ALAN WILSON
ATTORNEY GENERAL

May 26, 2026

The Honorable Patricia A. Howard
Clerk of Court, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211
(by email only – supctfilings@sccourts.org)

Re: **Justin J. Lewis, #362322 v. State of South Carolina**
Appellate Case No: 2026-001087
Lower Case No: 2019-CP-21-00580

Dear Ms. Howard:

Please accept this letter in response to this Court's request for a status on the final order dated May 22, 2026.

The Honorable Walton J. McLeod, IV, signed the initial order of dismissal on March 24, 2026 (Attachment 1), and mailed it to the Florence County Clerk of Court. That signed order was never received by the Clerk's Office. On May 7, 2026, my office requested that Judge McLeod sign another order and again mail it to the Florence County Clerk of Court. As of the date of the letter received from this Court, that order has not been filed with the Florence County Clerk of Court. Accordingly, I contacted Judge McLeod's law clerk to inquire about the order and was informed that the new order was signed and mailed on May 8, 2026 (Attachment 2).

As of today, May 26, 2026, that order has not been filed with the Florence County Clerk of Court. My return to the letter is due today, and I have not had a chance to reach out to the Florence County Clerk of Court to determine whether they would accept the copy of the signed order as the original. I intend to do that tomorrow, May 27, 2026, and will update the Court accordingly.

Should the Court require any further information regarding this matter, please do not hesitate to contact me.

Sincerely,

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General
SC Bar #105228

cc: Justin J. Lewis, *pro se*

STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	)	IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT
Justin J. Lewis, #362322	)	CASE NO. 2019-CP-21-580
Applicant,	)	
v.	)	**ORDER OF DISMISSAL WITH PREJUDICE**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of Justin J. Lewis' (Applicant) application for Post-Conviction Relief (PCR) filed on February 28, 2019. Respondent (the State of South Carolina) filed its Return on September 19, 2019, requesting an evidentiary hearing to resolve the claims as set forth in the application. Applicant filed an amended application on October 15, 2019, through appointed counsel Overture E. Walker, Esquire. On December 16, 2019, Respondent filed an amended Return and Motion to Dismiss, requesting the Court dismiss the application pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure, as Applicant knowingly and voluntarily waived his right to representation, and therefore, was not entitled to relief based on ineffective assistance of counsel. On June 19, 2020, the Honorable D. Craig Brown filed an Order of Dismissal, granting Respondent's motion to summarily dismiss the application.

Applicant filed a timely Notice of Appeal. Appellate Defender Victor Seeger filed a Petitioner for Writ of Certiorari on Applicant's behalf, raising the following issue:

> The post-conviction relief court erred when it summarily dismissed Petitioner's post-conviction relief application where the court found that because Petitioner proceeded *pro se* at his trial he was barred from raising ineffective assistance of counsel claims regarding defense counsel's pretrial conduct.

The Supreme Court granted certiorari, and on June 14, 2023, the Supreme Court issued an order reversing the PCR Court's order in part and remanding the case for a hearing on the following claims:

1. Pretrial counsel failed to adequately investigate the criminal charge,
2. Failed to communicate with material witnesses whose testimony would have allegedly been favorable to the defense,
3. Failed to advise him of right to appeal, provide necessary information for filing notice of appeal, and failed to file notice of appeal on Applicant's behalf.

Specifically, the Supreme Court noted that it was not prepared to determine whether counsel was required to advise Applicant of his right to appeal or to take other steps to file Applicant's appeal, where counsel moved for a new trial on Applicant's behalf.

Steven W. Fowler, Esquire, was subsequently appointed to represent Applicant. On October 24, 2024, Applicant appeared before the Honorable Maité Murphy, and counsel Steven W. Fowler moved to be relieved as counsel. Applicant advised Judge Murphy that he would like to proceed *pro se*. Judge Murphy questioned Applicant about his decision to proceed *pro se*, relieved counsel, and granted his request

On October 27, 2025, an evidentiary hearing was convened before this Court. Applicant was present and proceeded *pro se*. Assistant Attorney General Talida Balaj represented Respondent. Applicant proceeded with the claim in his application and with additional allegations raised during the hearing. In support of his claim, Applicant presented testimony from Wallace H. Jordan, Jr., Esquire (Standby Trial Counsel).

Following a thorough review of the record, 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 Applicant is presently confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted during the June 2017 term of the Florence County Grand Jury for distributing heroin (2017-GS-21-00764). Applicant proceeded *pro se* at trial with Wallace H. Jordan, Jr., Esquire, as Standby Counsel. Deputy Solicitor Todd S. Tucker prosecuted the case.

Applicant's case proceeded to a bench trial on September 4–5, 2018, before the Honorable Thomas A. Russo. Applicant was convicted as indicted. Judge Russo sentenced Applicant to serve fifteen years imprisonment for distribution of narcotics—second offense.[1] However, after realizing Applicant's offense was considered a first offense, Judge Russo immediately amended the original sentencing sheet to reflect Applicant's offense as a first offense, maintaining the fifteen-year sentence.

Applicant moved for sentencing reconsideration on September 21, 2018, and Applicant was transported for a motions hearing on the matter on October 3, 2018. Judge Russo then continued the motions hearing to allow Applicant more time to prepare for the hearing. There is a letter, not specifically addressed to anyone, in the Clerk's records filed October 29, 2018, indicating Applicant wished to appeal his conviction and sentence; however, this letter was sent prior to Applicant's final judgment.

Thereafter, on December 7, 2018, Applicant was transported for a motions hearing, but Judge Russo again continued the hearing because Applicant was not prepared to proceed. Judge

[1] Applicant was originally sentenced pursuant to section 44-53-370(b)(1) of the South Carolina Code.

Russo then elected to consider Applicant's motion for reconsideration based upon Applicant's written submissions. Finally, on December 17, 2018, Judge Russo granted Applicant's motion for reconsideration stating, "Although the [c]ourt's original imposition of Fifteen (15) years imprisonment was legally valid and within the sentencing range, the [c]ourt has decided to give some consideration to the fact that [Applicant] should have been sentenced under a lesser range." Judge Russo amended Applicant's sentence from fifteen years' imprisonment to twelve years' imprisonment. Applicant did not appeal his conviction or sentence.

CURRENT ACTION BEFORE THIS COURT

On February 28, 2019, Applicant filed his PCR application alleging he was being held in custody unlawfully for the following reasons:

(1) Ineffective Assistance of Counsel
  (a) Failure to investigate and challenge admissibility of evidence pretrial;
  (b) Failure to provide / review the discovery with Applicant; and
  (c) Failure to file an appeal.
(2) Evidence of material fact not previously heard or presented requiring vacation of conviction:
  (a) Evidence withheld from Applicant damaging defense.
(3) Conviction and sentence subject to collateral attack:
  (a) Applicant was denied appeal rights and due process rights were violated.

On October 15, 2019, Applicant filed an amended application for PCR with the following allegations:

1. Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to adequately investigate the criminal charge(s) for which Applicant was convicted.
2. Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel advised failed to file pre-trial motions challenging the admissibility of evidence. Applicant entered a plea of not guilty plea and was convicted at trial. Defendant was sentenced to a term of 15 years imprisonment.
3. Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to call or communicate with material witnesses whose testimony would have been favorable to Applicant.
4. Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to request or procure a copy of the chemical analysis report for establishing the physical evidence and sworn affidavits/statements from

witnesses in the chain of custody for purposes of establishing the same pursuant to Rule 6 of the South Carolina Rules of Criminal Procedure.
5. Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to timely request a preliminary hearing.
6. Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to advise him of his right to appeal and/or provide him with the necessary information for filing a Notice of Appeal
7. Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to file a Notice of Appeal on his behalf.

At his evidentiary hearing, Applicant went forward on the following allegations:

1. Failure to advise of and file a direct appeal
2. Failure to investigate
3. Failure to make pre-trial motions
4. Failure to attack the late disclosure of video to have more time to prepare
5. Failure to timely request a preliminary hearing

Applicant requests relief in the form of a new trial.

Before this Court are the Florence County Clerk of Court records from the underlying conviction and sentence, Applicant's records from SCDC, the trial transcript, the appellate records, and the records of this PCR action.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[2] 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

[2] S.C. Code Ann. §§ 17-27-10 *et seq*.

(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 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), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court must apply the two-part test outlined in *Strickland v. Washington* to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *accord Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be

said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the *Strickland* analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986); *cf. Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. *Strickland*, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if

professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; *see Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Richter*, 562 U.S.at 112.

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

applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

For ineffective assistance of standby counsel specifically, courts have held that there is no constitutional right to effective assistance of standby counsel. *See U.S. v. Windsor*, 981 F.2d 943, 947 (7th Cir. 1992); *U.S. v. Morrison*, 153 F.3d 34, 55 (2d Cir. 1998) (holding "without a constitutional right to standby counsel, a defendant is not entitled to relief for ineffectiveness of standby counsel").

Faretta requires that the accused be advised of their right to counsel and adequately warned of the dangers of self-representation to establish a valid waiver of counsel. *Prince v. State*, 301 S.C. 422, 392 S.E.2d 462 (1990), citing *Faretta v. California*, 422 U.S. 806 (1975). "Since the matter of hybrid representation is left to the discretion of the trial judge, then, by implication, there is no Sixth Amendment right to hybrid representation." *State v. Stuckey*, 333 S.C. 56, 57, 508 S.E.2d 564 (1998).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the PCR action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility. *See, e.g., State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); *Clemons v. Mississippi*, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and

in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

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

As an initial matter, this Court finds applicable the strong presumption that at all stages of Standby Counsel's representation of Applicant, he rendered adequate assistance and exercised reasonable professional judgment in his 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 the time they were made. *Strickland*, 466 U.S. at 689; *see Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF STANDBY COUNSEL ALLEGATIONS

Allegation 1: Failure to Advise of and File Direct Appeal

Applicant alleges Standby Counsel was constitutionally ineffective for failing to advise him of his right to appeal, and therefore, asserts he is entitled to belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). This Court finds this allegation to be without merit.

In *Dearybury v. State*, the Supreme Court held that where a defendant knowingly and voluntarily waived his right to counsel, his failure to file a direct appeal is due to his own inaction. 367 S.C. 34, 625 S.E.2d 212 (2006) (remanding to the PCR court for findings whether the applicant knowingly and voluntarily waived his right to counsel); *See U.S. v. Windsor*, 981 F.2d 943, 947 (7th Cir. 1992) (explaining the "court knows of no constitutional right to effective assistance of standby counsel"); *U.S. v. Morrison*, 153 F.3d 34, 55 (2d Cir. 1998) (holding "without a constitutional right to standby counsel, a defendant is not entitled to relief for ineffectiveness of standby counsel").

Faretta requires that the accused be advised of their right to counsel and adequately warned of the dangers of self-representation to establish a valid waiver of counsel. *Prince v. State*, 301 S.C. 422, 392 S.E.2d 462 (1990), citing *Faretta v. California*, 422 U.S. 806 (1975). "Since the matter of hybrid representation is left to the discretion of the trial judge, then, by implication, there is no Sixth Amendment right to hybrid representation." *State v. Stuckey*, 333 S.C. 56, 57, 508 S.E.2d 564 (1998). In *McKaskle*, the United States Supreme Court discussed the right of a defendant to represent himself and the appropriate conduct of standby counsel so as not to violate this right. *McKaskle v. Wiggins*, 465 U.S. 168 (1984). The *McKaskle* Court reasoned that a *pro se* defendant must be allowed to control the organization and content of his defense, including making his own motions, but categorical silencing of standby counsel is not necessary to achieve this objective. *McKaskle*, 465 U.S 168. The Court further reasoned that the *pro se* defendant's own conduct should be taken into consideration, and that a defendant's invitation for counsel to

participate obliterates any claim that the defendant was deprived of control over his own defense. *Id.*

Trial

At trial, Applicant indicated to Judge Russo that he wished to represent himself. (Trial Tr. p. 33). Based on this, Judge Russo began questioning Applicant about his level of education and knowledge of the law, warned Applicant of the dangers of self-representation, and advised him against it due to Applicant's limited knowledge of the law and court procedure. (Trial Tr. pp. 33-42). Applicant represented to the Court that he had completed some college, that he had read the rules of evidence, understood that he would not receive special treatment, that he would have Standby Counsel only as standby counsel, and elected to represent himself against the advice of the trial court and Standby Counsel. Ultimately, Judge Russo granted Applicant's request to represent himself and Applicant proceeded *pro se* with a bench trial. (Trial Tr. p. 48).

After Judge Russo pronounced Applicant guilty, Judge Russo asked Applicant whether he would like Standby Counsel to articulate Applicant's post-trial motion on his behalf. (Trial Tr. p. 276). Applicant indicated that he wished for Standby Counsel to make the post-trial motion on his behalf. (Trial Tr. p. 277). Standby Counsel stated the following while articulating Applicant's motion for a new trial:

> Your Honor, my client would like to -- to make a motion for a new trial on a couple grounds: From -- and -- … and bearing in mind that I've been sitting through this, of course, as you're aware, and – and he's been coming over to me during the course of the trial, asking for legal analysis, I guess. I've tried to help him to the best of my ability. I know he is -- and we certainly don't want to go through -- back through it again. But he had a -- what appears to be a legitimate misunderstanding as to the witness situation. **He feels that he was prohibited from calling a witness, bearing in mind he got the benefit of asking questions of [Officer Pate] yesterday…So for that reason, we would request a -- a new trial.**

(Trial Tr. p. 277) (emphasis added). Judge Russo denied the motion and Standby Counsel made no further motions on Applicant's behalf; instead, Applicant subsequently spoke on his own behalf in mitigation prior to sentencing. (Trial Tr. p. 282).

PCR Evidentiary hearing

Standby Counsel testified that he did not sit at the table throughout the trial and did not recall Applicant having many questions for him, if any. (PCR Tr. p. 35). When asked about his status while making Applicant's post-trial motion, Standby Counsel testified that he did not believe he had been reappointed as Applicant's attorney at that point. (PCR Tr. p. 37). Standby Counsel testified that Judge Russo asked Applicant if he wanted Standby Counsel to argue the post-trial motion on Applicant's behalf, not whether he wanted Standby Counsel reappointed. (PCR Tr. pp. 37-38). Standby Counsel testified that, in his understanding, he was just standing in for Applicant to argue that particular motion; he did not file a notice of representation or anything similar. (PCR Tr. pp. 38, 39). Standby Counsel testified that the time frame between the judge issuing the verdict and sentence, and the deputies moving in to get Applicant, was very short, so there was not a great opportunity for additional communication. (PCR Tr. p. 38). Standby Counsel testified he could not remember if anything was communicated at that point about appealing. (PCR Tr. p. 38).

Findings

This Court finds that, throughout the entirety of his trial, Applicant maintained sole control over his defense strategy. Standby Counsel moved forward with the post-trial motion only after Judge Russo asked Applicant if he would want it, at the explicit consent of Applicant, and after Judge Russo allowed it. Importantly, this motion was grounded in issues that Applicant himself had proactively raised during the trial. Standby Counsel merely articulated this motion to align with Applicant's arguments and defenses presented throughout the proceedings. Thus, it is clear

that Standby Counsel did not serve as co-counsel or re-engage as Applicant's attorney; rather, he strictly fulfilled the role of articulating a single post-trial motion at the trial judge's direction and with Applicant's consent.

Critically, Applicant never expressly requested Standby Counsel to be reappointed as counsel, nor did he indicate by his conduct that he desired or believed Standby Counsel had been reappointed by articulating his motion. *State v. Cabrera-Pena*, 350 S.C. 517, 535, 567 S.E.2d 472, 481-82 (Ct. App. 2002) (aff'd in part, remanded in part) (citing *State v. Hyatt*, 132 N.C.App. 697, 513 S.E.2d 90, 94 (1999) ("[T]o obtain relief from a waiver of his right to counsel, a criminal defendant must move the court for withdrawal of the waiver")). This is further exemplified by Applicant's immediate continuation to represent himself in sentencing subsequent to Standby Counsel articulating his post-trial motion, as noted *supra*. Further, the trial court did not indicate that Standby Counsel had been reappointed as counsel. *State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998) (finding no error where the trial court interpreted Applicant's request to have counsel cross-examine all the State's witnesses in the sentencing phase in a capital case as a reversal of Applicant's waiver of counsel).

This Court finds there was no express request for counsel to be re-appointed, and no indication by any of the parties that Standby Counsel's conduct operated as a re-appointment of his representation. Standby Counsel's conduct was limited to one post-trial motion that articulated Applicant's arguments and trial strategy, not his own. Even if this conduct could be viewed as an implied request to have counsel appointed, Standby Counsel's conduct would operate to re-engage his representation solely for the post-trial motion for a new trial, since Applicant resumed his self-representation immediately following the motion. Nevertheless, this Court finds Standby Counsel's conduct did not re-engage him as appointed counsel which would create an obligation

on his part to advise Applicant of his right to appeal. Therefore, Applicant is not entitled to a belated appeal pursuant to *White*.

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 Standby Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Standby Counsel committed either errors or omissions to prove the second prong of *Strickland*—that he was prejudiced by Standby Counsel's performance.

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

Allegation 2: Failure to Investigate

Applicant alleges Standby Counsel was constitutionally ineffective for failing to investigate. Specifically, Applicant alleges Standby Counsel did not investigate the drug chemical analysis, and that the chemical analysis showed Applicant did not possess drugs. This Court finds this allegation to be without merit.

"A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[W]hile the scope of a reasonable investigation depends [on] a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted). However, counsel

need only interview potential witnesses "when it is reasonable to do so." *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Id.* (citing *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.*, 377 S.C. at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. *Ard*, 372 S.C. at 331, 642 S.E.2d at 597 ("this duty is limited to [a] reasonable investigation"). The United States Supreme Court also instructed reviewing courts to "keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. Thus, in applying the Strickland standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014).

Additionally, Counsel must, at a minimum, make some effort to interview potential witnesses identified by the defendant and make an independent investigation of the facts and circumstances of the case. *Edwards*, 392 S.C. at 456, 710 S.E.2d at 64; *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). To support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. *Glover*, 318 S.C. at 498-99, 458 S.E.2d at 540. The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. *Id.*

Trial

At trial, Lieutenant Mitchell Hansen testified that he conducted the analysis on the substances retrieved from Applicant's person, and the test revealed the substances were positive for heroin. (Trial Tr. p. 193). Applicant did not object to Lieutenant Hansen's qualification as an expert nor the admission of the chemical analysis report. (Trial Tr. pp. 188, 192).

PCR Evidentiary hearing

Standby Counsel testified that based on the notes in his defense file, he filed a motion for production and inspection of evidence on March 3, 2017. (PCR Tr. p. 17). Standby Counsel testified he could not remember if he was in possession of the chemical analysis report before trial. (PCR Tr. p. 21). Standby Counsel testified that he followed the standard process to investigate the charges, including filing motions and meeting with Applicant. (PCR Tr. p. 23). Standby Counsel testified he remembered another attorney and an investigator also participating in the case. (PCR Tr. pp. 23-24). Standby Counsel testified his motions were sent directly to the solicitor, which was standard procedure for obtaining evidence. (PCR Tr. p. 24). Standby Counsel testified he disagreed

with the statement that he had no proof he ever requested any evidence from the State. (PCR Tr. p. 28). Standby Counsel testified he could not remember whether he communicated with the State's investigator, Investigator Pate. (PCR Tr. p. 30). Standby Counsel testified he did his due diligence in Applicant's case prior to trial. (PCR Tr. pp. 30-31). Standby Counsel testified he was not aware of any unrevealed discovery in Applicant's case. (PCR Tr. p. 32).

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 further finds Applicant has failed to overcome his burden in proving Standby Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

At the evidentiary hearing, Applicant asserted that drugs were never found on his person and were illegally planted in his file, that the chemical analysis report showed no drugs, and that Respondent conceded Standby Counsel was ineffective for failing to obtain the chemical analysis.[3] However, Applicant did not provide the chemical analysis to this Court at his PCR hearing and did not present any witnesses other than Standby Counsel, and Standby Counsel testified he was not aware of any unrevealed discovery in Applicant's case. Further, Applicant had the opportunity to object to the chemical analysis report being entered at trial, and he did not.[4] This Court finds the outcome of Applicant's trial would not have been different due to the pretrial investigation

Although Standby Counsel testified that he could not remember if he spoke with Investigator Pate, Applicant alleged that Investigator Pate's testimony at trial ultimately favored

[3] This Court found no evidence in the record of Respondent conceding that Standby Counsel was ineffective at any point.
[4] Trial Tr. p. 192.

the defense. (PCR Tr. p. 30). Applicant has not provided how Standby Counsel investigating this before trial would have changed the outcome of his trial when the testimony of that witness was, in Applicant's own words, favorable to the defense.

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 Standby Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Standby Counsel committed either errors or omissions to prove the second prong of *Strickland*—that he was prejudiced by Standby Counsel's performance.

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

Allegation 3: Failure to Make Pre-Trial Motions

Applicant alleges Standby Counsel was constitutionally ineffective for failing to make pre-trial motions on his behalf. Specifically, Applicant argued that Standby Counsel should have filed pre-trial motions to dismiss his case for lack of evidence, to obtain the audio and video of him buying drugs, and to receive all the evidence in the case. This Court finds this allegation to be without merit.

PCR Evidentiary hearing

Standby Counsel testified he made the standard motion for discovery and received all the evidence. (PCR Tr. pp. 23-24). Standby Counsel testified Applicant did not request Standby Counsel to make further pre-trial motions on his behalf and refused to communicate with Standby Counsel after he fired him. (PCR Tr. pp. 21-22, 29, 34). Standby Counsel testified he traditionally

makes pre-trial motions concerning the evidence on the record prior to trial, as the trial was about to get started. (PCR Tr. pp. 30, 34). Standby Counsel testified he would consider Applicant's motion for a bench trial to be a pretrial motion, which Applicant made on his own. (PCR Tr. p. 34). Standby Counsel testified he did not file any pretrial motions attacking the evidence prior to trial. (PCR Tr. p. 29). Standby Counsel testified it was difficult communicating with Applicant, as he would repeatedly dispute that Standby Counsel provided things. (PCR Tr. p. 33). Standby Counsel testified he could not remember if he and Applicant discussed pretrial motions. (PCR Tr. p. 34).

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 further finds Applicant has failed to overcome his burden in proving Standby Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Standby Counsel testified that Applicant would not communicate with Standby Counsel after Applicant fired him. *See Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). Standby Counsel explained that the type of motions Applicant is alleging he should have made were usually made right before trial started, at which point he was fired.[5] This is further evidenced by the fact that Applicant argued his own pretrial motion for a bench trial.[6] The only other motions Applicant alleges should have been filed are motions to compel the evidence, but

[5] Applicant stated he "requested to fire [Standby Counsel] last week" the first day of trial. (Trial Tr. p. 28). When asked about whether he decided not to fire his attorneys, Applicant stated "I didn't decide not to fire him." (Trial Tr. p. 29).
[6] Trial Tr. p. 50.

Standby Counsel testified he did file for discovery, and he was not aware of any evidence that was withheld. This Court finds this testimony to have been credible.

Additionally, Applicant failed to provide how the pre-trial motions would have changed the outcome of his proceeding. Applicant merely asserted "that there were no drugs in the case file" and law enforcement planted the drugs, without any evidence to substantiate his claims. *See Harris*, 377 S.C. at 75-76, 659 S.E.2d at 145-46 (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (An applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome.)).

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 Standby Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Standby Counsel committed either errors or omissions to prove the second prong of *Strickland*—that he was prejudiced by Standby Counsel's performance.

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

Allegation 4: Failure to Attack the Late Disclosure of Video to Have More Time to Prepare

Applicant alleges Standby Counsel was constitutionally ineffective for failing to attack the State based on the late disclosure of the video of the drug transaction. This Court finds this allegation to be without merit.

PCR Evidentiary hearing

Standby Counsel testified that he obtained the video the week prior to trial and reviewed it with Applicant. (PCR Tr. p. 32-33). Standby Counsel testified he agreed the video was provided very soon before trial, but it was his understanding that that was common practice when confidential informants were involved, and they were still given a couple of weeks. (PCR Tr. p. 32). Standby Counsel testified that he did not think there was anything in the video that would have necessitated Standby Counsel doing additional investigation or homework, such as requesting a continuance. (PCR Tr. p. 33). Standby Counsel testified Applicant did a good job representing himself when asking questions about the video at trial. (PCR Tr. p. 33).

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 further finds Applicant has failed to overcome his burden in proving Standby Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Standby Counsel testified that it was standard for the State to provide evidence where confidential informants are involved late in the process, and he did not see any problem with it to where he would need additional investigation or to file for a continuance. This Court finds this testimony to have been credible.

Additionally, Applicant failed to show how more time to review the video would have resulted in a different outcome. *See Ryals v. State*, 439 S.C. 230, 886 S.E.2d 239 (Ct. App. 2023) ("The PCR court acknowledged "[t]rial [c]ounsel may have been deficient in failing to request a continuance ... until [Ryals] could change into civilian attire"; however, relying on *Humbert*, the court ultimately denied PCR on this issue because it found Ryals failed to establish prejudice in

view of the overwhelming evidence against him. *See id.* at 338, 548 S.E.2d at 866 ("Due to the overwhelming evidence against petitioner, there is not a reasonable probability the outcome of his trial would have been different had petitioner not been dressed in his prison jumpsuit."). In Applicant's case, the evidence of guilt was overwhelming, as he was shown on video committing the offense.

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 Standby Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Standby Counsel committed either errors or omissions to prove the second prong of *Strickland*—that he was prejudiced by Standby Counsel's performance.

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

Allegation 5: Failure to timely request a preliminary hearing

Applicant alleges Standby Counsel was constitutionally ineffective for failing to timely request a preliminary hearing. This Court finds this allegation to be without merit.

Every criminal defendant is entitled to notice of his right to a preliminary hearing "to determine whether sufficient evidence exists to warrant [his] detention and trial." Rule 2(a) SCRCrimP. However, there is no state constitutional right to a preliminary hearing. *State v. McClure*, 277 S.C. 432, 289 S.E.2d 158 (1982); *State v. Keenan*, 278 S.C. 361, 296 S.E.2d 676 (1982). Furthermore, a preliminary hearing shall not be held if the defendant is already indicted by a grand jury. Rule 2(b) SCRCrimP; *see also State v. Hawkins*, 310 S.C. 50, 54-55, 524 S.E.2d

50, 53 (Ct. App. 1992) (holding trial court did not err in refusing to quash defendant's indictments because he did not receive a requested preliminary hearing because he was indicted before a preliminary hearing was held).

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 further finds Applicant has failed to overcome his burden in proving Standby Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Notably, Applicant failed to present any testimony or evidence on this allegation. However, the record before this Court shows that Applicant was indicted during the June 2017 term of the Florence County Grand Jury (2017-GS-21-00764). Thus, Applicant was not entitled to a preliminary hearing.

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 Standby Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Standby Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Standby Counsel's performance.

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

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 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 to 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 7TH **day of** MAY **, 2026.**

WALTON J. MCLEOD, IV
Presiding Judge
Twelfth Judicial Circuit

Lexington, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	)	IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT
Justin J. Lewis, #362322	)	CASE NO. 2019-CP-21-580
Applicant,	)	
v.	)	**ORDER OF DISMISSAL WITH PREJUDICE**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of Justin J. Lewis' (Applicant) application for Post-Conviction Relief (PCR) filed on February 28, 2019. Respondent (the State of South Carolina) filed its Return on September 19, 2019, requesting an evidentiary hearing to resolve the claims as set forth in the application. Applicant filed an amended application on October 15, 2019, through appointed counsel Overture E. Walker, Esquire. On December 16, 2019, Respondent filed an amended Return and Motion to Dismiss, requesting the Court dismiss the application pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure, as Applicant knowingly and voluntarily waived his right to representation, and therefore, was not entitled to relief based on ineffective assistance of counsel. On June 19, 2020, the Honorable D. Craig Brown filed an Order of Dismissal, granting Respondent's motion to summarily dismiss the application.

Applicant filed a timely Notice of Appeal. Appellate Defender Victor Seeger filed a Petitioner for Writ of Certiorari on Applicant's behalf, raising the following issue:

> The post-conviction relief court erred when it summarily dismissed Petitioner's post-conviction relief application where the court found that because Petitioner proceeded *pro se* at his trial he was barred from raising ineffective assistance of counsel claims regarding defense counsel's pretrial conduct.

The Supreme Court granted certiorari, and on June 14, 2023, the Supreme Court issued an order reversing the PCR Court's order in part and remanding the case for a hearing on the following claims:

1. Pretrial counsel failed to adequately investigate the criminal charge,
2. Failed to communicate with material witnesses whose testimony would have allegedly been favorable to the defense,
3. Failed to advise him of right to appeal, provide necessary information for filing notice of appeal, and failed to file notice of appeal on Applicant's behalf.

Specifically, the Supreme Court noted that it was not prepared to determine whether counsel was required to advise Applicant of his right to appeal or to take other steps to file Applicant's appeal, where counsel moved for a new trial on Applicant's behalf.

Steven W. Fowler, Esquire, was subsequently appointed to represent Applicant. On October 24, 2024, Applicant appeared before the Honorable Maité Murphy, and counsel Steven W. Fowler moved to be relieved as counsel. Applicant advised Judge Murphy that he would like to proceed *pro se*. Judge Murphy questioned Applicant about his decision to proceed *pro se*, relieved counsel, and granted his request

On October 27, 2025, an evidentiary hearing was convened before this Court. Applicant was present and proceeded *pro se*. Assistant Attorney General Talida Balaj represented Respondent. Applicant proceeded with the claim in his application and with additional allegations raised during the hearing. In support of his claim, Applicant presented testimony from Wallace H. Jordan, Jr., Esquire (Standby Trial Counsel).

Following a thorough review of the record, 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 Applicant is presently confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted during the June 2017 term of the Florence County Grand Jury for distributing heroin (2017-GS-21-00764). Applicant proceeded *pro se* at trial with Wallace H. Jordan, Jr., Esquire, as Standby Counsel. Deputy Solicitor Todd S. Tucker prosecuted the case.

Applicant's case proceeded to a bench trial on September 4–5, 2018, before the Honorable Thomas A. Russo. Applicant was convicted as indicted. Judge Russo sentenced Applicant to serve fifteen years imprisonment for distribution of narcotics—second offense.[1] However, after realizing Applicant's offense was considered a first offense, Judge Russo immediately amended the original sentencing sheet to reflect Applicant's offense as a first offense, maintaining the fifteen-year sentence.

Applicant moved for sentencing reconsideration on September 21, 2018, and Applicant was transported for a motions hearing on the matter on October 3, 2018. Judge Russo then continued the motions hearing to allow Applicant more time to prepare for the hearing. There is a letter, not specifically addressed to anyone, in the Clerk's records filed October 29, 2018, indicating Applicant wished to appeal his conviction and sentence; however, this letter was sent prior to Applicant's final judgment.

Thereafter, on December 7, 2018, Applicant was transported for a motions hearing, but Judge Russo again continued the hearing because Applicant was not prepared to proceed. Judge

[1] Applicant was originally sentenced pursuant to section 44-53-370(b)(1) of the South Carolina Code.

Russo then elected to consider Applicant's motion for reconsideration based upon Applicant's written submissions. Finally, on December 17, 2018, Judge Russo granted Applicant's motion for reconsideration stating, "Although the [c]ourt's original imposition of Fifteen (15) years imprisonment was legally valid and within the sentencing range, the [c]ourt has decided to give some consideration to the fact that [Applicant] should have been sentenced under a lesser range." Judge Russo amended Applicant's sentence from fifteen years' imprisonment to twelve years' imprisonment. Applicant did not appeal his conviction or sentence.

CURRENT ACTION BEFORE THIS COURT

On February 28, 2019, Applicant filed his PCR application alleging he was being held in custody unlawfully for the following reasons:

(1) Ineffective Assistance of Counsel
  (a) Failure to investigate and challenge admissibility of evidence pretrial;
  (b) Failure to provide / review the discovery with Applicant; and
  (c) Failure to file an appeal.
(2) Evidence of material fact not previously heard or presented requiring vacation of conviction:
  (a) Evidence withheld from Applicant damaging defense.
(3) Conviction and sentence subject to collateral attack:
  (a) Applicant was denied appeal rights and due process rights were violated.

On October 15, 2019, Applicant filed an amended application for PCR with the following allegations:

1. Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to adequately investigate the criminal charge(s) for which Applicant was convicted.
2. Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel advised failed to file pre-trial motions challenging the admissibility of evidence. Applicant entered a plea of not guilty plea and was convicted at trial. Defendant was sentenced to a term of 15 years imprisonment.
3. Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to call or communicate with material witnesses whose testimony would have been favorable to Applicant.
4. Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to request or procure a copy of the chemical analysis report for establishing the physical evidence and sworn affidavits/statements from

witnesses in the chain of custody for purposes of establishing the same pursuant to Rule 6 of the South Carolina Rules of Criminal Procedure.
5. Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to timely request a preliminary hearing.
6. Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to advise him of his right to appeal and/or provide him with the necessary information for filing a Notice of Appeal
7. Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to file a Notice of Appeal on his behalf.

At his evidentiary hearing, Applicant went forward on the following allegations:

1. Failure to advise of and file a direct appeal
2. Failure to investigate
3. Failure to make pre-trial motions
4. Failure to attack the late disclosure of video to have more time to prepare
5. Failure to timely request a preliminary hearing

Applicant requests relief in the form of a new trial.

Before this Court are the Florence County Clerk of Court records from the underlying conviction and sentence, Applicant's records from SCDC, the trial transcript, the appellate records, and the records of this PCR action.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[2] 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

[2] S.C. Code Ann. §§ 17-27-10 *et seq*.

(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 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), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court must apply the two-part test outlined in *Strickland v. Washington* to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *accord Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be

said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the *Strickland* analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986); *cf. Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. *Strickland*, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if

professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; *see Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Richter*, 562 U.S.at 112.

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

applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

For ineffective assistance of standby counsel specifically, courts have held that there is no constitutional right to effective assistance of standby counsel. *See U.S. v. Windsor*, 981 F.2d 943, 947 (7th Cir. 1992); *U.S. v. Morrison*, 153 F.3d 34, 55 (2d Cir. 1998) (holding "without a constitutional right to standby counsel, a defendant is not entitled to relief for ineffectiveness of standby counsel").

Faretta requires that the accused be advised of their right to counsel and adequately warned of the dangers of self-representation to establish a valid waiver of counsel. *Prince v. State*, 301 S.C. 422, 392 S.E.2d 462 (1990), citing *Faretta v. California*, 422 U.S. 806 (1975). "Since the matter of hybrid representation is left to the discretion of the trial judge, then, by implication, there is no Sixth Amendment right to hybrid representation." *State v. Stuckey*, 333 S.C. 56, 57, 508 S.E.2d 564 (1998).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the PCR action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility. *See, e.g., State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); *Clemons v. Mississippi*, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and

in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

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

As an initial matter, this Court finds applicable the strong presumption that at all stages of Standby Counsel's representation of Applicant, he rendered adequate assistance and exercised reasonable professional judgment in his 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 the time they were made. *Strickland*, 466 U.S. at 689; *see Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF STANDBY COUNSEL ALLEGATIONS

Allegation 1: Failure to Advise of and File Direct Appeal

Applicant alleges Standby Counsel was constitutionally ineffective for failing to advise him of his right to appeal, and therefore, asserts he is entitled to belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). This Court finds this allegation to be without merit.

In *Dearybury v. State*, the Supreme Court held that where a defendant knowingly and voluntarily waived his right to counsel, his failure to file a direct appeal is due to his own inaction. 367 S.C. 34, 625 S.E.2d 212 (2006) (remanding to the PCR court for findings whether the applicant knowingly and voluntarily waived his right to counsel); *See U.S. v. Windsor*, 981 F.2d 943, 947 (7th Cir. 1992) (explaining the "court knows of no constitutional right to effective assistance of standby counsel"); *U.S. v. Morrison*, 153 F.3d 34, 55 (2d Cir. 1998) (holding "without a constitutional right to standby counsel, a defendant is not entitled to relief for ineffectiveness of standby counsel").

Faretta requires that the accused be advised of their right to counsel and adequately warned of the dangers of self-representation to establish a valid waiver of counsel. *Prince v. State*, 301 S.C. 422, 392 S.E.2d 462 (1990), citing *Faretta v. California*, 422 U.S. 806 (1975). "Since the matter of hybrid representation is left to the discretion of the trial judge, then, by implication, there is no Sixth Amendment right to hybrid representation." *State v. Stuckey*, 333 S.C. 56, 57, 508 S.E.2d 564 (1998). In *McKaskle*, the United States Supreme Court discussed the right of a defendant to represent himself and the appropriate conduct of standby counsel so as not to violate this right. *McKaskle v. Wiggins*, 465 U.S. 168 (1984). The *McKaskle* Court reasoned that a *pro se* defendant must be allowed to control the organization and content of his defense, including making his own motions, but categorical silencing of standby counsel is not necessary to achieve this objective. *McKaskle*, 465 U.S 168. The Court further reasoned that the *pro se* defendant's own conduct should be taken into consideration, and that a defendant's invitation for counsel to

participate obliterates any claim that the defendant was deprived of control over his own defense. *Id.*

Trial

At trial, Applicant indicated to Judge Russo that he wished to represent himself. (Trial Tr. p. 33). Based on this, Judge Russo began questioning Applicant about his level of education and knowledge of the law, warned Applicant of the dangers of self-representation, and advised him against it due to Applicant's limited knowledge of the law and court procedure. (Trial Tr. pp. 33-42). Applicant represented to the Court that he had completed some college, that he had read the rules of evidence, understood that he would not receive special treatment, that he would have Standby Counsel only as standby counsel, and elected to represent himself against the advice of the trial court and Standby Counsel. Ultimately, Judge Russo granted Applicant's request to represent himself and Applicant proceeded *pro se* with a bench trial. (Trial Tr. p. 48).

After Judge Russo pronounced Applicant guilty, Judge Russo asked Applicant whether he would like Standby Counsel to articulate Applicant's post-trial motion on his behalf. (Trial Tr. p. 276). Applicant indicated that he wished for Standby Counsel to make the post-trial motion on his behalf. (Trial Tr. p. 277). Standby Counsel stated the following while articulating Applicant's motion for a new trial:

> Your Honor, my client would like to -- to make a motion for a new trial on a couple grounds: From -- and -- … and bearing in mind that I've been sitting through this, of course, as you're aware, and – and he's been coming over to me during the course of the trial, asking for legal analysis, I guess. I've tried to help him to the best of my ability. I know he is -- and we certainly don't want to go through -- back through it again. But he had a -- what appears to be a legitimate misunderstanding as to the witness situation. **He feels that he was prohibited from calling a witness, bearing in mind he got the benefit of asking questions of [Officer Pate] yesterday…So for that reason, we would request a -- a new trial.**

(Trial Tr. p. 277) (emphasis added). Judge Russo denied the motion and Standby Counsel made no further motions on Applicant's behalf; instead, Applicant subsequently spoke on his own behalf in mitigation prior to sentencing. (Trial Tr. p. 282).

PCR Evidentiary hearing

Standby Counsel testified that he did not sit at the table throughout the trial and did not recall Applicant having many questions for him, if any. (PCR Tr. p. 35). When asked about his status while making Applicant's post-trial motion, Standby Counsel testified that he did not believe he had been reappointed as Applicant's attorney at that point. (PCR Tr. p. 37). Standby Counsel testified that Judge Russo asked Applicant if he wanted Standby Counsel to argue the post-trial motion on Applicant's behalf, not whether he wanted Standby Counsel reappointed. (PCR Tr. pp. 37-38). Standby Counsel testified that, in his understanding, he was just standing in for Applicant to argue that particular motion; he did not file a notice of representation or anything similar. (PCR Tr. pp. 38, 39). Standby Counsel testified that the time frame between the judge issuing the verdict and sentence, and the deputies moving in to get Applicant, was very short, so there was not a great opportunity for additional communication. (PCR Tr. p. 38). Standby Counsel testified he could not remember if anything was communicated at that point about appealing. (PCR Tr. p. 38).

Findings

This Court finds that, throughout the entirety of his trial, Applicant maintained sole control over his defense strategy. Standby Counsel moved forward with the post-trial motion only after Judge Russo asked Applicant if he would want it, at the explicit consent of Applicant, and after Judge Russo allowed it. Importantly, this motion was grounded in issues that Applicant himself had proactively raised during the trial. Standby Counsel merely articulated this motion to align with Applicant's arguments and defenses presented throughout the proceedings. Thus, it is clear

that Standby Counsel did not serve as co-counsel or re-engage as Applicant's attorney; rather, he strictly fulfilled the role of articulating a single post-trial motion at the trial judge's direction and with Applicant's consent.

Critically, Applicant never expressly requested Standby Counsel to be reappointed as counsel, nor did he indicate by his conduct that he desired or believed Standby Counsel had been reappointed by articulating his motion. *State v. Cabrera-Pena*, 350 S.C. 517, 535, 567 S.E.2d 472, 481-82 (Ct. App. 2002) (aff'd in part, remanded in part) (citing *State v. Hyatt*, 132 N.C.App. 697, 513 S.E.2d 90, 94 (1999) ("[T]o obtain relief from a waiver of his right to counsel, a criminal defendant must move the court for withdrawal of the waiver")). This is further exemplified by Applicant's immediate continuation to represent himself in sentencing subsequent to Standby Counsel articulating his post-trial motion, as noted *supra*. Further, the trial court did not indicate that Standby Counsel had been reappointed as counsel. *State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998) (finding no error where the trial court interpreted Applicant's request to have counsel cross-examine all the State's witnesses in the sentencing phase in a capital case as a reversal of Applicant's waiver of counsel).

This Court finds there was no express request for counsel to be re-appointed, and no indication by any of the parties that Standby Counsel's conduct operated as a re-appointment of his representation. Standby Counsel's conduct was limited to one post-trial motion that articulated Applicant's arguments and trial strategy, not his own. Even if this conduct could be viewed as an implied request to have counsel appointed, Standby Counsel's conduct would operate to re-engage his representation solely for the post-trial motion for a new trial, since Applicant resumed his self-representation immediately following the motion. Nevertheless, this Court finds Standby Counsel's conduct did not re-engage him as appointed counsel which would create an obligation

on his part to advise Applicant of his right to appeal. Therefore, Applicant is not entitled to a belated appeal pursuant to *White*.

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 Standby Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Standby Counsel committed either errors or omissions to prove the second prong of *Strickland*—that he was prejudiced by Standby Counsel's performance.

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

Allegation 2: Failure to Investigate

Applicant alleges Standby Counsel was constitutionally ineffective for failing to investigate. Specifically, Applicant alleges Standby Counsel did not investigate the drug chemical analysis, and that the chemical analysis showed Applicant did not possess drugs. This Court finds this allegation to be without merit.

"A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[W]hile the scope of a reasonable investigation depends [on] a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted). However, counsel

need only interview potential witnesses "when it is reasonable to do so." *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Id.* (citing *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.*, 377 S.C. at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. *Ard*, 372 S.C. at 331, 642 S.E.2d at 597 ("this duty is limited to [a] reasonable investigation"). The United States Supreme Court also instructed reviewing courts to "keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. Thus, in applying the Strickland standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014).

Additionally, Counsel must, at a minimum, make some effort to interview potential witnesses identified by the defendant and make an independent investigation of the facts and circumstances of the case. *Edwards*, 392 S.C. at 456, 710 S.E.2d at 64; *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). To support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. *Glover*, 318 S.C. at 498-99, 458 S.E.2d at 540. The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. *Id.*

Trial

At trial, Lieutenant Mitchell Hansen testified that he conducted the analysis on the substances retrieved from Applicant's person, and the test revealed the substances were positive for heroin. (Trial Tr. p. 193). Applicant did not object to Lieutenant Hansen's qualification as an expert nor the admission of the chemical analysis report. (Trial Tr. pp. 188, 192).

PCR Evidentiary hearing

Standby Counsel testified that based on the notes in his defense file, he filed a motion for production and inspection of evidence on March 3, 2017. (PCR Tr. p. 17). Standby Counsel testified he could not remember if he was in possession of the chemical analysis report before trial. (PCR Tr. p. 21). Standby Counsel testified that he followed the standard process to investigate the charges, including filing motions and meeting with Applicant. (PCR Tr. p. 23). Standby Counsel testified he remembered another attorney and an investigator also participating in the case. (PCR Tr. pp. 23-24). Standby Counsel testified his motions were sent directly to the solicitor, which was standard procedure for obtaining evidence. (PCR Tr. p. 24). Standby Counsel testified he disagreed

with the statement that he had no proof he ever requested any evidence from the State. (PCR Tr. p. 28). Standby Counsel testified he could not remember whether he communicated with the State's investigator, Investigator Pate. (PCR Tr. p. 30). Standby Counsel testified he did his due diligence in Applicant's case prior to trial. (PCR Tr. pp. 30-31). Standby Counsel testified he was not aware of any unrevealed discovery in Applicant's case. (PCR Tr. p. 32).

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 further finds Applicant has failed to overcome his burden in proving Standby Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

At the evidentiary hearing, Applicant asserted that drugs were never found on his person and were illegally planted in his file, that the chemical analysis report showed no drugs, and that Respondent conceded Standby Counsel was ineffective for failing to obtain the chemical analysis.[3] However, Applicant did not provide the chemical analysis to this Court at his PCR hearing and did not present any witnesses other than Standby Counsel, and Standby Counsel testified he was not aware of any unrevealed discovery in Applicant's case. Further, Applicant had the opportunity to object to the chemical analysis report being entered at trial, and he did not.[4] This Court finds the outcome of Applicant's trial would not have been different due to the pretrial investigation

Although Standby Counsel testified that he could not remember if he spoke with Investigator Pate, Applicant alleged that Investigator Pate's testimony at trial ultimately favored

[3] This Court found no evidence in the record of Respondent conceding that Standby Counsel was ineffective at any point.
[4] Trial Tr. p. 192.

the defense. (PCR Tr. p. 30). Applicant has not provided how Standby Counsel investigating this before trial would have changed the outcome of his trial when the testimony of that witness was, in Applicant's own words, favorable to the defense.

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 Standby Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Standby Counsel committed either errors or omissions to prove the second prong of *Strickland*—that he was prejudiced by Standby Counsel's performance.

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

Allegation 3: Failure to Make Pre-Trial Motions

Applicant alleges Standby Counsel was constitutionally ineffective for failing to make pre-trial motions on his behalf. Specifically, Applicant argued that Standby Counsel should have filed pre-trial motions to dismiss his case for lack of evidence, to obtain the audio and video of him buying drugs, and to receive all the evidence in the case. This Court finds this allegation to be without merit.

PCR Evidentiary hearing

Standby Counsel testified he made the standard motion for discovery and received all the evidence. (PCR Tr. pp. 23-24). Standby Counsel testified Applicant did not request Standby Counsel to make further pre-trial motions on his behalf and refused to communicate with Standby Counsel after he fired him. (PCR Tr. pp. 21-22, 29, 34). Standby Counsel testified he traditionally

makes pre-trial motions concerning the evidence on the record prior to trial, as the trial was about to get started. (PCR Tr. pp. 30, 34). Standby Counsel testified he would consider Applicant's motion for a bench trial to be a pretrial motion, which Applicant made on his own. (PCR Tr. p. 34). Standby Counsel testified he did not file any pretrial motions attacking the evidence prior to trial. (PCR Tr. p. 29). Standby Counsel testified it was difficult communicating with Applicant, as he would repeatedly dispute that Standby Counsel provided things. (PCR Tr. p. 33). Standby Counsel testified he could not remember if he and Applicant discussed pretrial motions. (PCR Tr. p. 34).

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 further finds Applicant has failed to overcome his burden in proving Standby Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Standby Counsel testified that Applicant would not communicate with Standby Counsel after Applicant fired him. *See Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). Standby Counsel explained that the type of motions Applicant is alleging he should have made were usually made right before trial started, at which point he was fired.[5] This is further evidenced by the fact that Applicant argued his own pretrial motion for a bench trial.[6] The only other motions Applicant alleges should have been filed are motions to compel the evidence, but

[5] Applicant stated he "requested to fire [Standby Counsel] last week" the first day of trial. (Trial Tr. p. 28). When asked about whether he decided not to fire his attorneys, Applicant stated "I didn't decide not to fire him." (Trial Tr. p. 29).
[6] Trial Tr. p. 50.

Standby Counsel testified he did file for discovery, and he was not aware of any evidence that was withheld. This Court finds this testimony to have been credible.

Additionally, Applicant failed to provide how the pre-trial motions would have changed the outcome of his proceeding. Applicant merely asserted "that there were no drugs in the case file" and law enforcement planted the drugs, without any evidence to substantiate his claims. *See Harris*, 377 S.C. at 75-76, 659 S.E.2d at 145-46 (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (An applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome.)).

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 Standby Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Standby Counsel committed either errors or omissions to prove the second prong of *Strickland*—that he was prejudiced by Standby Counsel's performance.

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

Allegation 4: Failure to Attack the Late Disclosure of Video to Have More Time to Prepare

Applicant alleges Standby Counsel was constitutionally ineffective for failing to attack the State based on the late disclosure of the video of the drug transaction. This Court finds this allegation to be without merit.

PCR Evidentiary hearing

Standby Counsel testified that he obtained the video the week prior to trial and reviewed it with Applicant. (PCR Tr. p. 32-33). Standby Counsel testified he agreed the video was provided very soon before trial, but it was his understanding that that was common practice when confidential informants were involved, and they were still given a couple of weeks. (PCR Tr. p. 32). Standby Counsel testified that he did not think there was anything in the video that would have necessitated Standby Counsel doing additional investigation or homework, such as requesting a continuance. (PCR Tr. p. 33). Standby Counsel testified Applicant did a good job representing himself when asking questions about the video at trial. (PCR Tr. p. 33).

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 further finds Applicant has failed to overcome his burden in proving Standby Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Standby Counsel testified that it was standard for the State to provide evidence where confidential informants are involved late in the process, and he did not see any problem with it to where he would need additional investigation or to file for a continuance. This Court finds this testimony to have been credible.

Additionally, Applicant failed to show how more time to review the video would have resulted in a different outcome. *See Ryals v. State*, 439 S.C. 230, 886 S.E.2d 239 (Ct. App. 2023) ("The PCR court acknowledged "[t]rial [c]ounsel may have been deficient in failing to request a continuance ... until [Ryals] could change into civilian attire"; however, relying on *Humbert*, the court ultimately denied PCR on this issue because it found Ryals failed to establish prejudice in

view of the overwhelming evidence against him. *See id.* at 338, 548 S.E.2d at 866 ("Due to the overwhelming evidence against petitioner, there is not a reasonable probability the outcome of his trial would have been different had petitioner not been dressed in his prison jumpsuit."). In Applicant's case, the evidence of guilt was overwhelming, as he was shown on video committing the offense.

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 Standby Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Standby Counsel committed either errors or omissions to prove the second prong of *Strickland*—that he was prejudiced by Standby Counsel's performance.

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

Allegation 5: Failure to timely request a preliminary hearing

Applicant alleges Standby Counsel was constitutionally ineffective for failing to timely request a preliminary hearing. This Court finds this allegation to be without merit.

Every criminal defendant is entitled to notice of his right to a preliminary hearing "to determine whether sufficient evidence exists to warrant [his] detention and trial." Rule 2(a) SCRCrimP. However, there is no state constitutional right to a preliminary hearing. *State v. McClure*, 277 S.C. 432, 289 S.E.2d 158 (1982); *State v. Keenan*, 278 S.C. 361, 296 S.E.2d 676 (1982). Furthermore, a preliminary hearing shall not be held if the defendant is already indicted by a grand jury. Rule 2(b) SCRCrimP; *see also State v. Hawkins*, 310 S.C. 50, 54-55, 524 S.E.2d

50, 53 (Ct. App. 1992) (holding trial court did not err in refusing to quash defendant's indictments because he did not receive a requested preliminary hearing because he was indicted before a preliminary hearing was held).

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 further finds Applicant has failed to overcome his burden in proving Standby Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Notably, Applicant failed to present any testimony or evidence on this allegation. However, the record before this Court shows that Applicant was indicted during the June 2017 term of the Florence County Grand Jury (2017-GS-21-00764). Thus, Applicant was not entitled to a preliminary hearing.

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 Standby Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Standby Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Standby Counsel's performance.

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

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 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 to 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 24 **day of** MARCH **, 2026.**

WALTON J. MCLEOD, IV
Presiding Judge
Twelfth Judicial Circuit

Lexington, South Carolina