THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
B. Alex Hyman, Circuit Court Judge

Circuit Court Case No. 2022-CP-23-2161

Tristian Cummings, #344693 , ... Appellant,

v.

State of South Carolina,. . . . . Respondent.

NOTICE OF APPEAL

Tristian Cummings appeals the attached Order of Dismissal signed by the Hon. B. Alex Hyman on January 7, 2025 and entered into the record on January 13, 2025. The Appellant received written notice of the entry of this Order on January 13, 2025 by email.

Respectfully submitted,

s/J. Falkner Wilkes
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Counsel for Appellant/Petitioner

February 3, 2025.

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Tristian Cummings, #344693	)	Case No.: 2022-CP-23-2161
Applicant,	)	
v.	)	**ORDER OF DISMISSAL** (*with prejudice*)
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed on April 26, 2022, by Applicant Tristian Xavier-Marian Cummings. Respondent made its return requesting an evidentiary hearing on or about February 28, 2024.

An evidentiary hearing was held on Thursday, May 16, 2024, at the Greenville County Courthouse with the Honorable B. Alex Hyman presiding. Applicant and his counsel, J. Falkner Wilkes Esq., were present. Assistant Attorney General Christopher Runyan of the South Carolina Attorney General's Office represented Respondent. Applicant testified on his own behalf and additionally called witness Katelyn Williams to testify at the hearing. The State called Applicant's counsel Rodney Richey Esq.

After consideration of the testimony given at the hearing, thorough review and of the record, arguments presented by counsel, and the controlling case law, this Court finds that Applicant has failed to carry his burden of proof. Consequently, this Court **DENIES** relief for the specific reasons set out in this order.

PROCEDURAL HISTORY

Applicant is currently incarcerated by the South Carolina Department of Corrections in the Broad River Correctional Institution. During its June of 2017 term, the Greenville County grand jury indicted Applicant for criminal conspiracy (2016-GS-23-8773), attempted armed

robbery (2016-GS-23-8780), burglary first degree (2016-GS-23-8782), and murder and possession of a weapon during the commission of a violent crime (2016-GS-23-8778; 8779).[1]

On April 8, 2019, the State called the above charges for trial before the Honorable Michael G. Nettles, and a jury was selected and impaneled. Rodney Richey Esq. represented Applicant at trial and Assistant Solicitors William McMaster and Andrew Culbreath prosecuted the case. On April 10, 2019, the jury returned guilty verdicts on all counts as charged. Judge Nettles sentenced Applicant to 35 years for murder, 35 years for burglary first degree, 20 years for attempted armed robbery, 5 years for possession of a weapon during the commission of a violent crime, and 5 years for criminal conspiracy, with all sentences to run concurrently and credit for time served.

DIRECT APPEAL

Appellate Defender Katherine Haggard Hudgins of the South Carolina Commission on Indigent Defense perfected the appeal on December 20, 2019, by filing a brief pursuant to *Anders v. California,* 386 U.S. 738 (1967) raising the following issue:

> Did the trial judge err in structing the jury that if one intentionally kills another during the commission of a felony, the inference of malice may arise because the instruction is an improper comment on the facts?

Applicant filed a *pro se* response on February 10, 2020. The Court of Appeals dismissed the appeal *per curium* and relieved counsel on July 14, 2021. *State v. Cummings*, No. 2019-000665, 2021 WL 2947802 (S.C. Ct. App. July 14, 2021). The remittitur was issued on August 5, 2021.

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[1] Applicant's co-defendant, Simeon William was also indicted. Mr. Williams pled guilty to voluntary manslaughter and burglary first degree prior to Applicant's trial. His sentencing was deferred until after he testified at Applicant's trial.

CURRENT ALLEGATIONS

In his current application for post-conviction relief, filed on April 26, 2022, Applicant asks this Court for "reversal of conviction and sentence and the granting of a new trial" raising the following issues:

Ineffective Assistance of Counsel with the supporting grounds:

I. Counsel failed to timely notify the Court that grounds existed for him to move to be relieved as counsel of record.

II. Counsel failed to adequately advise client sufficiently to make an informed decision relating to the decision whether the Applicant should proceed to trial, enter a plea, or accept plea offers.

III. Counsel failed to properly make, raise and preserve issues relating to severance and joint trial with co-defendant.

IV. Counsel failed to adequately investigate the case, prepare and present a defense, including the failure to subpoena and call as witnesses, including an intern officer present at the scene and a witness to relevant events, neighbors at the incident location that were witnesses to relevant events, witnesses that would establish ownership of the weapon found at the scene and its connection to the co-defendant, witnesses that were in the vehicle with the defendant and co-defendant prior to the incident that could testify to the co-defendant' s possession of the firearm found at the scene.

V. Counsel failed to raise and preserve issues for direct appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to carefully considering the record and the arguments presented by counsel, this Court has also had the opportunity to consider the testimony presented at the PCR evidentiary hearing and has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. §17-27-80 (2003).

INEFFECTIVE ASSISTANCE OF COUNSEL: STRICKLAND STANDARD

To show a violation of the Sixth Amendment, an Applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington,* 466 U.S. 668, 694 (1984); *Simpson v. Moore,* 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland,* 466 U.S. at 694. It is presumed that counsel made all decisions in exercise of reasonable judgment. *Id.* at 689. It is the applicant's burden to prove, by a preponderance of the evidence, that he is entitled to relief. Rule 71.1 (e), SCRCP. *See also Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("The burden of proof is on the applicant to prove the allegations in his application.").

INEFFECTIVE ASSISTANCE OF COUNSEL: ALLEGATION I

As to Applicant's allegation that trial counsel failed to timely notify the Court that grounds existed for him to move to be relieved as counsel of record, this Court finds that Applicant has failed to provide supporting evidence establishing counsel's deficiency and resulting prejudice.

The record shows that Applicant was fully aware that he could move to relieve counsel at any time and was given the opportunity to do so. He filed his first motion to relieve his initial counsel, Susannah Ross Esq., on June 5, 2017. Judge Young denied the motion and Applicant filed an additional motion to have Ms. Ross relieved on January 26, 2018. The Honorable Letitia H. Verdin denied that motion. On April 17, 2018, Ms. Ross filed a motion to be relieved which Judge Verdin granted on June 16, 2018. (Trial Tr. at 12).

Mr. Richey was then appointed, and the State then extended a plea offer, the same offer accepted by Applicant's co-defendant, to which Applicant rejected. On March 28, 2019, the parties appeared before Judge Verdin at request of Mr. Richey due to Applicant's indication that he wished to fire counsel. Judge Verdin told Applicant he could keep trial counsel as his attorney, he could represent himself or hire a new attorney, however that attorney must be ready to proceed to trial on April 8, 2019, the scheduled date of Applicant's trial. Prior to selecting the jury for the April trial, Judge Nettles asked Applicant if he would like Mr. Richey to proceed as his representation or if he wanted to represent himself. (Trial Tr. at 10). Applicant stated he did not have a choice but to have Mr. Richey represent him, however, the court corrected him and instructed that he could choose to represent himself. (Trial Tr. at 10). Applicant stated that he would prefer Mr. Richey remain as counsel. (Trial Tr. at 10).

The testimony and evidence presented at the PCR hearing show that Applicant was given the opportunity to relieve trial counsel and aware of his right to do so had he wished. Trial counsel testified at the hearing that Applicant was trying to be his own lawyer and did not agree with his advice. The record shows that a hearing was held to determine if Applicant wanted to proceed with Mr. Richey representing him, and he was given the opportunity to make that decision. Further, it is solely within the discretion of the trial judge to grant Applicant's motion to relieve counsel and Applicant bears the burden to show why counsel should be relieved. *State v. Graddick*, 345 S.C. 383, 385-386, 548 S.E.2d 210, 211 (2001), *holding modified by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). The record shows that Applicant was aware of his right to relieve counsel as he had done so before. Further, Applicant was given this choice by Judge Nettles prior to trial. There is no merit to his allegation that trial counsel was ineffective because he did not timely notify Applicant that he could relieve him as counsel.

Additionally, Applicant cannot prove resulting prejudice. Applicant's alternative options as presented to him by the trial court were to assume his own representation or retain/be appointed a new attorney less than a month before his trial. Applicant cannot provide anything more than hindsight and speculation as to whether he made an advantageous choice in keeping Mr. Richey as counsel. Therefore, Applicant has failed to establish that trial counsel's assistance was unreasonable under professional prevailing norms and further, cannot establish resulting prejudice. This allegation is denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF COUNSEL: ALLEGATION II

As to Applicant's claim that counsel was ineffective in failing to adequately advise him on making an informed decision relating to whether he should proceed to trial, enter a plea, or accept plea offers, Applicant has not shown that trial counsel acted outside the standard of reasonableness under prevailing professional norms in criminal matters as to this allegation.

The State extended Applicant a plea offer on November 2, 2016, for a plea to murder with the State recommending 35 years. (Trial Tr. at 11). After Ms. Ross was relieved and Mr. Richey was appointed, the State then extended another offer – voluntary manslaughter and burglary first degree, with no recommendation and the remaining charges dismissed. (Trial Tr. at 12). Applicant rejected this offer. (Trial Tr. at 12). Notably, this was the same offer extended to Applicant's co-defendant. (Trial Tr. at 12). After the co-defendant accepted the offer, the offer was again extended to Applicant, and again he rejected. (Trial Tr. at 12-13). At trial, Mr. Richey requested that the State reinstate the previous offer. (Trial Tr. at 14-15). The State advised the court that Mr. Richey had been notified that if the State obtained a conviction, it would be seeking a life sentence, and, though it generally was not the policy to revisit a plea offer that late, it would consider the option. (Trial Tr. at 15). Mr. Richey then confirmed to the court that he had

gone over the offers, potential penalties, and the ramifications of his decisions with Applicant. (Trial Tr. at 16). Mr. Richey noted that he made recommendations to Applicant and reviewed different scenarios, but Applicant ultimately made his decision, though counsel did not "necessarily agree with" his decision. (Trial Tr. at 16). After a break until the afternoon, the State noted in light of Mr. Richey's request, that it had extended a plea offer of voluntary manslaughter, burglary first degree, and attempted armed robbery, concurrent, with no recommendation. (Trial Tr. at 17). Again, Applicant rejected this offer after discussion with counsel. (Trial Tr. at 17). Though Applicant denied all of these listed offers, the record shows that counsel advised Applicant of the consequences of rejecting or accepting the offers and acted reasonably in doing so.

Further, at the evidentiary hearing, Applicant testified that Mr. Richey did not tell him much about his case but that the State's theory was that Applicant was the individual in the house. Applicant testified he told Mr. Richey he was never in the house and that an individual Applicant refereed to as "lil twenty" was the only one who entered. Applicant testified that he believes Ms. Ross went over the 911 tapes with him, however Mr. Richey mentioned the tapes and never looked into them. Applicant testified that he felt like Mr. Richey was brushing him off and wasn't trying to help him.

Mr. Richey testified that he advised Applicant as to this offer and outlined with Applicant why he thought he would be unsuccessful at trial. He reasoned that Applicant was identified by the officer who saw him in the house and subsequently chased him, and that Applicant had gun residue on him when he was apprehended. Mr. Richey testified that Applicant's insistence that he was not in the house "severely handicapped" their argument because there was enough evidence to show Applicant *was* in the house. Applicant subsequently rejected two more plea

offers against trial counsel's advice.

Applicant cannot show trial counsel's deficiency. Applicant was insistent on proceeding to trial – rejecting four plea offers from the State, and advised by counsel on each offer that he should accept. Mr. Richey testified that Applicant had control of his case and as long as a request was not unreasonable, he advocated the issue for Applicant. Applicant has not provided this Court with any evidence or credible testimony to support this allegation. The record shows that Applicant was insistent on going to trial despite any favorable offers from the State and advice of counsel. Trial counsel advised Applicant of the risks he faced at trial and that he would not be able to argue that he was not in the house. Applicant chose to proceed to trial - rejecting the numerous plea offers presented to him by counsel - despite warnings from counsel.

As such, trial counsel's advice regarding the plea offers and the risk of proceeding to trial is well within prevailing professional norms in criminal matters. Applicant has not shown that counsel erroneously advised or failed to advise him. Therefore, trial counsel did not act deficiently as to this allegation and Applicant suffered no resulting prejudice. This allegation is denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF COUNSEL: ALLEGATION III

As to Applicant's allegation that trial counsel failed to properly make, raise and preserve issues relating to severance and joint trial with his co-defendant, the allegation has no bearing on trial counsel's performance.

Applicant's co-defendant pleaded guilty to voluntary manslaughter and first-degree burglary, with his sentence deferred until after he testified at Applicant's trial. It is unnecessary for trial counsel to raise an issue regarding trying Applicant and his co-defendant jointly or separately when Applicant's co-defendant had already pled guilty at the time of his trial.

Further, trial counsel raised the issue at Applicant's request. The record shows that trial counsel asked the Court to try Applicant and his co-defendant's case together. (Trial Tr. at 17). The Court stated that the rules of procedure do not allow someone to be tried when they have already pled guilty and further, the ability to try the cases together or separately is up to the State. (Trial Tr. at 18).

Therefore, trial counsel did not act deficiently as to this allegation and Applicant suffered no resulting prejudice from the alleged deficiency. This allegation is denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF COUNSEL: ALLEGATION IV

Applicant alleges that trial counsel was ineffective for failing to adequately investigate the case, prepare and present a defense, including the failure to subpoena and call witnesses.

The following can be gleaned from the record:

In the early morning hours of March 6, 2016, Applicant and Williams (Applicant's co-defendant) approached Mr. Jeryl "Cincinnati" White's duplex having agreed to rob Mr. White. (Trial Tr. at 149-150). Williams testified that he personally had purchased drugs from White previously. (Trial Tr. at 148). White told the two to go away. (Trial Tr. at 151). However, they discovered a side door which Applicant kicked in. (Trial Tr. at 153). They entered. Applicant was armed with a gun. (Trial Tr. at 153-154). The two began searching the home for drugs and money. (Trial Tr. at 154). White was in a nearby bathroom with the door locked. (Trial Tr. at 62). Applicant shot him several times through the door. (Trial Tr. at 97 and 154). The police arrived quickly, while Williams was still in the kitchen. (Trial Tr. at 156). White's girlfriend, April Green, who was seven months pregnant, was also living in the home at the time of the incident and had called the police. (Trial Tr. at 60-62). Ms. Green hid behind the bed in the

bedroom which had a shared wall with the bathroom where White was shot. (Attachment 2. Trial Tr. at 62 and 72-73). White was shot twice, once in the front portion of his right thigh, and once in the shoulder area. (Trial Tr. 264-265). The shoulder area shot traveled through the vertebra, cut the spinal cord, continued through the neck and transected the carotid artery. (Trial Tr. at 265). That shot was fatal. (Trial Tr. at 265-266 and 269).

Deputy Harold Robinson responded to the disturbance call due to his close proximity to the address. (Trial Tr. at 83). Deputy Kenneth Sandefur quickly arrived for backup. (Trial Tr. at 85). Deputy Robinson and Deputy Sandefur approached the bottom door of the duplex where Applicant and Williams entered and were able to see Williams going through cabinet drawers. (Trial Tr. at 87-90). Both Deputies announced their presence and told Williams "let me see your hands, get on the ground," and Williams complied. (Trial Tr. at 90-91). Williams "mumble[d] something" to Applicant such as "let's go, or we got to get out of here, or something along that line," after which Applicant ran behind Williams with a silver metallic firearm in his hands, slams it on the counter, and runs out the front door. (Trial Tr. at 91). Deputy Robinson held Williams at gunpoint for approximately eight minutes until backup arrived. (Trial Tr. at 92). Deputy Sandefur pursued Applicant. (Trial Tr. at 92 and 112). Applicant ran from Deputy Sandefur into a thick briar patch where Deputy Sandefur and the Applicant struggled in the thick vegetation. (Trial Tr. at 114-115). Eventually, backup arrived, and Deputy Ivan Rodriguez subdued Applicant, and held him until additional backup arrived to handcuff and place him in the police vehicle. (Trial Tr. at 138-139).

At the evidentiary hearing, Applicant called Katelyn Williams, formerly Katelyn Nichols, who was an intern riding with Deputy Robinson at the time he responded to the disturbance call. On direct examination, counsel read Ms. Williams' statement from the police report in which she

stated she saw a black male wearing a red shirt run out the front door. Ms. Williams confirmed that she did make that statement at the time of the incident. On cross examination, Ms. Williams explained how Deputy Robinson received the call and the two drove over to the location of the disturbance. She testified that she was at a bad angle to see much of anything and was looking over her right shoulder. She heard a gunshot, possibly two, and saw a black male run out of the door heading toward Poinsette highway. Ms. Williams confirmed that she had had not been involved in an incident of this sort before, and that she was concerned for her partner's safety. When asked if it was possible that the suspect was not wearing a red shirt at the time, Ms. Williams responded in the affirmative.

At the evidentiary hearing, Applicant testified that "even the intern said it wasn't me" and had trial counsel called Ms. Williams to testify, it would have changed the result of his trial. He asserts that trial counsel did not investigate as to who shot the gun or as to who owned the gun. Mr. Richey testified that the main issue he faced was that Applicant was identified as being in the house, yet Applicant continuously insisted that he was not. Mr. Richey testified that he chose not to call Ms. Williams so that he could comment on the State's failure to produce a witness because her statement contradicted the other officers. Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective. *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992).

As to Applicant's allegation that Mr. Richey should have called neighboring witnesses to testify, Applicant cannot overcome the high burden under *Strickland* requiring him to not only prove that trial counsel acted deficiently, but that trial counsel's failure affected the outcome of the trial. *Strickland*, *supra*. At the evidentiary hearing, Applicant presented a recording of the 911 call made by neighbors who reported the incident. Applicant argues that the caller's

description did not match Applicant at the time of the incident. Considering the evidence of guilt that was presented to the jury, and that such evidence would still have been heard and considered in addition to the 911 call of the neighbors, the State's evidence against Applicant is overwhelming and a different result is unlikely. *See Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 848 (2018) ("the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of "a reasonable probability ... the factfinder would have had a reasonable doubt" cannot possibly be met.").

Further, Applicant conceded that he agreed with Officer Robinson and Officer Sandefuer's testimony describing their pursuit of him, his struggle with Officer Sandufeur, that he was hit with a baton, and that he continued to run from police by running behind the house and jumping the fence. Therefore, Applicant has not established that there is a reasonable probability, a probability sufficient to undermine confidence in the outcome, but for counsel's unprofessional errors, that Applicant would not have been found guilty by a jury. *See Smith v. State*, 386 S.C. 562, 565-66, 689 S.E.2d 629, 631 (2010). "[] [N]o prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt." *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010) (citing *Rosemond v. Catoe*, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009)).

As to the allegation that Mr. Richey failed to call witnesses to testify that Applicant's co-defendant owned the gun, Applicant has failed to show how establishing ownership of the gun would have led to a different result. No witnesses were presented at the evidentiary hearing as to this allegation. Thus, the allegation is solely supported by mere speculation and Applicant has not satisfied his burden under *Strickland. See Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d

415 (1998). Further, ownership of the gun does not contradict the State's factual presentation and is irrelevant in disproving the events. Simply put, it is well within a reasonable determination that Applicant used a weapon that he did not own in the commission of this crime.

As to the allegation that Mr. Richey failed to call witnesses that were in the car prior to the incident to testify as to Applicant's co-defendant's possession of the gun found at the scene, Applicant failed to introduce witness testimony supporting this allegation. "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." *Martin v. State*, 427 S.C. 450, 455, 832 S.E.2d 277, 280 (2019) (citing *Glover v. State*, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995)). Therefore, these allegations are denied and dismissed with prejudice.

CONCLUSION

Based upon review of the records, pleadings, and the arguments of counsel in this matter, this Court finds the Applicant has failed carry his burden of proof on any of the allegations in his application and **DENIES** and **DISMISSES** the allegations within the application with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. Applicant's application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant is remanded to the custody of Respondent for the completion of his sentence.

AND IT IS SO ORDERED this 7 day of JAN., 2026.

B. ALEX HYMAN, Presiding Judge