

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Kristi F. Curtis, Circuit Court Judge

2022-CP-04-00877

Darrell E. Blackwell, Appellant,

v.

The State, Respondent.

NOTICE OF APPEAL

Darrell E. Blackwell appeals the Honorable Kristi F. Curtis's Order of Dismissal filed July 8, 2025.

This eighteenth day of July, 2025.

s/ Susannah Ross
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Other Counsel of Record:
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STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

Darrell E. Blackwell, #325994,

Applicant,

v.

State of South Carolina,

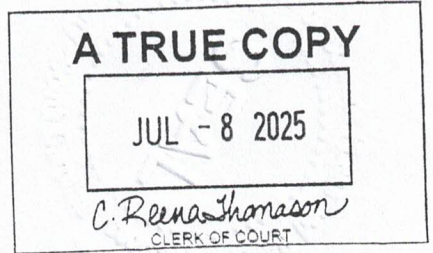
Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT

) CASE NO. 2022-CP-04-00877

**ORDER OF DISMISSAL
WITH PREJUDICE**

25 JUL 8 PM 4:15:21
Anderson, SC 0000 CP/SS



Presiding Judge:
Applicant's Attorney:
Respondent's Attorney:
Trial Counsel:

Appellate Counsel:
Solicitors:

Date of Hearing:
Court Reporter:

Hon. Kristi F. Curtis
Susannah C. Ross, Esq.
D. Russell Barlow, II, Esq.
A. Hadden Lucas, Esq.
Gordon A. Senerius, Esq.
Robert M. Dudek, Esq.
Catherine T. Huey, Esq.
Stan L. Overby, Esq.
September 16, 2024
Tara T. Scott

This matter comes before the Court by way of Darrell E. Blackwell's (Applicant) application for post-conviction relief (PCR) filed on April 20, 2022.¹ Respondent, the State of South Carolina, filed its Return and Partial Motion to Dismiss on February 15, 2024, requesting an evidentiary hearing on the claims of ineffective assistance of counsel. Applicant, through his appointed counsel Susannah C. Ross, Esquire (Attorney Ross), subsequently filed an Amended application for PCR on September 13, 2024.

An evidentiary hearing was convened on September 16, 2024, at the Anderson County Courthouse before the Honorable Kristi F. Curtis. Applicant was present and represented by

¹ On November 26, 2022, Susannah C. Ross, Esquire, was appointed to represent Applicant in this action.

Attorney Ross. Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented Respondent. Applicant testified on his own behalf at the evidentiary hearing. Respondent presented testimony from A. Hadden Lucas, Esquire, and Robert M. Dudek, Esquire (Appellate Counsel).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

The records before this Court establish that Applicant is presently confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment from the Anderson County Clerk of Court. In 2016, Applicant was arrested for taking \$2,500 in cash, a MacBook valued at \$1,300, and approximately \$500 in cigarettes from Shop Rite on Sayre Street in Anderson, South Carolina, while armed with a deadly weapon (2016A0410100033). Applicant was identified as the robber by surveillance video. During its March 2016 term, the Anderson County Grand Jury indicted Applicant on the charge of Armed Robbery (2016-GS-04-0043).

On October 8, 2018, Applicant proceeded to a jury trial before the Honorable J.C. "Buddy" Nicholson. Applicant was represented by Assistant Public Defenders A. Hadden Lucas (Trial Counsel) and Gordon A. Senerius of the Tenth Circuit Public Defender's Office. Deputy Solicitor Catherine T. Huey and Assistant Solicitor Stan L. Overby, Jr., of the Tenth Judicial Circuit prosecuted the case. At the conclusion of the trial, the jury found Applicant guilty as indicted. Judge Nicholson sentenced Applicant to eighteen (18) years imprisonment, with credit for thirty-three (33) days.

Applicant filed a timely notice of appeal on October 18, 2018. Applicant's appeal was perfected by Chief Appellate Defender Robert M. Dudek (Appellate Counsel) of the South Carolina Commission on Indigent Defense. Applicant asserted two (2) issues in his Initial Brief before the South Carolina Court of Appeals:

- I. Whether the court erred by admitting appellant's recorded statement into evidence, where the interrogating Detective, Garrett, did not testify, and was not subject to cross-examination, since this violated appellant's right to Confrontation and admitted hearsay evidence including Garrett repeatedly telling appellant that the videotape showed him robbing the store, and asserted that appellant was using a knife during the robbery, and insinuated the robbery was an "inside job" between appellant and the clerk who was supposed to be working that night?
- II. Whether the court erred by refusing to instruct the jury on the lesser-included offense of strong arm robbery, where there was no testimony appellant was armed with a deadly weapon, appellant denied using a knife, where the videotape was inconclusive on the knife, and where there was no evidence the clerk working at the store thought the toy gun was represented as being a real gun, since appellant was entitled to that lesser-included offense instruction under the "any evidence" standard?

In an unpublished opinion, the Court of Appeals dismissed the appeal and affirmed Applicant's sentence and conviction. State v. Blackwell, Op. No. 2021-UP-144 (S.C. Ct. App. filed May 5, 2021). The Remittitur was returned to the lower court on June 1, 2021.

FACTS GIVING RISE TO THE CONVICTION

This incident occurred on January 9, 2016, at Shop Rite on Sayre Street in Anderson County, South Carolina. The store was robbed, and Officer Rhonda Phillips (Officer Phillips) responded to the scene. The officer spoke to two (2) witnesses, who reported that a bearded white male left the scene of the crime in a white van. Officer Phillips also collected a copy of the surveillance video for the investigation. Deputy Craig Holbrooks (Deputy Holbrooks) watched the video that night and placed it into storage at the Anderson County Sheriff's Office. Additionally, he made a copy of it for the trial and confirmed the video used by the State was the

same one he reviewed the night of the robbery. Deputy Holbrooks noted that the person in the video was shown holding a knife and a gun in the recording. (Trial Tr. pp. 79, ll.4 – 102, ll. 15; St. Ex. 4-11).

Lieutenant Robert Gebing (Lieutenant Gebing) noted that after other officers could not identify the suspect in the video, the Sheriff's office reached out to local media to generate potential tips. Applicant's brother, Mark Steven Blackwell, recognized him in the surveillance video and informed police of his identity. Following the tip, Lieutenant Gebing and Detective Garrett went to the homes at 202 and 203 Gilbert Street, which they were told were residences occupied by Johnnie Taylor (Taylor), Applicant's mother, and Applicant. Upon arriving, officers observed a white van outside, which matched the description of the vehicle used in the robbery. Taylor spoke with the officers and showed them around her home, during which time they saw several items of clothing similar to those worn by the suspect in the surveillance video. Taylor permitted officers to collect the clothing. (Trial Tr. pp. 104, ll. 17 – 116, ll. 13; Trial Tr. pp. 134, ll. 6 – pp. 134, ll. 11; Trial Tr. pp. 169, ll. 20 – pp. 173, ll. 23; St. Ex. 15 – 19).

Investigator Kenneth Pigman (Investigator Pigman) accompanied Investigator Garrett while executing search warrants on the 202 and 203 Gilbert Street homes. Again, the white van was observed outside the home, and the investigators photographed it. The investigators also located a brown stocking cap behind the 203 Gilbert Street residence. At 202 Gilbert Street, the investigators found two unopened packs of Seneca cigarettes—the brand of cigarette stolen from Shop Rite—and a black jacket with an attached gray hood. The hat and jacket matched those the suspect wore in the surveillance video. (Trial Tr. pp. 15, ll. 17 – pp. 168, ll. 8; St. Ex. 22, 26).²

² At the conclusion of trial, Trial Counsel requested a charge on the offense of strong-arm robbery because during Applicant's interview, he did not recall having a knife with him and claimed the gun he used was not a lethal firearm, but rather an expensive toy gun that he found sometime

PRE-TRIAL JACKSON V. DENNO HEARING

Prior to trial, an audio recording of Applicant's interview with police was proffered by the State during a Jackson v. Denno³ hearing. Investigator Scotty Hill (Investigator Hill) testified at the hearing that he was present during the entirety of Applicant's interrogation, although Detective Garrett primarily interacted with Applicant. Investigator Hill testified that Applicant agreed to the questioning. Investigator Hill testified that Detective Garrett never misled Applicant about the information in law enforcement's possession. During the interview, Applicant admits to robbing the store that day, confirming that it was him captured on surveillance cameras within the store and claiming that the gun he used was a toy gun he found. (Trial Tr. pp. 53, ll. 1 – pp. 69, ll. 15; St. Ex. 2-A).

Trial Counsel objected to the admission of the audio recording on the grounds that the statement was not voluntarily given, arguing it should be suppressed based on the grounds that Applicant was not a "sophisticated man" and that he was "led along through a confession" without first viewing the surveillance video of the robbery. Based on this limited objection, the trial court denied the motion to suppress. (Trial Tr. pp. 69, ll. 17 – pp. 70, ll. 25). Investigator Hill testified he was one of the two officers present at Applicant's interview and was there for the entirety of it. Investigator Hill noted Applicant's statements to police were intelligently, knowingly, and voluntarily made. (Trial Tr. pp. 57, ll. 5 – pp. 64, ll. 15).

before the crime. Trial Counsel moved for a renewed directed verdict on the basis of insufficiency of evidence, specifically on the grounds that "the State did not prove beyond a reasonable doubt that the defendant was armed." The solicitor argued the video surveillance of the crime clearly demonstrated Applicant possessed a knife and that he did not dispute using a toy gun during the crime, rendering a strong-arm robbery charge inappropriate for jury consideration. The trial judge denied trial counsel's motion. (Trial Tr. pp. 219, ll. 19 – pp. 223, ll. 1; Trial Tr. pp. 247, ll. 17 – pp. 249, l. 5).

³ Jackson v. Denno, 378 U.S. 368 (1964).

Trial Counsel further objected to the statement's admission, claiming Detective Garrett's failure to testify at trial violated Applicant's Sixth Amendment right to confront his accusers, citing State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015). Trial Counsel claimed that any statement made by Detective Garrett during the interrogation was hearsay and was "clear[ly]" offered for the truth and not for non-hearsay purposes. Trial Counsel also claimed it was essential to exclude Detective Garrett's statements because they were "offered for context" regarding Applicant's statements to the police. (Trial Tr. pp. 183, ll. 5 – pp. 189, ll. 13).

The State disagreed with Trial Counsel's objection and explained that the facts of its case were opposite to those in Brewer because it redacted Detective Garrett's statements in which he referenced what any other person, including Applicant's mother, said to officers. The remaining portion of the recording only included Detective Garrett's questions to Applicant and his explanations of what officers found, including the content of the security footage played at trial. The State further explained that the recording was not being admitted for the "truth" in Detective Garrett's unredacted comments on the tape. Detective Garrett's statements were merely to provide context for Applicant's admissions to police. (Trial Tr. pp. 186, ll. 3 – pp. 192, ll. 23).

Trial Counsel noted that he had gone over the recording with the State and agreed upon portions that needed redaction to avoid the confrontation clause and hearsay issues. Trial Counsel clarified its position was that the video, in general, should be inadmissible because "all statements by [Detective] Garrett [were] inadmissible hearsay," violating the confrontation clause, and the statement was not freely and voluntarily given. The trial judge, noting Detective Garrett's hearsay statements were redacted, found Brewer did not apply and denied Trial Counsel's motion. (Trial Tr. pp. 189, ll. 14 – pp. 197, ll. 12; St. Ex. 2-A).

CURRENT ACTION BEFORE THE COURT

In his original application for post-conviction relief filed April 20, 2022, Applicant alleged he is being held in custody unlawfully for the following reasons:

- 1) Denied 6th Amendment Rights
 - a. "Interrogating Detective Garret who also took [Applicant's] statement was not made available at trial and was therefore not subject to cross examination".
- 2) Ineffective Assistance of Appellate Counsel
 - a. Appellate Counsel failed to raise issue on direct appeal of Trial Court's denial of trial counsel's motion for directed verdict.
 - b. Appellate Counsel failed to raise issue on direct appeal of trial judge making unestablished statements.
 - c. Appellate Counsel failed to raise issues on direct appeal of Trial Court error in allowing Investigator Hill to testify on truthfulness of investigation.

Applicant requested relief as follows:

"Sentence reversed and vacated sentence."

On September 13, 2024, Applicant filed an amended application alleging the following additional allegations:

- 3) Ineffective Assistance of Trial Counsel
 - a. Failing to review discovery with Applicant and advise him that still photographs could be taken from the video and admitted as evidence showing the presence of a knife and gun;
 - b. Failing to advise Applicant that a toy gun was "a representation of a deadly weapon" that satisfied the elements of armed robbery;
 - c. Failing to advise Applicant that the absence of available State witnesses to testify against him did not prevent the State from presenting an overwhelming case of guilt using the video and recorded statements only; and
 - d. Failing to argue that the use of photo stills of a knife allegedly taken from the store video violated the best evidence rule. (R. p. 90, 1.21 & SCRE 1002).
- 4) Ineffective Assistance of Appellate Counsel
 - a. Failing to brief the issue that the judge erred in allowing deputy Craig Holbrooks to testify that a photo still allegedly taken from the in-store video showed a bladed object. (R. p. 102, 1.4).
 - b. Failing to brief the issue of the trial judge's error in his denial of a directed verdict.

- c. Failing to brief the issue of the trial judge's error in making unestablished statements.
- 5) Denied 6th Amendment Rights
 - a. The absence of testimony from the State's available witnesses violated Applicant's Constitutional right to confront his accusers.

At the outset of the hearing, Applicant indicated he wished to withdraw his allegations of trial court error and proceed on the remainder of his allegations from his original and amended application. (PCR Tr. p. 5).

Before this Court are the Anderson County Clerk of Court records regarding the subject convictions and sentences; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; and the records of the current PCR action.

STANDARD OF REVIEW

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The Uniform Post-Conviction Procedure Act⁴ (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[.]

⁴ S.C. Code Ann. §§ 17-27-10 to -160.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard evidence presented at the evidentiary hearing and observed 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 section 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

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

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS

Allegation 4(a): Failing to review discovery with Applicant and advise him that still photographs could be taken from the video and admitted as evidence showing the presence of a knife and gun.

Applicant alleges that Trial Counsel was constitutionally ineffective for failing to review the discovery with him. Specifically, Applicant avers that Trial Counsel was ineffective for failing to review video discovery with Applicant, and for failing to advise him that still photographs could be taken from the video surveillance and be admitted into evidence to show Applicant was in possession of a weapon during the crime. This Court disagrees and finds this allegation 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 the 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. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel never showed him the entire video, and he turned down the plea because the footage that Trial Counsel showed him did not show Applicant holding a weapon. (PCR Tr. p. 10). Applicant testified that the video did not show

him holding a weapon, and he was so high at the time of the crime that he could not recall whether he had a weapon or not. (PCR Tr. p. 10). Applicant testified that a girl who lived behind the store came out of the store crying and told him the people in the store had harassed her. (PCR Tr. p. 11). Applicant testified he went into the store to confront the man who harassed the girl. (PCR Tr. p. 11). Applicant testified that he had never seen the part of the video that showed him with a weapon in his hand. (PCR Tr. p. 12). Applicant testified he would have taken the plea had he known about the video. (PCR Tr. p. 12). Applicant testified that in his statement to Investigator Garrett, he told him that he had found a toy gun the morning of the robbery, but he never told Investigator Garrett that he had a weapon or went into the store. (PCR Tr. p. 13). Applicant testified that he never saw the part of the video with him holding a knife, but a still photo from the video with Applicant holding a knife was shown at trial by the solicitor. (PCR Tr. p. 16). Applicant testified that the still photo of him holding a knife was never provided in discovery. (PCR Tr. p. 16). Applicant testified that had he known that he had a weapon, he would have taken the State's offer of seven years. (PCR Tr. p. 16).

On cross-examination, Applicant testified that he could not say what he and Trial Counsel discussed. (PCR Tr. p. 19). Applicant testified that he could not remember, as he was still on drugs at the time, and he was high when Trial Counsel advised him of the seven-year offer. (PCR Tr. p. 19). Applicant testified that he recalled Trial Counsel showing him a video of him entering the store, but it was not the video he saw the morning of the hearing. (PCR Tr. p. 19). Applicant testified he did meet with Trial Counsel and Trial Counsel believed him, but Applicant never saw the video, so he cannot testify to what happened. (PCR Tr. pp. 19–20). Applicant testified he met with Trial Counsel when he was out on bond, but he cannot recall his meetings with him because of his drug use. (PCR Tr. p. 20). Applicant testified that Trial Counsel could have shown him

discovery, and he might not remember because of the drugs and possible memory loss from a previous head injury. (PCR Tr. pp. 20–21). Applicant testified he did not recall committing the crime as he was on drugs, and he could not recall what happened during that time because he was “out of his mind”. (PCR Tr. p. 22). Applicant testified he has been clean while imprisoned. (PCR Tr. p. 22).

On direct examination, Trial Counsel testified that he was Applicant's fourth appointed attorney, and Applicant's case was almost two years old when he was appointed. (PCR Tr. p. 24). Trial Counsel testified that when he received Applicant's case file, it already had all the discovery, and Applicant's previous attorney had reviewed the discovery with Applicant. (PCR Tr. p. 24). Trial Counsel testified that he reviewed the discovery with Applicant at his office and met with him at least four times. (PCR Tr. p. 25). Trial Counsel testified that they met a few hours at a time, watching the videos during that time. (PCR Tr. p. 25). Trial Counsel testified that he reviewed the video evidence with Applicant at length on two separate occasions. (PCR Tr. p. 25). Trial Counsel testified he provided the video to Applicant before the PCR evidentiary hearing, and he is certain, based on his notes, that he reviewed the videos with Applicant. (PCR Tr. p. 25–26).

Trial Counsel testified that he was not provided still photographs before trial, and the stills were pulled from the video he reviewed with Applicant. (PCR Tr. p. 27). Trial Counsel testified that the video clearly showed Applicant. (PCR Tr. p. 27). Trial Counsel testified that he reviewed the entirety of the video with Applicant a couple of times. (PCR Tr. p. 27). Trial Counsel testified to the notes in Applicant's defense file made by Applicant's previous attorney, Austin McClain, as follows:

This is from back when, before I took the case on. So this is November 9, 2017. Austin says, "I've met with client on multiple occasions and reviewed all discovery with him, including video, multiple times. His daughter was present last time. Reviewed video with us. Mr. Blackwell, against my advice wants a trial. The

Solicitor has a great video of the armed robbery and, in general, a solid case. Mr. Blackwell didn't disagree with that. He just doesn't want to enter a plea."

(PCR Tr. p. 27, ll. 20 – p. 28, ll. 3).

Trial Counsel testified that he had the same advice for Applicant and told him there was no doubt about who it was in the video. (PCR Tr. p. 28). Trial Counsel testified that Applicant advised him that he was not going to plead to anything that involved prison time, and that Applicant told him, "God will not let me go to prison." (PCR Tr. p. 28). Trial Counsel testified that Applicant advised him repeatedly that he was looking for a miracle. (PCR Tr. p. 28).

On cross-examination, Trial Counsel testified that there were three videos, each about ten to twenty minutes long, and he reviewed every second of each video with Applicant. (PCR Tr. p. 32). Trial Counsel testified that he spent hours with Applicant reviewing the video, attempting to convince Applicant to accept the plea offer for strong-armed robbery. (PCR Tr. p. 32). Trial Counsel testified he reviewed the part of the video showing Applicant jumping over the counter, and it clearly showed a gun in Applicant's hand in the video. (PCR Tr. pp. 32–33). Trial Counsel testified he does not recall being confident about the video showing Applicant with a knife. (PCR Tr. p. 33).

On recross-examination, Trial Counsel testified that the video was entirely played for the jury based on his recollection and a brief review of the trial transcript. (PCR Tr. p. 36). Trial Counsel testified that the video was the primary evidence against Applicant. (PCR Tr. p. 36). Trial Counsel testified that he recalls an approximately six-by-ten picture given to the jury to review, rather than pausing the video. (PCR Tr. p. 37).

Findings

As an initial matter, this Court finds Applicant's testimony **not credible**. This Court further 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 additionally finds that Applicant has failed to overcome his burden of proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Trial Counsel **credibly** testified that he reviewed discovery with Applicant prior to trial, including the challenged portions of the videos. Trial Counsel **credibly** testified that he advised Applicant that the footage clearly depicted him committing the armed robbery and that it was in his best interest not to go to trial, but to plead guilty for a more favorable sentence.

Additionally, this Court finds that though Trial Counsel did not specifically review the photo stills of the video admitted at trial, those stills were taken from the footage Trial Counsel fully reviewed with Applicant and were part of Applicant's discovery. Notably, Applicant testified repeatedly that he did not clearly recall the armed robbery or his meetings with Trial Counsel due to drug use and an issue with his memory, and admitted it was possible he reviewed the entire video. Therefore, Trial Counsel was not deficient.

Moreover, Applicant failed to provide what could have been discovered or what other defenses he could have requested had Trial Counsel spent more time reviewing the videos with him, and how that would have changed the outcome of his trial. See Harris, 377 S.C. at 75-76, 659 S.E.2d at 145-46. Trial Counsel **credibly** testified that Applicant did not want to plead guilty to anything that involved prison time, and that Applicant was looking for a miracle. Additionally, Trial Counsel **credibly** testified there was overwhelming evidence of guilt, as the video clearly identified Applicant committing the armed robbery. See Smalls v. State, 422 S.C. 174, 188, 810

S.E.2d 836, 843 (2018) ("[T]he PCR court should consider the strength of the State's case in light of all the evidence presented to the jury.").

Notably, Trial Counsel **credibly** testified it was clear from the video that Applicant committed the robbery with a weapon, testifying the video was "yearbook quality." Further, Applicant's brother identified him as the one in the video (Trial Tr. p. 173), Applicant made a statement acknowledging it was him in the video going into the store that was robbed at the time of the robbery (Trial Tr. pp. 197 – 198), the items stolen from the store were found in Applicant's mother's residence (Trial Tr. pp. 162 – 166), and the vehicle used and clothing worn during the commission of the robbery were found in Applicant's residence (Trial Tr. pp. 159 – 161, 164 – 165). Therefore, Applicant is unable to show prejudice, that a different outcome would have resulted but for Trial Counsel's performance.

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 WITH PREJUDICE**.

Allegation 4(b): Failing to advise Applicant that a toy gun was 'a representation of a deadly weapon' that satisfied the elements of armed robbery.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to advise him on the elements of Armed Robbery. Specifically, Applicant avers that Trial Counsel was ineffective for failing to advise him that a toy gun was "a representation of a deadly weapon" that properly satisfied the elements of Armed Robbery. This Court disagrees and finds this allegation without merit.

"Armed robbery occurs when a person commits robbery while either armed with a deadly weapon or alleging to be armed by the representation of a deadly weapon. S.C. Code Ann. § 16–11–330 (2003)." State v. Mitchell, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009). In State v. Bailey, the Supreme Court held that "a gun used in a robbery is a deadly weapon regardless of its alleged inoperability." 273 S.C. 467, 257 S.E.2d 231 (1979). In Tasco, the Supreme Court cited the North Carolina Supreme Court's opinion in State v. Thompson, 297 N.C. 285, 254 S.E.2d 526, 528 (1979), where they said, "when a person perpetrates a robbery by brandishing an instrument which appears to be a firearm ... in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be, a firearm" State v. Tasco, 292 S.C. 270, 272, 356 S.E.2d 117, 118 (1987).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he never discussed a gun with Trial Counsel, because he did not see the gun in the video. (PCR Tr. p. 14). Applicant testified he honestly believed he did not have a weapon in his hand, but having reviewed the whole video prior to the PCR evidentiary hearing, Applicant testified he would have pled guilty. (PCR Tr. p. 14).

On direct examination, Trial Counsel testified that he definitely advised Applicant of the elements of armed robbery and that a toy gun could be used to charge Applicant with armed robbery. (PCR Tr. pp. 28 – 29). Trial Counsel testified that his practice is to print every statute

and review it with his client, and in reviewing Applicant's defense file, it included a printout of the armed robbery statute with Trial Counsel's name printed on it from WestLaw. (PCR Tr. p. 29).

Findings

This Court further finds from 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 additionally 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 he reviewed the elements of armed robbery with Applicant and advised Applicant that he could be charged with armed robbery, even considering that he used a toy gun. Trial Counsel credibly testified that Applicant's defense file contained a copy of the printed statute, which he reviewed with Applicant. *See* S.C. Code Ann. § 16–11–330 (2003) (Armed robbery occurs when a person commits robbery while either armed with a deadly weapon or alleging to be armed by the representation of a deadly weapon.). Applicant merely alleged that he did not discuss the existence of a gun with Trial Counsel, which this Court addressed *supra* in its findings that Trial Counsel reviewed the entirety of the videos with Applicant. Therefore, Trial Counsel was not deficient.

Additionally, Applicant failed to show how the result of his proceeding would have been different but for Trial Counsel's performance. As noted *supra*, Applicant did not want to accept any plea that involved prison time and was hoping for a miracle. Importantly, Applicant was not only in possession of a toy gun during the commission of the robbery, but a knife, as well. (Trial Tr. pp. 101 – 102, 221). Therefore, Applicant cannot establish prejudice.

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 WITH PREJUDICE**.

Allegation 4(c): Failing to advise Applicant that the absence of available State witnesses to testify against him did not prevent the State from presenting an overwhelming case of guilt using the video and recorded statements only.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to advise Applicant that the State was not prevented from presenting an overwhelming case of guilt against Applicant where certain State's witnesses did not testify. Specifically, Applicant stated Trial Counsel failed to advise him that the absence of the victim and investigator did not help him at trial. This Court disagrees and finds this allegation without merit.

Trial

Prior to the introduction of Applicant's video-recorded statement, Trial Counsel objected to the statement based on hearsay and the confrontation clause because Investigator Garrett was not available to be cross-examined. (Trial Tr. pp. 148–149). Specifically, Trial Counsel argued that Investigator Garrett asked Applicant all the questions, and the absence of Investigator Garrett's

testimony raises issues of hearsay and violation of the confrontation clause. (Trial Tr. p. 148). Regarding hearsay, Trial Counsel argued there were hearsay-within-hearsay concerns and suggested only playing the portions where Applicant was making his statements. (Trial Tr. pp. 148–149).

The State advised the trial court that Detective Scotty Hill (Investigator Hill), who was present during Applicant's statement, would be testifying. (Trial Tr. p. 149). The State argued for the admission of Applicant's statement through Detective Hill and stated they had redacted portions of the statement that made references to Applicant's drug use. (Trial Tr. p. 151). In response, Trial Counsel argued that though Detective Hill was present, he did not pose any of the questions to Applicant. (PCR Tr. p. 151). The trial court responded that Detective Hill was present and listened to the questions, but that an in camera hearing could take place prior to Detective Hill giving his testimony before the jury to ascertain if he was present throughout the entirety of Applicant's statement. (Trial Tr. pp. 151–152).

Upon the State moving the audio of Applicant's statement into evidence, Trial Counsel renewed his objection. The trial court heard arguments from Trial Counsel and the State, and Trial Counsel questioned Investigator Hill outside the presence of the jury. (Trial Tr. pp. 183–192). The trial court ultimately denied Trial Counsel's motion to suppress portions of the video, reasoning that potential hearsay statements had been redacted and the right to confrontation in State v. Brewer⁵ was related to the hearsay statement and not applicable in Applicant's case. (Trial Tr. p. 192).

In his closing argument, Trial Counsel argued to the jury about the importance of having eyewitnesses in a case like this, and highlighted the absence of the store clerks, the lead

⁵ 411 S.C. 401, 768 S.E.2d 656 (2015).

investigator, and other witnesses from the crime scene. Trial Counsel further advised the jury of the State's burden of proof to convict Applicant of Armed Robbery, and how establishing the element requiring possession of a weapon can be difficult without any eyewitnesses. (Trial Tr. pp. 229, ll. 8 – pp. 230, ll. 10).

PCR Evidentiary Hearing

On direct examination, Applicant testified as follows concerning this allegation:

- A. They wasn't at trial or my investigator. He wasn't at trial either. They had no witness. My brother testified he thought it was me from a video.
- Q. And had someone told you about the State's chances of proceeding and winning at trial if the victims and investigator weren't there to testify against you?
- A. Yeah, I talked to the attorney. I had to go to, roll call is what they called it, at the courthouse. And I talked to a lawyer in the elevator and told him that the two witnesses had been extradited. And he said, well, they can't try you if they don't have any witnesses. That's what he told me. And I believed that. And that was another reason I turned down the seven years. I said, well, surely he knows what he's talking about.
- Q. Did you and your trial attorney ever discuss that matter? Whether they could still convict you without victims testifying?
- A. Really, I was still getting high. I don't even – really couldn't tell you what me and my lawyer talked about. That's the honest truth.

(PCR Tr. pp. 14 – 15).

On cross-examination, Applicant testified that he stayed in the county detention center thirty-five days after his arrest and was released out on bond for the next two years. (PCR Tr. p. 19). Applicant testified he met with Trial Counsel prior to trial, but he does not recall their conversations because Applicant was using drugs during that time. (PCR Tr. pp. 19–20). Applicant testified he had an evaluation during this time, and the doctor told him he had short-term and long-term memory loss from a previous blow to the head. (PCR Tr. pp. 20–21). Applicant testified that he cannot remember a lot of stuff that happened between his arrest and trial because he was "out of his mind". (PCR Tr. p. 22).

On direct examination, Trial Counsel testified that Applicant's prior attorney had Applicant evaluated, and he was found criminally responsible and competent to stand trial. (PCR Tr. p. 26). Trial Counsel testified that the video clearly showed Applicant committing the armed robbery. (PCR Tr. p. 27). Trial Counsel testified that the trial was "unusual" because the lead investigator, Detective Jamie Garrett (Investigator Garrett), was not present to testify. (PCR Tr. p. 29). Trial Counsel testified that they learned of Investigator Garrett's absence either right at the start of the trial or a couple of days prior. (PCR Tr. p. 29). Trial Counsel testified that the store clerk, a victim in this case, did not testify at Applicant's trial, either. (PCR Tr. p. 29). Trial Counsel testified that both Investigator Garrett and the store clerk were included on the State's witness list, but the State rested without calling them. (PCR Tr. pp. 29). Trial Counsel testified that the State relied on the video and the Applicant's brother, Mr. Black, to identify Applicant. (PCR Tr. pp. 29–30).

On cross-examination, Trial Counsel testified that in his opening statement, he emphasized the jury's duty in holding the government to their burden; and he argued in closing that the jury should consider that certain fact witnesses were present but did not testify. (PCR Tr. p. 33). Trial Counsel testified that he had more to argue in closing than he anticipated, because he had expected the store clerk to testify, and he didn't. (PCR Tr. p. 33). Trial Counsel testified that he assumed that since the store clerk was on the witness list and was available to testify, the State would have called him. (PCR Tr. p. 33). Trial Counsel testified that he did not recall anyone telling him the store clerk would not be called to testify, and it surprised him when the store clerk did not testify. (PCR Tr. p. 34). Trial Counsel testified that the availability of the store clerk was discussed during plea negotiations, and his notes indicate that the State advised him that the store clerk had moved out of the state. (PCR Tr. p. 34). Trial Counsel testified that the plea offer might have been influenced by the store clerk's possible unavailability. (PCR Tr. p. 34). Trial Counsel testified that

he does not have a specific memory of discussing the potential unavailability of the clerk with Applicant. (PCR Tr. p. 35).

On redirect-examination, Trial Counsel testified that once he learned that Investigator Garrett was not testifying, he objected to portions of the video of Applicant's statement that included Investigator Garrett. (PCR Tr. p. 35). Trial Counsel testified that he objected based on hearsay and the confrontation clause. (PCR Tr. p. 35).

Findings

This Court further finds the combination of the record and Trial Counsel's **credible** testimony establishes 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 additionally finds that Applicant has failed to overcome his burden of proving Trial Counsel's representation was deficient and any resulting prejudice from the alleged deficiency. See Butler, *supra*. Trial Counsel **credibly** testified that he advised Applicant of the overwhelming evidence of guilt against him and advised Applicant that a trial was not in his best interest. Further, Trial Counsel **credibly** testified that he received little to no advance notice before trial that the store clerk and Investigator Garrett may not be available to testify, and therefore, he could not advise Applicant of this possibility. Applicant testified indicating that a separate attorney, rather than Trial Counsel, advised him in an elevator that the State could not initiate a trial in the absence of witnesses. Consequently, Trial Counsel cannot be deemed deficient in this respect.

Regardless, as found *supra*, Applicant was not inclined to accept the plea offer, and it is improbable that knowing these witnesses would not have testified would have changed his decision to plead, rather than proceed to trial. Notably, the absence of the store clerk's and Investigator

Garrett's testimony only served to benefit Applicant's defense, and still the jury convicted Applicant based on the evidence the State presented. Therefore, Applicant cannot establish prejudice, that but for Trial Counsel's performance, the outcome of the proceeding 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.

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 WITH PREJUDICE**.

Allegation 4(d): Failing to argue that the use of photo stills of a knife allegedly taken from the store video violated the best evidence rule.

Applicant alleges that Trial Counsel was constitutionally ineffective for failing to argue that the use of still photographs taken from video surveillance of the crime violated the best evidence rule. This Court disagrees and finds this allegation to be without merit.

The "best evidence rule" requires that "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." See Rule 1002, SCRE. The underlying purpose of the best evidence rule is to avoid the implicit danger that arises where "secondary" evidence is provided in place of "primary" evidence, allowing for the possibility of error in translating and interpreting the

evidence. See United States v. Chavez, 976 F.3d 1178, 1194 (10th Cir. 2020) (The best evidence rule "minimizes the risk of human error that inheres from the production of so-called 'secondary' evidence—that is, evidence other than the original offered to prove all or part of the original's contents; the original, of course, constitutes 'primary evidence' of its own contents."); See also United States v. Alexander, 326 F.2d 736, 742 (4th Cir. 1964) ("Moreover, the original may contain, and the copy will lack, such features of handwriting, paper, and the like, as may afford the opponent valuable means of learning legitimate objections to the significance of the document."). However, where the original is provided, the fear of error "wholly disappears." See Alexander, 326 F.2d at 742 ("As between a supposed literal copy and the original, the copy is always liable to errors on the part of the copyist, whether by wilfulness or by inadvertence"—a problem that "wholly disappears when the original is produced." (quoting 4 John Henry Wigmore, Evidence § 1179 (3d ed. 1940))).

Trial

When the State moved to enter the photo stills into evidence, Trial Counsel objected to the photo stills as they were not provided to him in discovery. (Trial Tr. p. 90). Trial Counsel argued that he had made a Rule 5 and Brady motion in 2016 and requested that the State provide weekly materials. (Trial Tr. p. 91). Trial Counsel argued that he was entitled to the photo stills because he is entitled to whatever the State intends to present. (Trial Tr. pp. 91–92). Trial Counsel argued that his motion covered photographs, citing request three from his discovery motion. (Trial Tr. pp. 92 – 93). Additionally, Trial Counsel argued that the photo stills were cumulative, as the video had already been published to the jury. (Trial Tr. pp. 93–94).

In response, the State stated that the photo stills were pulled from a disk that was provided in discovery, and the stills were printed from that disk. (Trial Tr. p. 96). The trial court took a

brief recess for the parties to assess whether the disk with the stills had been provided. (Trial Tr. p. 98). After the recess, the State advised the trial court that the disc, which included three of the stills, was provided to Trial Counsel on September 20, 2018. (Trial Tr. p. 98). The State argued that they did not realize the stills were not provided, but they were pulled straight from the video. (Trial Tr. pp. 98–99).

The trial court denied Trial Counsel's motion and admitted the photo stills. (Trial Tr. p. 99). The trial court reasoned that the purpose of discovery was to know what the State had, and Trial Counsel knew the State had pictures showing the Applicant's face. (Trial Tr. p. 99). The trial court stated that it would have been convenient if the State had provided the stills, but the stills had come from the video, which was provided. (Trial Tr. p. 99). Additionally, the trial court ruled the stills were not cumulative. (Trial Tr. pp. 101–102).

PCR Evidentiary Hearing

On direct examination, Trial Counsel testified to the following concerning this allegation:

Q. Did you object on the record to the photographs coming in?

A. Yes. So, I went back and looked at the transcript and I objected to those as being, you know, a discovery violation in the sense that they were trying to use something that had not been provided to us. And I think that was the appropriate objection. The Court actually overruled that and basically finding that since they were you know, they were taken directly from the video, there wasn't really a problem.

Q. And there is an argument or an allegation that you fail to argue the use of the photo stills of the knife, taken from the store video, violated the best evidence rule.

A. Yeah, I certainly didn't argue that. I concede that. I mean, I went back and looked at the rule and I'm really not sure that it applies, quite frankly. But no, I mean, I certainly would concede that I just objected on discovery grounds.

(PCR Tr. p. 30).

On recross examination, Trial Counsel testified that, based on his memory, the video of the armed robbery was played for the jury. (PCR Tr. p. 36). Trial Counsel testified that he does not

recall the photo stills being "blown up" or enhanced. (PCR Tr. p. 37). Trial Counsel testified that he recalled a six-by-ten photo that was provided to the jury to review, rather than pausing the video and having the jury review it that way. (PCR Tr. p. 37).

On cross-examination, Appellate Counsel testified that the failure of Trial Counsel to argue the best evidence rule was not what kept him from briefing the issue on appeal. (PCR Tr. p. 40). Appellate Counsel testified that, based on his review, he believed the evidence of the stills was cumulative to other evidence

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 additionally finds that 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 evidence on record, along with the **credible** testimony of Trial Counsel, demonstrates that Trial Counsel exercised sound judgment in the decision-making processes pertaining to his representation. While Trial Counsel did not object to the entry of the photographs on the grounds of a best evidence rule violation, he did object to the photographs being admitted on the grounds that they were not provided to the defense in discovery. Appellate Counsel **credibly** testified that based on his review, it seemed as if the stills were cumulative, and he did not see the best evidence rule as relevant. Further, Trial Counsel **credibly** testified that he did not believe the best evidence rule applied in these circumstances. This Court agrees, considering the purpose of the best evidence rule and the fact that the original video, from which the photo stills were pulled, was published to the jury at trial. Therefore, Trial Counsel was not deficient, and Applicant cannot show he suffered prejudice

from Applicant's performance. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

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

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

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ALLEGATIONS

Allegation 5(a): **Failing to brief the issue that the judge erred in allowing Deputy Craig Holbrooks to testify that a photo still allegedly taken from the in-store video showed a bladed object.**

Applicant alleges Appellate Counsel was constitutionally ineffective for failing to brief the issue on appeal that the trial judge erred in admitting certain testimony. Specifically, Applicant avers that Appellate Counsel was ineffective for failing to brief the issue on appeal that the trial judge erred in allowing Deputy Craig Holbrooks (Deputy Holbrooks) to testify about the photo stills that showed Applicant holding a bladed object. This Court disagrees and finds this allegation to be without merit.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCF; Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396-97 (1985) (citing Douglas v. California, 372 U.S. 353 (1963)). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 752-53 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy")).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel: an applicant must show that appellate counsel's performance was deficient and that he or she was prejudiced by the deficiency. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the allegedly ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

PCR Evidentiary Hearing

On direct examination, Appellate Counsel testified that he did not brief the issue that the trial judge erred in allowing Deputy Craig Holbrooks to testify at Applicant's trial that a photo still taken from the in-store video footage showed a bladed object in Applicant's hand. (PCR Tr. p. 38).

Appellate Counsel's testified as follows concerning his reasoning for not appealing this issue:

Well, I'm trying to identify the issues, the legal issues, that I think provides my client the best chance to win, and I did not think that that was one of them. I was looking back on my notes and I have the objection on my notes. All I can say, right or wrong, looking back on it, I've lost on that issue in the past. Meaning where a law enforcement officer had been allowed to even narrate a surveillance tape of what was going on on the surveillance tape was essentially the same objection that at least the speculation and best evidence rule, if you will, there was no reason to allow. It's unnecessary to have a law enforcement officer to say what's on the film. And I've just never got anywhere with that issue in the past. So, right or wrong, I thought these two issues I raised for Mr. Blackwell gave him the best chance of winning.

(PCR Tr. p. 39, ll. 2-16).

On cross-examination, Appellate Counsel was asked whether his strategy for briefing the issue on appeal would have changed if Trial Counsel had objected or argued that the photo still from the video violated the best evidence rule, and that the jury should stand on the video alone. (PCR Tr. p. 39). Appellate Counsel testified that the lack of a best evidence objection was not what kept him from arguing this photo still issue on appeal. (PCR Tr. p. 40). Appellate Counsel testified he did not remember this issue standing out to him. (PCR Tr. p. 40).

Findings

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all

significant decisions in [his] case". Ard v. Catoe, *supra*. This Court additionally finds Applicant has failed to overcome his burden in proving Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Appellate Counsel **credibly** testified that he considered that issue, but did not see it as a winning issue. Therefore, Appellate Counsel was not deficient for failing to raise this issue.

Additionally, Appellate Counsel **credibly** testified that the failure of Trial Counsel to object to the photo stills based on the "best evidence rule" would not have prompted him to raise this issue. As noted *supra* (**Allegation 1d**), the best evidence rule would not have been a meritorious objection based on the availability of the original video, which the photo stills were copied from, and therefore, this issue would not have been successful on appeal. See Alexander, 326 F.2d at 742 ("As between a supposed literal copy and the original, the copy is always liable to errors on the part of the copyist, whether by wilfulness or by inadvertence"—a problem that "wholly disappears when the original is produced." (quoting 4 John Henry Wigmore, Evidence § 1179 (3d ed. 1940))).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove that Appellate Counsel's performance was deficient as measured by the standard of reasonableness under professional norms. Furthermore, Applicant failed to prove that, because of Appellate Counsel's deficient performance, there is a reasonable probability that, but for Appellate Counsel's unprofessional errors, the result of the appeal would have been different.⁶

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

⁶ Southerland v. State, 337 S.C. 610, 524 S.E. 2d 833 (1999).

- Allegation 3(c):** Failing to brief the issue of the trial judge's error in allowing Investigator Hill to testify to the truthfulness of the investigation.
- Allegation 5(b):** Failing to brief the issue of the trial judge's error in his denial of a directed verdict.
- Allegation 5(c):** Failing to brief the issue of the trial judge's error in making unestablished statements.

above

Applicant alleges Appellate Counsel was ineffective for failing to raise the following issues on direct appeal. Applicant failed to present any evidence, testimony, or legal authority regarding this allegation 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, 37, 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, this Court deems the allegations abandoned.

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VIOLATION OF DUE PROCESS AND CONFRONTATION CLAUSE ALLEGATION

- Allegation 2(a):** Interrogating Detective Garrett, who also took Applicant's statement, was not made available at trial and was therefore not subject to cross-examination.
- Allegation 6(a):** Denial of 6th Amendment Rights when an audio recording of the Applicant's statement was played even though the interrogating investigator was not made available for cross-examination at trial.

Applicant alleges that his constitutional rights under the Sixth Amendment Confrontation Clause were violated when Investigator Garrett, who took Applicant's statement, was not made available by the State at trial for cross-examination. This Court finds that these allegations were raised separate and apart from the ineffective assistance of counsel claims; therefore, these allegations are not cognizable PCR claims in which this Court can provide relief. An applicant may commence a post-conviction relief action on the following grounds:

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 [was] 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). However, because an application for post-conviction relief is not a substitute for a direct appeal of trial court error, and because of the modern simplification of criminal jurisdiction jurisprudence in South Carolina, the *overwhelming* majority of cognizable claims fall under the broad umbrella of "ineffective assistance of counsel," based on the provisions of the Sixth Amendment to the Constitution of the United States. See Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) ("Allegations of trial court error are not cognizable on PCR.").

Applicant's allegations regarding the violation of his due process and his right to confront his accusers does not support a cognizable claim for post-conviction relief under any of the statutory grounds. Post-conviction relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). ~~Application~~ ^{Applicant} offers no collateral attack upon the conviction or sentence itself. Notably,

Trial Counsel argued this very issue before the trial court and the trial court did not agree, denying Trial Counsel's motion. (Trial Tr. pp. 148 – 152, 183 – 192).

Therefore, this Court **DENIES** and **DISMISSES** these allegations for failure to state a cognizable claim for which this Court can provide relief.

|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 the right to an appellate counsel's assistance in seeking 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 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.

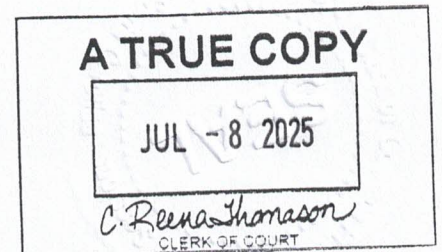
AND IT IS SO ORDERED this 13th day of May, 2025.

Kristi Curtis

KRISTI F. CURTIS
Presiding Judge
Tenth Judicial Circuit

Sunter

, South Carolina



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