

VOLUME II OF II

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Spartanburg County

S.C. SUPREME COURT

Honorable William C McMaster, III, Circuit Court Judge

JADEN I. GARY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2026-001000

APPENDIX

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1 A Well, looking back at it now, maybe I could have.
2 But I think that that, ultimately, would have been not
3 successful.

4 Q Why's that?

5 A Because I believe that Judge Kelly -- well, number
6 one, Judge Kelly sentenced him within the sentencing
7 guidelines, 15 to life. And I -- I don't think -- knowing
8 Judge Kelly and practicing in front of him for a
9 substantial amount of years since he's been on the bench,
10 I don't think that would have been, ultimately,
11 successful.

12 Q Mr. Gary is alleging that you failed to object to
13 Investigator Shue's identification of him. Did you object
14 to his identification?

15 A I believe I did.

16 Q Okay.

17 A If the transcript reflects it, I believe -- I think
18 that is accurate.

19 Q Do you know what the bolstering objection would be
20 with that?

21 A I'm not sure if I made a bolstering objection.

22 Q You did not. I -- the allegation is there should
23 have been a bolstering objection. Do you know what -- if
24 there could have been a bolstering objection there?

25 A I suppose I could have made an objection to

1 bolstering, but I did not.

2 Q Okay. Do you think that if you had, it would have
3 changed the outcome of the trial and, ultimately, been
4 successful?

5 A Possibly. There -- there was a video. And there was
6 statements, too. So it -- possibly with an identification
7 issue, if that had been -- and I believe I proffered that.

8 We -- we tried this case two times. The first time
9 we tried it in front of Judge Hayes. And the case was --
10 the case almost reached a verdict. But before that, a
11 juror got COVID, or maybe one or two jurors got COVID.
12 And that case had to be continued.

13 And then we went to another trial in front of Judge
14 Kelly. And that reached a conclusion and a verdict. And
15 I believe I made the same motions in those two trials to
16 exclude his testimony.

17 Q Do you recall advising Mr. Gary that the Judge could
18 charge burglary second degree?

19 A Yes. I do remember that. And I remember arguing
20 back in -- not arguing back in chambers, but talking about
21 this back in chambers about the possibility of Judge Kelly
22 giving a burg second either violent or non-violent
23 instruction to the jury.

24 The burg second statute is -- in comparison to the
25 burg first statute is quite confusing. And I -- and I

1 think any -- any practicing attorney or any judge would
2 agree with that. There's a difference between a building
3 and a dwelling. I -- I believe if the transcript reflects
4 it, I think I did make the argument on the record that the
5 jury should be instructed as to burg second either violent
6 or non-violent.

7 Obviously, if -- if the jury would not have found him
8 guilty of burg first -- or Mr. Gary guilty of -- or not
9 guilty of burg first, what would have happened is parole
10 eligibility could have changed if he was sentenced under a
11 burg second either violent or not violent. And so that
12 was my -- I guess my strategy coming into trial.

13 Does that answer your question?

14 Q Yes, it does.

15 Thank you.

16 So Mr. Gary alleges that you failed to advise him to
17 plead guilty after that first trial with Judge Hayes. Did
18 you advise him about continuing with the trial and
19 pleading guilty? Did you go either way?

20 A We were -- this -- this was a difficult case. And I
21 will say that the State's negotiation in this case was --
22 I would call it -- and I've told Spenser this, Mr. Smith,
23 the prosecuting attorney on this. It was particularly
24 house -- harsh, especially for a person like Mr. Gary who
25 was very young and who had no record whatsoever.

1 And the offer on this case -- and it continued to be
2 the offer on this case was 15 years under burg first. And
3 when somebody is convicted under that statute, that
4 sentence must be served, again, to my understanding, an
5 85 percent before that person has any chance of parole
6 eligibility. I thought for somebody, again, who was
7 youthful, who had no record whatsoever, I -- I believed
8 that that was harsh. He, ultimately, received 20, which
9 was more harsh, obviously.

10 So we were stuck -- and I think Mr. Gary would admit
11 this as well -- between a rock and a hard place. So I --
12 I can't remember -- he -- he knew the offer. I can't
13 remember, specifically, advising him of saying maybe we
14 better just take the 15.

15 I remember it was -- it was an odd sort of time in
16 court because what had happened is COVID was going on.
17 And we, actually, picked or swore a jury, I believe, over
18 in the Spartanburg Auditorium. Because we were following
19 COVID protocols.

20 And I remember I had a conversation with Mr. Gary in
21 one of the rooms off the basement of the Spartanburg
22 Memorial Auditorium that the State won't go down off the
23 15. And he was quite upset with that. And I remember in
24 my office saying that they will not go down from that 15.

25 And it -- it almost brings a tear to my eye that

1 Mr. Gary was -- was so upset with it, as was I. Mr. Gary
2 was lying on my floor in -- in the office when he, I
3 guess, realized the impact of that. And that was a very
4 sad moment. And I remember that distinctly. And I think
5 the family remembers that as well. Because I remember his
6 mother was in my office as well.

7 And for such a young man to be, you know, staring
8 down what he was staring down, a life sentence on burg
9 first. But still, 15 years for -- for this, again, was
10 unduly harsh. I know I went on for a while, but I wanted
11 to state that.

12 Did I answer your question?

13 Q Yeah. And did -- I think you indicated this, but was
14 that the only plea offer the whole time?

15 A That was the only plea offer the -- the entire time.
16 And I -- and I will say this, I remember talking to
17 Mr. Smith over the phone. I remember talking to him in
18 person. And I said, Just give us a chance at burg second
19 and you can negotiate a 15-year sentence. That, at least,
20 changes his parole eligibility either non-violent or
21 violent. Because it doesn't fall under the sentencing law
22 for something that carries 20 or more.

23 So -- and I think -- to give Mr. Smith the benefit of
24 the doubt, I think that he could have potentially wanted
25 to do this. But I think he was overruled from -- from his

1 supervisors and perhaps -- and I wasn't privy to these
2 conversations, possibly the victim and/or the police.

3 Q And, ultimately, did Mr. Gary still indicate to you
4 that he wanted to take it to trial?

5 A Yes.

6 Q I just quickly want to circle back to what you said
7 earlier about your objection to the investigator's
8 identification of Mr. Gary. You said that it would
9 have -- it could have changed the outcome. But then you,
10 also, after that said that the evidence was strong. There
11 was video.

12 So can you elaborate a little bit on how you think
13 the bolstering objection could have changed the outcome?

14 A It's difficult to go back in that. I do believe the
15 evidence was strong. They had the video. They had a
16 statement. And I made, obviously, a Jackson vs. Denno
17 motion to exclude the statement that was, ultimately,
18 unsuccessful as well. I don't -- you never know if it
19 could have changed the outcome. But in all probability,
20 it probably would not.

21 Q Okay. And something -- Mr. Gary said that there was
22 something about the investigator saying that he knew him
23 because he was in the gang unit. But he didn't have any
24 gang affiliations. Is that your understanding, or is your
25 understanding different?

1 A No. Investigator Shue was -- was in and still is in
2 the gang task force.

3 Does that answer your question?

4 Q Was Mr. Gary affiliated with any gang?

5 A Not to my knowledge.

6 MS. WESTRAAD: Okay. I think that is all the
7 questions I have.

8 Please answer any questions Ms. Ross has.

9 THE COURT: All right. Cross.

10 CROSS-EXAMINATION

11 BY MS. ROSS:

12 Q Just on that while I'm thinking about it, I'll turn
13 you to Page 158, Line 11 of the transcript.

14 A Thank you.

15 Line what?

16 Q 11.

17 A 11. Okay. Do you want me to read that into the
18 record?

19 Q Well, yes.

20 A Okay.

21 Q And then state whether you objected to it or not.

22 A There is Trevor Shue cross-examination by
23 Mr. Schultz.

24 Question by me apparently: Do you know if Mr. Gary
25 or his family had any part in the Department of Social

1 Services involvement, or anything?

2 Answer: Not -- not to my knowledge.

3 Question: Okay. You said you had an encounter with
4 Mr. Gary before; correct, sir?

5 Answer: Yes, sir.

6 How many years ago was that?

7 Answer: Approximately two years.

8 Do you want me to --

9 Q No.

10 A Okay.

11 Q Was that true, to your knowledge? I mean, when you
12 asked that question, did you expect him to say -- did
13 Mr. Gary have any prior [inaudible], or anything, or
14 experience with that investigator?

15 A Yes. I expect truthful answers from witnesses.

16 Q Right. And -- but you in your preparation for this
17 case, he had no prior arrests or incident reports,
18 Mr. Gary?

19 A I don't know about incident reports. But I checked
20 his NCIC. He did not have --

21 Q He didn't have any?

22 A Yes.

23 Q So you didn't expect him to sit there and say, I had
24 prior run-ins with Mr. Gary?

25 A No, I did not.

1 Q And wouldn't you agree that's a little bit
2 prejudicial for the jury to hear that?

3 A Yes.

4 Q Now, I just will go ahead and put these in. These
5 are SCDC -- these are SCDC runs from the co-defendants.
6 Do these look familiar to you?

7 A They don't look familiar to me. But if I could
8 peruse them?

9 Q Sure. And that's what -- is that what's in the
10 regular course of business -- if you run an SCDC person,
11 is that what comes up?

12 A Yes, yes. If they're a current inmate, yes.

13 Q Yes. Okay.

14 THE COURT: Are these going into evidence?

15 MS. ROSS: Yes.

16 THE COURT: Do you have numbers on them?

17 MS. ROSS: No. I will go ahead and mark them.

18 I would as, that these be marked as Applicant's
19 Exhibit Nos. 1 and 2.

20 (WHEREUPON, Applicant's Exhibit Nos. 1 and 2 were
21 marked for identification only.)

22 BY MS. ROSS:

23 Q All right. I'm showing you what's been marked as
24 Applicant's Exhibit Nos. 1 and 2.

25 A Thank you.

1 Q Now, what are those?

2 A These are printouts from SCDC indicating -- well,
3 it's -- it's titled, Inmate Search Detail Report. One is
4 for Zion Anthony Miller and one is for Tyquez McKinney.

5 Q All right. And those are the co-defendants in this
6 case; is that correct?

7 A That is correct.

8 Q And what does it say their max out dates are?

9 A Their max out dates are -- well, Mr. McKinney's max
10 out date is 10/7/2027.

11 Q All right.

12 A Well, the release date?

13 Q It doesn't matter. And then how about the
14 co-defendant -- the other co-defendant?

15 A The co-defendant is Zion Miller. And his projected
16 release date is 8/31/27 -- 2027. I'm sorry.

17 Q And can you see what the reflected sentences for
18 those two co-defendants were?

19 A Yes, I can.

20 Q What was that?

21 A Again, SCDC may not be the most accurate indicator of
22 really states [phonetic] and everything. But, however,
23 Tyquez McKinney, he was sentenced -- it appears to be
24 15 years to a burg second. And that's violent.
25 Concurrent to that, he was, also, sentenced to a grand

1 larceny of 2,000 to 10,000, and a firearms provision,
2 which I would assume was the five years day for day. That
3 more than likely was run concurrent.

4 Do you want me to go on?

5 Q No.

6 And then -- and the same for the co-defendant; is
7 that correct.

8 A Co-defendant Mr. Miller?

9 Q Yes.

10 A Okay. Mr. Miller was sentenced similarly. And he
11 received a 15-year sentence to be run concurrent.

12 Do you want me to state all the --

13 Q No. That's fine.

14 A Okay. And that was under violent. And both
15 sentence -- sentences started around the same time,
16 actually.

17 Q All right. And by violent, they're not doing
18 85 percent of the 15?

19 A No. They're -- they're not doing 85 percent.
20 It's -- it's a quirk of the law there that burglary second
21 violent carries up to 15 years, but is parole eligible.
22 Mr. Gary's 15 -- well, 20-year sentence is not parole
23 eligible.

24 Q So he'll get out probably 10 or 12 years after these
25 guys have been out?

1 A Mr. -- Mr. Gary?

2 Q Yeah.

3 A Well, I'm not -- I'm not positive. But, yes, it will
4 be a significant amount of time that Mr. Gary will have to
5 serve, as opposed to those gentlemen that I just read into
6 the record.

7 MS. ROSS: All right. I'd offer these as Applicant's
8 Exhibit Nos. 1 and 2.

9 THE COURT: Any objection?

10 MS. WESTRAAD: No objection, Your Honor.

11 THE COURT: Applicant's Exhibit Nos. 1 and 2 are in
12 evidence without objection.

13 (WHEREUPON, Applicant's Exhibit Nos. 1 and 2 were
14 admitted into evidence.)

15 MS. ROSS: And if I can approach.

16 THE WITNESS: And if I could go on with that,
17 Susannah?

18 BY MS. ROSS:

19 Q Sure.

20 A And that was my argument to Mr. Smith that
21 potentially the co-defendants in this could receive a
22 significantly lower sentence. Even though Mr. Miller and
23 Mr. McKinney received a 15-year sentence and Mr. Gary
24 received a 20-year sentence, they were sentenced under
25 different statutes.

1 Q Correct. And would it surprise you if Mr. Gary's max
2 out date is 7/28/36?

3 A No, it would not.

4 Q Now, just moving on. After Hayes' trial, did Hayes
5 make any statements or suggestion to the Solicitor that he
6 was not going to give Mr. Gary -- he didn't think burglary
7 first was appropriate, or do you recall?

8 A Make any comments on the record?

9 Q No. Just to -- to you or in the discussions after
10 the hung jury?

11 A I can't remember, specifically. I -- I think he -- I
12 think Judge Hayes was -- I'm not going to use the word
13 upset. But I think he was concerned with the disparity.

14 Q All right. And --

15 A I don't want to speak for the Judge, though.

16 Q Okay. Now, I'm going to switch back and start my
17 questioning over. Did you read the appellate opinion in
18 this case, by any chance?

19 A I -- I -- I perused it. I didn't --

20 Q One of the arguments --

21 A -- read it in depth, if that's what you're asking.

22 Q One of the arguments was the sentence violated Davis
23 vs. State in that -- that it violated Davis vs. State.

24 And that issue was found not to be preserved because you
25 did not object to the comments made by the Solicitor; is

1 that correct? Or does that sound correct?

2 A That is correct, yes.

3 Q All right. And I can turn you to page -- around Page
4 277 and 279 of the transcript. And that's really -- I'm
5 just getting a general idea --

6 A Thank you.

7 Q The Solicitor is arguing that he's not accepting
8 responsibility.

9 A Okay.

10 Q And I'll let the record speak for itself. But,
11 essentially, he's asking for a maximum sentence and,
12 certainly, not the minimum. And he is stating the reason
13 for that was Mr. Gary was not accepting responsibility?

14 A Yes. Do you want me to read something in the record?

15 Q No. I'll let the transcript speak for itself.

16 And then you -- you know, we've been through that
17 before. You didn't move to reconsider, even after the
18 co-defendants were sentenced for burglary second?

19 A I did not.

20 Q And, in your opinion -- there's some statement in the
21 record where the Solicitor is saying, well, Mr. Gary was
22 the only one with a gun. But isn't it true the
23 co-defendants then got guns as well?

24 A Yes.

25 Q And do you recall the background of this? How did

1 this start? How was the girl involved?

2 A What girl?

3 Q I thought a girl texted to -- to Jaden something
4 about, hey, you should go to this place and -- do you
5 recall any of that?

6 A I recall some of that. But without -- without
7 specifics, I can't distinctly remember.

8 Q Okay. Now, just going back, I guess you did object
9 to some of Mr. -- Investigator Shue's testimony?

10 A Yes.

11 Q But you didn't state that it was bolstering in any
12 way?

13 A Correct.

14 Q For -- for the investigator to say I have prior
15 knowledge of this person --

16 A Yes.

17 Q -- Mr. -- Mr. Gary, which he did not; right?

18 A Well, I think he had prior knowledge of Mr. Gary. I
19 think that was the --

20 Q That he had said that he'd pulled him over before?

21 A Yes, I believe so.

22 Q Okay. But, again, you weren't able to find any
23 incident report or arrest involved in that --

24 A No. I was never -- well, I don't believe I was given
25 that.

1 Q All right. And -- but if -- let the record speak for
2 itself. You didn't object to bolstering at that time?

3 A No. My objection was not over bolstering, correct.

4 Q All right. And we've talked about the -- that --
5 that you did believe you had a chance for a burglary
6 second jury instruction; is that correct?

7 A Yes. Because of the ambiguity of the sentence.
8 There -- there could have been a chance. But Judge Kelly,
9 ultimately, concluded that burg second -- well, he just
10 wasn't going to charge it.

11 Q And the court -- the appellate court agreed with his
12 decision. That was one of the --

13 A I believe so, yes.

14 Q Okay. Now, as far as taking responsibility, you talk
15 about -- Jaden Gary turned himself in afterwards; correct?
16 I mean, as far as him taking responsibility -- there was
17 an argument he wasn't taking responsibility by the
18 Solicitor at the end -- the sentencing phase of the trial?

19 A Yes.

20 Q All right. But what -- didn't he turn himself in and
21 give a statement, Mr. Gary?

22 A Yes.

23 Q So he fully did take responsibility as a 17-year-old,
24 admitted to what he had done, and gave a statement?

25 A Yes. He -- he gave a statement. And I -- I think he

1 was very remorseful during this time about what happened.

2 Q All right. And do you think it's fair that he got
3 this much more time than his co-defendants?

4 A Absolutely not. No, I -- I do not think that was
5 fair.

6 MS. ROSS: All right. I have no further questions.

7 THE COURT: All right. Any redirect?

8 MS. WESTRAAD: Just briefly, Your Honor.

9 REDIRECT EXAMINATION

10 BY MS. WESTRAAD:

11 Q So we were just talking about how -- the appeal that
12 happened in this case, and the arguments by the Solicitor
13 on appeal, and that that was not preserved. If it had
14 been preserved, do you think that that could have been
15 successful?

16 MS. ROSS: I object to speculation maybe, Judge.

17 THE COURT: I think you asked him similar questions.
18 I'm going to allow it.

19 THE WITNESS: Far be it for me to get into the minds
20 and the heads of the panel of Judges either on the Court
21 of Appeals or the Supreme Court. I really can't say.

22 BY MS. WESTRAAD:

23 Q But the argument in State vs. Davis that opposing
24 counsel brought up is about judges --

25 A Yes.

1 Q -- deciding that?

2 A Yeah.

3 Q And there was -- there was no indication on the
4 record that the Judge had decided the sentence based on
5 the lack of responsibility or taking it to trial?

6 A No. I don't think the Judge said something like
7 that. If -- if I could have the transcript.

8 MS. WESTRAAD: Your Honor, may I approach the
9 witness?

10 THE COURT: Sure.

11 BY MS. WESTRAAD:

12 Q Page 279.

13 A Thank you.

14 Do you want me to read what Judge Kelly said?

15 Q Just if you want to refresh your recollection on what
16 was said --

17 A Okay.

18 Q -- and then let me know if you think he said
19 anything that indicates --

20 A What I'll do is I'll start at Page 448 -- or excuse
21 me, Page 279. I apologize. "Mr. Gary" -- this is the
22 Court -- "you are, indeed, a very blessed and lucky man.
23 You broke into the house of a man who was a combat veteran
24 with three tours. Do you understand?"

25 Mr. Gary nods -- nods affirmatively.

1 "Had he been there, he would have killed you and your
2 two friends that day. Your mother would be minus a son
3 right now. No doubt or doubts in my mind, none. You
4 would be a dead person. That shotgun you took out, that's
5 the one he loaded to stop people like you. And the
6 citizens of this county and this state are tired of people
7 like you breaking into their houses. You didn't make a
8 mistake. A mistake is where you put too much salt on your
9 food. You made a bad judgment. That's what you did."

10 And then he proceeded to sentence.

11 Q Thank you.

12 A Does that answer your question?

13 Q So -- yes, it does.

14 A Okay.

15 Q And then the last thing, what was Mr. Gary's role in
16 the crime compared to his co-defendants? Do you -- did he
17 have a different role than they did?

18 A Well, the State interpreted it as Mr. Gary was the
19 ring leader of -- of this. I can see where the State is
20 coming from just -- just to be frank. But, however, I
21 think -- because of the relative youth of all these
22 individuals there, I -- I think they were all equally
23 responsible.

24 MS. WESTRAAD: I have no further questions.

25 THE COURT: All right. Anything further from this

1 witness?

2 MS. ROSS: Just one.

3 RECROSS-EXAMINATION

4 BY MS. ROSS:

5 Q Prior to trial, did Judge Kelly give any indication
6 of what kind of sentencing he as going to dole out, if
7 Mr. Gary sought a trial?

8 A No. I don't believe so.

9 Q He didn't say anything that --

10 A No.

11 MS. ROSS: Okay. No further questions.

12 THE COURT: All right. You may step down.

13 MS. WESTRAAD: The State has no further witnesses,
14 Your Honor.

15 THE COURT: All right. Anything further?

16 MS. ROSS: Can I recall Mr. Gary in rebuttal for one
17 question?

18 THE COURT: Sure.

19 MS. WESTRAAD: Your Honor, is Mr. Schultz free to
20 leave?

21 THE COURT: Any objection, Ms. Ross?

22 MS. ROSS: No objection.

23 THE COURT: All right. He's released from his
24 subpoena.

25 MR. JOSHUA SCHULTZ: Thank you, Your Honor.

1 THE COURT: All right. Mr. Gary, you're still under
2 oath.

3 DIRECT EXAMINATION

4 BY MS. ROSS:

5 Q As far as that last question I asked Mr. Schultz,
6 what was your recollection as far as what --

7 A When Josh was talking about when we were picking our
8 jury in the auditorium, he left out for a moment. And he
9 came back and he was telling me that -- he said, Okay.
10 The Judge said that -- you know, I asked him how much time
11 would you be looking at if you were found guilty at
12 trial --

13 MS. WESTRAAD: Objection. Hearsay.

14 THE COURT: I'll sustain it.

15 MS. ROSS: It goes to his --

16 THE COURT: Sustained.

17 BY MS. ROSS:

18 Q Did you -- did you have an understanding that you
19 would be punished for going to trial?

20 A No, ma'am.

21 MS. ROSS: Okay. No further questions.

22 THE COURT: All right. You may step down, sir.
23 Anything further?

24 MS. WESTRAAD: Not from the State, Your Honor.

25 MS. ROSS: No, Your Honor.

1 THE COURT: Okay. Well, I'll take this under
2 advisement and, hopefully, have a decision in the next
3 week or so.

4 MS. ROSS: Well, can I do a brief summation?

5 THE COURT: Sure.

6 MS. ROSS: Judge, you know, it will be brief. It
7 just goes back to the amended application and what's set
8 forth in there.

9 Certainly, Davis vs. State is clear. And I would
10 refer Your Honor to the second and third pages of the
11 application where I'm quoting the language and case law
12 from Ms. Best's appeal filings. And it just -- it does
13 show that similar -- similarly situated people were not
14 treated the same.

15 Mr. Gary was -- was punished for asserting his right
16 to a trial. While the language is not there, the Judge
17 doesn't state, specifically, on the record -- he didn't
18 hold him -- I guess taking responsibility is code in a way
19 for giving a greater sentence when someone seeks the right
20 to a trial, which is improper.

21 Here, while the Judge doesn't use those words, he
22 does exactly as the State is encouraging him to do. And
23 that encouragement was improper. They're encouraging him
24 to give Mr. Gary more time because he sought his right to
25 a trial. And that language is in there.

1 And I just ask you to pay close attention to those
2 last pages of this transcript, and look closely at the
3 family support Mr. Gary had, his lack of a prior record,
4 his good background. And this was just a terrible outcome
5 for him.

6 Thank you.

7 THE COURT: Yes, ma'am.

8 Anything you'd like to --

9 MS. WESTRAAD: Your Honor, just briefly.

10 May it please the Court.

11 I -- we would argue that the cases that they provide,
12 State vs. Davis, State vs. Hazel, and State vs. Brower,
13 all of those cases have indications in the record of the
14 Judge saying that that is going into his consideration of
15 the sentence.

16 In this case, the State asked for the maximum and
17 Mr. Gary got 20 years. So we would say that that --
18 those -- that case law is not relevant here because
19 there's not an indication in the record as there was in
20 those cases that the Judge used that. In fact, there's an
21 indication of the opposite, that he used a different
22 reasoning for sentencing, which is allowed in his
23 discretion.

24 That's all.

25 Thank you.

1 THE COURT: Thank you both for your arguments.

2 I'll take it under advisement.

3 Thank you.

4 *****END OF TRANSCRIPT OF RECORD*****
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 16th day of June, 2025.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

November 14, 2025

Hollie Jenkins

Hollie M. Jenkins, Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
JADEN I. GARY,	)	AMENDED APPLICATION
APPLICANT.	)	
v.	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	CASE # 2024-CP-42-3224
RESPONDENT.	)	

This matter comes before the Court by way of application of post-conviction relief filed August 13, 2024, alleging ineffective assistance of trial counsel. A Return and Motion for a more definite statement was made on October 22, 2024. The Applicant now alleges ineffective assistance of trial counsel for:

1. failure to object to the solicitor's arguments regarding sentencing;
2. failure to argue that the sentence punished the Applicant for exercising his right to jury trial; See ROA p. 279
3. failure to move to reconsider sentence, especially after the two co-defendants who were older than the seventeen year old Applicant were allowed to plead to burglary second degree and received fifteen-year sentences;
4. failure to object to Investigator Trevor Shue's identification of the Applicant from the video for bolstering and failing to argue the identification was a factual question for the jury; See ROA p. 152, l. 7, p. 156, l. 15-20
5. misadvising the Applicant on the law by telling him that the judge could charge burglary second when the Applicant admitted in his confession that he went in the dwelling with a gun and
6. failure to advise the Applicant to plead guilty after his first trial with Judge Hayes.

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The Applicant also alleges he was denied due process and fundamental fairness guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States & Art. I, Sec.3 of the South Carolina Constitution. The judge sentenced the Applicant to twenty years after the Solicitor argued against the minimum at sentencing stating that the Applicant had not accepted responsibility for his actions. Then the two similarly situated co-defendants were allowed to plead to burglary second degree.

To quote the language of the Applicant's final brief at page 13:

Jaden Gary had no criminal record prior to these events. At the time he and his co-defendants entered Mr. Williams's house, Gary had just recently lost his father to murder. Gary was 17 years old. No one was home when Gary and his co-defendants entered and stole Mr. Williams's firearms. Despite this, the solicitor argued to the trial court that Gary should not receive a minimum sentence because he exercised his right to trial.

SOLICITOR SMITH: Your Honor, Mr. Williams had to go back to work and obviously this is the second time we've tried this case. He did state he wanted Your Honor and Mr. Gary to know that he believes he's lucky that he wasn't home cause he thinks Mr. Gary might be getting a life sentence but in a, in a different way and possibly all three of the young men that were involved. He asks Your Honor to impose the maximum sentence because Mr. Gary had a chance to do the right thing and to plead, and instead he chose to keep doing the wrong thing. ROA 275, l. 20-276, l. 4. 13

... I don't think that the minimum sentence is appropriate because he did not admit responsibility. Although he did it to the investigator, made the State and Mr. Williams go through basically the last trial, we were one witness away from finishing, two different trials on a case where he confessed and is caught on video. So, he's not accepted responsibility. He could not just admit what he had done and take punishment. So, we do not think that the minimum sentence is appropriate. ROA 277, l. 20-278, l. 5.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State... U.S. Const. amend. VI. When a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of discretion. See Davis v. State, 336 S.C. 329, 520

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S.E.2d 801 (1999) (holding counsel was ineffective in failing to object when the trial judge indicated the reason he sentenced Davis more harshly than two similarly-situated offenders who, unlike Davis, had pled guilty was because those offenders admitted their guilt); State v. Hazel, 317 S.C. 368, 453 S.E.2d 879 (1995) (holding the trial judge abused his discretion when the judge considered the fact that Hazel did not plead guilty in declining to grant Hazel's request for 14 sentencing under the Youthful Offender Act); State v. Follin, 352 S.C. 235, 257-58, 573 S.E.2d 812, 824 (Ct. App. 2002) ("We caution the Bench that a trial judge abuses his or her discretion in sentencing when the judge considers the fact that the defendant exercises the right to a jury trial."). See also State v. Brouwer, 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001) (remand for a new sentencing hearing pursuant to Hazel, supra, stating, "Although the [trial judge] herein also stated it had never, and never would, 'punish someone for exercising their right to a jury trial,' we believe the mere disavowal of wrongful intent cannot remove the taint inherent in the [trial judge's] commentary, especially since the record fails to reflect an otherwise appropriate basis for Brouwer's disparate sentence.").

Respectfully submitted,

s/Susannah Ross
 Susannah Ross #11205
 Attorney for the Applicant
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Spartanburg, South Carolina
 This 18th day of February, 2025

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Jaden I. Gary, #385880,

Applicant,

v.

State of South Carolina,

Respondent.

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

) CASE NO. 2024-CP-42-03224

**ORDER OF DISMISSAL
WITH PREJUDICE**

Presiding Judge: Hon. William C. McMaster, III
Applicant's Attorney: Susannah C. Ross, Esq.
Respondent's Attorney: MacKinnon Westraad, Esq.
Trial Counsel: E. Joshua Schultz, Esq.
Date of Hearing: June 16, 2025
Court Reporter: Hollie M. Jenkins

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This matter comes before the Court by way of Jaden I. Gary's (Applicant) application for post-conviction relief (PCR) filed on August 13, 2024. Respondent, the State of South Carolina, filed its Return and Motion for a More Definite Statement on October 22, 2024, requesting an evidentiary hearing on the claims of ineffective assistance of counsel. On February 20, 2025, Applicant filed an amended application for PCR.

On June 16, 2025, an evidentiary hearing convened at the Spartanburg County Courthouse before the Honorable William C. McMaster. Applicant was present and represented by Susannah C. Ross, Esquire. Assistant Attorney General MacKinnon Westraad, Esquire, represented Respondent. Applicant testified on his behalf at the evidentiary hearing, and Respondent presented the testimony of E. Joshua Schultz, Esquire ("Trial Counsel").

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any

constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted during the September 2019 term of the Spartanburg County Grand Jury for grand larceny (2019-GS-42-05573), burglary in the first degree (2019-GS-42-05574), and possession of a weapon during the commission of a violent crime (2019-GS-42-05574A). Applicant was represented by Trial Counsel. Seventh Circuit Assistant Solicitor Spenser Smith prosecuted the case.

Applicant first proceeded to trial on August 10, 2021, before the Honorable J. Mark Hayes, II. That case ended in a mistrial after jurors were dismissed for medical and family reasons.

Applicant proceeded to trial for the second time on August 31, 2021, before the Honorable R. Keith Kelly. Applicant was found guilty as indicted. Judge Kelly sentenced Applicant to a term of twenty (20) years' imprisonment for burglary in the first degree, five years' imprisonment for possession of a weapon during the commission of a violent crime, and three years' imprisonment for grand larceny, to be served concurrently.

Applicant filed a timely Notice of Appeal. Appellate Defender Elizabeth Franklin Best perfected Applicant's appeal. After briefing, the South Carolina Court of Appeals dismissed the appeal by unpublished opinion. State v. Jaden Imarion Gary, Op. No. 2023-UP-364 (S.C. Ct. App. filed November 8, 2023). The Remittitur was returned to the lower court on November 28, 2023.

CURRENT ACTION BEFORE THIS COURT

On August 13, 2024, Applicant timely filed his original application for post-conviction relief, in which Applicant alleges he is being held in custody unlawfully based on the following:

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1. Ineffective Assistance Counsel:
 - a. "Unable to specify without attorney"

On February 20, 2025, Applicant filed an amended application for post-conviction relief, in which Applicant alleges he is being held in custody unlawfully based on the following:

1. Ineffective Assistance of Counsel for:
 - a. failure to object to the solicitor's arguments regarding sentencing;
 - b. failure to argue that the sentence punished the Applicant for exercising his right to jury trial; See ROA p. 279
 - c. failure to move to reconsider sentence, especially after the two co-defendants who were older than the seventeen year old Applicant were allowed to plead to burglary second degree and received fifteen-year sentences;
 - d. failure to object to Investigator Trevor Shue's identification of the Applicant from the video for bolstering and failing to argue the identification was a factual question for the jury; See ROA p. 152, l. 7, p. 156, l. 15-20
 - e. misadvising the Applicant on the law by telling him that the judge could charge burglary second when the Applicant admitted in his confession that he went in the dwelling with a gun;
 - f. failure to advise the Applicant to plead guilty after his first trial with Judge Hayes;
2. Denied due process and fundamental fairness guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States & Art. I, Sec.3 of the South Carolina Constitution
 - a. Applicant was punished with a higher sentence for exercising his right to a jury trial

Applicant requests relief in the form of a new trial.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act¹ (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based on 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;

¹ S.C. Code Ann. §§ 17-27-10 to -160.

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- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
- (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common-law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; 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.

Finally, 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

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proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court also heard the testimony presented at the evidentiary hearing and observed the witnesses, allowing the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRPC (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

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

INITIAL FINDINGS

As a matter of general impression, this Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant, he rendered adequate

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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 TRIAL COUNSEL ALLEGATIONS

- Allegation 1(a):** Failure to object to the solicitor's arguments regarding sentencing;
- Allegation 1(b):** Failure to argue that the sentence punished the Applicant for exercising his right to jury trial; See ROA p. 279
- Allegation 2(a):** Applicant was punished with a higher sentence for exercising his right to a jury trial

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to object to the solicitor's statements at sentencing that the Applicant should receive a harsher sentence because he did not take responsibility by admitting wrongdoing and accepting punishment.² This Court finds these allegations to be without merit.

A trial judge abuses their discretion in sentencing when they consider that the applicant exercised their right to a jury trial rather than pleading guilty. Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999) (citing State v. Hazel, 317 S.C. 368, 453 S.E.2d 879 (1995)). Courts will look to the record for indications of whether the judge improperly considered that the Applicant was exercising his right to a jury trial. See Davis v. State at 331, 333 (finding the judge's responses to defense counsel's argument for a sentence reduction, which expressed his preference for guilty pleas, were improper).

"An ineffective assistance claim based on a failure to object is tied to the admissibility of

² Trial Tr. pp. 276-278.

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the underlying evidence.” Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). “If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally ‘unreasonable’ action, nor can it prejudice the defendant against whom the evidence was admitted.” Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, “[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.

Sentencing Hearing

At Applicant’s sentencing hearing, Solicitor Smith made the following comments:

Your Honor, Mr. Williams had to go back to work and obviously this is the second time we’ve tried this case. He did state he wanted Your Honor and Mr. Gary to know that he believes he’s lucky that he wasn’t home cause he thinks Mr. Gary might be getting a life sentence but in a, in a different way and possibly all three of the young men that were involved. He asks Your Honor to impose the maximum sentence because Mr. Gary had a chance to do the right thing and to plead, and instead he chose to keep doing the wrong thing.

(Trial Tr. p. 276).

I don’t think that the minimum sentence is appropriate because he did not admit responsibility. Although he did it to the investigator, made the State and Mr. Williams go through basically the last trial, we were one witness away from finishing, two different trials on a case where he confessed and is caught on video. So, he’s not accepted responsibility. He could not just admit what he had done and take punishment. So, we do not think that the minimum sentence is appropriate.

(Trial Tr. pp. 277-278).

When Judge Kelly sentenced Applicant, he stated:

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Mr. Gary, you are indeed a very blessed and lucky man. You broke into the house of a man who is a combat veteran with three tours. . . Had he been there, he would of killed you and your two friends that day. Your mother would be minus a son right now. No doubts in my mind. None. You would be a dead person. That shotgun you took out, that's the one he had loaded to stop people like you and the citizens of this county and this state are tired of people like you breaking into their houses. You didn't make a mistake. A mistake is where you put too much salt on your food. You made a bad judgment. That's what you did.

(Trial Tr. pp. 279).

Judge Kelly then delivered the sentence and said to Applicant, "You can overcome this, Mr. Gary. You're gonna be close to 40 years old, but you still got time to overcome this and become the man that you want to be. Very best of luck to you, sir." (Trial Tr. p. 280).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not object to any of the statements the solicitor made about how Applicant was not remorseful, was smoking marijuana, and was the leader amongst the co-defendants. (PCR Tr. p. 13). Applicant testified that he was sentenced to twenty years instead of the fifteen years for non-violent offenses that his co-defendants received, but Trial Counsel never moved to reconsider the sentence that Applicant was aware of. (PCR Tr. p. 13). Applicant testified he was not the ringleader. (PCR Tr. p. 14).

On cross-examination, Applicant testified that the only reason he believed he was punished for exercising his right to a jury trial was the comments the solicitor made during sentencing. (PCR Tr. p. 15). Applicant testified that Judge Kelly did not make any comments to that effect. (PCR Tr. p. 15). Applicant agreed that the video evidence showed him leading his co-defendants through the home. (PCR Tr. p. 15). Applicant testified that he identified himself from the video in his interview with the police. (PCR Tr. p. 15).

On direct examination, Trial Counsel testified that he met with Applicant and his family several times in his office, and they discussed the charges and what the State was required to prove.

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(PCR Tr. p. 17). Trial Counsel testified the evidence included statements by Applicant, video of the break-in that was “obviously, very persuasive,” and incident reports. (PCR Tr. p. 17). Trial Counsel testified the solicitor did not make any arguments at sentencing that he believed were objectionable. (PCR Tr. pp. 17-18). Trial Counsel testified Judge Kelly made a comment about how folks are tired of having their homes broken into, but there was no indication that he sentenced Applicant the way he did to punish him for taking the case to trial. (PCR Tr. p. 18). Trial Counsel testified he did not think he could succeed on an argument about Judge Kelly punishing Applicant. (PCR Tr. p. 18).

Findings

This Court finds the combination of the record and Trial Counsel's credible testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds Trial Counsel's testimony credible that he did not think he could succeed on an argument that Judge Kelly punished Applicant. This Court also does not see any indication in the record that Judge Kelly sentenced Applicant the way he did because he was punishing him for taking the case to trial. On the contrary, all of Judge Kelly's comments during sentencing make it clear that Applicant's sentence was based on the severity of the crime. Further, the solicitor conveyed the victim's wishes that Applicant get the maximum sentence of life because of Applicant's failure to take responsibility, but Judge Kelly sentenced Applicant to twenty years—only five years beyond the minimum. Thus, it is clear that Judge Kelly did not embrace the solicitor's comments or request. See State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976) (Holding the trial court has broad discretion in imposing criminal sentences.).

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Additionally, Applicant cannot show prejudice from Trial Counsel's failure to object to the solicitor's comments. As Trial Counsel testified, he did not view the comments during sentencing as objectionable. The statements were the solicitor's request for life in prison, to which Trial Counsel attempted to respond with mitigation.³ Further, since Judge Kelly did not take the solicitor's request into account, it would not have impacted Applicant's sentence for Trial Counsel to object. See State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979) (Absent a showing of partiality, prejudice, oppression, or corrupt motive by the sentencing court, or absent a showing that the statutory punishment in and of itself constitutes cruel and unusual punishment, the post-conviction relief court has no authority or jurisdiction to review or change a sentence falling within statutory limits.).

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

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

Allegation 1(c): **Failure to move to reconsider sentence, especially after the two co-defendants who were older than the seventeen year old Applicant were allowed to plead to burglary second degree and received fifteen-year sentences;**

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³ Trial Tr. p. 279.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to move to reconsider the sentence after the co-defendants received lower sentences. This Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not object to any of the statements the solicitor made about how Applicant was not remorseful, was smoking marijuana, and was the leader amongst the co-defendants. (PCR Tr. p. 13). Applicant testified he was sentenced to twenty years instead of the fifteen for non-violent that his co-defendants got, but Trial Counsel never moved to reconsider the sentence that Applicant was aware of. (PCR Tr. p. 13). Applicant testified he did not know the context of his co-defendants getting a reduced charge, and his co-defendants did not help the State by testifying against him. (PCR Tr. p. 13). Applicant testified the solicitor did not tell the judge that he intended to give the co-defendants a deal for burglary second. (PCR Tr. p. 13). Applicant testified the co-defendants were his best friends from middle school, and Applicant was the youngest of them. (PCR Tr. p. 14). Applicant testified he was not the ringleader. (PCR Tr. p. 14).

On cross-examination, Applicant agreed that the video evidence showed him leading his co-defendants through the home. (PCR Tr. p. 15). Applicant testified he identified himself from the video in his interview with police. (PCR Tr. p. 15).

On direct examination, Trial Counsel testified one of the co-defendants pleaded guilty sometime around the same week of Applicant's sentencing, but he did not know specifically when the other co-defendants were sentenced. (PCR Tr. p. 18). Trial Counsel testified he maybe could have moved for the judge to reconsider the sentence based on the co-defendants' pleas, but he thought that ultimately would not have been successful. (PCR Tr. pp. 18-19). Trial Counsel

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testified Judge Kelly sentenced Applicant within the sentencing guidelines, and knowing Judge Kelly and practicing in front of him for many years, Trial Counsel did not think that motion would succeed. (PCR Tr. p. 19).

On cross-examination, Trial Counsel testified both co-defendants' SCDC records seemed to show that they each got fifteen-year sentences for burglary second, violent. (PCR Tr. pp. 28-29). Trial Counsel testified that because of the distinction between burglary second and burglary first, the co-defendants would not have to serve 85% and would get out much sooner than Applicant. (PCR Tr. pp. 29-30). Trial Counsel testified that he could not remember specifically if Judge Hayes made comments about the burglary first charge, but he thought Judge Hayes was concerned with the disparity, although he did not want to speak on Judge Hayes' behalf. (PCR Tr. p. 31).

On redirect examination, Trial Counsel testified the State interpreted the case as Applicant being the ringleader. (PCR Tr. p. 37). Trial Counsel testified he could understand why the State was interpreting it that way, he just felt differently because all the individuals were young. (PCR Tr. p. 37).

Findings

As an initial matter, this Court finds through the combination of the record and Trial Counsel's credible testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. Trial Counsel credibly testified that based on his extensive professional experience with Judge Kelly, Trial Counsel did not think that a motion to reconsider would be successful.

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Applicant was sentenced well within the required sentencing range. Applicant testified he was shown on video leading his co-defendants through the home, and the record reflects he entered the house with a firearm.⁴ Trial Counsel testified that the State's position was that Applicant was the ringleader of the co-defendants, and Trial Counsel understood why the State interpreted it that way. He also testified the plea offer for Applicant was fifteen years for burglary first. The co-defendants both pleaded guilty to fifteen years for burglary second, violent. (PCR Tr. pp. 28-29). Thus, the distinction in the offers was parole eligibility, which the State seemingly did not want to offer to Applicant because of his position as the ringleader. Therefore, Trial Counsel was not deficient for recognizing the difference in Applicant's case. Additionally, Applicant was not prejudiced, as he did not show that Judge Kelly likely would have reduced his sentence based only on his co-defendants' sentences, which were sentences for burglary second and not burglary first like Applicant's. See Cogdell, supra.

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

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

Allegation 1(d): Failure to object to Investigator Trevor Shue's identification of the Applicant from the video for

⁴ Trial Tr. pp. 156, 179.

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A. V. W. COX

bolstering and failing to argue the identification was a factual question for the jury; See ROA p. 152, I. 7, p. 156, I. 15-20

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to object to the investigator's identification of Applicant at trial. This Court finds this allegation to be without merit.

To prove trial counsel's performance was deficient, a PCR applicant alleging that counsel failed to object to bolstering testimony must show that counsel's representation fell below an objective standard of reasonableness. Chappell v. State, 429 S.C. 68, 75, 837 S.E.2d 496, 500 (Ct. App. 2019). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility ... within the exclusive province of the jury." State v. Taylor, 404 S.C. 506, 514–15, 745 S.E.2d 124, 128 (Ct. App. 2013) (citing State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). "In an ineffective assistance case, 'trial counsel's failure to object to [improper bolstering] testimony does not remove a[] [PCR] applicant's burden to prove prejudice.'" Chappell, 429 S.C. at 80, 837 S.E.2d at 502 (quoting Thompson v. State, 423 S.C. 235, 246, 814 S.E.2d 487, 492 (2018)). Failure to object to bolstering comments may be prejudicial where the case hinges on the credibility of the bolstered testimony. State v. Chavis, 412 S.C. 101, 110, 771 S.E.2d 336, 341 (2015); Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010).

"If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training." Rule 701, SCRE.

PCR Evidentiary Hearing

On direct examination, Applicant testified that Investigator Trevor Shue (“Investigator Shue”) told Applicant that he took the video to an acquaintance of his and she identified Applicant. (PCR Tr. p. 10). Applicant testified that his “data” said that Investigator Shue identified Applicant from an incident that happened in 2018, but he had not been involved in any of that and had no prior record. (PCR Tr. pp. 10-11). Applicant testified Investigator Shue said he recognized Applicant from when he investigated or interviewed Applicant, or something like that. (PCR Tr. p. 11). Applicant testified that never occurred, but Trial Counsel did not object to it. (PCR Tr. p. 11). Applicant testified Investigator Shue was part of the gang unit at the time, and there was some suggestion that that’s how Applicant was identified, but he was not involved with gangs before. (PCR Tr. p. 11). Applicant testified Trial Counsel did not object when Investigator Shue was testifying that he recognized Applicant from the video. (PCR Tr. p. 12).

On direct examination, Trial Counsel testified he believed he objected to Investigator Shue’s identification of Applicant. (PCR Tr. p. 19). Trial Counsel testified he supposed he could have made a bolstering objection, but he did not. (PCR Tr. pp. 19-20). Trial Counsel testified it possibly could have changed the outcome of the trial to get the identification testimony excluded, but he made the motions to exclude that testimony in both trials. (PCR Tr. p. 20). Trial Counsel testified the evidence was strong, and it was hard to know if something would have changed the outcome of the trial, but it probably would not have changed the outcome. (PCR Tr. p. 24).

On cross-examination, Trial Counsel testified he thought Investigator Shue had prior knowledge of Applicant, but he was never given any incident report or anything like that. (PCR Tr. p. 33).

Findings

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As an initial matter, this Court finds through the combination of the record and testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. The record reflects that Investigator Shue's testimony laid the foundation for Applicant's status as a suspect in this investigation, which was rationally based on his prior personal experience with Applicant.⁵ However, Applicant identified himself as the individual on video during his interview with law enforcement, which was presented to the jury.⁶ Therefore, Applicant cannot establish prejudice on an allegation that there was bolstering of a witness identifying him when the jury was shown a separate identification by Applicant himself.

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

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

Allegation I(e): Misadvising the Applicant on the law by telling him that the judge could charge burglary second when the Applicant admitted in his confession that he went in the dwelling with a gun;

⁵ Trial Tr. pp. 155-160.

⁶ Trial Tr. p. 179.

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Applicant alleges Trial Counsel's representation was constitutionally ineffective for misadvising him on the law when he told Applicant that the judge could charge burglary second.

This Court finds this allegation to be without merit.

A person is guilty of burglary in the first degree if the person enters a **dwelling** without consent and with intent to commit a crime in the dwelling, and either:

- (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
 - (a) is armed with a deadly weapon or explosive; or
 - (b) causes physical injury to a person who is not a participant in the crime; or
 - (c) uses or threatens the use of a dangerous instrument; or
 - (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
- (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
- (3) the entering or remaining occurs in the nighttime.

S.C. Code Ann. §§ 16-11-311 (emphasis added).

A person is guilty of burglary in the second degree if the person enters a **building** without consent and with intent to commit a crime therein, and either:

- (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
 - (a) is armed with a deadly weapon or explosive; or
 - (b) causes physical injury to a person who is not a participant in the crime; or
 - (c) uses or threatens the use of a dangerous instrument; or
 - (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
- (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
- (3) the entering or remaining occurs in the nighttime.

S.C. Code Ann. §§ 16-11-312 (emphasis added).

For purposes of Sections 16-11-311 through 16-11-313:

- (1) "Building" means any structure, vehicle, watercraft, or aircraft:
 - (a) Where any person lodges or lives; or
 - (b) Where people assemble for purposes of business, government, education, religion, entertainment, public transportation, or public use or where goods are stored. Where a building consists of two or more units separately occupied or secured, each unit is deemed both a separate building in itself and a part of the main building.

- (2) "Dwelling" means its definition found in Section 16-11-10 and also means the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person.

S.C. Code Ann. §§ 16-11-310.

A defendant has the right to effective assistance of counsel during the plea-bargaining process. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)). "The United States Supreme Court has held that 'defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.'" Collins v. State, 422 S.C. 250, 261, 810 S.E.2d 871, 876 (2018) (quoting Missouri v. Frye, 566 U.S. 134, 145 (2012)); see also Lafler v. Cooper, 566 U.S. 156, 169-70 (2012) (rejecting proposition that a fair trial wipes clean any deficient performance by defense counsel during plea bargaining). Generally, defense counsel provides deficient performance when he or she does not communicate such an offer to the defendant. Frye, 566 U.S. at 145.

To show prejudice, an applicant for post-conviction relief "must demonstrate a reasonable probability that: (1) he [or she] 'would have accepted the earlier plea offer had [he or she] been afforded effective assistance of counsel;' (2) 'the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;' and (3) 'the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.'" Collins, 422 S.C. at 262, 810 S.E.2d at 877 (quoting Frye, 566 U.S. at 147; citing Lafler v. Cooper, 566 U.S. 156, 164 (2012)). An applicant must show actual prejudice, but depending on the facts of the case, an applicant's self-serving statement may be sufficient to establish actual prejudice. Davie, 381 S.C. at 613, 675 S.E.2d at 422.

PCR Evidentiary Hearing

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On direct examination, Applicant testified that he felt Trial Counsel was ineffective because Trial Counsel led him to believe he was eligible for second-degree burglary when he wasn't, which resulted in him getting more time when he could have gotten less. (PCR Tr. p. 9). Applicant testified he did not take the plea offer of fifteen years for burglary in the first degree because his attorney told him he could get burglary in the second degree. (PCR Tr. pp. 9-10). Applicant testified Trial Counsel asked for an instruction on burglary second during the trial, but the instruction was not given. (PCR Tr. p. 12). Applicant testified he thought he wouldn't be found guilty of first-degree, but of second-degree. (PCR Tr. p. 12). Applicant testified he was never told he had no chance for second-degree burglary because the video showed him with a gun. (PCR Tr. p. 12).

On direct examination, Trial Counsel testified that he advised Applicant that the judge could charge burglary in the second degree, and he remembered discussing in chambers the possibility of Judge Kelly giving a burglary second-degree charge to the jury, either violent or non-violent. (PCR Tr. p. 20). Trial Counsel testified the burglary second statute is "quite confusing" when compared to the burglary first statute because of the difference between a "building" and a "dwelling." (PCR Tr. pp. 20-21). Trial Counsel testified that he believed any practicing attorney or judge would agree it was confusing. (PCR Tr. p. 21). Trial Counsel testified his strategy going into trial was that if the jury was charged on burglary second, and Applicant was acquitted of burglary first, then his parole eligibility could have changed. (PCR Tr. p. 21). Trial Counsel testified he could not specifically remember advising Applicant one way or the other when it came to the fifteen-year plea offer. (PCR Tr. p. 22).

On cross-examination, Trial Counsel testified he believed he had a chance for a burglary second jury instruction because of the ambiguity, but Judge Kelly ultimately decided he would not charge it. (PCR Tr. p. 34).

Findings

As an initial matter, this Court finds Applicant's testimony not credible. This Court further finds through the combination of the record and Trial Counsel's credible testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. Trial Counsel credibly testified that his strategy was to get the judge to charge burglary second to the jury because of the ambiguity in the statute, with "dwelling" and "building" having seemingly indistinguishable meanings. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (where counsel articulates a valid reason for employing a strategy, such conduct is not ineffective assistance of counsel). The reason this strategy failed was not that Applicant had a gun, as suggested by Applicant, but because the judge ruled he should not charge the lesser-included offense when there was no evidence that Applicant committed the lesser-included offense *rather than* the greater offense. See State v. Smith, 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994). However, the strategy was reasonable considering Applicant was unhappy with his options, and this strategy may have provided his best chance of a lower sentence. Trial Counsel credibly testified that Applicant wanted to take the case to trial after extensive discussion of his options. Therefore, this Court finds Trial Counsel is not deficient.

Moreover, Applicant failed to show that he would have accepted the plea offer rather than going to trial, or that it would have been accepted by the judge, if Trial Counsel had not advised him of the possibility of a second-degree burglary charge. Given the judge's comments during sentencing, where he expressed frustration with Applicant's actions, it is unlikely he would have accepted a guilty plea to the minimum sentence. Therefore, Applicant cannot establish prejudice.

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

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

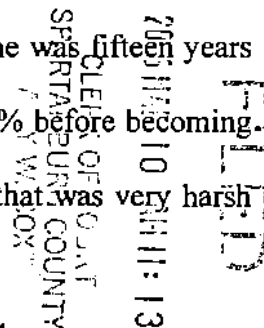
Allegation 1(f): Failure to advise the Applicant to plead guilty after his first trial with Judge Hayes

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to advise him to plead guilty after his first trial. This Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified that his case had been tried once before by Judge Hayes, but it resulted in a mistrial. (PCR Tr. p. 10). Applicant testified that Judge Hayes did not mention anything about his sentence. (PCR Tr. p. 10).

On direct examination, Trial Counsel testified Applicant's case was difficult, and the State's negotiation was particularly harsh for a person like Applicant who was young and had no record. (PCR Tr. p. 21). Trial Counsel testified he expressed those thoughts to the prosecuting attorney on the case. (PCR Tr. p. 21). Trial Counsel testified the plea offer the entire time was fifteen years under burglary first, and under the statute, Applicant would have to serve 85% before becoming eligible for parole. (PCR Tr. pp. 22, 23). Trial Counsel testified he thought that was very harsh



under Applicant's circumstances, and the twenty-year sentence Applicant ultimately got was even harsher. (PCR Tr. p. 22). Trial Counsel testified that because of those circumstances, they were stuck between a rock and a hard place, and he thought Applicant would admit to that as well. (PCR Tr. p. 22).

Trial Counsel testified he couldn't remember specifically advising Applicant that he should take the fifteen-year plea, but he remembered a conversation he had with Applicant about how the State wouldn't go down from fifteen years, and Applicant was "quite upset" with that. (PCR Tr. p. 22). Trial Counsel testified he distinctly remembered Applicant seemingly realizing the impact of the time he was facing and that it was a very sad moment. (PCR Tr. pp. 22-23). Trial Counsel testified that he recalled asking the solicitor to at least give them a chance at burglary second and still have a fifteen-year sentence, so Applicant could at least be parole-eligible. (PCR Tr. p. 23). Trial Counsel testified he actually thought the solicitor was open to this, but was overruled by his supervisors. (PCR Tr. pp. 23-24). Trial Counsel testified that ultimately, Applicant still indicated to Trial Counsel that he wanted to take the case to trial, so that is what they did. (PCR Tr. p. 24). Trial Counsel testified that he could not remember specifically if Judge Hayes made comments about the burglary first charge, but he thought Judge Hayes was concerned with the disparity, although he did not want to speak on Judge Hayes's behalf. (PCR Tr. p. 31).

Findings

As an initial matter, this Court finds through the combination of the record and testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting

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prejudice from that alleged deficiency. See Butler, supra. Trial Counsel credibly testified he discussed the options with Applicant, and that Applicant was upset that the State would not go down from a fifteen-year plea offer. Applicant testified that Judge Hayes did not mention anything about a sentence. Trial Counsel testified that he thought Judge Hayes may have been concerned with the disparity. However, that would not have helped Applicant, as the State's plea offer did not change. Trial Counsel testified that Applicant wanted to go to trial, so that is what they did. Therefore, Trial Counsel is not deficient for discussing Applicant's options with him and following Applicant's wishes.

Moreover, Applicant cannot establish prejudice where Applicant did not provide evidence that anything occurred during the first trial that should have prompted Trial Counsel to advise him to plead guilty.

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

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

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

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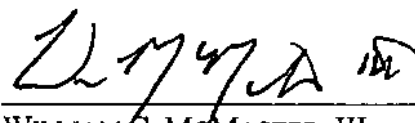
application. Therefore, this application for post-conviction relief must be **DENIED AND DISMISSED WITH PREJUDICE.**

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

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 5th day of March, 2026.



WILLIAM C. MCMASTER, III.
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

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Spartanburg, SC

ROSS & ENDERLIN, PA
ATTORNEYS AT LAW

March 16, 2026

Ms. Amy Cox
Spartanburg Clerk of Court
PO Box 3483
Spartanburg, SC 29304

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SPARTANBURG COUNTY
AMY W. COX

To Whom It May Concern:

Please find for filing the enclosed Motions to Alter or Amend. Please return a clocked copy to me by e-mail or post. If you have any questions or concerns, please let me know.

Sincerely,



Susannah Ross
Attorney at Law

enclosures

330 E. COFFEE ST., GREENVILLE SC 29601
PHONE: (864) 242-0029
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

JADEN I. GARY,
APPLICANT,

VS.

STATE OF SOUTH CAROLINA,
RESPONDENT.

IN THE COURT OF COMMON PLEAS
CASE NO. 2024-CP-42-03224

MOTION TO ALTER OR AMEND
THE JUDGMENT

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COMES NOW the Applicant and hereby moves pursuant to Rule 59(c) SCRPC, to alter or amend the judgment of this Court filed on March 10, 2026. The Applicant takes issue with the findings of fact and conclusions of law in the Order denying post-conviction relief in his case. Most notably, the Applicant alleges error in the reasoning behind dismissing the allegation that trial counsel misadvised the Applicant on the law by telling him that the judge could charge burglary second when the Applicant admitted in his confession that he went in the dwelling with a gun. The Order presents the burglary statutes in a misleading manner. (Order p. 19) It leaves out part (A) of § 16-11-312 which creates the distinction of entering a dwelling without aggravators versus (B) entering a building with aggravators. It further misstates the statute at § 16-11-312 (B) (1) to say "dwelling" when the statute reads "building". This mischaracterization of law is used to support the erroneous finding that the Applicant's testimony was not credible while counsel's testimony was credible and reflected a valid legal strategy. (Order p. 22)

At the PCR hearing, the Applicant testified that he turned down a fifteen-year offer for burglary first because counsel told him that he had a chance for the jury to come back with burglary second degree if he proceeded to trial. He said his lawyer never told

him that he had no change for the reduced charge because: (1) he confessed to entering the home through the kitchen, and (2) there was a surveillance video of him doing it while holding a gun. There was no basis to find the Applicant's testimony not credible. Especially because, trial counsel whose testimony was found to be credible, admitted that he told the Applicant that the judge could charge burglary second at trial. Counsel said he believed that any practicing attorney or judge would find the burglary second statute to be "quite confusing" with "dwelling" and "building" having seemingly indistinguishable meanings. Counsel further testified that his strategy going into trial was to get the judge to charge burglary second due to the ambiguity in the law. This was not a valid strategy because it was based on an error of law.

During the Applicant's trial, Judge Keith Kelly clearly articulates counsel's error of law when he denies trial counsel's request for an instruction on burglary second.

I'm sorry. The defense's motion for the lesser included offense is denied. I refer you to State versus Goldenbaum that can be found at 294 S.C. 455, that's a 1988 case out of our Supreme Court which says the statutory law of burglary was substantially rewritten by act number 159 in 1985 and codified that first degree burglary is now defined as entry of a dwelling without consent and with intent to commit a crime therein and the existence of an aggravated circumstance.

Second degree burglary consists of entry of a dwelling without consent and with the intent to commit a crime therein but absent any aggravated circumstances or entry of a building without consent and with the intent to commit a crime and existence of aggravating circumstances and then it also defines third degree burglary.

Also State versus Berntsen, 295 S.C. 52, as discussed in State versus White which can be found at, looks like I only have a Westlaw cite, being 25346. That's a 2002 case where Judge Jim Williams was affirmed by Justice Waller writing for the court. And also Abney versus the State of South Carolina, also an appellate case, Gary Hill, my good friend, was Circuit Court judge in that, it's 2010-164906 where the trial court should refuse to charge on a lesser included offense when there's no evidence the defendant committed the lesser rather than the greater offense. That's State versus Smith at 315 S.C. 547, a 1994 case. (Trial Transcript pp.216-217)

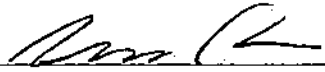
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JANUARY 19, 2026

It is worth noting that both the Applicant's confession and the video were found to be admissible in a prior trial which resulted in a mistrial. Therefore, counsel knew of admissible evidence showing clearly that the elements of burglary first degree were met when he misadvised the Applicant that there was a chance for the jury to come back with a verdict for burglary second degree. Given the confession and video evidence, there was no chance for a jury instruction on burglary second degree because the Applicant clearly entered a dwelling with a gun and stole guns while therein.

Applicant further argues that while each allegation may not amount to ineffective assistance of counsel standing alone, the cumulative effect of counsel's performance was deficient and prejudiced him to the degree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 386 S.E.2d 624, 625 (1989).

For the foregoing reasons, the Applicant requests the presiding Judge, William C. McMaster, alter or amend the Order of Dismissal filed on March 10, 2026.

Respectfully submitted,


 Susannah Ross #11205
 Attorney for the Applicant
 333 E. Coffee Street,
 Greenville, SC 29601
susannah@rossenderlin.com
 (864) 242-0029

Greenville, South Carolina
 This 16 day of March, 2026.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	Civil Action No.: 2024-CP-42-03224
Jaden I. Gary,	)	
	)	
	)	ORDER GRANTING IN PART AND
vs.	)	DENYING IN PART APPLICANT'S
	)	MOTION TO ALTER OR AMEND
State of South Carolina,	)	JUDGMENT
	)	
	)	
Respondent.	)	
_____	)	

Applicant's Motion to Alter or Amend Judgment was served on this Court via email on March 16, 2026. After careful consideration of the materials submitted, Applicant's Motion is GRANTED IN PART, insofar as the State shall amend the Order of Dismissal With Prejudice to include the complete burglary statute, S.C. Code Section § 16-11-312. Specifically, the State should include subsection (A) of § 16-11-312 along with subsection (B), as well as edit § 16-11-312 (B) (1) to state "building" rather than "dwelling".

The remaining arguments and requests contained in Applicant's Motion are DENIED. With regard to these arguments and requests, the Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded, and further finds no error of law or fact not appropriately considered.

Therefore, Applicant's Motion to Alter or Amend Judgment is GRANTED IN PART and DENIED IN PART.

IT IS SO ORDERED.

Judge's signature on the following page.

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W. McMaster III

The Honorable William C. McMaster, III

Seventh Judicial Circuit

4/3, 2026
Spartanburg, South Carolina

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AMY W. COX

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4/3/2026



State of South Carolina
The Circuit Court of the Thirteenth Judicial Circuit

William C. McMaster, III
 Judge

Greenville County Courthouse
 305 E. North Street, Suite 314
 Greenville, SC 29601
 Phone: (864) 467-8740
 Fax: (864) 467-8325
 wcmasterj@sccourts.org

April 3, 2026

Amy W. Cox
 Spartanburg County Clerk of Court
 PO Box 3483
 Spartanburg, SC 29304

Re: 2024CP4203224 – Jaden I. Gary v. State of South Carolina

Ms. Cox,

Please find enclosed an Order Granting in Part and Denying in Part Applicant's Motion to Alter or Amend for the above-referenced case as signed by Judge McMaster. Please confirm via email when the Order has been filed.

Thanks,

Devyn Fischer
 Judicial Law Clerk
 The Honorable William C. McMaster, III

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
Jaden I. Gary, #385880,	)	CASE NO. 2024-CP-42-03224
	)	
Applicant,	)	
	)	
v.	)	AMENDED ORDER OF DISMISSAL
	)	WITH PREJUDICE
State of South Carolina,	)	
	)	
Respondent.	)	

Presiding Judge:	Hon. William C. McMaster, III
Applicant's Attorney:	Susannah C. Ross, Esq.
Respondent's Attorney:	MacKinnon Westraad, Esq.
Trial Counsel:	E. Joshua Schultz, Esq.
Date of Hearing:	June 16, 2025
Court Reporter:	Hollie M. Jenkins

This matter comes before the Court by way of Jaden I. Gary's (Applicant) application for post-conviction relief (PCR) filed on August 13, 2024. Respondent, the State of South Carolina, filed its Return and Motion for a More Definite Statement on October 22, 2024, requesting an evidentiary hearing on the claims of ineffective assistance of counsel. On February 20, 2025, Applicant filed an amended application for PCR.

On June 16, 2025, an evidentiary hearing convened at the Spartanburg County Courthouse before the Honorable William C. McMaster. Applicant was present and represented by Susannah C. Ross, Esquire. Assistant Attorney General MacKinnon Westraad, Esquire, represented Respondent. Applicant testified on his behalf at the evidentiary hearing, and Respondent presented the testimony of E. Joshua Schultz, Esquire ("Trial Counsel").

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any

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constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted during the September 2019 term of the Spartanburg County Grand Jury for grand larceny (2019-GS-42-05573), burglary in the first degree (2019-GS-42-05574), and possession of a weapon during the commission of a violent crime (2019-GS-42-05574A). Applicant was represented by Trial Counsel. Seventh Circuit Assistant Solicitor Spenser Smith prosecuted the case.

Applicant first proceeded to trial on August 10, 2021, before the Honorable J. Mark Hayes, II. That case ended in a mistrial after jurors were dismissed for medical and family reasons.

Applicant proceeded to trial for the second time on August 31, 2021, before the Honorable R. Keith Kelly. Applicant was found guilty as indicted. Judge Kelly sentenced Applicant to a term of twenty (20) years' imprisonment for burglary in the first degree, five years' imprisonment for possession of a weapon during the commission of a violent crime, and three years' imprisonment for grand larceny, to be served concurrently.

Applicant filed a timely Notice of Appeal. Appellate Defender Elizabeth Franklin Best perfected Applicant's appeal. After briefing, the South Carolina Court of Appeals dismissed the appeal by unpublished opinion. State v. Jaden Imarion Gary, Op. No. 2023-UP-364 (S.C. Ct. App. filed November 8, 2023). The Remittitur was returned to the lower court on November 28, 2023.

CURRENT ACTION BEFORE THIS COURT

On August 13, 2024, Applicant timely filed his original application for post-conviction relief, in which Applicant alleges he is being held in custody unlawfully based on the following:

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1. Ineffective Assistance Counsel:
 - a. "Unable to specify without attorney"

On February 20, 2025, Applicant filed an amended application for post-conviction relief, in which Applicant alleges he is being held in custody unlawfully based on the following:

1. Ineffective Assistance of Counsel for:
 - a. failure to object to the solicitor's arguments regarding sentencing;
 - b. failure to argue that the sentence punished the Applicant for exercising his right to jury trial; See ROA p. 279
 - c. failure to move to reconsider sentence, especially after the two co-defendants who were older than the seventeen year old Applicant were allowed to plead to burglary second degree and received fifteen-year sentences;
 - d. failure to object to Investigator Trevor Shue's identification of the Applicant from the video for bolstering and failing to argue the identification was a factual question for the jury; See ROA p. 152, I. 7, p. 156, I. 15-20
 - e. misadvising the Applicant on the law by telling him that the judge could charge burglary second when the Applicant admitted in his confession that he went in the dwelling with a gun;
 - f. failure to advise the Applicant to plead guilty after his first trial with Judge Hayes;
2. Denied due process and fundamental fairness guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States & Art. I, Sec.3 of the South Carolina Constitution
 - a. Applicant was punished with a higher sentence for exercising his right to a jury trial

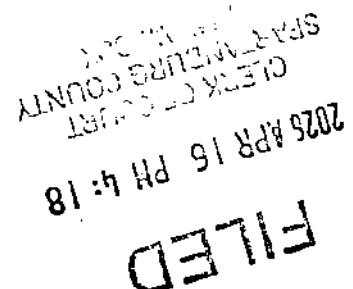
Applicant requests relief in the form of a new trial.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act¹ (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based on 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;

¹ S.C. Code Ann. §§ 17-27-10 to -160.



- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
- (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of 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 applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; 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).

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

Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very 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

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proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court also heard the testimony presented at the evidentiary hearing and observed the witnesses, allowing the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRPC (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

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

INITIAL FINDINGS

As a matter of general impression, this Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant, he rendered adequate

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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 TRIAL COUNSEL ALLEGATIONS

- Allegation 1(a):** Failure to object to the solicitor's arguments regarding sentencing;
- Allegation 1(b):** Failure to argue that the sentence punished the Applicant for exercising his right to jury trial; See ROA p. 279
- Allegation 2(a):** Applicant was punished with a higher sentence for exercising his right to a jury trial

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to object to the solicitor's statements at sentencing that the Applicant should receive a harsher sentence because he did not take responsibility by admitting wrongdoing and accepting punishment.² This Court finds these allegations to be without merit.

A trial judge abuses their discretion in sentencing when they consider that the applicant exercised their right to a jury trial rather than pleading guilty. Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999) (citing State v. Hazel, 317 S.C. 368, 453 S.E.2d 879 (1995)). Courts will look to the record for indications of whether the judge improperly considered that the Applicant was exercising his right to a jury trial. See Davis v. State at 331, 333 (finding the judge's responses to defense counsel's argument for a sentence reduction, which expressed his preference for guilty pleas, were improper).

"An ineffective assistance claim based on a failure to object is tied to the admissibility of

² Trial Tr. pp. 276-278.

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the underlying evidence.” Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). “If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally ‘unreasonable’ action, nor can it prejudice the defendant against whom the evidence was admitted.” Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, “[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.

Sentencing Hearing

At Applicant’s sentencing hearing, Solicitor Smith made the following comments:

Your Honor, Mr. Williams had to go back to work and obviously this is the second time we’ve tried this case. He did state he wanted Your Honor and Mr. Gary to know that he believes he’s lucky that he wasn’t home cause he thinks Mr. Gary might be getting a life sentence but in a, in a different way and possibly all three of the young men that were involved. He asks Your Honor to impose the maximum sentence because Mr. Gary had a chance to do the right thing and to plead, and instead he chose to keep doing the wrong thing.

(Trial Tr. p. 276).

I don’t think that the minimum sentence is appropriate because he did not admit responsibility. Although he did it to the investigator, made the State and Mr. Williams go through basically the last trial, we were one witness away from finishing, two different trials on a case where he confessed and is caught on video. So, he’s not accepted responsibility. He could not just admit what he had done and take punishment. So, we do not think that the minimum sentence is appropriate.

(Trial Tr. pp. 277-278).

When Judge Kelly sentenced Applicant, he stated:

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Mr. Gary, you are indeed a very blessed and lucky man. You broke into the house of a man who is a combat veteran with three tours. . . Had he been there, he would of killed you and your two friends that day. Your mother would be minus a son right now. No doubts in my mind. None. You would be a dead person. That shotgun you took out, that's the one he had loaded to stop people like you and the citizens of this county and this state are tired of people like you breaking into their houses. You didn't make a mistake. A mistake is where you put too much salt on your food. You made a bad judgment. That's what you did.

(Trial Tr. pp. 279).

Judge Kelly then delivered the sentence and said to Applicant, "You can overcome this, Mr. Gary. You're gonna be close to 40 years old, but you still got time to overcome this and become the man that you want to be. Very best of luck to you, sir." (Trial Tr. p. 280).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not object to any of the statements the solicitor made about how Applicant was not remorseful, was smoking marijuana, and was the leader amongst the co-defendants. (PCR Tr. p. 13). Applicant testified that he was sentenced to twenty years instead of the fifteen years for non-violent offenses that his co-defendants received, but Trial Counsel never moved to reconsider the sentence that Applicant was aware of. (PCR Tr. p. 13). Applicant testified he was not the ringleader. (PCR Tr. p. 14).

On cross-examination, Applicant testified that the only reason he believed he was punished for exercising his right to a jury trial was the comments the solicitor made during sentencing. (PCR Tr. p. 15). Applicant testified that Judge Kelly did not make any comments to that effect. (PCR Tr. p. 15). Applicant agreed that the video evidence showed him leading his co-defendants through the home. (PCR Tr. p. 15). Applicant testified that he identified himself from the video in his interview with the police. (PCR Tr. p. 15).

On direct examination, Trial Counsel testified that he met with Applicant and his family several times in his office, and they discussed the charges and what the State was required to prove.

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(PCR Tr. p. 17). Trial Counsel testified the evidence included statements by Applicant, video of the break-in that was “obviously, very persuasive,” and incident reports. (PCR Tr. p. 17). Trial Counsel testified the solicitor did not make any arguments at sentencing that he believed were objectionable. (PCR Tr. pp. 17-18). Trial Counsel testified Judge Kelly made a comment about how folks are tired of having their homes broken into, but there was no indication that he sentenced Applicant the way he did to punish him for taking the case to trial. (PCR Tr. p. 18). Trial Counsel testified he did not think he could succeed on an argument about Judge Kelly punishing Applicant. (PCR Tr. p. 18).

Findings

This Court finds the combination of the record and Trial Counsel's credible testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds Trial Counsel's testimony credible that he did not think he could succeed on an argument that Judge Kelly punished Applicant. This Court also does not see any indication in the record that Judge Kelly sentenced Applicant the way he did because he was punishing him for taking the case to trial. On the contrary, all of Judge Kelly's comments during sentencing make it clear that Applicant's sentence was based on the severity of the crime. Further, the solicitor conveyed the victim's wishes that Applicant get the maximum sentence of life because of Applicant's failure to take responsibility, but Judge Kelly sentenced Applicant to twenty years—only five years beyond the minimum. Thus, it is clear that Judge Kelly did not embrace the solicitor's comments or request. See State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976) (Holding the trial court has broad discretion in imposing criminal sentences).

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Additionally, Applicant cannot show prejudice from Trial Counsel's failure to object to the solicitor's comments. As Trial Counsel testified, he did not view the comments during sentencing as objectionable. The statements were the solicitor's request for life in prison, to which Trial Counsel attempted to respond with mitigation.³ Further, since Judge Kelly did not take the solicitor's request into account, it would not have impacted Applicant's sentence for Trial Counsel to object. See State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979) (Absent a showing of partiality, prejudice, oppression, or corrupt motive by the sentencing court, or absent a showing that the statutory punishment in and of itself constitutes cruel and unusual punishment, the post-conviction relief court has no authority or jurisdiction to review or change a sentence falling within statutory limits.).

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

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

Allegation 1(c): **Failure to move to reconsider sentence, especially after the two co-defendants who were older than the seventeen year old Applicant were allowed to plead to burglary second degree and received fifteen-year sentences;**

³ Trial Tr. p. 279.

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Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to move to reconsider the sentence after the co-defendants received lower sentences. This Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not object to any of the statements the solicitor made about how Applicant was not remorseful, was smoking marijuana, and was the leader amongst the co-defendants. (PCR Tr. p. 13). Applicant testified he was sentenced to twenty years instead of the fifteen for non-violent that his co-defendants got, but Trial Counsel never moved to reconsider the sentence that Applicant was aware of. (PCR Tr. p. 13). Applicant testified he did not know the context of his co-defendants getting a reduced charge, and his co-defendants did not help the State by testifying against him. (PCR Tr. p. 13). Applicant testified the solicitor did not tell the judge that he intended to give the co-defendants a deal for burglary second. (PCR Tr. p. 13). Applicant testified the co-defendants were his best friends from middle school, and Applicant was the youngest of them. (PCR Tr. p. 14). Applicant testified he was not the ringleader. (PCR Tr. p. 14).

On cross-examination, Applicant agreed that the video evidence showed him leading his co-defendants through the home. (PCR Tr. p. 15). Applicant testified he identified himself from the video in his interview with police. (PCR Tr. p. 15).

On direct examination, Trial Counsel testified one of the co-defendants pleaded guilty sometime around the same week of Applicant's sentencing, but he did not know specifically when the other co-defendants were sentenced. (PCR Tr. p. 18). Trial Counsel testified he maybe could have moved for the judge to reconsider the sentence based on the co-defendants' pleas, but he thought that ultimately would not have been successful. (PCR Tr. pp. 18-19). Trial Counsel

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testified Judge Kelly sentenced Applicant within the sentencing guidelines, and knowing Judge Kelly and practicing in front of him for many years, Trial Counsel did not think that motion would succeed. (PCR Tr. p. 19).

On cross-examination, Trial Counsel testified both co-defendants' SCDC records seemed to show that they each got fifteen-year sentences for burglary second, violent. (PCR Tr. pp. 28-29). Trial Counsel testified that because of the distinction between burglary second and burglary first, the co-defendants would not have to serve 85% and would get out much sooner than Applicant. (PCR Tr. pp. 29-30). Trial Counsel testified that he could not remember specifically if Judge Hayes made comments about the burglary first charge, but he thought Judge Hayes was concerned with the disparity, although he did not want to speak on Judge Hayes' behalf. (PCR Tr. p. 31).

On redirect examination, Trial Counsel testified the State interpreted the case as Applicant being the ringleader. (PCR Tr. p. 37). Trial Counsel testified he could understand why the State was interpreting it that way, he just felt differently because all the individuals were young. (PCR Tr. p. 37).

Findings

As an initial matter, this Court finds through the combination of the record and Trial Counsel's credible testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. Trial Counsel credibly testified that based on his extensive professional experience with Judge Kelly, Trial Counsel did not think that a motion to reconsider would be successful.

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Applicant was sentenced well within the required sentencing range. Applicant testified he was shown on video leading his co-defendants through the home, and the record reflects he entered the house with a firearm.⁴ Trial Counsel testified that the State's position was that Applicant was the ringleader of the co-defendants, and Trial Counsel understood why the State interpreted it that way. He also testified the plea offer for Applicant was fifteen years for burglary first. The co-defendants both pleaded guilty to fifteen years for burglary second, violent. (PCR Tr. pp. 28-29). Thus, the distinction in the offers was parole eligibility, which the State seemingly did not want to offer to Applicant because of his position as the ringleader. Therefore, Trial Counsel was not deficient for recognizing the difference in Applicant's case. Additionally, Applicant was not prejudiced, as he did not show that Judge Kelly likely would have reduced his sentence based only on his co-defendants' sentences, which were sentences for burglary second and not burglary first like Applicant's. See Cogdell, supra.

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

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

Allegation 1(d): Failure to object to Investigator Trevor Shue's identification of the Applicant from the video for

⁴ Trial Tr. pp. 156, 179.

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**bolstering and failing to argue the identification
was a factual question for the jury; See ROA p.
152, I. 7, p. 156, I. 15-20**

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to object to the investigator's identification of Applicant at trial. This Court finds this allegation to be without merit.

To prove trial counsel's performance was deficient, a PCR applicant alleging that counsel failed to object to bolstering testimony must show that counsel's representation fell below an objective standard of reasonableness. Chappell v. State, 429 S.C. 68, 75, 837 S.E.2d 496, 500 (Ct. App. 2019). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility ... within the exclusive province of the jury." State v. Taylor, 404 S.C. 506, 514–15, 745 S.E.2d 124, 128 (Ct. App. 2013) (citing State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). "In an ineffective assistance case, 'trial counsel's failure to object to [improper bolstering] testimony does not remove a[] [PCR] applicant's burden to prove prejudice." Chappell, 429 S.C. at 80, 837 S.E.2d at 502 (quoting Thompson v. State, 423 S.C. 235, 246, 814 S.E.2d 487, 492 (2018)). Failure to object to bolstering comments may be prejudicial where the case hinges on the credibility of the bolstered testimony. State v. Chavis, 412 S.C. 101, 110, 771 S.E.2d 336, 341 (2015); Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010).

"If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training." Rule 701, SCRE.

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PCR Evidentiary Hearing

On direct examination, Applicant testified that Investigator Trevor Shue (“Investigator Shue”) told Applicant that he took the video to an acquaintance of his and she identified Applicant. (PCR Tr. p. 10). Applicant testified that his “data” said that Investigator Shue identified Applicant from an incident that happened in 2018, but he had not been involved in any of that and had no prior record. (PCR Tr. pp. 10-11). Applicant testified Investigator Shue said he recognized Applicant from when he investigated or interviewed Applicant, or something like that. (PCR Tr. p. 11). Applicant testified that never occurred, but Trial Counsel did not object to it. (PCR Tr. p. 11). Applicant testified Investigator Shue was part of the gang unit at the time, and there was some suggestion that that’s how Applicant was identified, but he was not involved with gangs before. (PCR Tr. p. 11). Applicant testified Trial Counsel did not object when Investigator Shue was testifying that he recognized Applicant from the video. (PCR Tr. p. 12).

On direct examination, Trial Counsel testified he believed he objected to Investigator Shue’s identification of Applicant. (PCR Tr. p. 19). Trial Counsel testified he supposed he could have made a bolstering objection, but he did not. (PCR Tr. pp. 19-20). Trial Counsel testified it possibly could have changed the outcome of the trial to get the identification testimony excluded, but he made the motions to exclude that testimony in both trials. (PCR Tr. p. 20). Trial Counsel testified the evidence was strong, and it was hard to know if something would have changed the outcome of the trial, but it probably would not have changed the outcome. (PCR Tr. p. 24).

On cross-examination, Trial Counsel testified he thought Investigator Shue had prior knowledge of Applicant, but he was never given any incident report or anything like that. (PCR Tr. p. 33).

Findings

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As an initial matter, this Court finds through the combination of the record and testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. The record reflects that Investigator Shue's testimony laid the foundation for Applicant's status as a suspect in this investigation, which was rationally based on his prior personal experience with Applicant.⁵ However, Applicant identified himself as the individual on video during his interview with law enforcement, which was presented to the jury.⁶ Therefore, Applicant cannot establish prejudice on an allegation that there was bolstering of a witness identifying him when the jury was shown a separate identification by Applicant himself.

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

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

Allegation 1(e): **Misadvising the Applicant on the law by telling him that the judge could charge burglary second when the Applicant admitted in his confession that he went in the dwelling with a gun;**

⁵ Trial Tr. pp. 155-160.

⁶ Trial Tr. p. 179.

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Applicant alleges Trial Counsel's representation was constitutionally ineffective for misadvising him on the law when he told Applicant that the judge could charge burglary second.

This Court finds this allegation to be without merit.

A person is guilty of burglary in the first degree if the person enters a **dwelling** without consent and with intent to commit a crime in the dwelling, and either:

- (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
 - (a) is armed with a deadly weapon or explosive; or
 - (b) causes physical injury to a person who is not a participant in the crime; or
 - (c) uses or threatens the use of a dangerous instrument; or
 - (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
- (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
- (3) the entering or remaining occurs in the nighttime.

S.C. Code Ann. §§ 16-11-311 (emphasis added).

(A) A person is guilty of burglary in the second degree if the person enters a dwelling without consent and with intent to commit a crime therein.

(B) A person is guilty of burglary in the second degree if the person enters a **building** without consent and with intent to commit a crime therein, and either:

- (1) when, in effecting entry or while in the building or in immediate flight, he or another participant in the crime:
 - (a) is armed with a deadly weapon or explosive; or
 - (b) causes physical injury to a person who is not a participant in the crime; or
 - (c) uses or threatens the use of a dangerous instrument; or
 - (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
- (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
- (3) the entering or remaining occurs in the nighttime.

S.C. Code Ann. §§ 16-11-312 (emphasis added).

For purposes of Sections 16-11-311 through 16-11-313:

- (1) "Building" means any structure, vehicle, watercraft, or aircraft:
 - (a) Where any person lodges or lives; or
 - (b) Where people assemble for purposes of business, government, education, religion, entertainment, public transportation, or public use or where goods are stored. Where a building consists of two or more units separately occupied or secured, each unit is deemed both a separate building in itself and a part of the main building.

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- (2) "Dwelling" means its definition found in Section 16-11-10 and also means the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person.

S.C. Code Ann. §§ 16-11-310.

A defendant has the right to effective assistance of counsel during the plea-bargaining process. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)). "The United States Supreme Court has held that 'defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.'" Collins v. State, 422 S.C. 250, 261, 810 S.E.2d 871, 876 (2018) (quoting Missouri v. Frye, 566 U.S. 134, 145 (2012)); see also Lafler v. Cooper, 566 U.S. 156, 169-70 (2012) (rejecting proposition that a fair trial wipes clean any deficient performance by defense counsel during plea bargaining). Generally, defense counsel provides deficient performance when he or she does not communicate such an offer to the defendant. Frye, 566 U.S. at 145.

To show prejudice, an applicant for post-conviction relief "must demonstrate a reasonable probability that: (1) he [or she] 'would have accepted the earlier plea offer had [he or she] been afforded effective assistance of counsel;' (2) 'the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;' and (3) 'the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.'" Collins, 422 S.C. at 262, 810 S.E.2d at 877 (quoting Frye, 566 U.S. at 147; citing Lafler v. Cooper, 566 U.S. 156, 164 (2012)). An applicant must show actual prejudice, but depending on the facts of the case, an applicant's self-serving statement *may* be sufficient to establish actual prejudice. Davie, 381 S.C. at 613, 675 S.E.2d at 422.

PCR Evidentiary Hearing

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On direct examination, Applicant testified that he felt Trial Counsel was ineffective because Trial Counsel led him to believe he was eligible for second-degree burglary when he wasn't, which resulted in him getting more time when he could have gotten less. (PCR Tr. p. 9). Applicant testified he did not take the plea offer of fifteen years for burglary in the first degree because his attorney told him he could get burglary in the second degree. (PCR Tr. pp. 9-10). Applicant testified Trial Counsel asked for an instruction on burglary second during the trial, but the instruction was not given. (PCR Tr. p. 12). Applicant testified he thought he wouldn't be found guilty of first-degree, but of second-degree. (PCR Tr. p. 12). Applicant testified he was never told he had no chance for second-degree burglary because the video showed him with a gun. (PCR Tr. p. 12).

On direct examination, Trial Counsel testified that he advised Applicant that the judge could charge burglary in the second degree, and he remembered discussing in chambers the possibility of Judge Kelly giving a burglary second-degree charge to the jury, either violent or non-violent. (PCR Tr. p. 20). Trial Counsel testified the burglary second statute is "quite confusing" when compared to the burglary first statute because of the difference between a "building" and a "dwelling." (PCR Tr. pp. 20-21). Trial Counsel testified that he believed any practicing attorney or judge would agree it was confusing. (PCR Tr. p. 21). Trial Counsel testified his strategy going into trial was that if the jury was charged on burglary second, and Applicant was acquitted of burglary first, then his parole eligibility could have changed. (PCR Tr. p. 21). Trial Counsel testified he could not specifically remember advising Applicant one way or the other when it came to the fifteen-year plea offer. (PCR Tr. p. 22).

On cross-examination, Trial Counsel testified he believed he had a chance for a burglary second jury instruction because of the ambiguity, but Judge Kelly ultimately decided he would not charge it. (PCR Tr. p. 34).

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Findings

As an initial matter, this Court finds Applicant's testimony not credible. This Court further finds through the combination of the record and Trial Counsel's credible testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, supra. Trial Counsel credibly testified that his strategy was to get the judge to charge burglary second to the jury because of the ambiguity in the statute, with "dwelling" and "building" having seemingly indistinguishable meanings. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (where counsel articulates a valid reason for employing a strategy, such conduct is not ineffective assistance of counsel). The reason this strategy failed was not that Applicant had a gun, as suggested by Applicant, but because the judge ruled he should not charge the lesser-included offense when there was no evidence that Applicant committed the lesser-included offense *rather than* the greater offense. See State v. Smith, 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994). However, the strategy was reasonable considering Applicant was unhappy with his options, and this strategy may have provided his best chance of a lower sentence. Trial Counsel credibly testified that Applicant wanted to take the case to trial after extensive discussion of his options. Therefore, this Court finds Trial Counsel is not deficient.

Moreover, Applicant failed to show that he would have accepted the plea offer rather than going to trial, or that it would have been accepted by the judge, if Trial Counsel had not advised him of the possibility of a second-degree burglary charge. Given the judge's comments during sentencing, where he expressed frustration with Applicant's actions, it is unlikely he would have accepted a guilty plea to the minimum sentence. Therefore, Applicant cannot establish prejudice.

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

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

Allegation 1(f): Failure to advise the Applicant to plead guilty after his first trial with Judge Hayes

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to advise him to plead guilty after his first trial. This Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified that his case had been tried once before by Judge Hayes, but it resulted in a mistrial. (PCR Tr. p. 10). Applicant testified that Judge Hayes did not mention anything about his sentence. (PCR Tr. p. 10).

On direct examination, Trial Counsel testified Applicant's case was difficult, and the State's negotiation was particularly harsh for a person like Applicant who was young and had no record. (PCR Tr. p. 21). Trial Counsel testified he expressed those thoughts to the prosecuting attorney on the case. (PCR Tr. p. 21). Trial Counsel testified the plea offer the entire time was fifteen years under burglary first, and under the statute, Applicant would have to serve 85% before becoming eligible for parole. (PCR Tr. pp. 22, 23). Trial Counsel testified he thought that was very harsh

under Applicant's circumstances, and the twenty-year sentence Applicant ultimately got was even harsher. (PCR Tr. p. 22). Trial Counsel testified that because of those circumstances, they were stuck between a rock and a hard place, and he thought Applicant would admit to that as well. (PCR Tr. p. 22).

Trial Counsel testified he couldn't remember specifically advising Applicant that he should take the fifteen-year plea, but he remembered a conversation he had with Applicant about how the State wouldn't go down from fifteen years, and Applicant was "quite upset" with that. (PCR Tr. p. 22). Trial Counsel testified he distinctly remembered Applicant seemingly realizing the impact of the time he was facing and that it was a very sad moment. (PCR Tr. pp. 22-23). Trial Counsel testified that he recalled asking the solicitor to at least give them a chance at burglary second and still have a fifteen-year sentence, so Applicant could at least be parole-eligible. (PCR Tr. p. 23). Trial Counsel testified he actually thought the solicitor was open to this, but was overruled by his supervisors. (PCR Tr. pp. 23-24). Trial Counsel testified that ultimately, Applicant still indicated to Trial Counsel that he wanted to take the case to trial, so that is what they did. (PCR Tr. p. 24). Trial Counsel testified that he could not remember specifically if Judge Hayes made comments about the burglary first charge, but he thought Judge Hayes was concerned with the disparity, although he did not want to speak on Judge Hayes's behalf. (PCR Tr. p. 31).

Findings

As an initial matter, this Court finds through the combination of the record and testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting

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prejudice from that alleged deficiency. See Butler, *supra*. Trial Counsel credibly testified he discussed the options with Applicant, and that Applicant was upset that the State would not go down from a fifteen-year plea offer. Applicant testified that Judge Hayes did not mention anything about a sentence. Trial Counsel testified that he thought Judge Hayes may have been concerned with the disparity. However, that would not have helped Applicant, as the State's plea offer did not change. Trial Counsel testified that Applicant wanted to go to trial, so that is what they did. Therefore, Trial Counsel is not deficient for discussing Applicant's options with him and following Applicant's wishes.

Moreover, Applicant cannot establish prejudice where Applicant did not provide evidence that anything occurred during the first trial that should have prompted Trial Counsel to advise him to plead guilty.

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

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

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

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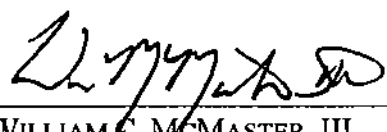
application. Therefore, this application for post-conviction relief must be **DENIED AND DISMISSED WITH PREJUDICE**.

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

IT IS THEREFORE ORDERED:

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

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


 WILLIAM C. MCMASTER, III.
 Presiding Judge
 Seventh Judicial Circuit

Spartanburg, South Carolina

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 SPARTANBURG COUNTY



State of South Carolina
The Circuit Court of the Thirteenth Judicial Circuit

William C. McMaster, III
Judge

Greenville County Courthouse
305 E. North Street, Suite 314
Greenville, SC 29601
Phone: (864) 467-8740
Fax: (864) 467-8325
wmcmasterj@sccourts.org

April 7, 2026

Amy W. Cox
Spartanburg County Clerk of Court
PO Box 3483
Spartanburg, SC 29304

Re: 2024CP4203224 – Jaden I. Gary v. State of South Carolina

Ms. Cox,

Please find enclosed an Amended Order of Dismissal with Prejudice for the above-referenced case as signed by Judge McMaster. Please confirm via email when the Order has been filed.

Thanks,

A handwritten signature in black ink, appearing to read "Devyn Fischer", written over a horizontal line.

Devyn Fischer
Judicial Law Clerk
The Honorable William C. McMaster, III

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Jaden Imarion Gary, Appellant.

Appellate Case No. 2021-000967

Appeal From Spartanburg County
R. Keith Kelly, Circuit Court Judge

Unpublished Opinion No. 2023-UP-364
Submitted October 1, 2023 – Filed November 8, 2023

AFFIRMED

Elizabeth Anne Franklin-Best, of Elizabeth
Franklin-Best, P.C., of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Ambree Michele Muller, both of
Columbia; and Solicitor Barry Joe Barnette, of
Spartanburg, all for Respondent.

PER CURIAM: Jaden Gary appeals his convictions for first-degree burglary, possession of a weapon during the commission of a violent crime, and grand larceny, and his concurrent sentences of twenty years' imprisonment for

first-degree burglary, five years' imprisonment for the weapon charge, and three years' imprisonment for grand larceny. On appeal, Gary argues the trial court erred by (1) refusing to instruct the jury on second-degree burglary as a lesser-included offense of first-degree burglary and (2) punishing him for exercising his right to a jury trial by imposing a sentence greater than the State offered during plea negotiations. We affirm pursuant to Rule 220(b), SCACR.

1. We hold the trial court did not abuse its discretion in refusing to instruct the jury on second-degree burglary because there was no evidence from which the jury could infer the defendant committed the lesser rather than the greater offense. *See State v. McGowan*, 430 S.C. 373, 379, 845 S.E.2d 503, 505 (Ct. App. 2020) ("An appellate court will not reverse a [trial] court's decision regarding a jury instruction unless there is an abuse of discretion."); *State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2014) ("A trial judge must charge a lesser included offense if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense."); S.C. Code Ann. § 16-11-311(A)(1)(a) (2015) ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . is armed with a deadly weapon . . ."); S.C. Code Ann. § 16-11-312(A)(1)(a) (2015) ("A person is guilty of burglary in the second degree if the person enters a building without consent and with intent to commit a crime therein, and . . . is armed with a deadly weapon . . ."); S.C. Code Ann. § 16-11-10 (2015) (defining a dwelling as "any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property"). Although Gary argues that he did not know the house was occupied, the evidence presented at trial was that the house contained furniture, electronics, and other personal belongings, the house had working utilities, and the victim testified he intended to return to the house after work. Video capturing the burglary showed Gary telling the other participants to be quiet by motioning with his finger over his mouth. Thus, we find there is no evidence from which the jury could infer Gary committed the lesser offense of second-degree burglary rather than first-degree burglary. *See State v. Glenn*, 297 S.C. 29, 32, 374 S.E.2d 671, 672 (1988) (explaining that "the test of whether a building is a dwelling . . . turns on whether the occupant has left with the intention to return"); *compare State v. Phillips*, 393 S.C. 407, 413-14, 712 S.E.2d 457, 460 (Ct. App. 2011), *aff'd as modified*, 400 S.C. 460, 734 S.E.2d 650 (2012) (finding the occupant leaving his dog and other items at the house was sufficient evidence he intended to return), *with State v. Ferebee*, 273 S.C. 403, 405-06, 257 S.E.2d 154, 155 (1979) (finding no intent to return when the tenants permanently

vacated the rental apartment a week before the burglary, the apartment was listed for rent, and no evidence indicated the owner ever occupied or intended to occupy the apartment).

2. We find that whether the trial court punished Gary for exercising his right to a jury trial by imposing a longer sentence than the State offered during plea negotiations is not preserved for appellate review because it was not raised to or ruled on by the trial court. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); *id.* at 142, 587 S.E.2d at 693-94 ("Issues not raised and ruled upon in the trial court will not be considered on appeal.").

AFFIRMED.¹

MDONALD and VINSON, JJ., and BROMELL HOLMES, A.J., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.