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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Heath P. Taylor, Circuit Court Judge

Case No.: 2021-CP-42-01217

Keshawn Rice, 338305, Petitioner,

vs.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Keshawn Rice, Petitioner, appeals the Order of Dismissal issued by the Honorable Heath P. Taylor on January 3, 2025, which was filed on January 13, 2025. Petitioner, through counsel timely filed a Rule 59, SCRCP, Motion, which was denied by an Order issued on January 24, 2025 and filed on January 30, 2025. Petitioner, through counsel, received notice of the entry of the Order on January 30, 2025.

Respectfully submitted,

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February 27, 2025

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Keshawn Rice, #338305, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2021-CP-42-01217 **ORDER**

THIS MATTER IS BEFORE THE COURT on Applicant's Motion to Reconsider, pursuant to Rule 59, SCRCP, Dismissal of Applicant's Application for Post Conviction Relief. On May 23, 2024, an evidentiary hearing was convened at the Spartanburg County Courthouse before the undersigned. An Order of Dismissal with Prejudice was subsequently issued on January 3, 2025, and filed on January 13, 2025. The present motion was filed by Applicant on January 21, 2025. After considering the arguments set forth in Applicant's Motion to Reconsider as well as the facts of the case and arguments of counsel at the evidentiary hearing, this Court finds that the Application's Application for Post Conviction Relief was appropriately dismissed. Thus, this Court hereby denies Applicant's Motion to Reconsider.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that Applicant's Motion to Reconsider is hereby denied.

IT IS SO ORDERED.

The Hon. Heath P. Taylor
Circuit Court Judge
First Judicial Circuit

This 24th day of January, 2025.

Columbia, South Carolina

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CLERK OF COURT
SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Keshawn M. Rice, SCDC #378305, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2021-CP-42-01217 **ORDER OF DISMISSAL**

This matter is before the Court pursuant to an application for post-conviction relief ("PCR") filed by Keshawn M. Rice ("Applicant") on April 19, 2021. On May 23, 2024, an evidentiary hearing convened before the Honorable Heath P. Taylor. Applicant was present and represented by Tricia A. Blanchette, Esquire. Assistant Attorney General Bryan T. Hall represented Respondent. At the hearing, Applicant called as witnesses Richard H. Warder, Esquire, and Kathrine H. Hudgins, Esquire. Respondent did not call any witnesses. Following a thorough review of the trial transcript and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections ("SCDC") serving a thirty (30) year sentence. In March 2017, the Spartanburg County Grand Jury indicted Applicant for murder (2017-GS-42-1795), 1st degree burglary (2018-GS-42-0649), and armed robbery (2017-GS-42-1796). These charges arose from incident in which Applicant and his co-defendants (Carnellious Stringer,[1] Elian Nava, and Kameron Wilson) went to the victim's home

[1] Carnellious Stringer pled guilty to murder and armed robbery before the Honorable J. Derham Cole on February 5, 2018, and received a sentence of thirty (30) years.

to buy marijuana. Applicant and Stringer were armed with guns. In a plot to rob the victim, a scuffle ensued, and Stringer shot victim three (3) times, resulting in victim's death.

On February 5-7, 2018, Applicant proceeded to a jury trial before the Honorable J. Derham Cole, which resulted in a mistrial. On November 13-15, 2018, Applicant proceeded to a second jury trial before the Honorable J. Derham Cole. Deputy Solicitor Derrick Bulsa prosecuted the case. Richard Warder, Esquire, ("Counsel") represented Applicant. The jury convicted Applicant of voluntary manslaughter, the lesser included of murder; 1st degree burglary; and armed robbery. Judge Cole sentenced Applicant to a concurrent sentence of thirty (30) years for each charge.

Applicant filed a timely notice of appeal. Applicant was represented on appeal by Appellate Defender Kathrine H. Hudgins, who filed an *Anders*[2] brief, raising the following issue:

> Did the trial judge err in allowing an officer to speculate that Appellant could have left the county during the ten days between the time of the shooting and the time Appellant turned himself in to police when there was no evidence that Appellant left the country?

On March 10, 2021, the Court of Appeals dismissed the Applicant's appeal following review pursuant to *Anders*. The Remittitur was sent on March 31, 2021.

CURRENT APPLICATION

Applicant timely commenced this PCR action on April 19, 2021, alleging he is being held in custody unlawfully because of ineffective assistance of counsel for failure to properly prepare and investigate prior to trial, failure to present a reasonable defense, and failure to make objections and motions. On May 21, 2021, Respondent filed its Return and Motion for a More Definite Statement. On June 9, 2021, Respondent filed an Amended Return and Motion for a More Definite Statement. On March 14, 2023, Applicant filed an amendment to his PCR application, raising the following allegations (verbatim):

[2] *Anders v. California*, 386 U.S. 738 (1967).

[Ineffective Assistance of Trial Counsel]

1. Trial counsel rendered ineffective assistance that was prejudicial to Applicant when he failed to properly investigate, prepare and effectively represent Applicant prior to and at his second trial. Specifically, Applicant alleges the following deficiencies:
   a. Trial counsel failed to properly advise Applicant and handle matters related to the additional indictment [burglary 1st degree] (2018-GS-42-0649).
   b. Trial counsel failed to investigate and/or utilize witnesses for the defense. **[Allegation withdrawn]**
   c. Trial counsel failed to effectively handle matters related to Cesar Mendez. Specifically, but not limited to the following:
      i. Failure to prepare and/or utilize Cesar Mendez as a witness at trial.
      ii. Failure to properly handle the State's Motion in Limine regarding matters related to the testimony of Cesar Mendez and/or failure to proffer his testimony.
      iii. Failure to object to hearsay that violated the Confrontation Clause when law enforcement testified regarding the information provided by Cesar Mendez.
   d. Trial counsel failed to effectively handle matters related to Applicant's co-defendant Carnellious D. Stringer. Specifically, but not limited to the following:
      i. Failure to utilize and/or obtain the transcript of Mr. Stringer's plea on February 5, 2028.
      ii. Failure to address the information provided regarding Mr. Stringer's plea to the court during sentencing.
   e. Trial counsel failed to advise Applicant and prepare for the State's evidence of flight that was not presented in the first trial. Trial counsel failed to object to the line of questioning and to hearsay evidence offered regarding flight at Applicant's second trial.
   f. Trial counsel failed to object and/or move for a mistrial when Kameron Wilson referenced the first trial during his direct testimony.
   g. Trial counsel failed to make objections and arguments in the first and second trial and prepare in the second trial for the testimony of Zaria Owens and the State's witnesses regarding meeting with her.
   h. Trial counsel failed to effectively utilize information contained in discovery and testimony offered at the first trial to cross-examine and/or impeach the following witnesses:
      i. Jonathan Lawson
      ii. Kevin Bowen
      iii. Wendy Thomas
      iv. Mary Ann Kotlarich
      v. Kameron Wilson
      vi. Elian Nava

vii. Dr. Wren

i. Trial counsel failed to present a reasonable defense through his closing argument and failed to present the theory of the case provided in the first trial.

[Ineffective Assistance of Appellate Counsel]

2. Appellate counsel provided ineffective assistance that was prejudicial to Applicant when she failed to raise any meritorious issues on appeal.

Before this Court are the Spartanburg County Clerk of Court records of the subject conviction; Applicant's records from SCDC; the appellate records; the trial transcript; and the records of the current PCR action.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Trial Counsel's Testimony

Richard Warder ("Counsel") testified that he has been practicing law for fifty (50) years, including thirty (30) years exclusively in criminal defense. Counsel testified that he was retained by Applicant's family. Counsel testified that he represented Applicant in his first trial in February 2018. Counsel testified that he does not recall a motion to be relieved as counsel after Applicant's first trial but the fact that he represented Applicant in his second trial assumes Applicant did not relieve Counsel. Counsel testified that he did not obtain a transcript from Applicant's first trial but has done so [before]. Counsel testified that the purpose for getting a transcript from the first trial would be for impeachment materials.

Counsel testified that in preparation, he files discovery motions and prepares the case to know the facts. Counsel testified that he did not hire a private investigator for Applicant's case but conducted an independent investigation with an investigator who worked on the case. Counsel testified that he reviewed the discovery with his investigator, read the investigative reports, and statements. Counsel testified that the State's theory was that Applicant, and others, went to steal marijuana, and there was a shooting. Counsel testified that his defense strategy was to create

reasonable doubt and argue that although Applicant was present, he was not the trigger man.

Regarding the burglary indictment, Counsel testified that the State motioned for the defense not to comment on the timing of the indictment, and Counsel told the court that if something arises regarding timing that would be beneficial to Applicant, he would ask about it. (Nov. Tr. 15-16). Counsel testified that timing of the indictment did not become relevant during the second trial.

Regarding Cesar Mendez, Counsel testified that Mendez was a third-person that was going to the victim of the robbery plot, but Mendez did not have marijuana, so he took Applicant and his co-defendants to his supplier. Mendez testified that he reviewed statements made by Mendez and investigative reports with his investigator but did not interview Mendez. Counsel testified that he does not recall an Order for Transport for Cesar Mendez (Appl.'s Ex. 5). Counsel testified that he had a general recollection of what Mendez's testimony would be but does not recall his strategy for not calling Mendez. Counsel testified that there was "somewhat danger" in calling Mendez to testify, and Mendez was present at the scene of the shooting and could have identified the shooters. Counsel testified that he did not recall a SLED report that indicated the presence of GSR on Mendez (Appl.'s Ex. 6). Counsel testified that the GSR report might have fit into the defense strategy or not. On cross-examination, Counsel agreed that he would expect GSR to be on Mendez since it was known that Mendez shot at the robbers. (Nov. Tr. 207).

Counsel testified that the State made a motion in limine to preclude the questioning of the victim's mother, Mary Ann Kotlarich, regarding her moving marijuana. Counsel testified that he questioned Kotlarich in the first trial about moving marijuana.[3] Counsel testified that he did not believe it was necessary to call Mendez to contradict Kotlarich's testimony. Counsel testified that

[3] The court excluded the testimony in Applicant's second trial since Kotlarich had denied the allegation. (Feb. Tr. 16-17; Nov. Tr. 14). The court stated that it would permit questioning of Kotlarich regarding the marijuana if Applicant had another witness to contradict the denial. (Feb. Tr. 13-14).

he does not recall a reason for not getting into the testimony in his second trial but his trial strategy changes depending on what Counsel believes is most effective based on the facts presented at trial. Counsel testified that he does not recall asking the court to proffer Kotlarich's testimony. Counsel testified that if he had crossed Kotlarich on the marijuana, he does not believe it would have changed the outcome.

Regarding Kameron Wilson's mentioning Applicant's first trial, Counsel testified that he does not believe asking for an instruction for the jury to disregard the comment would have changed the outcome.

Regarding Kevin Bowen's testimony about what Mendez told him, Counsel testified that he objected for hearsay but does not recall the bench conference from seven (7) years ago (Nov. Tr. 114:7). Counsel testified that what the judge said in the bench conference stood and does not recall mentioning the Confrontation Clause. Counsel testified that if he had objected for violation of the Confrontation Clause, and Bowen's testimony were excluded, he does not believe it would have changed the outcome of trial. Regarding Carnellious Stringer's testimony, Counsel testified that he cross-examined the best he could with the facts he had. Counsel testified that the case was that Applicant and others got together, and everyone involved was culpable. Counsel testified that he believes if he had obtained a transcript from Stringer's guilty plea that it would not have mattered in Applicant's trial.

Regarding testimony of flight, Counsel testified that he does not recall flight being in Applicant's first trial and might have been suspicious of flight. Counsel testified that he does not recall speaking to Cheryl Rice, Lakeisha Rice, or Richie Foster or Kim Parnell. Counsel testified that he does not recall the purpose of his cross-examination of Cheryl Rice but did not believe Cheryl Rice's testimony was material to the case. Counsel testified that he did not believe there

was a basis to object to Lakeisha Rice's testimony that Applicant was in an alternative school and does not believe the exclusion of Rice's testimony would have changed the outcome. Counsel testified that he does not know why he did not cross-examine Lakeisha Rice but did not see a reason to. Regarding Kim Parnell's testimony, Counsel testified that he believed it was objectionable as hearsay but does not recall why he did not object but thinks the State was trying to impeach Zaria Owens. Regarding Richie Foster's testimony, Counsel testified that he crossed Foster about flight. Counsel further testified that flight was not a material issue in the case, and he does not believe flight had an effect on the outcome of trial. Counsel testified that he believed the State interjected the speculation first. Regarding Zaria Owens' testimony, Counsel testified that he spoke to Owens before trial but does not recall the extent of the conversation. Counsel testified that he did not cross-examine Owens because he did not believe it would be beneficial to the case. Counsel testified that the hearsay testimony (Nov. Tr. 244) was objectionable, but he does not know of a specific reason for not objecting. Regarding Jonathan Lawson, Counsel testified that there was testimony of a struggle in the second trial, and Counsel believed the testimony to be favorable to Applicant.

Counsel testified that two trials are never the same, some witnesses' testimonies change between the first and second trial. Counsel testified that he does not recall any of the witnesses' testimonies being substantially inconsistent between Applicant's first and second trial, and the State's theory of the case remained constant. Counsel testified that he does not believe cross-examining the witnesses on minor inconsistencies would have changed the outcome of Applicant's trial. Counsel testified that a single trial depends on how the jury perceives the cases. Counsel testified that it is reasonable for an attorney to change their strategy as a trial progresses. Counsel testified that he was prepared for Applicant's second trial. Counsel testified that using prior

testimony for impeachment depends on whether the facts are significant. Counsel testified that he made arguments in closing based on what was different in the second trial and what he believed to be most effective. Counsel testified that the State had sufficient evidence to convict Applicant, and Counsel did the best he could with the facts and evidence given.

Appellate Counsel's Testimony

Katherine Hudgins ("Appellate Counsel") testified that she was appointed to Applicant's case as appellate defender. Appellate Counsel testified that she read and reviewed the trial transcript from Applicant's trial to look for preserved errors and meritorious issues. Appellate Counsel testified that she does legal research and writes the brief. Appellate Counsel testified that she files an *Anders* brief if she does not find meritorious issues that may result in a reversal. Appellate Counsel testified that she filed an *Anders* brief in Applicant's case. Appellate Counsel testified that her hands were tied in Applicant's case because of issues that were not preserved by objection. Regarding the speculation issue, Appellate Counsel testified that while Counsel objected to it, she believed Counsel opened the door to this issue. Appellate Counsel testified that she wrote Applicant a letter (Appl.'s Ex. 3) to explain to Applicant why she filed an *Anders* brief in his case. Regarding the impeachment testimony of Zaria Owens, Appellate Counsel testified that Owens' testimony was properly admitted over Counsel's objection as impeachment under Rule 613(b). Appellate Counsel testified that there was no discussion of a *Sierra* argument. Regarding the testimony of Richie Foster about Zaria Owens, Appellate Counsel testified that she could not raise the issue on appeal because there was no objection. Regarding Deputy Bowens' testimony about what Cesar Mendez said, Appellate Counsel testified that Counsel objected to the statements for hearsay but not for a Confrontation Clause violation, which did not preserve the issue for appeal. Regarding speculation of flight, Appellate Counsel testified that Counsel's objection was weak

since Counsel asked about it, opening the door to the solicitor's testimony. Regarding Kim Parnell's testimony about Applicant's mother, Appellate Counsel testified that the testimony should have been objected to, and Appellate Counsel would have raised this issue on appeal if preserved. Regarding Kameron Wilson's reference to Applicant's first trial, Appellate Counsel testified that the reference should not have been made, and she would have raised the issue on appeal if Counsel had objected. Regarding a *Sierra* issue, Appellate Counsel testified that testimony by the solicitor was problematic, and she would have raised the issue on appeal if preserved. Appellate Counsel testified that in the *Sierra* case, the solicitor did not have a third-party present when the solicitor spoke to the witness. Appellate Counsel agreed that the solicitor in Applicant's case had a third-party present who testified at trial and was able to be cross-examined. Appellate Counsel testified that she could not say whether the Court of Appeals would have ruled in Applicant's favor on all the issues that could have been raised if preserved.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the trial transcript in its entirety and has heard the testimony at the PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony. After a careful review based on the *Strickland* standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "counsel's conduct so undermined the proper functioning of the

adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, 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. *Strickland*, 466 U.S. at 687–88; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Applicant must prove prejudice by showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

1. Failure to Properly Investigate, Prepare, and Effectively Represent Applicant Prior to and at his Second Trial

This Court finds Applicant failed to prove Counsel was ineffective for failing to properly investigate, prepare, and effectively represent him prior to and at his second trial. "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "The scope of a reasonable investigation depends on a number of issues, but at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331–32, 642

S.E.2d 590, 597 (2007). Counsel's duty to investigate is limited to reasonable investigations or a reasonable decision that makes particular investigations unnecessary. *Ard*, 372 S.C. at 331, 642 S.E.2d at 597; *Strickland*, 466 U.S. at 691. In applying the *Strickland* standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation should be evaluated for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014).

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 if counsel had more fully prepared. *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result. *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998). The applicant must further present evidence demonstrating how additional preparation and the discoverable matters or defenses would have resulted in a different outcome. *Harris v. State*, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (holding applicant's allegation that counsel's preparation was inadequate was merely speculative, and applicant failed to prove he was prejudiced by counsel's preparation), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

This Court finds Counsel's investigation, preparation, and representation of Applicant was reasonable under prevailing professional norms and thus, was not deficient. This Court finds credible Counsel's testimony that he was prepared to try Applicant's case. This Court finds credible Counsel's testimony that he reviewed discovery with an investigator on his staff. This Court finds credible Counsel's testimony that his defense strategy was to create reasonable doubt.

and argue that although Applicant was present, he was not the trigger man. This Court finds credible Counsel's testimony that, in his experience, trial strategies change between a first and second trials based on the information that is presented to the jury. This Court finds credible Counsel's testimony that the State's theory of the case remained constant between the first and second trials. This Court finds credible Counsel's testimony that he made arguments in closing argument based on what was different in the second trial and what he believed to be most effective. This Court finds Applicant failed to prove he was prejudiced by Counsel's investigation, preparation, and representation by failing to present evidence demonstrating how additional investigations or preparation by Counsel would have resulted in a different outcome. Thus, Applicant failed to meet his burden.

A. Failure to properly advise Applicant and handle matters related to the additional indictment for first-degree burglary (2018-GS-42-0649).

This Court finds Applicant failed to prove Counsel was ineffective for failing to properly advise him and handle matters related to the indictment for first-degree burglary. This Court finds credible Counsel's testimony that the burglary indictment and the timing thereof were immaterial in Applicant's second trial. This Court finds the record reflects Counsel informed the court that he would bring up the timing of the indictment if it became apparent that the timing was beneficial to Applicant. (Nov. Tr. 15-16). This Court finds Applicant failed to prove prejudice by failing to show a reasonable probability the result of trial would have been different but for Counsel's performance in handling the burglary indictment. Thus, Applicant failed to meet his burden.

B. Failure to investigate and/or utilize witnesses for the defense. [Allegation withdrawn by Applicant]

C. Failure to effectively handle matters related to Cesar Mendez.

Failure to call Cesar Mendez as a witness at trial.

Failure to properly handle the State's motion in limine regarding the testimony of Cesar Mendez and failure to proffer his testimony.

This Court finds Applicant failed to prove Counsel was ineffective for failing to call Cesar Mendez as a witness at trial and failure to proffer his testimony. At trial, the State made a motion in limine to exclude the defense from question whether Mary Ann Kotlarich, the victim's mother, told Cesar Mendez to move or hide marijuana. (Nov. Tr. 11). Counsel informed the Court that Kotlarich testified in the first trial and denied telling Mendez to move or remove marijuana. (Nov. Tr. 13). When asked by the court if Counsel had a witness who could contradict Kotlarich's testimony if she denies the allegation, Counsel stated that Cesar Mendez can contradict it. (Nov. Tr. 13). When asked by the court, Counsel stated that he did not know whether he would call Mendez. (Nov. Tr. 13). The court told Counsel that he would permit questioning of Kotlarich regarding the marijuana if Counsel had a witness that could contradict Kotlarich if she denied. (Nov. Tr. 15).

This Court finds credible Counsel's testimony that although he does not recall why Cesar Mendez was not called as a witness at trial, he does not believe the testimony would have been favorable to Applicant. This Court finds credible Counsel's testimony that Cesar Mendez was present at the scene and could have identified the shooter(s). This Court finds Applicant failed to prove prejudice by failing to call Cesar Mendez as a witness in the PCR hearing. *See Glover v. State*, 318, 496, 498-99, 458 S.E.2d 285, 540 (1995) (applicant must prove counsel's inaction resulted in prejudice by producing witnesses at the PCR hearing to show a reasonable probability the result of trial would have been different based on the witness' testimony). Regarding the State's motion in limine, this Court finds Applicant failed to prove prejudice by failing prove there is a reasonable probability the result of trial would have been different but for Counsel's performance in handling the State's motion in limine. Thus, Applicant failed to meet his burden.

Failure to object to hearsay that violated the Confrontation Clause when law enforcement testified regarding the information provided by Cesar Mendez.

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to Deputy Bowen's testimony about what Cesar Mendez said for violation of the Confrontation Clause. This Court finds that Counsel objected to Bowen's testimony for hearsay, which was sustained initially. (Nov. Tr. 113:8-14). The solicitor then questioned Bowen about Mendez's emotion state, which he described as "distraught" and in "shock" when the officer arrived shortly after the incident. (Nov. Tr. 113:15-21). The solicitor then offered the testimony under the excited utterance exception of the hearsay rule. (Nov. Tr. 114-15). Deputy Bowen testified that Cesar Mendez told him that four (4) men were present, and Mendez identified Elian Nava as one of the men. (Nov. Tr. 114). Bowen testified that Mendez told him that Nava did not fire a shot, but two (2) Black males fired shots. (Nov. Tr. 115).

This Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object to testimony of Mendez's statements for violation of the Confrontation Clause. The Sixth Amendment's Confrontation Clause guarantees the accused right to confront witnesses against him. U.S. Const. amend VI. The Confrontation Clause bars a testimonial out-of-court statement by a witness unless the witness is subject to cross-examination by the defendant. *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford v. Washington*, 541 U.S. 36 (2004). A violation of the Sixth Amendment right to confront witnesses is not a per se reversible error, but depends upon a host of factors such as (1) the importance of the witnesses' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of corroborating or contradicting testimony by the witness; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case. *State v. Sierra*, 337 S.C. 368, 379, 523 S.E.2d 187, 193 (1999).

Applying the factors from *Sierra*, this Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object. Mendez's statements established that four (4) men were present in the victim's garage: Elian Nava and two (2) unidentified Black men who fired shots. The State presented testimony from Elian Nava, Applicant's co-defendant, who placed himself, Cesar Mendez, Carnellious Stringer, and Applicant in the victim's garage at the time of the shooting. (Nov. Tr. 204-07). Nava testified that Applicant and Stringer had guns inside of the garage when victim was shot. (Nov. Tr. 206-07). Kameron Wilson, Applicant's co-defendant, testified that he drove Applicant and the others to the victim's house, and four (4) men got out of the car. (Nov. Tr. 150). Wilson testified that he only saw Applicant and Stringer with guns that night. (Nov. Tr. 151).

This Court finds Bowen's testimony of Mendez' statements was merely cumulative to and corroborated the testimonies of Nava and Wilson, establishing that four (4) men were present in the victim's garage including two (2) Black men with guns. This Court finds that Nava's and Wilson's testimonies sufficiently established those facts irrespective of Mendez' statements such that if Mendez' statements had been excluded from trial, it would not have made a difference. Accordingly, this Court finds Mendez's statements were not important to the prosecution's case since the information provided from the statements was presented through the testimonies of Nava and Wilson. This Court finds credible Counsel's testimony that he does not believe the result of Applicant's trial would have been different if he had objected to, and the court had excluded, Bowen's testimony regarding what Mendez told him.

This Court finds the prosecution's case was strong without Mendez' statements since two eyewitnesses, Nava and Wilson, placed Applicant and Stringer at the scene with guns when the victim was shot. This Court finds Applicant failed to prove prejudice by failing to show a

reasonable probability that the result of trial would have been different but for Counsel's failure to object to the testimony as a violation of the Confrontation Clause. This Court need not address whether Counsel was deficient for failing to object because Applicant failed to prove prejudice. *Strickland*, 466 U.S. at 697 (stating if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed). Thus, Applicant failed to meet his burden.

D. Failure to effectively handle matters related to Applicant's co-defendant, Carnellious Stringer.

Failure to utilize/and or obtain the transcript of Stringer's guilty plea.

Failure to address the information provided regarding Stringer's plea to the court during sentencing.

This Court finds Applicant failed to prove Counsel was ineffective for failing to obtain and utilize the transcript form Stringer's guilty plea and failing to give the information from the plea to the court during Applicant's sentencing. At Applicant's sentencing, the judge asked for his memory to be refreshed regarding the admissions Stringer made at his guilty plea. (Nov. Tr. 364). At Stringer's guilty plea hearing, Stringer denied knowing the names of the others that were present and admitted to shooting his firearm once. (Appl.'s Ex. 7, pages 24-25), This Court finds ***credible*** Counsel's testimony that he believes obtaining a transcript from Stringer's guilty plea would not have mattered in Applicant's case. Applicant and Stringer both received thirty (30) year sentences. This Court finds Applicant failed to prove he was prejudiced by failing to show there's a reasonable probability the result of his trial or sentencing would have been different but for Counsel's failure to obtain, utilize, and present information from Stringer's guilty plea. *See Harris*, 377 S.C. at 77, 659 S.E.2d at 146 (stating that even if the applicant showed counsel was deficient for failing to obtain a transcript, the applicant failed to prove the allege deficiency prejudiced his defense).

abrogated on other grounds by Smalls, 422 S.C. 174, 810 S.E.2d 836. Thus, Applicant failed to meet his burden.

E. Failure to Prepare for the State's Evidence of Flight that was not presented in the first trial.

Failure to Object to the Line of Questioning and Hearsay Evidence Offered Regarding Flight in Applicant's Second Trial.

This Court finds Applicant failed to prove Counsel was ineffective for failing to prepare for the State's evidence of flight in the second trial that was not presented in Applicant's first trial. This Court find's credible Counsel's testimony that the State's theory of the case remained constant between the first and second trials. This Court finds credible Counsel's testimony that that he does not recall flight being in Applicant's first trial and although he might have been suspicious of flight in the second trial, he did not believe evidence of flight in the second trial flight was a material issue that had an effect on the outcome of trial. This Court finds Applicant failed to prove he was prejudiced by Counsel's performance because there was overwhelming evidence of Applicant's guilt as two (2) eyewitnesses, Nava and Wilson, testified that Applicant and Stringer had guns, and Nava testified that Stringer shot the victim during the course of the robbery. *See Brown v. State*, 383 S.C. 506, 518, 680 S.E.2d 909, 916 (2009) (stating there was overwhelming evidence of the applicant's guilt where the state presented testimony from four (4) eyewitnesses who saw the applicant committing the crime). This Court finds Applicant failed to prove there is a reasonable probability that the result of trial would have been different but for Counsel's performance regarding evidence of flight.

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to the line of questioning and hearsay evidence offered regarding flight in Applicant's second trial. Investigator Kim Parnell testified in the second trial that she spoke to Applicant's mother who told

Parnell that she had contact with Applicant and tried to get him to turn himself in. (Nov. Tr. 233-34). This Court finds credible Counsel's testimony that he did not believe flight was a material issue that had an effect on the outcome of Applicant's trial. Since there was overwhelming evidence of Applicant's guilt, this Court finds Applicant failed to prove prejudice by failing to show a reasonable probability that the result of trial would have been different but for Counsel's failure to object to the line of questioning and hearsay testimony regarding flight. Thus, Applicant failed to meet his burden.

F. Failure to object to Kameron Wilson referencing Applicant's first trial

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to Kameron Wilson referencing Applicant's first trial. This Court finds credible Counsel's testimony that he does not believe asking for an instruction for the jury to disregard the comment would have changed the outcome. Since there was overwhelming evidence of Applicant's guilt, this Court finds Applicant failed to prove prejudice by failing to show a reasonable probability that the result of trial would have been different but for Counsel's failure to object to Wilson's reference to Applicant's first trial. Thus, Applicant failed to meet his burden.

G. Failure to make objections and arguments in the first and second trial and prepare for the testimony of Zaria Owens and the State's witnesses regarding meeting with her.

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to and prepare for the testimony of Zaria Owens and the State's witness regarding meeting with her. When questioning a witness about a prior inconsistent statement that the witness allegedly made to the cross-examiner, the cross-examiner is implicated as a witness with the natural result of pitting the cross-examiner's memory and credibility against that of the witness. *Sierra*, 337 S.C. at 373, 523 S.E.2d at 189. Absent written or recorded statements, the natural source of extrinsic

proof of the prior inconsistent statement under Rule 613, SCRE, is the testimony of the person to whom the statement was made. *Id.*

In *Sierra*, the Court of Appeals held a solicitor's questioning of a witness regarding what the witness told the solicitor was improper where there was *no independent evidence* presented to establish the witness' statement, and the solicitor argued her own version of the prior conversation to the jury. *Id.* at 376, 523 S.E.2d at 191 (emphasis added). The witness testified that the drugs in question belonged to him, and his co-defendant knew nothing about it. *Id.* at 371, 523 S.E.2d at 188. Attempting to impeach the witness for a prior inconsistent statement, the solicitor questioned the witness about statements the witness made to the solicitor in a pretrial meeting. *Id.* at 371-72, 523 S.E.2d at 188-89. The solicitor presented *no independent evidence* to establish that the witness made the statement. *Id* (emphasis added). The solicitor argued her version of the prior conversation to the jury in closing arguments. *Id.* The Court reasoned the solicitor's attempt to impeach the witness under Rule 613 was improper because the solicitor implicated themselves as a witness, pitting the solicitor's memory against the witness' credibility, since there was *no extrinsic evidence of the witness' statement* other than the solicitor's knowledge. *Id.* (emphasis added). The solicitor violated the Sixth Amendment's Confrontation Clause by implicating themselves as a witness because the defendant was denied the opportunity to cross-examine the solicitor about the statements. *Id.* at 378, 523 S.E.2d at 192. The court determined the solicitor's statements were prejudicial to the defendant because the case was circumstantial, credibility was crucial to the case, and there was *no other evidence offered* to dispute the witness' testimony besides the solicitor's word. *Id.* at 380, 523 S.E.2d at 193.

In Applicant's second trial, Zaria Owens testified that she had contact with Applicant after the shooting, but she *denied* telling the solicitor and an investigator that Applicant was "involved"

in a robbery, and nobody was supposed to get hurt[.]" (Nov. Tr. 231) (emphasis added). In response to Owens' denial, the solicitor presented testimony from Investigator Thomas Smith, who was present at the meeting between Owens and the solicitor, to impeach Owens using her prior statement to the solicitor about Applicant's involvement in the robbery. (Nov. Tr. 244-45).

Unlike in *Sierra*, the solicitor's impeachment of Owens with her prior statements did not depend solely on the solicitor's word or recollection because the solicitor presented extrinsic evidence through the testimony of Investigator Smith to establish that Owens had in fact made the statement. Owens was presented with sufficient information regarding the prior statement she made to the solicitor, and when she denied it, the solicitor presented the testimony of Investigator Smith to attack Owens' credibility, which is allowed under Rule 613(b). *See* Rule 613(b), SCRE. Additionally, unlike in *Sierra*, there is no Confrontation Clause violation because Investigator Thomas testified and was subject to cross-examination by Applicant. Since the solicitor's questioning did not violate *Sierra* or the Confrontation Clause, this Court finds Applicant failed to prove Counsel was deficient for failing to object.

This Court finds Counsel articulated a reasonable strategic decision for not cross-examining Owen because this Court finds credible Counsel's testimony that he did not believe cross-examining Owens would be beneficial to the case. In accordance with *Strickland*, this Court defers to Counsel's judgment. This Court finds Applicant failed to prove prejudice by failing to show a reasonable probability that the result of trial would have been different but for Counsel's failure to object, arguments, and preparation regarding Owens' testimony. Thus, Applicant failed to meet his burden.

H. Failure to effectively utilize information contained in discovery and testimony offered at the first trial to cross-examine and/or impeach the following witnesses: Jonathan Lawson, Kevin Bowen, Wendy Thomas, Mary Ann Kotlarich, Kameron Wilson, Elian Nava, and Dr. Wren.

This Court finds Applicant failed to prove Counsel was ineffective for failing to utilize the information contained in discovery and testimony from the first trial to cross-examine and/or impeach Jonathan Lawson, Kevin Bowen, Wendy Thomas, Mary Ann Kotlarich, Kameron Wilson, Elian Nava, and Dr. Wren. Applicant cited *Harris v. State*.

In *Harris*, the Supreme Court held trial counsel was not ineffective for failing to prepare for a defendant's first and second trial by not obtaining the transcript from first trial and not impeaching witnesses in the second trial for statements made in the first trial where the witnesses' statements were essentially the same. *Harris*, 377 S.C. at 76, 659 S.E.2d at 146-47, *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836. The applicant alleged trial counsel was ineffective for failing to prepare for the second trial by failing to obtain a transcript from the first trial and failing to cross-examine the State's witnesses for statements made in the first trial. *Id.* Trial counsel testified at the PCR hearing that he reviewed the discovery materials; there were no additions to discovery between the first and second trials; the facts were fresh on his mind for the second trial; and he had mastered the applicant's defense and was prepared for the applicant's case. *Id.* at 74, 659 S.E.2d at 144-45. Trial counsel acknowledged there were differences in officer testimony from the first and second trials. *Id.* at 78, 659 S.E.2d at 147. In the applicant's first trial, an officer who arrested the applicant testified that the applicant stated "you got me;" however, in the second trial, a different officer, who assisted in the arrest, testified that the applicant said "you got me. I did it. You got me[.]" *Id.* The Court determined that the testimonies from both officers in the separate trials were "essentially the same," and the fact that trial counsel did not obtain a transcript to impeach the officer in the second trial was "inconsequential." *Id.* The Court held the applicant failed to prove he was prejudiced by trial counsel's preparation and failure to obtain a

transcript from the first trial to impeach the witnesses for prior inconsistent statements because there was overwhelming evidence of the applicant's guilt. *Id.*

This Court has reviewed the trial transcripts and compared the testimonies of the witnesses from Applicant's first and second trials. A summary of the testimonies from the witnesses at issue are as follows:

Deputy Kevin Bowen

1st Trial: testified that he arrived and noticed a male and female. (Feb. Tr. 70). The male was a dark-skinned Hispanic who had knowledge of someone involved, and the name provided was a Hispanic name. (Feb. Tr. 71-72).

2nd Trial: testified that he arrived and noticed a male and female. (Nov. Tr. 111). The male was identified as Cesar Mendez. (Nov. Tr. 112). Mendez identified Elian Nava as the only person he knew. Mendez indicated that two (2) Black men fired shots. (Nov. Tr. 112-115).

Officer Wendy Thomas

1st Trial: testified that she arrived to assist and saw Bowen speaking to a male and female. (Feb. Tr. 76). Thomas took the female, who was identified as the victim's mother. (Feb. Tr. 76-77). The victim's mother's demeanor was distraught, and Thomas stayed with her for approximately one (1) hour until a victim's advocate and an investigator arrived. (Feb. Tr. 76-77).

2nd Trial: testified that she spoke to a female, who was identified as the victim's mother. (Nov. Tr. 111-12). The victim's mother was distraught, confused, and crying. (Nov. Tr. 118). Thomas stayed with her for approximately thirty (30) minutes. (Nov. Tr. 118).

Investigator Jonathan Lawson

1st Trial: testified that based on the location, it appeared the shooter(s) were moving around. Based on observation, it appeared that a struggl had ensued. (Feb. Tr. 94).

2nd Trial: testified that he could tell from the scene that some type of gunfight had occurred, and if a struggle ensued, things could have been kicked around. (Nov. Tr. 90).

Mary Ann Kotlarich

1st Trial: testified that she woke up to a noise around 3:34 am, got out of bed and went looking for the victim. (Feb. Tr. 105-06). She went to the garage and does not remember if the main garage door was open or closed, but if opened, the victim would have been the one to open it. (Feb. Tr. 108).

She went to the front door, heard a man screaming and went back to the garage, where she saw a man standing. (Feb. Tr. 108-09). She asked the man who he was, what was going on, and where was the victim. (Feb. Tr. 109). The man responded and pointed, and she saw the victim lying on the ground. (Feb. Tr. 109-10).

2nd Trial: testified that she heard noises around 3:30 am and went looking for the victim. (Nov. Tr. 121-22). She looked around the garage but did not see anything. (Nov. Tr. 122). She does not recall whether the garage door was open or closed but if open when police arrived, she would have been the one to open it. (Nov. Tr. 123). She went to the front door, heard yelling, and went back to the garage where she saw a man standing. (Nov. Tr. 123-24). She did not know who the man was. (Nov. Tr. 124). She asked the man what was going on and where was the victim. The man pointed, and she saw the victim lying on the ground. (Nov. Tr. 124).

Kameron Wilson

1st Trial: testified that he understood from Applicant that they were going to pick up Elian Nava to rob him and talk of the robbery came up when Nava got into the car. (Feb. Tr. 131). There was no talk of a robbery before Nava got in. (Feb. Tr. 131). Applicant was involved in the robbery talk. (Feb. Tr. 132). Wilson gave the group a ride and was just the driver; Wilson was not going to rob anyone. (Feb. Tr. 132). Wilson understood that he was to stay in the car while the others committed the robbery. (Feb. Tr. 132-33). Applicant and Stringer had guns. (Feb. Tr. 138-39). While waiting in the car, Wilson heard gunshots and saw people, Applicant, Stringer, and Nava running back to the car. (Feb. Tr. 140-41)

2nd Trial: testified that he was going to Elian Nava's house to pick him up to find someone with weed. (Nov. Tr. 145). Applicant used the words "money mission" when he texted Wilson on Snap Chat and asked Wilson to pick him up. (Nov. Tr. 145). Wilson believed he was on a "money mission" when Applicant picked him up, and "money mission" could mean a lot of things. (Nov. Tr. 146). The group picked up Nava then went to Cesar Mendez because Nava believed Mendez had weed. (Nov. Tr. 146). Talk of the robbery started on the way to Mendez. (Nov. Tr. 146). Wilson did not talk about the robbery but was driving. (Nov. Tr. 146-47). Wilson knew the group was going to rob someone but continued to drive them. (Nov. Tr. 146-47). Wilson stayed in the car while the others went up to the house. (Nov. Tr. 150-51). Applicant and Stringer had guns that night. (Nov. Tr. 151). Wilson heard three (3) gunshots and saw Applicant, Stringer, and Nava running back to his car. (Nov. Tr. 153-53).

Elian Nava

1st Trial: testified that he did not really know the victim, met the victim one? (1) time, and the victim sold bud to one of Nava's friends. (Feb. Tr. 174).

Applicant, Nava, Stringer, and Wilson were going to rob someone; the group did not include Mendez in the robbery plan. (Feb. Tr. 177). Applicant and Stringer (A.KA. "Neal" for Carnellious) came into the garage with guns. (Feb. Tr. 179). Applicant and Stringer started shooting. (Feb. Tr. 179). Applicant and the victim started wrestling; Stringer pointed a gun at Nava and Mendez. (Feb. Tr. 179). Nava heard gunshots bud did not know if the victim was hit. (Feb. Tr. 180). After hearing shots, Stringer came back in and shot the victim in the back two (2) to three (3) times while the victim was holding onto Applicant's leg. (Feb. Tr. 180-82). Mendez pulled out his gun and started shooting at them. (Feb. Tr. 181). Nava ran back to the car with Applicant and Stringer. (Feb. Tr. 184).

2nd Trial: testified that he met the victim one (1) time but did not really know him. (Nov. Tr. 201). Nava hit up Mendez. (Nov. Tr. 199) If Mendez had marijuana, he would have been the target of the robbery. (Nov. Tr. 200). Mendez said he did not have marijuana but knew who did. (Nov. Tr. 200). Mendez was not in the robbery scheme. (Nov. Tr. 200-01). When they arrived at the victim's house, Nava was unsure whether it was still a robbery because the group did not discuss what would happen at the victim's house. (Nov. Tr. 203). When Applicant handed Nava money, Nava thought the group just wanted to buy weed. (Nov. Tr. 203). Applicant and Stringer entered the garage with guns pointed at Nava and the victim. (Nov. Tr. 205). The victim started fighting Applicant, then Nava heard gunshots. Nov. Tr. 205). Stringer came back into the garage. (Nov. Tr. 206). While the victim was holding onto Applicant's leg, Stringer shot the victim three (3) times in the back. (Nov. Tr. 206-07). Mendez pulled out a gun and started shooting at Nava. (Nov. Tr. 207). Nava ran to the car with Applicant and Stringer. (Nov. Tr. 207).

Dr. John Wren

1st Trial: regarding the victim's position, testified that two (2) shots in the back came from the same general direction. (Feb. Tr. 249). The person that inflicted those wounds was firing down toward him in some manner. (Feb. Tr. 249). The victim had a close-range gunshot. (Feb. Tr. 249). The victim had an abraded area over his right eye and forehead with blood draining, a superficial minor laceration to his posterior and superior right ear, and contusions of the upper mid abdomen. (Feb. Tr. 250).

2nd Trial: testified that the victim's gunshot wound to the leg did not hit anything of vital importance but was potentially fatal if it had not been treated. (Nov. Tr. 267). The victim's two (2) gunshot wounds to the back were immediately fatal. (Nov. Tr. 267). [No testimony about the victim's position or abrasions.]

This Court finds the witnesses testimonies were essentially the same in the second trial as in the first trial. This Court finds that any inconsistencies between each of the witnesses' testimonies in the first and second trials were minor and inconsequential to the State's theory of the case. This Court finds credible Counsel's testimony that he reviewed discovery and was prepared for Applicant's second trial. This Court finds credible Counsel's testimony that the State's theory of the case remained constant between the first and second trials. This Court finds credible Counsel's testimony that he cross-examined the witnesses the best he could with the facts he had. This Court finds credible Counsel's testimony that using prior testimony for impeachment depends on whether the facts are significant. This Court finds credible Counsel's testimony that there were no substantial inconsistencies between the witnesses' testimonies in the first and second trial.

This Court has reviewed Counsel's cross-examination of the witnesses and finds Counsel's performance was reasonable under prevailing professional norms and thus, not deficient. Due to the overwhelming evidence of Applicant's guilt, this Court finds Applicant failed to prove prejudice by failing to show a reasonable probability that the result of trial would have been different but for Counsel's failure to cross-examine any of the witnesses in question for prior inconsistent statements. Thus, Applicant failed to meet his burden.

I. Failure to present a reasonable defense through his closing argument and failed to present the theory of the case provided in the first trial.

This Court finds Applicant failed to prove Counsel was ineffective for failing to present a reasonable defense in closing argument and failed to present the same theory of the case provided in the first trial. As *Strickland* states, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant." *Strickland*,

466 U.S. at 688-89. Judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689.

This Court finds Counsel's performance in closing argument in Applicant's second trial was reasonable under prevailing professional norms and thus, was not deficient. This Court finds credible Counsel's testimony that, in his experience, a trial depends on how the jury perceives the case, and it is reasonable for an attorney to change their strategy as the trial progresses. This Court finds credible Counsel's testimony that he was prepared for Applicant's second trial. This Court finds credible Counsel's testimony that he made arguments in closing based on what was presented in the second trial and what he believed to be most effective. This Court finds credible Counsel's testimony that his defense strategy was to create reasonable doubt and argue that although Applicant was present, he was not the trigger man.

This Court finds Counsel articulated reasonable strategic decisions for what he believed was best to represent Applicant, and this Court defers to Counsel's judgment. This Court finds Applicant failed to prove prejudice by failing to present some argument or defense that Counsel could have presented in the second trial that would have resulted in a different outcome. Thus, Applicant failed to meet his burden.

Ineffective Assistance of Appellate Counsel

In analyzing ineffective assistance of appellate counsel, the court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (providing applicant must prove appellate counsel's performance was deficient and must prove prejudice by showing a reasonable probability the result of the proceeding would have been different but for counsel's errors).

2. ***Failure to raise any meritorious issues on appeal.***

This Court finds Applicant failed to prove Appellate Counsel was ineffective for failing to raise any meritorious issues on appeal. This Court finds credible Appellate Counsel's testimony that she read and reviewed the trial transcript from Applicant's trial to look for preserved errors and meritorious issues. This Court finds credible Appellate Counsel's testimony that she did legal research and wrote the brief based on her research. This Court finds credible Appellate Counsel's testimony that hands were tied in Applicant's case because of issues that were unpreserved. This Court finds credible Appellate Counsel's testimony that she filed an *Anders* brief in Applicant's case because she did not find any meritorious issues. This Court finds credible Appellate Counsel's testimony that she could not say whether the Court of Appeals would have ruled in Applicant's favor on call of the issues that could have been raised if preserved.

This Court finds Appellate Counsel's representation and performance was reasonable under prevailing professional norms and thus, was not deficient. This Court finds Appellate Counsel exercised reasonable judgment in deciding which issue(s) to raise on appeal in Applicant's case, and this Court defers to Appellate Counsel's judgment. This Court finds Applicant failed to prove prejudice by failing to show a reasonable probability that Applicant's appeal would have resulted in a different outcome but for Appellate Counsel's failure to raise an issue that she could have. Thus, Applicant failed to meet his burden.

[*Space left blank intentionally. Conclusion follows on next page.*]

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty (30) days of receipt by counsel of written notice of entry of judgment. *See* Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 3rd **day of** January **, 2025.**

HEATH P. TAYLOR
Presiding Judge
Seventh Judicial Circuit

Orangeburg, South Carolina

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