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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

Honorable H. Steven DeBerry, IV
Appellant No. 2025-000029
Case No. 2020-CP-04-01211

Damarius D. Gaines

Appellant,

VS.

The State of South Carolina

Respondent,

Notice of Appeal under
SCACR Rule 243(c) / SCRPC Rule 71.1(g)

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

Alan Wilson
Attorney General
1231 Gervais St
Columbia SC 29201

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Table of Authority

Rules

SCACR Rule 243(c) Explanation Required.

If the lower court has determined that post-conviction relief action is barred as successive or being untimely under statute of limitations, the petitioner must at the time of notice of appeal is filed provide an explanation as to why this determination was improper. This determination must contain sufficient facts, argument and citation to legal authority to show that there is an arguable basis for asserting that the determination by the lower court was improper. If the petitioner fails to make a sufficient showing the notice of appeal may be dismissed.

SCRCP 71.1(a) Appellate Review, Continuing Representation.

A final decision entered under the act shall be reviewed according to the procedure specified by Rule 243 SCACR. If an applicant represented by counsel desires to appeal counsel shall serve and file a Notice of Appeal as required by Rule 243, SCACR, and shall continue to represent the assist the applicant in obtaining representation by the division of appellate defense of the office of indigent defense.

SCACR Rule 243(b) Notice of Appeal and ordering of transcript.

In the same manner and under the same limitations as provided for appeals from the Court of Common Pleas in rule 203 and 207, the petitioner shall serve and file a notice of appeal and shall obtain from the court reporter a transcript of the proceedings in the lower court.

Constitutional and Statutory provisions.

Table of Authority

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VI. Jury trials for Crimes and Procedural rights.

In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Question(s)

1. Do to Petitioner not having legal representation and incompetent to procedure's as followed according to SCACR's does it satisfy explanation pursuant to SCACR, Rule 243(c)

2. By time limit expiring, and PCR hearing being dismissed with prejudice, do Petitioner still meet required right pursuant to SCRPC 71.1(c) to have indigent Counsel assist in further appeal proceedings?

3. Do to incompetency, and petitioner not having the assist of Counsel, after providing "transcript request form" pursuant to SCACR Rule 243(b), may case proceed as followed?

4. Do to being forced to proceed PCR hearing pro, se by honorable Litta Verdin Oct. 19th 2021, does this violate petitioner's VI Amendment favor to have assistance of Counsel for his defence?

5. Do to incompetency, and multiple failure attempts to gain access to a public appeal Court hearing with the assistance of Counsel, does it violate Amendment XIV. Due process of law by a United State of America Citizen?

Statement of appeal notice

On November 20th 2024, Petitioner's PCR hearing was denied by Honorable. H. Steven DeBerry, IV. See Appendix A. Petitioner went to PCR hearing 8 months prior. April 8th 2024. A day before scheduled date. Petitioner's witnesses that were requested through mail to Anderson County Clerk of Court office (Do to RHU not being able to get a copy of official witness request list to Anderson Clerk office will provide on a later date) were not available. Violating petitioner due process of law right. "See Amendment. XIV Section. 1." In table of authority, petitioner not being a lawyer and incompetent to the practice of law. in South Carolina hope in regard to SCACR, Rule 243(c) that he meets the burden required to have appeal retried to the South Carolina Supreme Court. See table of authority SCACR Rule 243(c).

Petitioner being indigent, not able to afford representation, and having PCR hearing denied request under SCRPC 71.1(g) "See table of authority SCRPC Rule 71.1(g), to have indigent Counsel assistance.

Petitioner also address to the Court the violation of malicious prosecution and Amendment. VI by not being able to confront witnesses against him, do to send petitioner to hearing not on scheduled date, and refusing to subpoena witnesses requested. "See table of authority Amendment. VI

Petitioner being incompetent to the practice of law or of being a lawyer, over looked sending request transcript form. Petitioner has failed multiple times in sending form to wrong Clerk to receive own personal copy of PCR transcript. And have yet to receive personal copy still.

See Appendix B. Being the form needed and requested according to SCACR Rule 243(b) "See table of authority".

It was order by South Carolina Supreme Court clerk under Appellate case no. 2025-000029 that petitioner failed to show good cause to restate under SCACR 260(a) "See appendix C. Petitioner in good faith, and hope by filing this notice of appeal under SCACR 243(b); 243(c) to the best of his ability request the assistance of counsel pursuant to SCRCP 11.1(g) and Case Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991).

Conclusion

Do to incompetency of practicing law, enforcement of pro, se, and lack of assistance of counsel. Restatement under SCACR 2.13 Should be granted.

Respectfully Submitted.

Dominic Ujir

October 20th 2025

Pro, Se petitioner
Lee Correctional Inst
990 WISACKY Highway
Bishopville SC. 29010

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

Damorius D. Gaines, #346524,

Applicant,

v.

State of South Carolina,

Respondent.

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

) CASE No. 2020-CP-04-01211
)

**ORDER OF DISMISSAL
WITH PREJUDICE**

Presiding Judge:

Respondent's Attorney:

Trial Counsel:

Date of Hearing:

Court Reporter:

Hon. H. Steven DeBerry, IV

D. Russell Barlow, II, Esq.

Alexander H. Lucas, Esq.

Gordon A. Senerius, Esq.

April 8, 2024

Lesa D. Taylor, RPR

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

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

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

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

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

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

FACTS GIVING RISE TO THE CONVICTION

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

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

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

to manipulate the jury"

Applicant requests relief as follows:

"vacate, set aside; remanded; dismissed"

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act² (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

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

S.C. Code Ann. § 17-27-20(A).

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

² S.C. Code Ann. §§ 17-27-10 to -160.

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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

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), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

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

INITIAL FINDINGS

This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant he rendered adequate assistance and exercised reasonable professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at

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

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

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

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

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

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

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

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

Allegation 1c: Failure to file motion requested by Applicant to reveal deal made for key witness Sherika Harper to write statement against Applicant.

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

Trial

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

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Evidentiary Hearing

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

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

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

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

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

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

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

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

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

Trial

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

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

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

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

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

Applicant alleges that Trial Counsel was ineffective for failing to investigate the facts and circumstances surrounding his conviction. Specifically, Applicant alleges Trial Counsel failed to investigate and submit Applicant's mother, Connie Gaines (Gaines), statement into supplemental discovery. This Court finds this allegation to be without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete

Evidentiary Hearing

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

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

(PCR Tr. pp. 8–10).

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

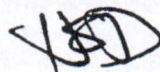
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along those lines. Id. Applicant moved to have Gaines's letter admitted as an exhibit to the Court, and though this Court did not admit the letter into evidence, the letter was reviewed by Counsel Lucas and considered by this Court. (PCR Tr. p. 22).

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

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Counsel Lucas **credibly** testified he interviewed key witnesses and reviewed the discovery. Counsel Lucas **credibly** testified Applicant's case was not a mitigation case, but whether it was an LWOP case, and the court determined Applicant's case was not an LWOP case. Concerning admission of Gaines's statement, Counsel Lucas **credibly** testified that he did not recall Applicant providing him with a notarized statement by Gaines, and he did not see how it would have been helpful to submit the statement. Additionally, Counsel Lucas **credibly** testified that submitting the statement would not have prevented the State from calling Gaines to testify against Applicant.



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

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

The South Carolina Supreme Court has repeatedly held that a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony per the rules of evidence at the PCR hearing to establish prejudice from the witness' failure to testify at trial. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice).

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

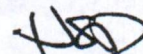
been favorable to the defendant); Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

Evidentiary Hearing

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

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

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



Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Counsel Lucas **credibly** testified he did not recall Applicant asking him to request a continuance for these witnesses. Applicant averred that Strong's statement indicated that no robbery had taken place, and therefore, Trial Counsel should have requested a continuance to subpoena Strong. However, Counsel Lucas **credibly** testified that Strong's statement did not indicate the robbery had not occurred but described the attempted robbery Applicant committed. Counsel Lucas **credibly** testified he did not know how Strong's testimony would have been helpful. Concerning the private investigator, Counsel Lucas **credibly** testified he would not have called the private investigator to testify to his conversation with witnesses as it would have constituted hearsay. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (When counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective).

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

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

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



resulting prejudice from that alleged deficiency. See Butler, supra. This Court finds the issue of the delayed disclosure of an alleged deal between Investigator Gardner and Harper was raised at trial, and as noted *supra* (**Allegation 1e**), Applicant elected not to pursue a mistrial based on the delayed disclosure and proceed with trial. (R. p. 190).

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

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

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

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

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe, supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler, supra*. This Court finds there was no Brady violation. As Applicant noted, Strong and Bell were known witnesses; they were included on the potential witness list. Therefore, Applicant cannot show the prosecution suppressed these witnesses. The fact the prosecution elected not to call the witnesses does not constitute prosecutorial misconduct, and Applicant was not prevented from calling them. Further, both Counsel Lucas and Counsel Senerius credibly testified they had no reason to believe a Brady violation was committed in Applicant's case. Based on this, Trial Counsel had no basis to object to the State's failure to call Strong and Bell as witnesses.

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

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

[Handwritten signature]

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

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

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, supra. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, supra. This Court finds there was no basis for Trial Counsel to object to Patel as a witness as she was listed pretrial as a potential witness, and thus, no Brady violation occurred. While Applicant argued that Patel was a surprise witness, Applicant provided nothing more than his conjecture. Notably, the record establishes that

CONCLUSION

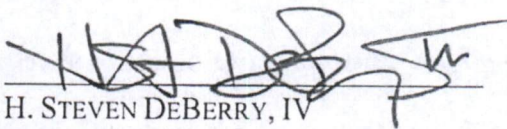
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED** and **DISMISSED WITH PREJUDICE**.

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

IT IS THEREFORE ORDERED:

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

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



H. STEVEN DEBERRY, IV
Presiding Judge
Tenth Judicial Circuit

Florence, South Carolina

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S.C. SUPREME COURT

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