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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable H. Steven DeBerry, IV

Case No. 2020-CP-04-01211

Damarius D. Gaines

Applicant

v.

THE STATE OF SOUTH CAROLINA

Respondent

NOTICE OF APPEAL

Damarius D. Gaines
Lee Correctional Inst.
990 Wisacky Highway
Bishopville SC 29010

Alan Wilson
Attorney General
D. Russell Barlow
Asst. Attorney General
P.O. Box 11549
Columbia SC, 29211

THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

Demorius D. Gaines }
v } Case No. 2020-CP-04-01211
THE STATE OF SOUTH CAROLINA } Rule 203. Notice of Appeal

Now Comes the above Applicant, to Appeal judgment handed down by Honorable H. Steven DeBerry IV.

This motion is as followed by SCACR Rule 203.

April 8th 2024 (Monday) Applicant was transported to Anderson County Court house for PCR hearing. This being a day before Applicant's scheduled appointed hearing date. Which was April 9th 2024; (Tuesday). Applicant was thought off guard, unable to properly present evidence, and key witnesses to provide facts of Applicant's not guilty defense. Being an injunction on Applicant's 4th Search and Seizure, 5th, 14th due process of law."

Applicant also proving competent enough to realize political scrutiny centered in the entirety of case.

Apart upon the face of the record. The prejudice from blatant disregard for the multiple errors of law, regulations, and professional conduct in the state of South Carolina's appeal process against Applicant.

Applicant further addresses to court the disregard to the policy and procedure with the malice intent to confuse Applicant himself, and also public opinion of the true matters and facts revolving around case. Putting Applicant's life in jeopardy based upon false narratives.

Facts based around errors of case:

- Suggestive identification process, leading to wrongful conviction.
- Trial Counsel, Appellate counsel, and PCR counsel all being Esquires violating Applicant's 14th Amend effective assist.

by disregarding Applicant's many request for particular motions, file at particular times throughout appeal history.

- Failure to allow Applicant to have all motions notarized making document legal. here inside Lee Correctional Inst.

- Not allowing Applicant to receive legal representation to assist Applicant, but assist the State of South Carolina in it's conviction of Applicant.

- Fraudulent document(s) and incorporated correspondence to by pass legitimate process. etc, etc. And the process continues against Applicant's person.

Conclusion

Conclusion: That Applicant's Criminal Conviction be overturned to Not guilty, and immediate release from South Carolina Department of Corrections.

Respectfully Submitted, this 11th day of December, 2024.

* Demetrius James

STATE OF SOUTH CAROLINA
COURT OF APPEALS

Honorable. H. Steven DeBerry IV
Case No. 2020-CP-04-01211

Damarius D. Gaines Applicant

v.

THE STATE OF SOUTH CAROLINA

Respondent

CERTIFICATE OF SERVICE

I Damarius D. Gaines, the above said Applicant hereby certify that a true copy of SCACR Rule 203. Motion of "Notice of Appeal" of per hearing dismissal with prejudice ordered by Honorable H. Steven DeBerry IV. April 8th 2024; received order through mail November 13th 2024; I certify this motion this 4th day of December 2024.

Damarius D Gaines Applicant pro, se
Lee Correctional Institution
990 Wisacky Highway
Bishopville SC 29010

Alan Wilson
Attorney General
D. Russel Borlow II,
Asst. Attorney General
P.O. Box 115419
Columbia SC 29211

**MEMORANDUM
OFFICE OF GENERAL COUNSEL**

TO: All SCDC inmates
FROM: The Office of General Counsel
DATE: July 1, 2019
RE: Notary Services

Recently some confusion has arisen regarding the role of SCDC employee notaries. The following explains what SCDC employee notaries can and cannot do for you.

As part of accommodating an inmate's right to access the courts, SCDC provides access to notary services. **A notarization simply affirms that the inmate/person who signed the document is who they say they are.** In order to confirm your identity, SCDC notaries will have to see your inmate ID so make sure you bring it with you when seeking notary services and that it is in good legible condition.

A notarization does not lend credibility to or affirm the accuracy of the document itself. Unless a document is specifically required to be notarized, having it notarized will not cause it to be more believable, to be processed faster, or to be taken more seriously.

Notaries are not lawyers or trained legal professionals in any way. They are not trained to provide legal advice or guidance. **SCDC notaries cannot not assist you with filing lawsuits, complaints, or other documents.** Their only role is to confirm the identity of the person signing a document and then notarize the document if it requires notarization.

Lastly, SCDC employee notaries will only notarize documents that require notarization. Below are examples of documents which do and do not require notarization.

Items that DO require notarization:

- Post Conviction Relief (PCR) applications
- In Forma Pauperis applications (filings requesting to proceed in court without paying fees)
- Powers of Attorney
- Wills
- Affidavits (a sworn statement of fact confirm by the oath of the person signing, will be labeled as an affidavit)
- Verified tort claims (sometimes called verified complaints, these are used in a very limited number of types of cases such as class action lawsuits)

Items that DO NOT require notarization:

- Summons and Complaint
- ~~Motions~~
- Letters/Correspondence (no matter who it is to)



ALAN WILSON
ATTORNEY GENERAL

December 4, 2024

Damorius D. Gaines, #346524 (F6A-1154-T)
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

Re: Damorius D. Gaines, #346524 v. State of South Carolina
2020-CP-04-01211

Dear Mr. Gaines,

Enclosed is a copy of the filed Order of Dismissal for the above-captioned case signed by the Honorable H. Steven DeBerry, IV, and filed with the Anderson County Clerk of Court.

Sincerely,

D. Russell Barlow, II
Senior Assistant Deputy Attorney General

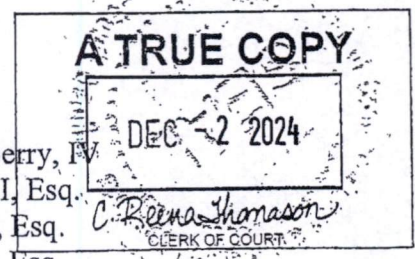
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Anderson, SC COC, CP/OS

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)
Damorius D. Gaines, #346524,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CASE No. 2020-CP-04-01211

**ORDER OF DISMISSAL
WITH PREJUDICE**



Presiding Judge: Hon. H. Steven DeBerry, IV
Respondent's Attorney: D. Russell Barlow, II, Esq.
Trial Counsel: Alexander H. Lucas, Esq.
Gordon A. Senerius, Esq.
Date of Hearing: April 8, 2024
Court Reporter: Lesa D. Taylor, RPR

This matter comes before this Court by way of Damorius D. Gaines (Applicant) post-conviction relief application filed June 4, 2020. Respondent, the State of South Carolina, made its Return on November 20, 2020, requesting an evidentiary hearing to resolve the claims as outlined in the application.

On October 19, 2021, Applicant appeared before the Honorable Letitia Verdin on a motion to relieve counsel. Don A. Thompson, Esquire, represented Applicant. Assistant Attorney General Lilian Loch Meadows represented Respondent. At the conclusion of the hearing, Judge Verdin relieved counsel and ruled Applicant would proceed *pro se* and did not appoint new counsel based on Applicant's failure to provide good cause.

On April 8, 2024, an evidentiary hearing convened before the Honorable H. Steven DeBerry, IV, at the Anderson County Courthouse. Applicant proceeded *pro se*. Assistant Attorney General D. Russell Barlow, II, represented Respondent. Applicant did not call any witnesses in support of his allegations. Respondent presented testimony from Alexander H. Lucas

NJD

and Gordon A. Senerius, Esquires.

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

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Anderson County Clerk of Court. During its July 2017 term, the Anderson County Grand Jury indicted Applicant for Armed Robbery (2017-GS-04-01681), Attempted Armed Robbery (2017-GS-04-01674), Kidnapping (2017-GS-04-01676), and two counts of Possession of a Weapon During the Commission of a Violent Crime (2017-GS-04-01674; -01681).

On September 4, 2018, Applicant proceeded to a jury trial before the Honorable J. Cordell Maddox. Tenth Circuit Assistant Public Defenders Alexander H. Lucas, Esquire (Counsel Lucas), and Gordon A. Senerius, Esquire (Counsel Senerius) (Collectively referred to as Trial Counsel) represented Applicant. Tenth Circuit Assistant Solicitors Stanford L. Overby, Jr., and Catherine T. Huey prosecuted the case. On September 6, 2018, the jury convicted Applicant as indicted of all charges. Judge Maddox sentenced Applicant to concurrent terms of twenty (20) years imprisonment, suspended to fifteen (15) years, followed by five (5) years' probation for Armed Robbery, Attempted Armed Robbery, and Kidnapping. Applicant was also sentenced to concurrent terms of five (5) years imprisonment for each weapons charge.

Applicant filed a timely Notice of Appeal. Appellate Defender Lara M. Caudy perfected

Applicant's appeal by filing an Anders¹ brief with the South Carolina Court of Appeals, raising the following issue:

Whether the trial judge abused his discretion by admitting opinion testimony from [Applicant's] mother and his ex-girlfriend concerning the identity of the suspect caught on surveillance footage from the attempted armed robbery in violation of Rule 701, SCRE, since their identifications (1) were not rationally based on their perceptions and (2) were not helpful to a clear understanding of the determination of a fact in issue, rather the testimony likely confused the jury?

The Court of Appeals affirmed Applicant's conviction pursuant to Anders review. State v. Gaines, Unpub. Op. No. 2020-UP-147 (S.C. Ct. App. filed May 20, 2020). The Remittitur was returned to the lower court on July 8, 2020.

FACTS GIVING RISE TO THE CONVICTION

At approximately 7:40 PM on February 16, 2017, an armed and masked man—later identified as Applicant—attempted to enter the Little General, a convenience store in Anderson. While the store was open for business at the time, the front door was locked because the ATM inside the store was being refilled. (R. pp. 154-55, 163). After being unable to open the door, Applicant ran to the back of the building and removed his mask. An exterior surveillance camera captured Applicant's face as he lifted his mask. (R. p. 92).

About twenty minutes later, at 8:03 PM, the same armed and masked man entered the nearby Dollar Tree store. (R. p. 109). He approached the cashier, who was in the stockroom located at the back of the store, put a gun in her face, and demanded she walk to the register and give him cash. (R. pp. 101-02, 110). After the cashier opened the register, Applicant filled his bag with cash and fled out the front door. (R. pp. 102-03).

¹ Anders v. California, 386 U.S. 738 (1967).

CURRENT ACTION BEFORE THIS COURT

In his PCR application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel (guilt phase)
 - a. Failure to "file motion to suppress identification" pursuant to Neil v. Biggers;
 - i. Failure to "let court rule on motion under Neil v. Biggers"
 - b. Failure to "object to prosecutorial misconduct" based on an alleged Brady violation;
 - c. Failure to "file motion requested by Applicant to reveal deal made for key witness Sherika Harper to write statement against Applicant;"
 - d. Failure to "submit Applicant's mother's statements into supplemental discovery;"
 - e. Failure to "advise Applicant of the proper terms of a mistrial;"
 - f. Failure to "adequately investigate the facts and circumstances surrounding the convictions of Applicant;"
 - g. Failure to "investigate, develop, and present all available, relevant, and admissible mitigating evidence" and "as a result Applicant was convicted of crimes he did not commit;"
 - h. Failure to "ask for a continuance to subpoena Jimmie Strong and Doug Bell;" and
 - i. Failure to "prepare for a defen[s]e through proper pre-trial motions and calling important factor[sic] witnesses"
 - i. Failure to subpoena private investigator who interviewed Connie Gaines and Applicant
2. Prosecutorial misconduct
 - a. Brady violation regarding alleged statements provided by Jimmie Strong and Doug Bell;
 - b. Solicitors were "aware of Jimmie Strong being only witness listed on affidavit" and "knowingly used a witness to replace Jimmie Strong;"
 - c. Solicitors "knowingly used a surprise witness," Hanisha Patel, "to manipulate the jury" with "false testimony;"
 - d. Solicitor improperly stated during closing argument that Sherika Harper was "afraid of Applicant;" and
 - e. Solicitors "knowingly used false and misleading evidence

to manipulate the jury"

Applicant requests relief as follows:

"vacate, set aside; remanded; dismissed"

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 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

² S.C. Code Ann. §§ 17-27-10 to -160.

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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), SCRPC; 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 and prosecutorial misconduct through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility. See, e.g., State v. Mercer, 381 S.C. 149, 166, 672

S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), 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 further 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 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

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the time they were made. Strickland, 466 U.S. at 689; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS ON THE MERITS

Allegation 1a: Failure to file motion to suppress identification pursuant to Neil v. Biggers and failure to let court rule on motion under Neil v. Biggers.

Applicant alleges Trial Counsel was ineffective for failing to file motion to suppress identification pursuant to Neil v. Biggers³, specifically, failing to let the trial court rule on the motion. This Court finds this allegation to be without merit.

"To ensure due process, Neil v. Biggers requires courts to assess, on a case-by-case basis, the following: (1) whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, (2) whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." State v. Heyward, 422 S.C. 488, 494, 812 S.E.2d 432, 435 (Ct. App. 2018). However, "Neil v. Biggers does not apply to a first-time in-court identification because the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification, rather than merely hearing testimony about it; and cross-examination offers defendants an adequate safeguard or remedy against suggestive examinations." State v. Lewis, 363 S.C. 37, 43, 609 S.E.2d 515, 518 (2005).

Trial

At trial, Counsel Lucas moved for a Biggers hearing based on Sherika Harper's (Harper) statement given to investigators when she was in jail. Counsel Lucas argued that when the investigator approached Harper, he said he wanted to talk to her about Applicant, which suggested

³ Neil v. Biggers, 405 U.S. 954 (1972).

an identification. (R. p. 87). In response, the State argued that this did not amount to a Biggers issue, as Harper knew Applicant prior to this event as they had dated. Id. The Court responded with the following:

Yeah, I just — I don't I'm not sure it's a Neil v. Biggers issue. I think it is more of a factual issue as to whether or not this jury both of y'all are going to be arguing either to believe her or not to believe her. If she testifies now to something different than she said later, the State has the right to cross-examine her on the prior inconsistent statement. I'm not sure it's opinion testimony. That's where we maybe disagree.

(R. pp. 87, l. 23 – 88, l. 7). Based on this, Counsel Lucas withdrew his request for a Biggers hearing.

On direct examination, Harper testified that Applicant was her ex-boyfriend, and they had dated for a couple of months. (R. p. 166). Harper testified she recalled speaking with Detective Gardner about the robberies at the Little General and the Dollar Tree that took place in February 2017. (R. p. 167). Harper testified Detective Gardner showed her three different photos and that she told Detective Gardner that Exhibit 11 showed a man similar to Applicant, but the photo was blurry. (R. p. 168). Harper testified that she never said the man in the photo was one hundred percent Applicant and that she also looked at the surveillance video but did not say Applicant was in the video. (R. p. 169).

At this point, Counsel Lucas raised several motions before the trial court, outside the presence of the jury, including the motion to exclude Harper's testimony based on Biggers. (R. p. 171). Counsel Lucas argued that Harper's testimony should not be admitted as it was lay opinion testimony, as it was not rationally based on her perception under Rule 701, and renewed his motion that it should not be admitted under Neil v. Biggers. Id. The trial court denied Trial Counsel's motions, stating these issues went to Harper's credibility and could be brought up by Counsel Lucas

through examination. Id.

Evidentiary Hearing

On direct examination, Counsel Lucas testified that he recalled making a motion to suppress pursuant to Biggers and that the issue was not a classic Biggers issue. (PCR Tr. p. 11). Counsel Lucas testified that the motion was related to Harper's identification of Applicant from a photo and video, but it was not an issue of a quick identification based on how far she was or her view. Id. Counsel Lucas testified the motion was ultimately not successful. (PCR Tr. p. 12). Counsel Lucas testified he also raised a Biggers issue in regard to Investigator Gardner. Id.

On cross-examination, Counsel Lucas testified that Harper changed her statement at trial, testifying that it was not Applicant in the video. (PCR Tr. p. 29). Counsel Lucas testified that the video with the perpetrator was shown to the jury, and the jury determined that it was Applicant in the video. Id.

Findings

This Court finds the combination of the record and Counsel Lucas'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 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. The record and Counsel Lucas's credible testimony establish that Trial Counsel made the pretrial Biggers motion, withdrew the motion based on the trial court's response in considering the arguments, and subsequently re-raised the motion during Harper's testimony. The trial court considered the motion and ultimately denied it, stating it was an issue of credibility for the jury. The record directly contradicts Applicant's allegations that Trial



Counsel failed to file a Biggers motion and let the court rule on it.

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: Failure to file motion requested by Applicant to reveal deal made for key witness Sherika Harper to write statement against Applicant.

Applicant alleges Trial Counsel was ineffective for failing to file a motion he requested Trial Counsel to file to reveal the deal made by the State to a key witness, Sherika Harper (Harper) in exchange for a written statement that hurt Applicant. This Court finds this allegation to be without merit.

Trial

Prior to Investigator Gardner's testimony, the State advised the trial court that the defense wanted to object to the lateness of a particular disclosure. (R. pp. 188 – 89). The State advised the trial court that in discussions with Investigator Gardner during a break, he said that Harper had asked him for help with bench warrants when he was taking her back to the jail after she had identified Applicant in some photographs. (R. p. 189). Investigator Gardner said he told Harper he could not promise anything but would talk to the judge. Id. The State stated that they advised

the defense about this once they discovered it, and they would elicit testimony from Investigator Gardner on it. (R. pp. 189 – 90).

In response, Counsel Lucas stated he believed this was a Brady violation to the trial court, but it had been disclosed as soon as the State discovered it. (R. p. 190). Counsel Lucas stated he believed it was grounds for a mistrial, but after discussing it with Applicant, Applicant wished to proceed with his trial. Id.

On direct examination, Investigator Gardner interviewed Harper based on information from Applicant's mother, Gaines. (R. p. 213). Investigator Gardner testified that he showed Harper a photograph taken from the surveillance video of the attempted robbery at the Little General. (Trial Tr. p. 215). Investigator Gardner testified that upon reviewing the photograph, Harper said the individual in the photograph looked like Applicant. (R. p. 216). Investigator Gardner testified that he then took Harper back to the detention center, and before turning her over to the jail, she asked him if he could help her with some bench warrants she had. (R. p. 217). In response, Investigator Gardner testified he told Harper that if he saw the judge, he would ask him, but he did not make any promises. Id. Investigator Gardner testified that after he left the jail, he saw the judge and told him about Harper's bench warrants in passing. (Trial Tr. pp. 217 – 18). Investigator Gardner testified he did not promise Harper anything in exchange for her statement concerning the photograph. (Trial Tr. p. 218).

On cross-examination, Counsel Lucas questioned Investigator Gardner about helping Harper with her bench warrants. (Trial Tr. pp. 248 – 50). Investigator Gardner testified that Harper asked him for help after they had left the interview room outside the detention room door. (Trial Tr. p. 249). Investigator Gardner testified that right before he turned her over back to the detention center, Harper asked him if he could help her with the bench warrants. Id.



Evidentiary Hearing

On direct examination, Counsel Lucas testified that he recalled a significant issue with Investigator Gardner concerning a delayed disclosure that he had dismissed some of Harper's charges in exchange for her statement. (PCR Tr. p. 12). Counsel Lucas testified he could not recall whether a deal was made with Harper but that municipal-level charges were dismissed against Harper the same day she gave the statement. (PCR Tr. p. 13). Counsel Lucas testified this was several years before the trial, but he could not recall anything further. Id.

On cross-examination, Counsel Lucas testified that he did not believe there was a deal *per se* between Investigator Gardner and Harper. (PCR Tr. p. 32). Counsel Lucas testified that the municipal charges against Harper were dismissed well before the case came to the Solicitor's Office. Id. Counsel Lucas testified his understanding was that Investigator Gardner had the municipal charges dismissed or bench warrants lifted against Harper the same day she gave the statement, and it was before the Solicitor's Office was involved. Id. Counsel Lucas testified that the decision of what motions to file is up to him. (PCR Tr. pp. 33-34). Counsel Lucas testified that Investigator Gardner's actions were revealed because of the subpoenas he filed during the trial. (PCR Tr. p. 34).

Counsel Lucas testified he was unsure whether he filed a motion to reveal the deal. Id. Counsel Lucas testified he recalled filing a number of motions about discovery, and he would send an unfiled copy of the motion to Applicant. Id. Counsel Lucas testified Applicant would argue he never filed the motions because he received an unfiled copy, but Counsel Lucas did file the motions. Id. Counsel Lucas testified that if he looked back at the file, and he believed there would be a filed motion. (PCR Tr. pp. 34-35).

Applicant argued that Counsel Lucas filed a motion to quash when the State advised them

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they would be seeking LWOP, and within two weeks of filing the motion, they were in court on the motion. (PCR Tr. p. 35). However, they did not go to court after Counsel Lucas filed the motion to reveal the deal because he filed it improperly. Id.

Counsel Lucas testified he filed the motion, and Applicant is likely confused about the issue. Id.

Findings

As an initial matter, this Court finds the testimony of Counsel Lucas **credible** and the testimony of Applicant **not credible**. 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. Whether or not Trial Counsel filed a motion in this case remains a question that is unanswered and not within the record before this Court. However, from the record, this Court finds that the issue regarding Investigator Gardner asking a magistrate to help Harper after she helped them in Applicant's case was fleshed out at trial. Further, from the record, it is clear that Applicant made the decision for Trial Counsel not to move for a mistrial and that Applicant wished to proceed.

Additionally, Counsel Lucas **credibly** testified that there was not a deal between Harper and Investigator Gardner. This Court agrees and finds that the record is clear that the matter was addressed at trial and that Investigator Gardner asked the magistrate to help Harper out since she had helped them in Applicant's case. This was after Harper wrote the statement and before the Solicitor's Office had the case before them.

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Moreover, this issue was raised before the trial court and presented to the jury during Investigator Gardner's testimony. Investigator Gardner testified that Harper had asked him for help after identifying Applicant and not in exchange for the identification. Seeing as the exchange between Investigator Gardner and Harper concerning her bench warrants was presented to the jury, Applicant cannot show how filing the motion would have changed the outcome of his 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.

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 1e: Failure to advise Applicant of the proper terms of a mistrial.

Applicant alleges Trial Counsel was ineffective for failing to advise Applicant about the terms of a mistrial. This Court finds this allegation to be without merit.

Trial

At trial, the trial court instructed parties to put on the record their discussions in chambers concerning the late disclosure. (R. p. 188–99). Trial Counsel advised the trial court he believed the late disclosure was a Brady violation and was grounds for a mistrial, but that it was Applicant's decision not to move forward with a mistrial. (R. p. 190). The trial court then stated, "As long as he understands he can't make it late. I mean, once you...", and Applicant responded, "Yes, sir."

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(R. p. 191).

Evidentiary Hearing

On direct examination, Counsel Lucas testified that he had explained in detail what a mistrial was to Applicant. (PCR Tr. p. 14). Counsel Lucas testified he discussed with Applicant how based on Detective Gardner's late disclosure, he had a right to get a mistrial. (PCR Tr. pp. 13–14). Counsel Lucas testified that Applicant liked how the trial was going and decided to waive his right to a motion for a mistrial on that issue at that time. (PCR Tr. p. 12).

On cross-examination, Counsel Lucas testified that the trial court would have granted a mistrial had Applicant chosen to accept it. (PCR Tr. p. 32).

On direct examination, Counsel Senerius testified he was involved in Applicant's case as a mentor and advisor to Counsel Lucas. (PCR Tr. pp. 37–38). Counsel Senerius testified he recalled having a lengthy discussion with Applicant about a mistrial, and he believes Applicant understood and elected not to move for a mistrial. (PCR Tr. p. 38).

Findings

This Court finds 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 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*. Trial Counsel **credibly** testified that they discussed moving for a mistrial with Applicant, and Applicant waived his right to move for a mistrial based on the delayed disclosure. Counsel Lucas **credibly** testified that he discussed moving for a mistrial based on the delayed disclosure in detail. Counsel Lucas **credibly** testified Applicant liked how



his trial was going and elected not to pursue a mistrial. Counsel Senerius credibly testified they had lengthy discussions with Applicant about moving for a mistrial, and Applicant decided to waive his right.

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:** Failure to submit Applicant's mother's statements into supplemental discovery.
- Allegation 1f:** Failure to adequately investigate the facts and circumstances surrounding the convictions of Applicant.
- Allegation 1g:** Failure to investigate, develop, and present all available, relevant, and admissible mitigating evidence and as a result Applicant was convicted of crimes he did not commit.

Applicant alleges that Trial Counsel was ineffective for failing to investigate the facts and circumstances surrounding his conviction. Specifically, Applicant alleges Trial Counsel failed to investigate and submit Applicant's mother, Connie Gaines (Gaines), statement into supplemental discovery. This Court 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.

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)).



Evidentiary Hearing

On direct examination, Counsel Lucas testified he reviewed discovery with Applicant, and gave a brief overview of the State's evidence in the case and his defense strategy, as follows:

So, Mr. Gaines was charged with an armed robbery and an attempted armed robbery -- I think there were some other associated, like, weapons charges as well. But essentially, he had two robbery charges that stemmed from, you know, two incidents that were close in time. It was one completed robbery and one that was an attempt. So essentially, the State's main evidence was videos from both of these. And it appeared to me to be, you know, certainly the same person. Whether or not it was, you know, Mr. Gaines, I don't know. A jury certainly determined that it was. So, what you had is one of the robberies -- I think it was the Little General. That was the attempted armed robbery. You had a man who had a sock on one hand and a gun in the other and a mask push the door. It was locked, so there was no completed robbery there. And then there was a second one. I think the State determined it was after the first. And in that second one, the perpetrator went into, I believe it was the Dollar Tree and held up the clerk at gunpoint and you know, robbed the place, and then got out of there. The main issue at trial was that the perpetrator was wearing a mask the whole time. When they walked out of the Little General, they pulled their mask off. I think they must have thought they were, you know, beyond the reach of the surveillance cameras. So, what you were left with was a very clear view of the robber in profile. And really, the whole trial was about whether that was Mr. Gaines or not. And it was quite clear from the video that the person who committed the second robbery was the same person as the first in the sense that they were wearing identical clothing. It was very close in time. I forget the exact distance, but I think it was within maybe a half a mile or so, and then the method of the robberies was exactly the same.

(PCR Tr. pp. 8-10).

So, the defense strategy is that the man shown in the picture was not Mr. Gaines. Kind of the main thing that we looked at is that the skin color did not appear to be bright. That was complicated by the fact that during the police investigation, Mr. Gaines was allegedly identified by both his mother and ex-girlfriend. We really were able to get at that quite successfully at trial. But the ultimate issue was that there was a quite good picture of the perpetrator, and the issue before the jury was whether or not it was Mr. Gaines. It's simply not that complicated of a matter.

(PCR Tr. p. 10)

Counsel Lucas testified that he did a lot of work on Applicant's case, seeing as it was an LWOP trial. (PCR Tr. p. 14). Counsel Lucas testified that he interviewed Applicant's mother, interviewed Harper, reviewed the video many times, and did all of this well in advance of trial. Id. Counsel Lucas testified Applicant's case was less about mitigation and more about whether it was an LWOP case or not, and Counsel Lucas focused on that. Id. Counsel Lucas testified that the trial court ultimately determined Applicant's case was not eligible for LWOP, and Applicant was sentenced to twenty years and suspended to fifteen—which is what he was offered prior to trial. (PCR Tr. pp. 14–15).

On cross-examination, Counsel Lucas testified that he does not have a specific memory of Applicant presenting him with a notarized statement by Gaines that Applicant wanted Counsel Lucas to present to the trial court. (PCR Tr. p. 20). Counsel Lucas testified that in reviewing the record, Gaines testified favorably on behalf of Applicant at trial, denying making any statement of identification to law enforcement. (PCR Tr. pp. 20–21). Counsel Lucas testified that the affidavit Gaines signed would have been inadmissible hearsay, and it would only have been admissible if Gaines had testified inconsistently with what she said in the affidavit. (PCR Tr. p. 21).

Applicant argued that had Counsel Lucas admitted Gaines's statement at trial, it would have prevented the State from calling Gaines as a witness against him. Id. Counsel Lucas testified that presenting the statement to the trial court would not have stopped the State from calling Gaines as a witness. Id. Counsel Lucas testified that he was not present when Investigator Gardner had spoken with Gaines, but he recalled that Gaines had made a statement to him that he interpreted as an identification. Id. Counsel Lucas testified that he recalled Gaines stating to Investigator Gardner that, "I don't know what's gotten into this boy. The drugs made him do it," or something

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along those lines. Id. Applicant moved to have Gaines's letter admitted as an exhibit to the Court, and though this Court did not admit the letter into evidence, the letter was reviewed by Counsel Lucas and considered by this Court. (PCR Tr. p. 22).

This Court, *sua sponte*, questioned Applicant about what testimony Gaines could have provided at the evidentiary hearing had he been able to call her to testify on his behalf. (PCR Tr. p. 42). Applicant advised the Court that Gaines would have testified that she asked Applicant why Counsel Lucas had not called Strong to testify on his behalf at trial, that the solicitor told her she could leave in the parking lot, and she would have testified that Counsel Lucas informed her that he was not going to call her to testify five minutes before the State put her on the stand. (PCR Tr. pp. 42–43).

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*. Counsel Lucas **credibly** testified he interviewed key witnesses and reviewed the discovery. Counsel Lucas **credibly** testified Applicant's case was not a mitigation case, but whether it was an LWOP case, and the court determined Applicant's case was not an LWOP case. Concerning admission of Gaines's statement, Counsel Lucas **credibly** testified that he did not recall Applicant providing him with a notarized statement by Gaines, and he did not see how it would have been helpful to submit the statement. Additionally, Counsel Lucas **credibly** testified that submitting the statement would not have prevented the State from calling Gaines to testify against Applicant.



Notably, Applicant failed to present Gaines or the alleged notarized letter to this Court. To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

Further, even if Trial Counsel could have admitted Gaines' statement at trial, the statement would have been cumulative to Gaines' testimony at trial and, therefore, would not have changed the outcome of Applicant's trial. Counsel Lucas credibly testified that Gaines's testimony at trial was helpful to Applicant and that the statement likely would not have been admitted because it was hearsay.

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 Counsel Lucas committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Therefore, Applicant failed to meet his burden in establishing Trial Counsel was deficient, and that he was prejudiced by Trial Counsel's performance. Accordingly, the allegations are **DENIED** and **DISMISSED WITH PREJUDICE**

- Allegation 1h:** Failure to ask for a continuance to subpoena Jimmie Strong and Doug Bell
- Allegation 1i:** Failure to prepare for a defense through proper pre-trial motions and calling important factor witnesses and failure to subpoena private investigator who interviewed Connie Gaines and Applicant

Applicant alleges Trial Counsel was ineffective for failing to prepare a defense through proper pre-trial motions and failing to call important witnesses. Specifically, Applicant alleges Trial Counsel failed to call the private investigator that interviewed his mother, Gaines. Additionally, Applicant alleges Trial Counsel should have requested a continuance to subpoena Jimmie Strong (Strong) and Doug Bell (Bell). This Court finds these allegations to be without merit.

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 Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice).

At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented,

consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. See, e.g., Smith v. State, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); Edwards v. State, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); Glover, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was 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 trial proceedings results may have been different because of the testimony. See, e.g., Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may 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).

Evidentiary Hearing

On direct examination, Counsel Lucas testified he did not recall Applicant requesting him to move for a continuance to subpoena Strong and Bell. (PCR Tr. p. 15). Counsel Lucas testified he did not know how Strong's testimony would have been helpful to Applicant, and it was probably more favorable to Applicant for Strong not to testify. Id. Counsel Lucas testified he did not recall Bell. Id. Counsel Lucas testified that he could not recall if there were other witnesses present at Dollar Tree, but they would not have been very important as everything was on video. (PCR Tr. pp. 15-16).

Counsel Lucas testified he hired a private investigator, and it was his practice to use investigators to interview witnesses or do whatever needed to be done. (PCR Tr. p. 17). Counsel Lucas testified he recalled that they had interviewed Gaines before trial. (PCR Tr. p. 18). Counsel Lucas testified that in his experience, it is the State's practice to put every witness they could possibly call on the witness list, but they will frequently not call every person. (PCR Tr. pp. 19 - 20).

On cross-examination, Counsel Lucas testified that Strong was the clerk for the store that was not actually robbed, and her testimony would not have been helpful as she did not actually see who robbed the store. (PCR Tr. p. 23). Counsel Lucas testified Applicant was convicted based on the video. (PCR Tr. p. 24). Counsel Lucas testified he did not recall receiving a statement by Strong in supplemental discovery wherein she stated that she never called 911 because nothing happened. (PCR Tr. p. 25). Counsel Lucas testified that the statement would not have been helpful



to Applicant, as the statement described an attempted robbery, as Strong was describing Bell telling her that it looked like there was a man with a mask and gun. (PCR Tr. p. 26). Counsel Lucas testified that Strong's statement did not say that the incident did not take place but that she described a robbery that was not completed. (PCR Tr. p. 27).

Applicant argued that based on what the State presented—including Harper's testimony that she was not sure it was Applicant in the video—the evidence against him at trial was frivolous. (PCR Tr. pp. 28–29). Counsel Lucas testified that the evidence was not frivolous, as there was a video showing the perpetrator, and the jury decided it was Applicant. (PCR Tr. p. 29).

Counsel Lucas testified he did not call the private investigator he hired to testify about his conversations with Applicant and Gaines because it would have constituted hearsay. (PCR Tr. p. 30). Counsel Lucas testified that if Applicant wanted to testify, he would have called Applicant to testify. *Id.* Additionally, Counsel Lucas testified that Gaines did testify at trial. (PCR Tr. p. 31). Counsel Lucas testified that he uses private investigators for the underlying fact investigation, and there was no reason to call the private investigator to testify. (PCR Tr. p. 31).

On cross-examination, Counsel Senerius testified to the following regarding the failure to call Strong as a witness:

I would not call a witness that I thought couldn't help me. I wouldn't call a witness that I didn't know exactly what they were going to say. And if they were listed in the indictment, they're most likely prosecution witnesses. The failure of the prosecution to call them, that's their failure. That's not mine. That's not Mr. Lucas'. We only call people who we understand are going to help us, not rehabilitate the State's case.

(PCR Tr. p. 40, ll. 17-24).

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*. Counsel Lucas **credibly** testified he did not recall Applicant asking him to request a continuance for these witnesses. Applicant averred that Strong's statement indicated that no robbery had taken place, and therefore, Trial Counsel should have requested a continuance to subpoena Strong. However, Counsel Lucas **credibly** testified that Strong's statement did not indicate the robbery had not occurred but described the attempted robbery Applicant committed. Counsel Lucas **credibly** testified he did not know how Strong's testimony would have been helpful. Concerning the private investigator, Counsel Lucas **credibly** testified he would not have called the private investigator to testify to his conversation with witnesses as it would have constituted hearsay. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (When counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective).

Further, Applicant failed to establish how the outcome of his trial would have been different had Trial Counsel moved for a continuance to subpoena Strong and Bell. Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (Where PCR applicant fails to establish what evidence he could have procured had counsel moved for a continuance, he fails to establish how he was prejudiced by counsel's incomplete preparation.). Concerning Trial Counsel's failure to subpoena Strong and Bell, Applicant failed to present those same witnesses—Strong, Bell, and the private investigator—or otherwise present evidence consistent with the rules of evidence establishing what

allegedly helpful testimony the witnesses would have provided had they been called. See Underwood v. State, supra (prejudice from trial counsel's failure to interview or call witnesses could not be shown where witnesses did not testify at PCR hearing); see also Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) (pure conjecture as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at 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 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

Therefore, Applicant failed to meet his burden in establishing Trial Counsel was deficient, and that he was prejudiced by Trial Counsel's performance. Accordingly, the allegations are

DENIED and DISMISSED WITH PREJUDICE

- Allegation 1b:** Failure to object to prosecutorial misconduct based on an alleged Brady violation.
- Allegation 2a:** Brady violation regarding alleged statements provided by Jimmie Strong and Doug Bell.
- Allegation 2b:** Solicitors were aware of Jimmie Strong being only witness listed on affidavit and knowingly used a witness to replace Jimmie Strong.
- Allegation 2c:** Solicitors knowingly used a surprise witness, Hanisha Patel, to manipulate the jury with false testimony.
- Allegation 2e:** Solicitors knowingly used false and misleading evidence to manipulate the jury.

Applicant alleges the State committed several Brady violations. This Court's finds these allegations to be without merit.

The United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83 (1963). The South Carolina Supreme Court has found: "A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Sheppard v. State, 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." State v. Davis, 420 S.C. 50, 62, 800 S.E.2d 138, 144 (Ct. App. 2017), citing State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996); Kvles v. Whitley, 514 U.S. 419, 434 (1995) ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

"The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense." United States v. Aeurs, 427 U.S. 97, 109 – 10 (1976); Cone v. Bell, 556 U.S. 449, 491 (2009) ("It simply is not sufficient, therefore, to claim that 'there is a reasonable possibility that . . . testimony might have produced a different result [Petitioner's burden is to establish a reasonable probability of a different result.]" (quoting Strickler v. Greene, 527 U.S. 263, 291 (1999))).

Harper

On direct examination, Counsel Lucas testified he did object to the State's Brady violation and was going to move for a mistrial. (PCR Tr. p. 12). Trial Counsel testified Applicant decided to waive his right to a mistrial. Id. Counsel Lucas testified he did not recall an actual deal between Investigator Gardner and Harper. (PCR Tr. p. 13). Counsel Lucas testified he discussed the discovery with Applicant and his right to move for a mistrial. (PCR Tr. pp. 13-14). Counsel Lucas testified the Solicitor's Office did not intentionally withhold anything. (PCR Tr. p. 18). Counsel Lucas testified that it was clear Investigator Gardner was acting independently. Id. Counsel Lucas testified he has dealt with Solicitor Huey and Solicitor Overby frequently and has never known them to withhold evidence intentionally. Id.

On cross-examination, Counsel Lucas testified he did not believe there was a deal between the State and Harper, and whatever happened with Investigator Gardner and Harper took place well before the Solicitor's Office had the case. (PCR Tr. p. 32). Counsel Lucas testified that before the case went to the Solicitor's Office, Investigator Gardner dismissed some municipal court charges or lifted bench warrants against Harper. Id.

On direct examination, Counsel Senerius testified he vaguely recalled Harper. (PCR Tr. p. 38). Counsel Senerius testified that he had lengthy discussions with Applicant about his options after the delayed disclosure, and after discussions, Applicant decided not to file for a mistrial. 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. This Court finds the issue of the delayed disclosure of an alleged deal between Investigator Gardner and Harper was raised at trial, and as noted *supra* (**Allegation 1e**), Applicant elected not to pursue a mistrial based on the delayed disclosure and proceed with trial. (R. p. 190).

Additionally, Counsel Lucas credibly testified that Investigator Gardner's conduct with Harper took place prior to the Solicitor's Office taking on Applicant's case, and the Solicitor's Office did not intentionally withhold anything. Had Applicant known about this evidence, it could have been used to impeach Harper's testimony at trial. However, Harper testified favorably to Applicant, stating she never identified Applicant in the video. (R. pp. 166–5). Therefore, this Court finds that even if Applicant had not waived his right to assert the delayed disclosure as a Brady violation, there was no Brady violation as the Solicitor's Office did not intentionally withhold the information, and the evidence was not material, as there is not a reasonable probability it would have changed the result of Applicant's trial—this is especially true considering Applicant had knowledge of the delayed disclosure at trial and elected to proceed with his 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.

Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**

Strong and Bell

On direct examination, Counsel Lucas testified that Strong was the clerk in one of the two stores that were robbed, and he is unsure how her testimony would have been helpful. (PCR Tr. p. 15). Counsel Lucas testified he believed it was more beneficial that Strong did not testify. Id. Counsel Lucas testified he does not recall Bell. Id. Counsel Lucas testified that in terms of witnesses, he does not recall the witnesses being important because there was video. (PCR Tr. p. 16). Counsel Lucas testified that the main issue was whether Applicant was the person in the video and whether Gaines or Harper had identified Applicant in the video. (PCR Tr. p. 17). Counsel Lucas testified it is the general practice of the State to include every possible witness on a witness list, but not every witness on that list will necessarily be called. (PCR Tr. p. 20).

Applicant presented to the Court his indictment for attempted armed robbery, wherein it named Jimmy Strong as an employee of the Little General, and the potential witness list naming Jimmy Strong. (PCR Tr. pp. 22–23).

On cross-examination, Counsel Lucas testified that he did not recall receiving a statement by Strong in the supplemental discovery. (PCR Tr. p. 25). Applicant then provided Counsel Lucas with Strong's statement, wherein Strong stated she never called 911 because nothing happened. Id. After reviewing the statement, Counsel Lucas testified it seemed familiar and was likely part of Applicant's discovery. (PCR Tr. p. 26). Counsel Lucas testified the statement described Bell telling Strong that it looked like there was a man with a mask and gun at the store door. Id.

On direct examination, Counsel Senerius testified that he had no reason to believe that there was any prosecutorial misconduct regarding a Brady violation in Applicant's case. (PCR Tr. p. 38). Counsel Senerius testified that he had no reason to believe that the Solicitor's knowingly introduced false and misleading evidence to manipulate the jury. Id. Counsel Senerius testified



he has known Solicitor Huey and Solicitor Overby for about twenty years, and he has no reason to believe they would knowingly introduce false evidence. Id. Counsel Senerius testified he has no reason to believe the solicitors hid evidence in Applicant's case. (PCR Tr. pp. 39–40).

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 finds there was no Brady violation. As Applicant noted, Strong and Bell were known witnesses; they were included on the potential witness list. Therefore, Applicant cannot show the prosecution suppressed these witnesses. The fact the prosecution elected not to call the witnesses does not constitute prosecutorial misconduct, and Applicant was not prevented from calling them. Further, both Counsel Lucas and Counsel Senerius **credibly** testified they had no reason to believe a Brady violation was committed in Applicant's case. Based on this, Trial Counsel had no basis to object to the State's failure to call Strong and Bell as witnesses.

Based on the foregoing, this Court finds 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 allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

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Hanisha Patel

Trial

At trial, Hanisha Patel (Patel) was presented as a potential witness to the jury prior to Applicant's trial starting. (R. p. 16). Patel testified she was the manager of the Little General, and Strong and Bell worked for her. (R. p. 153). Patel testified she did not actually witness anything. (R. p. 154). Patel testified she had access to the surveillance video, knowledge of how it worked, and the surveillance records on a hard drive located on the premises. (R. pp. 156–57). The State presented photographs to Patel, and Patel identified the photographs as photos of the Little General. (R. pp. 157–58). Patel testified that the photos fairly and accurately depicted the location of the cameras. (R. p. 159). Additionally, Patel testified she reviewed the surveillance video and that the video fairly and accurately depicted what the camera recorded. (R. pp. 160–61); State's Exhibit 10). The Video was admitted into evidence. (R. p. 161).

Evidentiary Hearing

On direct examination, Counsel Lucas testified he did not completely recall Patel being called, and he believed she was called to authenticate one of the videos. (PCR Tr. 18). Counsel Lucas testified he did not believe she was an important witness, and the witness testimony, in general, was not the key issue at trial. (PCR Tr. pp. 18–19). Counsel Lucas testified that he believed Patel testified, but he did not have a specific memory of her testimony. (PCR Tr. p. 19). Counsel Lucas testified the Solicitor's Office did not intentionally withhold anything. (PCR Tr. p. 18).

On cross-examination, Counsel Lucas testified that he did not think he should have objected to Patel as a surprise witness based on testimony that Strong and Bell worked for her because the main issue was who the person in the video was. (PCR Tr. pp. 27–28). Counsel Lucas



testified that the issue was not whether an attempted robbery took place but who the video showed attempting to commit a robbery. (PCR Tr. p. 28). Counsel Lucas testified that he likely did not object to Patel as a witness because she was merely there to authenticate the video and did not provide any specific, meaningful testimony about the identity of the person in the video. (PCR Tr. p. 36). Counsel Lucas testified that Patel did not provide false testimony that she was present the night of the crime. Id. Counsel Lucas testified he was unaware of any false testimony that Patel provided. Id.

On direct examination, Counsel Senerius testified that he had no reason to believe that there was any prosecutorial misconduct regarding a Brady violation in Applicant's case. (PCR Tr. p. 38). Counsel Senerius testified that he vaguely recalled Patel and that she merely testified to authenticate the video. (PCR Tr. p. 39). Counsel Senerius testified that he had no reason to believe the Solicitor knowingly introduced false and misleading evidence to manipulate the jury. Id. Counsel Senerius testified he has no reason to believe the solicitors hid any evidence in Applicant's case. (PCR Tr. pp. 39–40).

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 finds there was no basis for Trial Counsel to object to Patel as a witness as she was listed pretrial as a potential witness, and thus, no Brady violation occurred. While Applicant argued that Patel was a surprise witness, Applicant provided nothing more than his conjecture. Notably, the record establishes that

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Patel was listed as a potential witness prior to Applicant's trial starting. Further, Counsel Lucas and Counsel Senerius **credibly** testified that they do not believe any evidence was withheld by the Solicitor's Office in Applicant's case.

Additionally, Counsel Lucas **credibly** testified that Patel merely authenticated the surveillance video, and she did not provide any false testimony at 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.

Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 2d: Solicitor improperly stated during closing argument that Sherika Harper was afraid of Applicant.

Applicant failed to present any evidence, testimony, or legal authority regarding these allegations at the evidentiary hearing. "When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue." Palmer v. State, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (citing State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011)). Therefore, the Court deems these allegations abandoned.

[CONCLUSION PAGE FOLLOWS]

CONCLUSION

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

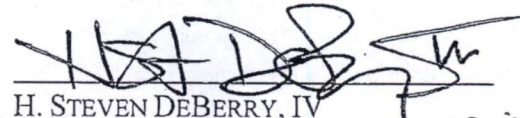
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991),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

IT IS THEREFORE ORDERED:

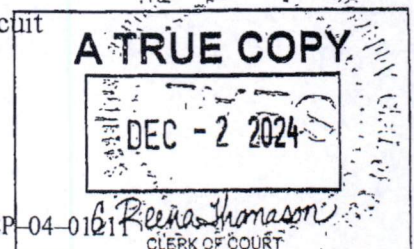
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 20 day of November, 2024.

24 DEC 2 PM 2:16:41
Anderson, SC COC, CP/GS


H. STEVEN DEBERRY, IV
Presiding Judge
Tenth Judicial Circuit

Florence, South Carolina



STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT

DAMORIUS D. GAINES, #346524

Applicant,

v.

STATE OF SOUTH CAROLINA,

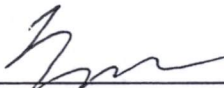
Respondent.

AFFIDAVIT OF SERVICE

The undersigned hereby certifies that a true copy of the filed Order of Dismissal has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

Damorius D. Gaines, #346524 (F6A-1154-T)
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

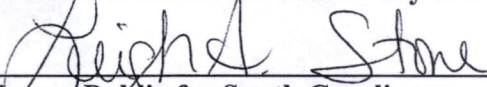
This 4th day of December, 2024.



Z. Williams

Legal Assistant for Respondent

SWORN to before me this 4th day of December, 2024.



Notary Public for South Carolina.

My Commission Expires: *May 16, 2029*

RECEIVED

JAN 07 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable H. Steven DeBerry, IV

Case No. 2020-CP-04-01211

Damarius D. Gaines

Applicant

v

THE STATE OF SOUTH CAROLINA

Respondent

Damarius D. Gaines
Lee Correctional Inst.
990 Wisacky Highway
Bishopville SC. 29010

Alan Wilson
Attorney General
D. Russell Burlew II
Asst. Attorney General
P.O. Box 115419
Columbia, SC 29211

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Question (5)

By Sending Applicant to a hearing a day before scheduled hearing date prove fraud upon Court?

Does Sending, and Conducting hearing a day ahead of scheduled date violate Applicant's 5th, 14th Amend. Due process?"?

Does dismissing Applicant's hearing, and not ruling on any of the multiple errors of trial Counsel performance with prejudice prove fraud upon Court?

Does blatant disregard for Applicant's rights, and professional conduct show and prove Applicant's Innocence, and not guilty of Crimes charged with thereof?

By Applicant's PCR hearing being dismissed with prejudice prove Miscarriage of Justice?

Damarius D. Grimes # 346524
Lee Correctional Inst. F-6-A-1154
990 Wisacky Highway
Bishopville SC. 29010

IMS

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JAN 07 2025

S.C. SUPREME COURT

CLERK OFFICE
The South Carolina Supreme Court
Post office Box 11330
Columbia SC, 29211

LEGAL MAIL ONLY