 (counsel misadvised defendant "that the prosecution would be unable to establish his intent to murder [the victim] because she had been shot below the waist.").

To show prejudice, an applicant for post-conviction relief "must demonstrate a reasonable probability that: (1) he [or she] 'would have accepted the earlier plea offer had [he or she] been afforded effective assistance of counsel;' (2) 'the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;' and (3) 'the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.'" Collins, 422 S.C. at 262, 810 S.E.2d at 877 (quoting Frye, 566 U.S. at 147;

2024 DEC 16 AM 11:34
CLERK OF COURT
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citing Lafler v. Cooper, 566 U.S. 156, 164 (2012)). An applicant must show actual prejudice, but depending on the facts of the case, an applicant's self-serving statement *may* be sufficient to establish actual prejudice. Davie, 381 S.C. at 613, 675 S.E.2d at 422.

Trial

At trial, the following colloquy occurred:

THE COURT: Have there been numerous offers by the prosecution?

MR. SMITH: There have been numerous negotiations pretrial, the last being a 15-year active sentence for Burglary in the first degree, followed by a probationary sentence . Consecutive with the armed robbery, we have the ABHAN reduced to assault and battery first, and the other assault and battery in the first degree, he would get a ten-year sentence concurrent with the burglary first active sentences.

THE COURT: Mr. Schultz, does that comport with your understanding of the offer?

MR. SCHULTZ: It does, Your Honor. This offer was given recently by Mr. Smith, just a couple of hours ago. I conveyed that offer to Mr. Thompson. Mr. Thompson, from my understanding, has rejected that. Now, the offer, as I understand it, would be a 15-year active sentence followed by some term of probation in the Court's discretion. He is 26 years old. We have calculated the time in that respect to approximately two-and-a-half years in jail on these charges that he is statutorily required to get. Time credit. I have done the math. Assuming that the legislature keeps the sentence at 85 percent, he would have to do approximately 12.5 half years with no credit for time served. He has credit for one hundred some-odd days. I have discussed that with my client. He has rejected that. He is well aware of the consequences if the jury comes back with a guilty verdict on one of the violent charges . So burglary, armed robbery, or the other charge. This could make this case a life-

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SPARTANBURG COUNTY
CLERK OF COURT
2024 DEC 16 AM 11:34

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without -parole charge. I have talked with him about this. I have talked to his mother about this, with the client's permission. My understanding is that unless that is changed over the course of the past couple of minutes here, he has rejected that offer.

THE COURT: So he has a previous criminal history that subjects him to a sentence of life without parole if he is convicted of burglary in the first degree or armed robbery.

MR. SMITH: The ABHAN would do it as well. He has a burglary in the first degree, violent, 2011; two attempted murders in 2015; he has a most serious and serious .

THE COURT: So any of those would result in a mandatory life sentence.

MR. SMITH: Yes, Your Honor.

THE COURT: Mr. Schultz, have you talked to Mr. Thompson about that?

MR. SCHULTZ: I have, Your Honor.

THE COURT: Do you believe he understands?

MR. SCHULTZ: I do believe he understands it.

THE COURT: Mr. Thompson, you have heard what the solicitor and your lawyers has told me about the charges and about the offer that they have made, as well as the consequences to you in the event that you went to trial and the jurors were to find you guilty. Do you understand what is being said here?

[APPLICANT]: Yes, sir.

THE COURT: Do you understand that if you are found guilty by the jury of burglary or armed robbery or aggravated assault and battery, you must be sentenced to a term of imprisonment of life without the possibility of parole?

[APPLICANT]: Yes, sir.

THE COURT: You understand that they have made an offer which is substantially less than that?

[APPLICANT]: Yes, sir, I do.

THE COURT: Have you had plenty of time to talk with Mr. Schultz about your decision as to how you would like to proceed?

[APPLICANT]: Yes, sir.

THE COURT: Do you want to talk to him anymore?

[APPLICANT]: No, sir.

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CLERK OF COURT
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THE COURT: You have made a decision about what you want to do?

[APPLICANT]: Yes, sir.

THE COURT: What is that decision?

[APPLICANT]: I want to proceed to trial.

THE COURT: You are rejecting the State's offer?

[APPLICANT]: Yes, sir.

THE COURT: Do you understand that once the jury is selected, if you wish to plead guilty, you will be pleading on your own without any recommendation.

[APPLICANT]: Yes, sir.

THE COURT: Do you wish to proceed with the trial and reject the State's offer?

[APPLICANT]: Yes, sir.

(ROA pp. 20–23).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel failed to advise him about the plea offer's details fully. (PCR Tr. p. 7).

On cross-examination, Applicant testified that Trial Counsel discussed the plea offer with him, but he felt it was rushed because it came on the day of the trial. Applicant testified that he was offered a plea offer at his first trial and rejected it. (PCR Tr. p. 15). Applicant testified that he had pled to stuff before but did not understand this particular plea. (PCR Tr. p. 16). Applicant testified that he did not have time to process the details. Id.

On direct examination, Trial Counsel testified that he fully explained the details of the plea offered to Applicant and all of that was placed on the record. (PCR Tr. pp. 34–37).

Findings

This Court finds the combination of the record and Trial Counsel's **credible** and **persuasive**

~~testimony~~ that Applicant has failed to overcome the "strong presumption that counsel rendered

adequate assistance and exercised reasonable professional judgment in making all significant

SPARTANBURG COUNTY
CLERK OF COURT
2024 DEC 16 AM 11:34

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decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds that Trial Counsel **credibly** testified that he communicated and explained the plea offer to Applicant. Furthermore, the trial court had an extensive colloquy with Applicant and Trial Counsel regarding Applicant's choice to reject the plea offer. Applicant told the trial court he did not need more time with Trial Counsel, that Trial Counsel had explained everything to him, and he was rejecting the offer even though he knew that he could be sentenced to life without parole and the State's offer was substantially less than that. This Court finds Applicant cannot establish that he would have accepted the plea offer where the record provides Applicant rejected the plea offer. Thus, Applicant cannot satisfy the aforementioned standard.

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 Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

2024 DEC 16 AM 11:34
CLERK OF COURT
SPARTANBURG COUNTY
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Allegation (1b): Trial Counsel failed to effectively utilize transcript and cross-witnesses on inconsistent testimony in the prior trial.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to utilize the transcript from the first trial to cross-examine the witnesses on their inconsistent testimony. This Court finds this allegation is without merit.

Findings

This Court finds that 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 Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*, see also Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) ("[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Sexton v. French, 163 F.3d 874, 885 (4th Cir.1998). Examples of such decisions include which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, *[and] whether and how a witness should be cross-examined.*") (emphasis added).

Here, Applicant failed to present testimony or evidence of how Trial Counsel was ineffective in their cross-examination of the witnesses and what they could have discovered through a more thorough cross-examination that would have affected the outcome of Applicant's trial. See Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) (mere speculation as to what a witness's testimony would have been, by itself, cannot satisfy applicant's burden of showing prejudice).

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2024 DEC 16 AM 11:34
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Furthermore, from the record, this Court finds Trial Counsel did utilize the transcript from the first trial to cross-examine Summer Hall Donahue, Christine Richard, and Makayla Richard on the inconsistencies in their testimony at the second trial. (ROA p. 92; pp. 99–100; p. 116; pp. 171–72). Thus, the record directly refutes Applicant's allegation.

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 Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation (1c): Trial Counsel failed to effectively argue Rules 403 and 609, SCRE, which would have allowed the impeachment of witnesses Summer Hall [Donahue] and Christine Richard with prior records and failed to object to the judge's ruling. ROA pp. 65–72; p. 365, l. 8; p. 397.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to effectively argue Rules 403 and 609, SCRE, to allow the impeachment of Summer Hall Donahue (Summer) and Christine Richard (Richard) with their prior record and failed to object to the trial court's ruling. This Court finds these allegations to be without merit.

Rule 403, SCRE, provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations

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of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 609, SCRE, provides in part:

- (a) General Rule. For the purpose of attacking the credibility of a witness,
 - (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
 - (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Findings

This Court finds that 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 Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. At trial, Trial Counsel argued that he should be allowed to use Summer's prior drug charge to impeach her. After conducting an analysis of Rule 403, SCRE, the trial court found that the probative value of testimony on that charge was "substantially outweighed by the nature of unfair prejudice." (ROA p. 69). Trial Counsel also argued for the admission of Richard's prior shoplifting and child neglect charges. The trial court found the prior shoplifting charges of Richard fell under the exception because those charges were crimes dealing with dishonesty, and they would be allowed to come in. (ROA pp. 69-70, p. 102). However, the trial court found that the child neglect charges were irrelevant

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2024 DEC 16 AM 11:34

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and the "probative value being substantially outweighed by the danger of unfair prejudice." (ROA pp. 70–71).

The record before this Court provides that Trial Counsel argued for the admission of all the priors on Richard and Summer. Albeit, while Trial Counsel was successful on some and not successful on others, his unsuccessful argument does not rise to the requisite level that this Court should find his actions deficient. This Court further finds Trial Counsel arduously and effectively argued for the admission of all priors. Trial Counsel cannot be deficient when a well-reasoned argument is presented to the trial court, and the trial court rejects the argument. See Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial").

Applicant further argued that Trial Counsel did not preserve the issue for appeal because Trial Counsel did not object to the trial court's ruling and did not proffer the testimony for the record. This Court finds there was nothing to proffer as the arguments from Trial Counsel and the State were on the record, and the trial court issued its ruling on the records. This Court further finds there was no legal basis for an objection as the argument of Trial Counsel was placed on the record, and the trial court issued its ruling. Moreover, this issue was raised on appeal and the South Carolina Court of Appeals affirmed Applicant's convictions and sentences.³

³ To any extent Applicant argues that the issue was not preserved because appellate counsel filed an Anders brief is wholly unsupported by the record. An Anders brief is submitted to the court when appellate counsel believes the issue is frivolous, but appellate counsel must submit "anything in the record arguably supporting the appeal." Anders, 384 U.S. at 744. The issue raised by appellate counsel was preserved for review, and the South Carolina Court of Appeals affirmed Applicant's convictions and sentences.

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 Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation (1d): Trial Counsel failed to effectively address the witness identification of Applicant through Facebook and where testimony was improbable. p. 98⁴, l. 12; p. 86; p. 110.

Allegation: Trial Counsel failed to hire/consult an eyewitness expert.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to effectively address the witness identification of Applicant through Facebook and for failing to hire/consult an eyewitness expert. This Court finds these allegations to be without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel was ineffective for failing to move to suppress the witness identification of him through Facebook and for failing to hire an eyewitness expert. (PCR Tr. pp. 10–11). Applicant testified that he was allegedly identified in a

ANN W. COOK
SPARTANBURG COUNTY
CLERK OF COURT

⁴ Applicant erroneously had this as page 116 when it is page 98 of the trial transcript and record on appeal.

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post on Makayla's Facebook, but that was impossible because Makayla testified that Applicant and Makayla never had contact on Facebook. (PCR Tr. p. 12).⁵

On direct examination, Kenshuwn Goode, Applicant's co-defendant, testified that there was a picture on Facebook of him and Applicant.

On direct examination, Deidra Mills, Applicant's mother, testified that Makayla and Applicant were not Facebook friends.

On direct examination, Latoya Thompson (Latoya), Applicant's sister, testified that Applicant was identified from a picture on Facebook of Applicant, Kenshuwn Goode, and her other brother at the club. (PCR Tr. pp. 30–31). Latoya testified that it was possible that Makayla liked the picture on Facebook. (PCR Tr. p. 31). Latoya testified that Trial Counsel did his job in the first trial, but the second trial seemed scripted. Id.

Findings

This Court finds that 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 Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, supra, see also Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) ("[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Sexton v. French, 163 F.3d 874, 885 (4th Cir.1998). Examples of such decisions include which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the

AMY W. COX
SPARTANBURG COUNTY
CLERK OF COURT

⁵ At trial on cross-examination, Makayla testified that she did not think she was friends with Applicant on Facebook, but she could not answer with certainty. (ROA p. 177).

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admission of evidence, *[and] whether and how a witness should be cross-examined.*") (emphasis added). This Court finds the record provides Trial Counsel thoroughly cross-examined these witnesses on this issue, and Trial Counsel's actions were reasonable under the circumstances. See Mazzell, supra.

Applicant further argued that Trial Counsel failed to hire/consult an eyewitness expert. The South Carolina Supreme Court has repeatedly held that a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony per the rules of evidence at the PCR hearing to establish prejudice from the witness' failure to testify at trial. See, e.g., Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding a PCR applicant failed to show prejudice from his Trial Counsel's failure to hire an expert because he failed to have an expert testify at his PCR hearing), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

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 Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX
2024 DEC 16 AM 11:34

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Allegation (1e): Trial Counsel misadvised Applicant not to testify due to his prior record when prior burglaries came in any way because the State was not required to stipulate to prior burglaries. ROA p. 260.

Applicant alleges Trial Counsel was constitutionally ineffective for misadvising Applicant not to testify due to his prior record when his prior burglaries came in anyway because the State was not required to stipulate to the prior burglaries. This Court finds these allegations to be without merit

"The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. [However], if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations." Id. "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id.

Trial

At the beginning of trial, the following occurred:

MR. SMITH: . . .The defendant should be aware he has two prior burglary convictions. That is one of the ways we are trying to enhance. We do intend to call somebody from the Clerk of Court's office. Assuming that is not stipulated to, that is an element that we are pursuing.

THE COURT: You don't have to stipulate to that.

(ROA p. 260)
SPARTANBURG COUNTY
CLERK OF COURT

2024 DEC 16 AM 11:34

FILED

Later in trial, the following colloquy occurred:

THE COURT: Have you talked to Mr. Thompson about his right to testify as well as not?

[TRIAL COUNSEL]: I have, Your Honor.

THE COURT: Has he indicated to you what his decision is?

[TRIAL COUNSEL]: He has, Your Honor.

THE COURT: Mr. Thompson, have you and Mr. Schultz discussed your right to remain silent, as well as your right to testify if you want to?

[APPLICANT]: Yes, sir.

THE COURT: Do you understand that when you are charged with a crime, you have an absolute right to remain silent, which means that nobody can call you as a witness?

[TRIAL COUNSEL]: Yes, sir.

THE COURT: Your lawyer can't call you; the prosecutor can't call you; I can't call you. Nobody can make you testify if you don't want to. At the same time, if you want to testify, now is the only opportunity that you will have to do so. In other words, you can't wait until after a decision has been reached by a jury and then change your mind about that decision. Now has come the time for you to present evidence. You can do that by presentation of your own testimony, or, if you choose not to testify, you can still call other witnesses or introduce other evidence. The choice is yours. Have you had time to talk to Mr. Schultz about your decision about whether or not you will testify?

[APPLICANT]: Yes, sir.

THE COURT: Has he discussed with you the advantages and disadvantages of testifying as well as not testifying?

[TRIAL COUNSEL]: Yes, sir.

THE COURT: Do you appreciate what those advantages and disadvantages are?

[APPLICANT]: Yes, sir.

THE COURT: Do you understand that if you elect not to testify, I will instruct the jury that they cannot consider that or hold it against you in any way?

ANN W. COX
SPRINGFIELD COUNTY
CLERK OF COURT
2024 DEC 16 AM 11:34

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[APPLICANT]: Yes, sir.
 THE COURT: And if you do testify, you have to answer not only your lawyer's questions, but you have also got to answer any questions posed to you by the prosecutor, to the extent they are relevant, even if the responses to those questions might tend to prove your guilt? Do you understand your right to testify as well as not?

[APPLICANT]: Yes, sir.
 THE COURT: Have you had time to reflect upon your decision?

[TRIAL COUNSEL]: Yes, sir.
 THE COURT: Have you reached a decision?
 [APPLICANT]: Yes, sir.
 THE COURT: What is that decision?
 [APPLICANT]: I will not testify.
 THE COURT: You will not testify?
 [APPLICANT]: No, sir.
 THE COURT: Is that a decision that you made of your own free will and accord?

[TRIAL COUNSEL]: Yes, sir.
 THE COURT: Has anybody forced you into it?
 [APPLICANT]: No, sir.
 THE COURT: Has anybody pressured you into it?
 [APPLICANT]: No, sir.
 THE COURT: Has anybody even suggested that that is the decision that you ought to make in this case?

[APPLICANT]: No, sir.
 THE COURT: You made that decision on your own?
 [APPLICANT]: Yes, sir.
 THE COURT: You are satisfied with it?
 [APPLICANT]: Yes, sir.

(ROA pp. 259–262).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he was not sure if testifying would have helped him or hurt him. (PCR p. 13). Applicant testified that his priors would have hurt him more than helped him. *Id.* Applicant testified he did not know that his priors would come out even if

2024 DEC 16 AM 11:34

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he did not testify. Id. Applicant testified that had he known his priors would come out independent of his testifying he "probably" would have changed his mind about testifying. Id.

Findings

As an initial matter, this Court finds that the record provides the trial court conducted a thorough colloquy with Applicant regarding his right to testify. Applicant indicated he had enough time to consider his right to testify, and Trial Counsel had discussed the advantages and disadvantages of testifying. Applicant indicated that his choice not to testify was his own, and he was not coerced. Furthermore, this Court finds from the record Applicant was aware from the start of his trial that the State intended to call someone from the Clerk's office to enter his prior burglary charges as enhancements. Additionally, the record provides that Applicant's prior record was entered into the record through the testimony of Gail Moffitt the prior day before the trial court conducted the colloquy with Applicant on his right to testify. (ROA pp. 210–212). Therefore, any contention by Applicant that had he known his record would come in whether he testified or not, and he probably would have changed his mind about testifying is refuted by the record.

This Court finds that 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 Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Applicant presented nothing to this Court to indicate how, if he had testified, the result of his trial would have been different.

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 Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has

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2024 DEC 16 AM 11:34

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failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation (1f): Trial Counsel failed to take exception to the jury instructions regarding the 'hand of one' and accomplice liability when the testimony and State's theory of the case was the Applicant was the principal. ROA p. 410, l. 11; p. 421. l. 19. p. 106. l. 17, p. 345.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to take exception to the jury instructions regarding the 'hand of one' and accomplice liability when the testimony and State's theory of the case was the Applicant was the principal. This Court finds this allegation to be without merit.

Findings

As an initial matter, this Court finds this allegation fails as a matter of law. "It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." State v. Condrey, 349 S.C. 184, 562 S.E.2d 320, 325 (Ct. App. 2002) (quoting State v. Dickman, 341 S.C. 293, 534 S.E.2d 268, 269 (2000)). "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." Id. at 324 (citing State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999)). "Under an accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common

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design, aid, abet, or assist in the commission of that crime through some overt act.' " Id. at 325 (citing Langley, 515 S.E.2d at 101). " 'The law is that when two or more persons aid, encourage, and abet each other in the commission of a crime, all being present, all are principals and equally guilty.' " State v. Hicks, 257 S.C. 279, 185 S.E.2d 746, 748 (S.C.1971) (quoting State v. Williams, 189 S.C. 19, 199 S.E. 906 (S.C.1938)).

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 Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant's allegation fails a matter of law and Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation (1g): Trial Counsel was constitutionally ineffective in recalling Danielle Krind, who was a State's witness. ROA p. 327.

Applicant alleges Trial Counsel was constitutionally ineffective for recalling Danielle Krind (Krind). This Court finds these allegations to be without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified that he did not think recalling Krind "hurt" his case. (PCR Tr. p. 14).

On cross-examination, Trial Counsel testified that Krind testified that she saw Applicant with Makayla getting into a black car. (PCR Tr. p. 45).

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Findings

This Court has reviewed the entirety of Krind's testimony when called as the State's witness and on recall by Trial Counsel and finds that 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 Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. In a review of the record, this Court finds that Trial Counsel had a strategic reason for recalling Krind as her testimony was inconsistent with her statements. When reading Krind's recall testimony as a whole, Trial Counsel's strategic reason can be reasonably inferred. Krind was an important eyewitness whose testimony was inconsistent with her statements and prior testimony. See Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

A strategic or tactical decision does not have to be articulated by counsel on the record before the Court may acknowledge it, nor does counsel have to personally identify his or her thinking. It is enough that the record reflects strategic design, such that the Court may fairly infer from the record what the strategy was, even if Trial Counsel cannot or will not subsequently articulate it. See Wood v. Allen, 558 U.S. 290 (2010) (finding the PCR court was reasonable in inferring from evidence in the record that trial counsel's failure to pursue or present evidence of defendant's mental deficiencies was a strategic decision); Koon v. Rushton, 364 Fed.Appx. 22, 29 (4th Cir. 2010) (upholding PCR court finding that applicant failed to carry his burden where trial counsel had an articulable strategy behind his method of impeaching a witness); McNair v.

Campbell, 307 F.Supp.2d 1277, 1312 (M.D.Ala 2004) ("Generally, courts have found that where

counsel had an *articulable* strategy at sentencing, and where mitigation evidence at issue contradicted or weakened that strategy, counsel's decision not to enter the mitigation evidence was reasonable." (emphasis added); Geralds v. State, 111 So.3d 778, 794 (Fl. 2010) (finding trial strategy from the record where trial counsel was deceased, and therefore not able to testify).

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 Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

ALLEGATIONS NOT PLED BUT RAISED AT THE PCR EVIDENTIARY HEARING

Allegation: Trial Counsel failed to object to the prior attempted murder sentencing sheets being used to support LWOP where the violent, serious, and most serious boxes were not checked.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to the murder sentencing sheets being used to support LWOP where the violent, serious, and most serious boxes were not checked. This Court finds this allegation to be without merit

PCR Evidentiary Hearing

On direct examination, the following occurred:

Now, what about your priors -- there were sentencing sheets where it wasn't checked serious or most serious on some of the prior sentencing sheets that were used to convict you.

2024 DEC 16 AM 11:34
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

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- A. Yes, ma'am, I had two attempted murders from 2015, April 1st. It was a 2015 sentencing and I think -- like neither one of the boxes was checked on the attempted murders. The most serious and serious box, neither one of them was checked. And I brought it to his attention numerous times before the trial and it wasn't -- and he never addressed it before my trial. He never put in the motion for it.
- Q. Do you think that might have effect on the State's ability to give you a life sentence?
- A. Yes, ma'am.
- Q. And did he ever explain to you that does not matter at all, you're gonna get a life sentence if you're convicted?
- A. I mean he told me that. But I felt like it still could of changed something. I, I felt like it could of -- I felt like it basically gave the State grounds to, to really push for the LWOP.

(PCR Tr. pp. 8–9).

Findings

This Court finds that 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 Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court has reviewed that sentencing sheet and the violent box is checked contrary to Applicant's assertion. While the serious and most serious boxes are not checked, that is controlled by the offense for which Applicant was convicted. Applicant provided no caselaw or evidence to support his speculation. Mere speculation and conjecture are not sufficient to substantiate an 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)..

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 Trial Counsel failed to render

reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation: Trial Counsel failed to object to Exhibit 35 which was a box of bullets that had nothing to do with the crime.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to a box of bullets that had nothing to do with the crime. This Court finds this allegation to be 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.

2024 DEC 16 AM 11:34

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The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

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

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2024 DEC 16 AM 11:34

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PCR Evidentiary Hearing

On direct examination, the following occurred:

- Q. Are there any other allegations of ineffective assistance of counsel that you're alleging?
- A. Yes, ma'am, I, I got another one that I, I would like to address to the Courts.
- Q. Okay.
- A. I -- my lawyer was ineffective due to deficient performance which caused prejudice to my defense. I said my counsel was ineffective due to refusal to object to multiple occasions during my trial that I told him to. I said one being Exhibit 35---
- Q. Well---
- A. ---which was a box of bullets that had my fingerprint on it. It's -- I said there's no evidence that Exhibit 35 was even a part of the crime or part of the case. I said there's no caliber that -- I said there's no caliber or type bullets that saying that this was a part of the crime and---
- Q. And did you -- give some context. The -- this was a box of bullets that was found in --
- A. It was found in---
- Q. -- a codefendant's house?
- A. Yes, ma'am.
- Q. And that had nothing to do with this case and he didn't object to that?
- A. It didn't have nothing to do with the case. He, he didn't object to it when they used it against me and I brought that to his attention. He never object to it when they use it against me even though it being at they house.
- Q. All right.
- A. He ain't fight to suppress the evidence to me.

(PCR Tr. pp. 9–10).

Findings

This Court finds that 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 Trial Counsel's representation was deficient and any

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resulting prejudice from that alleged deficiency. See Butler, supra. Applicant's contention that the bullet container had nothing to do with the crime is demonstrably false. This container was found in Applicant's co-defendant's home during a search within hours of the crime occurring. Applicant's fingerprints were found on the inside of the container. Here, Applicant has failed to provide what legal basis Trial Counsel would have had to make the objection and must prove that the objections would have been sustained. This Court is not persuaded with this and finds that even if Trial Counsel had objected, the objection would have been overruled. 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).

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 Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

2024 DEC 16 AM 11:34
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SPARTANBURG COUNTY
ANN W. COX

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CONCLUSION

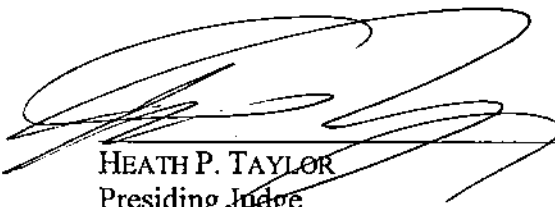
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. This Court finds Trial Counsel provided effective representation. Therefore, this application for post-conviction relief **must be DENIED and DISMISSED WITH PREJUDICE.**

Should Applicant wish to appeal, he must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Pursuant to Rule 71.1(g), SCRPC, if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. Post-conviction relief is denied and the application for post-conviction relief be dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 10th day of December, 2024.


HEATH P. TAYLOR
Presiding Judge
Seventh Judicial Circuit

Orangeburg, South Carolina

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2024 DEC 16 AM 11:34