STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Donnel L. Washington, #361295, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2022–CP–22–00239 **ORDER OF DISMISSAL WITH PREJUDICE**

Presiding Judge:	Hon. J. Mark Hayes, II
Applicant's Attorney:	Steven W. Fowler, Esq.
Respondent's Attorney:	Shayla J. Flores, Esq.
Trial Counsel:	Madison C. Harte, Esq.
Date of Hearing:	October 28, 2024

This matter comes before the Court by way of Donnel Lamont Washington's (Applicant) application for post-conviction relief (PCR) filed on March 22, 2022. Respondent, the State of South Carolina, submitted its Return on July 25, 2022, requesting an evidentiary hearing to resolve the claims as set forth in the application.

On October 28, 2024, an evidentiary hearing was held at the Georgetown County Courthouse before the Honorable J. Mark Hayes, II. Applicant was present and represented by Steven W. Fowler, Esquire. Assistant Attorney General Shayla Joan Flores represented Respondent. Applicant proceeded forward on the claims set forth in his application for post-conviction relief. In support of these claims, Applicant testified on his own behalf and presented testimony from Martin D. Spratlin, Esq. and Madison C. Harte, Esq. (Trial Counsel).

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

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

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections (SCDC). In July 2017, the Georgetown County Grand Jury indicted Applicant for first-degree burglary (2017-GS-22-00802).[1] Applicant was represented by Madison C. Harte, Esquire. Assistant Solicitor Richard D. Todd, Jr. of the Fifteenth Circuit Solicitor's Office prosecuted the case. On June 17-19, 2019, Applicant proceeded to trial before the Honorable Larry B. Hyman, circuit court judge, and a jury. The jury found Applicant guilty of first-degree burglary. Judge Hyman sentenced Applicant to life in priosn suspended upon the service of eighteen years' imprisonment.

Applicant filed a timely notice of appeal on June 24, 2019, that was perfected by Kathrine H. Hudgins, 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. Washington, 2021-UP-346 (S.C. Ct. App. filed Oct. 6, 2021). The Remittitur was issued on October 25, 2021.

FACTS GIVING RISE TO THE CONVICTION

Officer Ryan Call with the City of Georgetown Police Department testified that he responded to an anonymous call of shots fired at the home of Ms. Cheryl Gadson (Victim) at 2:00 AM on April 9, 2017. (R. p. 69, ll. 13-24). Officer Call found a holster in the roadway and a

[1] Applicant was also indicted for criminal domestic violence of a high and aggravated nature, first degree criminal domestic violence, discharging a firearm into a dwelling, and obstruction of justice. Applicant was found not guilty of criminal domestic violence of a high and aggravated nature, first degree criminal domestic violence, and discharging a firearm into a dwelling at trial. Judge Hyman directed a verdict of acquittal for the obstruction of justice charge.

projectile in the front door of a trailer belonging to Bobby Sykes. (R. pp. 70, l. 7-71, l. 12). Sykes and Victim were both in the trailer and came out to speak with the officer. (R. p. 72, ll. 19-25). Victim testified that on the evening of April 8, 2017, she had dinner with Sykes and had returned to his house when Applicant showed up. (R. pp. 143, l. 3 -144, l. 4). Victim testified that there was a confrontation between Applicant and Sykes and shots were fired. (R. p. 144, ll. 4-11). Neither Sykes nor Victim called the police. (R. p. 144, ll. 12-17).

Victim testified Applicant later returned and shot into the trailer. (R. pp. 144, l. 18-145, l. 5). The police arrived and they eventually went with Victim back to her home. (R. pp. 147, l. 14-148, l. 19).[2] The officers and Victim discovered that the home had been broken into and items inside the house destroyed. (R. pp. 147, l. 14-148, l. 19). The State presented evidence of threatening text messages sent from Applicant to Victim in the early morning hours of April 9, 2017. (R. pp. 146, l. 15-147, l. 13, 189, ll. 1-25).

After a stand-off with police, Applicant was arrested at the Bay View Motel where he had been living. (R. pp. 92, l. 16-94, l. 23).[3] Patricia Shubrick, Victim's next door neighbor, testified that on April 9, 2017, at around 2:00 AM she saw Applicant banging on the back door of Victim's house. (R. pp. 104, l. 24-108, l. 22). Shubrick testified, "That night it was early in the morning and I heard a lot of banging and it woke me up and I went downstairs, and I looked out my window

[2] The home was rented by Applicant's mother for Victim to allow her to regain custody of Applicant's daughter and her other three daughters after the children were removed by the Department of Social Services [DSS] based on allegations of neglect. (R. pp. 138, l. 20-142, l. 12; 153, ll. 7-22).

[3] The morning before Applicant was arrested Victim texted Applicant, "I'm looking to fuck shit up better stay clear cause it's coming." (R. p. 155, ll. 12-13). Victim admitted that she was angry after learning that Applicant was involved in a relationship with another woman. (R. p. 155, ll. 14-21).

and I saw a young man beating on the back door. He walked around to the front of the house, he came back, he got in his car and he left." (R. p. 105, ll. 8-12).

Officer Allen Morris testified that when he interviewed Applicant and obtained his cell phone, he noticed that the back plate covering the battery was missing. (R. p. 170, ll. 6-18). The officer claimed to have found the back plate to the phone inside Victim's home. (R. pp. 174, l. 11-175, l. 6). The officer testified, "Yes. It was on the floor. We actually about stepped on in on the way out and we picked it up right before we stepped on it." (R. p. 175, ll. 4-6). On cross-examination the officer admitted that he was mistaken and that Victim had provided him with the back plate a few days later on April 12, 2017. (R. p. 194, ll. 17-22). At the close of the State's case Applicant moved for a directed verdict of acquittal for burglary first degree because there was no evidence placing Applicant inside the house. (R. pp. 203, l. 23-204, l. 3). The judge denied the directed verdict motion. (R. p. 206, ll. 13-19).

CURRENT ACTION BEFORE THIS COURT

In his application for post-conviction relief filed on March 22, 2022, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a) " Trial judge erred in refusing to direct a verdict of acquittal for burglary first-degree when the State failed to present evidence.
   b) Failure to call witnesses.
   c) Failure to investigate.
   d) Brevity of time in consultation/preparing for trial.
   e) Failure to properly cross-examine the witnesses.
   f) Failure to file discovery motion.
   g) Failure to show discovery to Applicant.
   h) Failure to discuss trial strategy with Applicant.
   i) Failure to investigate faulty indictments.

Applicant requested relief in the form of this Court reversing his conviction and sentences.

Before this Court is the Georgetown County Clerk of Court records regarding the subject convictions and sentences, Applicant's records from the South Carolina Department of Corrections, Applicant's trial transcript, the records of Applicant's appellate action, and the records of the current PCR action.

STANDARD OF REVIEW

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

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

S.C. Code Ann. § 17-27-20(A).

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

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

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 v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that

the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

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

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

at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S.at 112.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

INITIAL FINDINGS

This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant that he rendered adequate assistance and exercised reasonable professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689, 104 S.Ct. 2052; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). 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.").

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS

Allegation 1: Trial Counsel Failed to Investigate

Applicant alleges Trial Counsel was constitutionally ineffective for failing to investigate. Specifically, applicant alleges Trial Counsel was ineffective for failing to investigate and call witnesses during his trial and for failing to investigate his allegedly faulty indictments and arrest warrant. This Court finds this allegation to be without merit.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Failure to Call and Investigate Witnesses

"A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d

354, 360 (2008). "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Ard, 372 S.C. at 331–32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted). However, counsel need only interview potential witnesses "when it is reasonable to do so." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011); see id. at 457, 710 S.E.2d at 64–65 ("While our case law does provide that defense counsel must, at a minimum, interview potential witnesses, a strict adherence to that rule loses sight of the controlling standard for counsel's duty to investigate: reasonableness. Indeed, it would be an absurdity to require criminal defense lawyers to interview *every* potential witness when they can articulate reasonable grounds not to. When counsel makes such a reasonable decision, he will have fulfilled the duty he owes to his client.").

"In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691; cf. Green v. French, 143 F.3d 865, 892 (4th Cir. 1998) ("Although counsel should conduct a reasonable investigation into potential defenses, Strickland does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client."), abrogated on other grounds by Williams v. Taylor, 529 U.S. 362 (2000).

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. See Ard, 372 S.C. at 331, 642 S.E.2d at 597 ("Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation."). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional

judgments support the limitations on investigation." Strickland, 466 U.S. at 690– 91; see id. ("In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Thus, in applying the Strickland standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 63 (Ct. App. 2014). "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness' testimony is insufficient to establish prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis— and the analysis by the appellate court— is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. See, e.g., Smith v. State, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence

that established prejudice to the petitioner); Edwards v. State, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); Glover, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was not deficient by failing to call alibi witnesses when two witnesses who testified at PCR hearing did not establish the alibi).

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

PCR Evidentiary Hearing

During the evidentiary hearing, Applicant testified that Trial Counsel represented him for approximately two to three months prior to his trial. Applicant testified that he did not believe Trial Counsel had adequate time to prepare for his trial. Applicant testified that he requested Trial Counsel motion for a continuance, but Trial Counsel refused. Applicant testified that Trial Counsel met with him two or three times prior to his trial. Applicant testified that during those meetings the two did not have any meaningful discussions regarding his case. Applicant testified to his belief that more/better communication between himself and Trial Counsel could have led to a better

outcome in his trial.

Applicant testified that Trial Counsel failed to call witnesses during his trial. Applicant testified that he provided Trial Counsel with a list of potential witnesses. Applicant testified that Trial Counsel did not respond when he asked about presenting witnesses during his trial. Applicant testified that the potential witnesses he notified Trial Counsel about would have testified that he lived at the subject property. Applicant testified that his residence was the crux of his case because he was charged with the burglary of the victim's dwelling.

Applicant testified to belief that Ms. Patricia Shubrick would have testified that he lived at the subject property. Applicant testified that Ms. Shubrick stated she saw Applicant go into the home, but this was inconsistent with what was stated in his arrest warrant. Applicant testified that he requested Trial Counsel investigate a Mr. Derrick Ford as a possible witness, but Trial Counsel did not attempt to interview him. Applicant testified that he had a close relationship with his mother who rented the subject home. Applicant testified that his mother rented the home for the victim because he was living in a hotel at the time. Applicant testified that he had a right to be present at the subject home.

During the evidentiary hearing, Trial Counsel testified that he was appointed to represent Applicant on March 18, 2019. Trial Counsel testified that Applicant's trial was set, date certain, for June 17, 2019. Trial Counsel testified that he met with Applicant twice while he was incarcerated at the county jail and on the morning of his trial. Trial Counsel testified that he and applicant reviewed discovery during those meetings. Trial Counsel testified that following those meetings he filed a motion for bond on Applicant's behalf. Trial Counsel testified that he was able to obtain bond for Applicant, which was set on May 19, 2019.

Trial Counsel testified that his trial preparation included creating a trial notebook,

investigating the facts and circumstances of Applicant's case, reviewing the case photos, and researching jurors. Trial Counsel testified that he felt prepared for Applicant's trial. Trial Counsel testified that the State's evidence centered around Applicant and the victim's tumultuous relationship, which included a series of incidents at various locations. Trial Counsel testified that Applicant was arrested for the current charges at a hotel. Trial Counsel testified that his trial strategy was to focus on the holes in the State's case against Applicant.

Trial Counsel testified that he did not call any witnesses during Applicant's trial because he felt good about his ability to cross examine the State's witnesses. Trial Counsel testified that he cross examined the State's witnesses to the best of his ability and had detailed notes for his cross examination of each witness. Trial Counsel testified that in doing so he focused on bringing the jury's attention to the State's lack of DNA evidence, inconsistent statements made by State's witnesses, and the fact that it was not unique for shell casings to have red primer on them. Trial Counsel testified that Patricia Shubrick testified during applicant's trial that she saw Applicant at the subject property but could not say that Applicant resided there.[5] Trial Counsel testified that Applicant asked him to interview Derrick Ford as a potential witness, but he was unable to contact Mr. Ford despite numerous attempts.

Trial Counsel testified that Applicant requested he reach out to Applicant's mother as a potential witness. Trial Counsel testified that he did not call Applicant's mother, as he did not believe her testimony would add anything to their case. Trial Counsel testified that there was a lease agreement for the subject property included in Applicant's discovery. Trial Counsel testified that this lease agreement listed Applicant as the tenant and gave permission to only the victim and her children to reside on the premises. Trial Counsel testified that the Department of Social

[5] R. pp. 104, l. 24-108, l. 22.

Services had ordered that Applicant and the victim could not reside together. Trial Counsel testified that Applicant's mother rented the property for the victim in order to help her regain custody of her children from the State. Trial Counsel testified to his belief that Applicant and the victim shared one child in common.

Trial Counsel testified that at the time of the crime the victim was the only individual living at the property. Trial Counsel testified that either Applicant or his mother later provided him with a subsequent lease agreement containing Applicant's name on the list of individuals permitted on the premises. Trial Counsel testified that he did not feel comfortable presenting the subsequent lease agreement to the court as it appeared to him to have been altered. Trial Counsel testified that he did not feel it necessary to call any witnesses regarding Officer Allen Morris's inconsistent statements.

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 Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Whether the witnesses Applicant contends should have been readily presented would have changed the outcome of Applicant's trial is mere speculation. Consequently, speculation cannot satisfy Applicant's burden of proving prejudice. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice). Further, during Applicant's evidentiary hearing, **no evidence** was produced from these alleged witnesses, nor was **any testimony** presented regarding what information the alleged unidentified witnesses would have provided at

Applicant's trial.

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.

This Court finds through the combination of the record, and Trial Counsel's **credible** testimony that Applicant has failed to meet the burden of showing Trial Counsel was constitutionally ineffective. 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**.

Failure to Investigate Indictments and Arrest Warrant

The indictment is a notice document, and any challenges to its sufficiency "shall be taken by demurrer or on motion to quash...before the jury shall be sworn and not afterwards." S.C. Code § 17-19-20 (2003); State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The sufficiency of the indictment is determined by whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon, and (2) whether it apprises defendant of elements of the offense that is intended to be charged. State v. Gentry, 363 S.C. 93, 101-02, 610 S.E.2d 494, 499 (2005) citing State v. Wilkes, 353 S.C. 462, 465, 578 S.E.2d 717, 719 (2003).

An indictment that cites the applicable general criminal statute is sufficient to fulfill the required notice and jurisdictional functions, where the body of the indictment indicates the particular crime of which the defendant is accused. See Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998). When defendant timely objects to the sufficiency of the indictment, before the jury is sworn, a ruling that an indictment is not sufficient will result in the quashing of the indictment unless the defendant waives presentment to the grand jury and pleads guilty. State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006), overruled on other grounds by Gentry, 363 S.C. 93, 610 S.E.2d 494.

Non-jurisdictional defects apparent on the face of the indictment must be timely raised as required by S.C. Code Ann. § 17-19-90, or they are waived. Hooks v. State, 353 S.C. 48, 577 S.E.2d 211 (2003), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Young, 243 S.C. 187, 133 S.E.2d 210 (1963). While the failure to allege certain circumstances of the crime may be grounds to quash an indictment for insufficient notice, such a defect does not necessarily implicate the court's subject matter jurisdiction, which is satisfied so long as the elements of the offense are sufficiently stated. Names of victims or co-defendants are classified as non-jurisdictional defects. Thompson v. State, 357 S.C. 192, 593 S.E.2d 139 (2004), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

PCR Evidentiary Hearing

During the evidentiary hearing, Applicant testified that Trial Counsel failed to investigate the facts and circumstances of his case. Applicant testified to his belief that had Trial Counsel investigated his case, he would have noticed that his indictment was missing the address of the residence where the crime took place, in violation of his Fourth Amendment rights. Applicant testified that his arrest warrant was falsified in violation of his Fourth Amendment Rights, as it

reflected a spelling error regarding his name. Applicant testified that his indictment was also falsified where it had been signed by the Honorable Jimmy A. Richardson, II, but not by a witness. Applicant testified to his knowledge that his indictment had been signed by the foreperson of the Grand Jury. Applicant testified to his knowledge that his indictment listed the location of the crime as "the dwelling of" the victim but contended that the law required an address to be present on a valid indictment.

Trial Counsel testified that his trial preparation included creating a trial notebook, investigating the facts and circumstances of Applicant's case, reviewing the case photos, and researching jurors. Trial Counsel testified that he thoroughly investigated Applicant's case and felt prepared for Applicant's trial. Trial Counsel testified that he and Applicant did not have any discussions about the falsification of Applicant's indictments or arrest warrant as he believed they appeared to be valid. Trial Counsel testified that Applicant's arrest warrant contained a spelling error. Trial Counsel testified that the original spelling of Applicant's name on the arrest warrant was "Donnell" which was replaced via a handwritten edit reflecting the original name crossed out and the name "Donnel" handwritten above it. Trial Counsel testified to his belief that Applicant's indictments were valid.

During the evidentiary hearing, Mr. Martin D. Spratlin, Esq. testified that he was unaware of any legal authority dictating that an address must be present on an indictment.

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 v. Gentry, 540 U.S. 1, 8 (2003) (internal quotation marks omitted); cf. Sallie v. State of N.C., 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed to was not "intended to promote judicial second-guessing on questions of strategy as basic as the

handling of a witness"). Accordingly, when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); see Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("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).

Findings

This Court finds Applicant's indictment clearly states the name of the victim, the crime charged, the date of the crime, and the location of the crime. The indictment is also signed and stamped as true-billed. On its face, the indictment is clearly sufficient to give Applicant and his attorney notice of the allegation Applicant was required to answer. This Court finds Applicant has failed to present any evidence, testimony, or legal authority at his PCR evidentiary hearing regarding this allegation. This Court finds the indictments are clearly sufficient, and any challenge to the indictment would have been non-meritorious.

Additionally, this Court finds the facts that were included within the affidavit of Applicant's arrest warrant were sufficient to support a finding of probable cause for Applicant's arrest. See Franks v. Delaware, *supra* ("[P]robable cause may be founded upon hearsay and upon information received from informants, as well as upon information within affiant's own knowledge that sometimes must be garnered hastily; but showing is to be "truthful" in the sense that information put forth is believed or appropriately accepted by affiant as true.") (U.S.C.A. Const. Amends. 4, 14).

This Court finds through the combination of the record, and Trial Counsel's **credible** testimony that Applicant has failed to meet the burden of showing Trial Counsel was constitutionally ineffective. Accordingly, this Court finds Trial Counsel's representation of

Applicant was not deficient. Therefore, Applicant's request for relief by way of this allegation is **DENIED** and **DISMISSED.**

Allegation 2: Brevity of Time in Consultation/ Preparing for Trial.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to meet with him a sufficient number of times. 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 Trial 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."). An applicant must present evidence to show how additional time spent in consultation would have resulted in a different outcome; mere speculation as to how the alleged lack of preparation prejudiced an

applicant is not sufficient to support a grant of relief. Smith v. State, 404 S.C. 493, 500-01, 745 S.E.2d 378, 382 (Ct. App. 2012) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998); Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997)).

PCR Evidentiary Hearing

During the evidentiary hearing, Applicant testified that Trial Counsel represented him for approximately two to three months prior to his trial. Applicant testified that he did not believe Trial Counsel had adequate time to prepare for his trial. Applicant testified that he requested Trial Counsel motion for a continuance, but Trial Counsel refused. Applicant testified that Trial Counsel met with him two or three times prior to his trial. Applicant testified that during those meetings the two did not have any meaningful discussions regarding his case. Applicant testified to his belief that more/better communication between himself and Trial Counsel could have led to a better outcome in his trial. Applicant testified to his belief that Trial Counsel's ineptitude was evidenced by the appearance of Mr. Martin D. Spratlin, Esq. as second chair at his trial.

During the evidentiary hearing, Trial Counsel testified that he was appointed to represent Applicant on March 18, 2019. Trial Counsel testified that Applicant's trial was set, date certain, for June 17, 2019. Trial Counsel testified that he met with Applicant twice while he was incarcerated at the county jail and on the morning of his trial. Trial Counsel testified that he and applicant reviewed discovery during those meetings. Trial Counsel testified that following those meetings he filed a motion for bond on Applicant's behalf. Trial Counsel testified that he was able to obtain bond for Applicant, which was set May 19, 2019.

Trial Counsel testified that his trial preparation included creating a trial notebook, investigating the facts and circumstances of Applicant's case, reviewing the case photos, and researching jurors. Trial Counsel testified that he felt prepared for Applicant's trial and for his

Jackson v. Denno hearing. Trial Counsel testified that his trial strategy was to focus on the holes in the State's case against Applicant. Trial Counsel testified that in doing so he focused on bringing the jury's attention to the State's lack of DNA evidence, inconsistent statements made by State's witnesses, and the fact that it was not unique for shell casings to have red primer on them.

Trial Counsel testified that during his representation of Applicant he and his supervisor were the only two full time public defenders in Georgetown County. Trial Counsel testified that it was common practice in their office to have two attorneys appear for a trial. Trial Counsel testified that his supervisor was unavailable to sit second chair during Applicant's trial. Trial Counsel testified that his supervisor then informed him that Mr. Martin D. Spratlin, Esq. would appear at Applicant's trial to sit second chair. Trial Counsel testified that he did not request that Mr. Spratlin sit second chair during Applicant's trial, nor did Mr. Spratlin appear because he was unprepared for Applicant's trial. Trial Counsel testified that he investigated Applicant's case to the best of his ability and thoroughly prepared for his trial.

During the evidentiary hearing, Mr. Spratlin testified that he never told Applicant that he was appearing because Trial Counsel was unprepared to handle Applicant's trial. Mr. Spratlin testified that he had confidence in Trial Counsel's ability to handle Applicant's case. Mr. Spratlin testified that he did not have time to meet with Applicant prior to his trial, and was not the primary attorney on his case.

Findings

This Court finds Applicant 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, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland). Trial Counsel's **credible** testimony indicates he and Applicant met prior to his

trial and during those meetings discussed the State's case against Applicant. Applicant failed to present "any evidence of how additional preparation or communication would have resulted in a different outcome." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012); see Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998) (explaining that, where an applicant failed to present any evidence of what counsel could have discovered or what other defenses he would have requested counsel pursue had counsel more fully prepared for the trial, applicant failed to show his counsel's lack of preparation prejudiced him); Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (finding that, when there is evidence counsel met with a defendant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

This Court further finds Applicant has failed to meet his burden of showing Trial Counsel was constitutionally ineffective for failing to meet with Applicant a sufficient number of times. See 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); Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) ("Brevity of time spent in consultation, without more, does not establish that counsel was ineffective.").

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 3: Trial Counsel Failed to Properly Cross-Examine Witnesses

Applicant alleges Trial Counsel was constitutionally ineffective for failing to properly cross-examine witnesses during his trial. Specifically, Applicant testified during his evidentiary hearing that Trial Counsel should have objected to the trial testimony of Officer Allen Morris. 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. 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.

Ultimately, 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 v. Gentry, 540 U.S. 1, 8 (2003) (internal quotation marks omitted); cf. Sallie v. State of N.C., 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed to was not "intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness"). Accordingly, when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); see Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("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).

The Court in United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), citing Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), addressed the lack of a prejudice requirement where an individual had been denied the right of effective cross-examination as follows:

> The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. **No specific showing of prejudice was required in Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), because the petitioner**

> **had been "denied the right of effective cross-examination," which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."** Id., at 318, 94 S.Ct., at 1111 (citing Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed.2d 956 (1968), and Brookhart v. Janis, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314 (1966)). Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), was such a case.

(Id. at 659-660). (Emphasis added). In accordance with the Court's holding in Cronic, pursuant to their analysis of Davis an individual need not be required to show prejudice where they have been denied the right of effective cross-examination.

The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. This right to confront and cross-examine witnesses "is essential to a fair trial in that it promotes reliability in criminal trials and ensures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). The Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." United States v. Owens, 484 U.S. 554, 559, (1998) (internal quotation marks and citations omitted; emphasis in original). Indeed, the opponent's opportunity for cross-examination has been deemed the "main and essential purpose of confrontation." Delaware v. Fensterer, 474 U.S. 15, 19–20 (1985) (internal quotation marks and citation omitted); see also Kentucky v. Stincer, 482 U.S. 730, 739 (1987) (describing the Confrontation Clause's "functional purpose" as "ensuring a defendant an opportunity for cross-examination").

PCR Evidentiary Hearing

During the evidentiary hearing, Applicant testified to his belief that Trial Counsel should have objected to Officer Allen Morris' testimony that Applicant took something from the victim's residence, because he was not charged with taking anything from the property.[6] Additionally, Applicant testified that Officer Allen Morris erroneously stated that he almost stepped on the back of Applicant's cell phone while searching the victim's residence.[7] Applicant stated that Officer Allen Morris testified about pictures of a shell casing found at the crime scene to show Applicant's bad character.[8]

During the evidentiary hearing, Trial Counsel testified that he cross examined the State's witnesses to the best of his ability and had detailed notes for his cross examination of each witness. Trial Counsel testified that his trial strategy was to focus on the holes in the State's case against Applicant. Trial Counsel testified that in doing so he focused on bringing the jury's attention to the State's lack of DNA evidence,[9] inconsistent statements made by State's witnesses,[10] and the fact that it was not unique for shell casings to have red primer on them.[11] Trial Counsel testified that he was able to address each of these issues during cross examination.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland at 688-89. "Representation is an

---

[6] R. p. 165, ll. 12-18.
[7] R. pp. 174, l. 15 – 175, l. 6.
[8] R. p. 187, ll. 8 – 17.
[9] R. pp. 192, l. 11-193, l. 14.
[10] R. pp. 193, l. 12 – 195, l. 13.
[11] R, pp. 191, l. 10 – 192, l. 10.

art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Strickland therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

To avoid a finding of ineffectiveness, and where counsel articulates a strategy, counsel must also articulate a valid reason for employing a certain strategy. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Thereafter, that strategy is measured under an objective standard of reasonableness. Id.; see also Stacy v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges."). When counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010).

Findings

As an initial matter, this Court finds that Applicant is not exempt from being required to prove prejudice resulting from the alleged deficiencies of counsel pursuant to Cronic, as he has not been denied his right to effective cross-examination.

Further, this Court finds through the combination of the record, and Trial Counsel's **credible** testimony 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 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*.

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 meet his burden of proving that Trial Counsel's alleged deficiency prejudiced him. Consequently, speculation cannot satisfy Applicant's burden of proving prejudice. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

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 4: Trial Counsel Failed to File Discovery Motion

Applicant alleges Trial Counsel was constitutionally ineffective for failing to file a discovery motion. This Court disagrees and finds this allegation to be without merit.

Where counsel has failed to conduct discovery, reviewing courts must analyze counsel's decision "from his perspective at the time he decided to forgo that stage of pretrial preparation and applying a heavy measure of deference, to his judgment...." Kimmelman v. Morrison, 477 U.S. 365, 385, 106 S. Ct. 2574, 2588, 91 L. Ed. 2d 305 (1986) (internal citation omitted). In order to prevail upon such a claim, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)), abrogated on other

grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Likewise, in order to prevail on a claim that counsel did not review discovery with applicant, the applicant must demonstrate prejudice by showing what evidence could have been discovered or what other defenses could have been pursued. Id.

Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is insufficient to support a relief grant. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Findings

This Court finds the combination of the record, and Trial Counsel's **credible** testimony that Trial Counsel did file a supplemental discovery motion and received discovery in response, as well as receiving the discovery obtained by Applicant's prior counsel from Applicant's prior counsel, and that Applicant has failed to meet the burden of showing Trial Counsel was constitutionally ineffective. See Campbell v. Polk, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) Applicant failed to present "any evidence of how additional preparation or communication would have resulted in a different outcome." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012); see Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998) (explaining that, where an applicant failed to present any evidence of what counsel could have discovered or what other defenses he would have requested counsel pursue had counsel more fully prepared for the trial, applicant failed to show his counsel's lack of preparation prejudiced him); Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (finding that, when there is evidence counsel met with a

defendant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

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 5: Trial Counsel Failed to Review Discovery and Discuss Trial Strategy with Applicant

Applicant alleges Trial Counsel was constitutionally ineffective for failing to review discovery and discuss trial strategy with Applicant. This Court disagrees and finds this allegation to be without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

An applicant who alleges his or her defense attorney was ineffective in failing to spend more time preparing or providing a copy of the discovery materials must demonstrate prejudice by showing what evidence could have been discovered or what other defenses could have been pursued. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836. Likewise, in order to prevail on a claim that counsel did not review discovery with applicant, the applicant must demonstrate prejudice by showing what evidence could have been discovered or what other defenses could have been pursued. Id. Furthermore, an applicant must also show how the new evidence or defenses would have resulted in a different outcome. Id. (citing David v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

PCR Evidentiary Hearing

During the evidentiary hearing, Applicant testified that Trial Counsel represented him for approximately two to three months prior to his trial. Applicant testified that he did not believe Trial Counsel had adequate time to prepare for his trial. Applicant testified that he requested Trial Counsel motion for a continuance, but Trial Counsel refused. Applicant testified that Trial Counsel met with him two or three times prior to his trial. Applicant testified that during those meetings the two did not have any meaningful discussions regarding his case. Applicant testified to his belief that more/better communication between himself and Trial Counsel could have led to a better outcome in his trial. Applicant testified that Trial Counsel did not review discovery with him.

Applicant testified that Trial Counsel did not request any Brady or Rule 5 discovery materials.

During the evidentiary hearing, Trial Counsel testified that he was appointed to represent Applicant on March 18, 2019. Trial Counsel testified that Applicant's trial was set, date certain, for June 17, 2019. Trial Counsel testified that he met with Applicant twice while he was incarcerated at the county jail and on the morning of his trial. Trial Counsel testified that he and applicant reviewed discovery during those meetings. Trial Counsel testified that following those meetings he filed a motion for bond on Applicant's behalf. Trial Counsel testified that he was able to obtain bond for Applicant, which was set on May 19, 2019.

Trial Counsel testified that his trial preparation included creating a trial notebook, investigating the facts and circumstances of Applicant's case, reviewing the case photos, and researching jurors. Trial Counsel testified that he felt prepared for Applicant's trial. Trial Counsel testified that the State's evidence centered around Applicant and the victim's tumultuous relationship, which included a series of incidents at various locations. Trial Counsel testified that Applicant was arrested for the current charges at a hotel. Trial Counsel testified that his trial strategy was to focus on the holes in the State's case against Applicant.

Trial Counsel testified that he received the discovery from Applicant's prior Counsel when he was appointed to Applicant's case. Trial Counsel testified that he filed a supplemental motion for discovery in Applicant's case following his appointment. Trial Counsel testified that it is the standard practice of his office to file a letter of representation and a motion for discovery at the same time. Trial Counsel testified that he reviewed the discovery with Applicant and gave him multiple opportunities to review the evidence. Trial Counsel testified that he and Applicant specifically reviewed the relevant photos in Applicant's case.

Findings

This Court finds the combination of the record, and Trial Counsel's **credible** testimony that Applicant has failed to meet the burden in proving any prejudice he suffered from the alleged failure to review discovery and discuss trial strategy. See Harris v. State, *supra*; Campbell v. Polk, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) Applicant failed to present "any evidence of how additional preparation or communication would have resulted in a different outcome." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012); see Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998) (explaining that, where an applicant failed to present any evidence of what counsel could have discovered or what other defenses he would have requested counsel pursue had counsel more fully prepared for the trial, applicant failed to show his counsel's lack of preparation prejudiced him); Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (finding that, when there is evidence counsel met with a defendant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

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 OF JUDICIAL MISCONDUCT

Allegation 1: Trial Court Erred in Refusing to Direct a Verdict of Acquittal for Burglary First-Degree When the State Failed to Present Evidence.

Applicant alleges the trial court erred in refusing to direct a verdict of acquittal for burglary first-degree when the State failed to present evidence. This Court finds this allegation is without merit.

"Under settled principles, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt." State v. Bostick, 392 S.C. 134, 142, 708 S.E.2d 774, 778 (2011) (citing State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004)). A case should be submitted to the jury when the evidence is circumstantial "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); see also State v. Williams, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996). "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict...." State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452–53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. Id. at 133, 322 S.E.2d at 452 (internal citation omitted). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." State v. Irvin, 270 S.C. 539, 543, 243 S.E.2d 195, 197 (1978) (citing State v. Massey, 267 S.C. 432, 229 S.E.2d 332 (1976)).

The record reflects that Trial Counsel made a timely directed verdict motion at the conclusion of the State's case. Trial Counsel moved for a directed verdict of acquittal for burglary

first degree based on his argument that there was no evidence placing Applicant inside of the subject home:

> Thank you, Your Honor. At this time the defense would move for a directed verdict regarding the burglary charge, it's our position that from the testimony from Patricia Shubrick, Mr. Washington was not in the home. There was also no forensic testing done throughout the home, no DNA, no fingerprints. As far as the CDVHAN and the discharging the firearm into a dwelling, there's nobody that puts Mr. Washington at the scene. They didn't test the spent shells that were found at the scene with the shell that was found in the truck. And, Your Honor, as far as the obstruction of justice, Mr. Washington did not hinder or obstruct law enforcement in any way. He simply stayed in his hotel room, which is not a crime…

(R. pp. 203, l. 23 – 204, l. 10). This motion was denied by the trial court:

> Alright. Mr. Harte, I would say that, you know, on directed verdict the issue is not so much for the Court as to whether or not -- or the value or affect of the evidence, but whether there is evidence. As to the burglary, there's no dispute that this home was burglarized in the nighttime, I mean, that's not even been contested. There's ample proof that there was a burglary, the burglary took place in the night. Ms. Shubrick testified that she recognized the defendant along about this time pounding on the door with some object. There's obviously some, or there has been some evidence of a blunt object being used to break into the home. It's consistent with that testimony. She testified that, as I recall it, that he was there sometimes. She may have testified that he was overnighting sometimes, but there's also ample testimony not only from the landlord but [Victim] who was certainly an occupant of the home that he had no right to be there. There's even some issue about, or testimony concerning the fact that by DSS's plan he was prohibited from being there. I think that all is enough to take this to the jury. Again, as we have discussed, the offense is one against habitation, occupation and [Victim] has testified that she and hopefully her children were going to the be only occupants at that home. That he was not supposed to be there. That they had been estranged for some period of time. So, I'm going to let that go to the jury. The jury can certainly consider all of the evidence and any reasonable inferences for them and the reasonable inference that could be raised is that he was not an occupant of that home, was not living there and had no right to be there or should not have been there. So, I'm going to deny your motion as to that.

(R. pp. 204, l. 11- 205, l. 15).

Findings

Applicants are not entitled to directed verdicts as a matter of law. See Teamer v. State, 416 S.C. 171, 181, 786 S.E.2d 109, 114 (2016) (finding counsel was not ineffective for failing to request a directed verdict when, viewed in the light most favorable to the State, ample evidence of the defendant's guilt was clear). Here, given that ample evidence existed suggesting Applicant's involvement and that the jury ultimately found Applicant guilty, a directed verdict was rightfully denied.

Accordingly, This Court finds through the combination of the record, and Trial Counsel's **credible** testimony that Applicant has failed to meet the burden of showing the Trial Court errored in failing to render a directed verdict of acquittal for burglary first-degree under the current circumstances. Therefore, Applicant's request for relief by way of this allegation is **DENIED** and **DISMISSED.**

CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking a review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

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

AND IT IS SO ORDERED this 9th **day of** December**, 2024.**

THE HONORABLE J. MARK HAYES, II
Presiding Judge
Fifteenth Judicial Circuit

Georgetown, South Carolina