RECEIVED

MAR 19 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM MARION COUNTY

Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Case No. 2012-CP-33-356

Joshua Lee Phillips #312606, ... Petitioner,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

The Petitioner appeal the Honorable Thomas A. Russo's Order dated January 29, 2018, denying post conviction relief to the Petitioner. The Order was received by the undersigned counsel on March 6, 2018 . A copy of the Order on appeal is attached to this notice.

This 13th day of March, 2018.

Steven W. Fowler
Fowler Law Firm
730 Main Street, Unit 237
North Myrtle Beach, SC 29582
843-663-0006
SC Bar #69683

THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

MAR 19 2018

S.C. SUPREME COURT

APPEAL FROM MARION COUNTY

Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Case No. 2012-CP-33-356

Joshua Lee Phillips #312606, ... Petitioner,

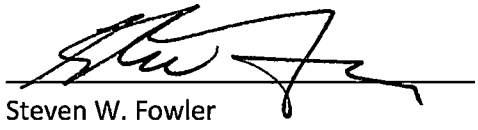
v.

State of South Carolina, ...Respondent

PROOF OF SERVICE

I, Steven W. Fowler, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the Assistant Attorney General, PO Box 11549, Columbia, SC 29211 and South Carolina Supreme Court, Office of the Clerk, 1231 Gervais St, Columbia, SC 29201. I further certify that all parties required by Rule to be served have been served this March 13, 2018.

This 13 day of March, 2018.



Steven W. Fowler
Fowler Law Firm
730 Main Street, Unit 237
North Myrtle Beach, SC 29582
843-663-0006
SC Bar #69683

ALAN WILSON
ATTORNEY GENERAL

March 2, 2018

Steven Willard Fowler, Esquire
730 Main Street Unit #237
North Myrtle Beach, South Carolina 29582

Re: **Joshua Lee Phillips, #312606 v. State of South Carolina**
2012-CP-33-0356

Dear Mr. Fowler:

Enclosed please find a copy of the signed and filed **Order of Dismissal** in the above mentioned post conviction-relief case. With this letter, we are closing our post-conviction relief file in this matter.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General

LAM/ch
Enclosure(s)

STATE OF SOUTH CAROLINA
COUNTY OF MARION
IN THE COURT OF COMMON PLEAS

JOSHUA LEE PHILLIPS, #312606 Applicant,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Steven Willard Fowler, Esquire
730 Main Street Unit # 237
North Myrtle Beach, South Carolina 29582

This 2nd day of March 2, 2018.

Lindsey A. McCallister
Attorney for Respondent

SWORN to before me this 2nd day of March, 2018.

Notary Public for South Carolina.
My Commission Expires:

STATE OF SOUTH CAROLINA COUNTY OF MARION	)	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT
Joshua Lee Phillips, #312606, Applicant, v. State of South Carolina, Respondent.	)	C.A. No. 2012-CP-33-0356 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Joshua Lee Phillips (Applicant) on May 24, 2012. Respondent made its Return on December 12, 2012. An evidentiary hearing into the matter was convened on August 30, 2017, at the Florence County Courthouse. Steven W. Fowler, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf. Hank Anderson, Esquire, and Ron Smith testified for the State. This Court had before it a copy of the records of the Marion County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application, the State's Return, the trial transcript, and Applicant's appellate records.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Marion County Clerk of Court's orders of commitment. Applicant was indicted at the February 2008 term of the Marion County Grand Jury for two counts each of murder and armed robbery and one count of possession of a weapon during the commission of a violent crime

(2008-GS-33-0071). Jack Lawson (Counsel), Esquire,[1] and Hank Anderson, Esquire, represented Applicant. On August 31 through September 3, 2009, Applicant proceeded to a jury trial before the Honorable Ralph King Anderson and a jury. After the jury convicted Applicant as indicted, Judge Anderson sentenced Applicant to consecutive terms of confinement for life on each count of murder, plus concurrent terms of thirty years each for each count of armed robber and five years for the count of possession of a weapon during the commission of a violent crime.

A notice of appeal was filed on Applicant's behalf, and an appeal was perfected by Joseph Savitz, III, Esquire, of the South Carolina Commission on Indigent Defense – Appellate Defense Division, pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Phillips, Op. No. 2012-UP-143 (filed on February 29, 2012). The remittitur was issued on March 16, 2012.

SUMMARY OF FACTS ADDUCED AT TRIAL

At approximately 5:15 a.m. on the morning of September 29, 2007, a woman approached three officers from the Marion County Sheriff's Department at the Sunny Mart in Nichols. Tr. pp. 127-129, 177-78. The woman was "hysterical," and reported to the officers she had just left the Nichols Night Life club, where a man was inside shooting people. Tr. p. 129, 178, 487. The woman also reported the man left in a gold Jeep with three other people. Tr. pp. 179-80, 478. The woman told the officers the shooter was a black male with twists in his hair, who she knew as Scrappy.[2] Tr. p. 180, 487, 493. Upon arrival and entry to the club, the officers discovered two deceased victims, spent shell casings, and a wallet with dollar bills scattered on the floor. Tr. pp. 131-34, 183. The male victim's red pickup truck was idling in the parking lot, and the

[1] Mr. Lawson died on November 2, 2011.
[2] Testimony at trial established Applicant's nickname was Scrappy or Little Scrappy. Tr. p. 258, 600-01, 664-65.

lights were on inside the club. Tr. p. 139, 183, 282-83. Both of the deceased victims inside the club had suffered gunshot wounds to the head. Tr. pp. 739, 744.

Later that morning, the woman who first reported the incident, Jacqueline Love, returned to the crime scene and was interviewed by a detective there. Tr. pp. 144-45, 225, 230. Based on Ms. Love's description of the shooter,[3] another officer on scene suggested Applicant as a possible suspect. Tr. p. 255, 494. The officer prepared a photo lineup with Applicant's picture, and Ms. Love immediately identified Applicant as the man she had seen inside the club. Tr. p. 257-58, 494-96, 506. Ms. Love also identified Applicant from the stand at trial. Tr. pp. 477, 499-500, 507-08.

Once Applicant was identified, officers searched his house and were able to identify Applicant's codefendants, who were in the car with him. Tr. pp. 384-85, 602-03, 611. Applicant's codefendants testified at trial that Applicant went into the club after closing, they heard gunshots, then Applicant ran back to the car, and they drove off. Tr. pp. 604-08, 659-60, 665-68. One codefendant further testified he helped Applicant dispose of the gun. Tr. p. 675. Officers eventually located a .45 caliber pistol near the 501 bridge in Mullins, which was consistent with shell casings found at the crime scene. Tr. pp. 367-68, 385-86, 445. Applicant fled to Kentucky and was apprehended there a few weeks later. Tr. pp. 216-19.

ALLEGATIONS

In his application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
    a. Counsel failed to call alibi witnesses or ask for instructions on alibi defense;

[3] Applicant suffers from vitiligo, which is visible around his mouth, and has two tear drop tattoos on his face. Tr. p. 494; see also Applicant's records from the South Carolina Department of Corrections.

b. Counsel advised Applicant not to exercise his right to testify because Counsel "wanted last argument" but Applicant would have testified if he had known no witnesses would be called;
c. Counsel failed to file a motion to dismiss the case after the solicitor failed to dispose of it within 180 days;
d. Counsel did not make any motions for mistrial or retrial based on contact between Applicant's mother and a juror.

2. Violation of Due Process
   a. Counsel failed to challenge search warrant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Applicant testified Counsel represented him on these charges and did the preparation for trial, although Mr. Anderson assisted at trial. Applicant testified he only met with Counsel twice before trial. Applicant testified at the first meeting he gave Counsel a "run down" of the case, they discussed his alibi, and he gave Counsel the names of some potential witnesses. Applicant testified the second time he met with Counsel, Counsel asked about "a guy named Eric" who was a potential witness for the State. Applicant further testified he could not remember whether Counsel sent him any letters prior to trial, but Applicant sent several letters to Counsel. Applicant testified he never met Mr. Anderson until the day of trial.

Mr. Anderson testified he assisted Counsel at trial as second chair, and he was present for the entire trial. Mr. Anderson testified he was also involved with preparation approximately three to four weeks prior to the trial, and he and Counsel reviewed all the discovery and prepared witnesses together. Mr. Anderson testified his role was to deliver the opening statement and to cross-examine three witnesses – Conswella Smith, Jason Phillips, and Eric Moultrie. Mr. Anderson testified he had obtained the case file from the Marion County Public Defender's Office, where it had been in storage since the trial. Mr. Anderson also testified he was familiar with Counsel's work and handwriting, and he recognized Counsel's notes in the file. Mr.

Anderson testified Counsel had prepared a trial notebook which contained notes on Counsel's investigation and case preparation, indicating Counsel had talked with several witnesses prior to trial. Mr. Anderson also testified notes in the case file indicate Counsel met with Applicant at least four times prior to trial, as well as sent several letters. Mr. Anderson testified he met with Applicant once at the jail prior to trial.

Issue #1 – Counsel failed to call alibi witnesses or ask for jury instructions on alibi defense.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), overruled on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 744 (2014). However, failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In order to prevail on a claim of ineffectiveness based on Counsel's failure to call a favorable witness, the South Carolina Supreme Court has repeatedly held a PCR applicant *must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis added). Applicant's speculation the witness' testimony would have been favorable cannot, by itself, satisfy his burden of showing prejudice. Glover v. State, 318 S.C. 396, 498-99, 458 S.E.2d 538, 540 (1995). Additionally, "[c]ourts 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) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

Applicant testified he gave Counsel the names of several alibi witnesses, but Counsel never told Applicant whether those witnesses were investigated, and the witnesses were not called at trial, even though several were present. Applicant testified the witnesses were Johnny McLeod, Yolanda Phillips, James Riggins, Stevie Riggins, and Kayla Bellamy, all of whom could verify Applicant's whereabouts at the time of the crime. Applicant testified he had no knowledge as to whether Counsel ever interviewed any potential witnesses, except for his mother, Yolanda Phillips, and Counsel never told Applicant if he did.

Applicant further testified he was surprised at trial when no witnesses were called on his behalf, and he stated if he had known ahead of time, he would have changed his decision not to testify. Applicant testified the witnesses were in the courthouse during trial, and he anticipated they would be called because Counsel asked to have them sequestered, and he had no other defense. Applicant further testified Counsel and Mr. Anderson advised him not to testify because they wanted to have the last argument to the jury, but he would have testified if he had known his attorneys were not going to put up any defense. Applicant also testified Counsel did not request a jury instruction on the alibi defense.

Mr. Anderson testified documentation in the case file reflects the defense listed Stevie Riggins, Yolanda Phillips, and Johnny McLeod as potential defense witnesses, among others. Mr. Anderson testified some alibi witnesses were present in the courtroom, and the defense asked to have witnesses sequestered because they had not yet made a decision about whether Applicant would testify and present witnesses. Mr. Anderson further testified they waited to make the decision about whether to call defense witnesses until after the State had presented its

case. Mr. Anderson also testified the main defense strategy was to deny Applicant's involvement and show the State's theory was not reasonable. Mr. Anderson testified the State relied on witnesses who admitted to smoking marijuana and drinking on the night of the crime, and they gave conflicting, inaccurate statements, all of which the defense attacked on cross-examination. Mr. Anderson also testified he and Counsel repeatedly pointed out poor police work, made motions to limit witnesses' testimony, and objected to the introduction of evidence. Mr. Anderson further testified if the alibi witnesses were not called, it was because Counsel did not find them to be credible.

Counsel's investigator, Ron Smith, also testified for the State. Mr. Smith testified he accompanied Counsel on several trips to Loris and Green Sea several weeks before trial to attempt to locate the people Applicant had named as potential alibi witnesses. Mr. Smith testified they were specifically searching for a music producer who had a studio between Loris and Green Sea, as well as a witness from the Loris Pizza Hut who might have seen Applicant that night. Mr. Smith testified Applicant told him and Counsel that Applicant was with the music producer listening to music all night, but they could never corroborate that alibi. Mr. Smith testified they searched for several days from dawn until after dark, but they were unable to locate any of the witnesses, and the music studio building appeared to be abandoned and overgrown. Mr. Smith further testified they received information the music producer might have gone to Omaha, NE, and Counsel attempted to track him down through the Nebraska Department of Corrections, but was unsuccessful. Mr. Smith testified he and Counsel also went to the Conway Housing Authority and interviewed Applicant's mother, sister, and Johnny McLeod.

This Court finds Applicant has failed to prove either Counsel or Mr. Anderson was deficient or failed to render reasonably effective assistance under prevailing professional norms

in regards to their handling of a potential alibi defense at trial. This Court finds Counsel and his investigator, Mr. Smith, investigated Applicant's alleged alibi and interviewed the witnesses they were able to locate. Therefore, neither Mr. Anderson nor Counsel was deficient. This Court finds credible Mr. Smith's testimony regarding the extensive search the defense undertook to locate the music producer and substantiate Applicant's alibi. Further, this Court finds credible Mr. Anderson's explanation of the defense strategy and why defense witnesses were present at trial but ultimately not called to testify.

Additionally, Applicant did not call any alibi witnesses to testify on his behalf at the evidentiary hearing. Applicant's assertion alone these witnesses would have provided favorable testimony is not enough to meet his burden as to this allegation. See Glover, 318 S.C. at 499, 458 S.E.2d at 540 ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). This allegation is therefore denied and dismissed.

Issue #2 – Counsel advised Applicant not to testify without informing Applicant no witnesses would be called in his defense.

"The right of a criminally accused to testify or not to testify is fundamental." State v. Rivera, 402 S.C. 225, 241-42, 741 S.E.2d 694, 702-03 (2013) (citing Rock v. Arkansas, 483 U.S. 44, 52, (1987)). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." Id. Further, it is the defendant who retains the ultimate authority to decide whether or not to testify. United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991) (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)). Under Strickland, in order to prove ineffective assistance of counsel based on his claim Counsel prevented him from exercising his right to testify, Applicant must show both that his attorney violated his right to testify and that his testimony had a

"reasonable probability" of changing the outcome of the trial. United States v. Rashaad, 249 F. App'x 972, 973 (4th Cir. 2007).

Applicant testified Counsel and Mr. Anderson advised him not to testify because they wanted to have the last argument to the jury, but he would have testified if he had known his attorneys were not going to put up a defense or call witnesses on his behalf. Mr. Anderson testified he, Counsel, and Applicant discussed Applicant's right to testify multiple times throughout the course of the representation. Mr. Anderson further testified, and the transcript confirms, Counsel requested additional time to discuss the matter of Applicant's testimony with Applicant, and the trial court allowed a recess overnight in order to make the decision. See Tr. p. 759. Mr. Anderson also testified Applicant was thoroughly questioned on the record by the trial court about his decision. Mr. Smith also testified he was present for the final conversation between Applicant, Mr. Anderson, and Counsel, and Counsel thoroughly explained Applicant's right to testify and the significance of preserving the defense's opportunity to make the last closing argument.

This Court finds Applicant has failed to prove Counsel or Mr. Anderson was deficient in his advice to Applicant regarding his right to testify. This Court finds Mr. Anderson's testimony on this issue to be credible and also finds Applicant's testimony was not credible. Further, this Court has reviewed the trial transcript, which confirms Mr. Anderson's testimony and reflects the trial judge advised Applicant of his right to testify if he wished. Tr. p. 762-65. Applicant informed the trial judge he had made the decision not to testify. Tr. p. 765. Significantly, the transcript also reflects Counsel explained to the trial court the decisions as to whether Applicant would and whether the defense would call any additional witnesses were linked, and if Applicant did not testify, the defense likely would not put up any other witnesses. See Tr. p. 759.

Further, this Court finds Applicant failed to prove prejudice because it is not reasonably likely his testimony would have changed the outcome of the case. Applicant did not offer any testimony at the evidentiary hearing to establish an alibi or refute the testimony of the eyewitness, Ms. Love, or his codefendants, all of whom placed him at the scene as the shooter. This allegation is therefore denied and dismissed.

Issue #3 - Counsel failed to file a motion to dismiss the case after the solicitor failed to dispose of it within 180 days.

This Court finds Applicant failed to present any testimony, argument, or evidence at the hearing regarding the allegation in his application that Counsel was ineffective for failing to file a motion to dismiss the case after it was not disposed of within 180 days. Therefore, this Court deems that allegation abandoned, and the allegation is dismissed.

Issue #4 - Counsel did not make any motions for mistrial or retrial based on contact between a member of Applicant's family and a juror.

Applicant testified that at trial, his sister overheard a juror say something in the hallway during a recess in trial. Applicant testified he felt Counsel should have asked to hold a hearing to find exactly what was said, and possibly move for a mistrial. Mr. Anderson testified he had no specific memory of this event. This Court has reviewed the transcript and finds Applicant's family member, Yolanda Phillips, approached a juror and attempted to speak to him or her, which was reported to the trial judge by courtroom deputies. See Tr. pp. 751-52. The Court finds Applicant has failed to prove either deficient conduct on the part of Mr. Anderson or Counsel or that he was prejudiced as he did not call the juror in question to testify. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the

testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . .). This allegation is therefore denied and dismissed.

Issue #5 – Counsel failed to obtain Applicant's mental health records or make any motions to have Applicant evaluated for competency.

Although not specifically raised in his application, at the hearing, Applicant testified he had mental health issues Counsel did not investigate. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), overruled on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 744 (2014). Further, "[c]ounsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "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) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

Applicant testified he asked Counsel to obtain his mental health records and to have him evaluated for competency, but Counsel told him it was irrelevant because he was pleading not guilty. Applicant testified he and Counsel never discussed his mental health history. Applicant further testified he suffers from schizophrenia and bipolar disorder. Mr. Anderson testified he was not present for any discussions with Applicant regarding Applicant's mental health. However, this Court has reviewed the transcript which reflects Counsel was aware of Applicant's mental health history and obtained copies of Applicant's records for his file. Tr. p. 772. Further, Counsel explained on the record he had discussed the issue with Applicant, including possible defenses, but Applicant asserted he was not present or involved in the crime in any way, so Counsel did not pursue the matter as part of a defense or as possible mitigation. Tr. p. 772.

This Court finds Applicant has failed to prove Counsel was deficient with respect to the handling of Applicant's mental health history, as the record reflects Counsel was aware of the issue, obtained the relevant records, discussed his findings with Applicant, and articulated a reasonable trial strategy for not pursuing a defense or mitigation based upon Applicant's mental health. Additionally, Applicant has failed to prove he was prejudiced in any way because he did not introduce the records themselves or any expert testimony indicating he was incompetent or incapacitated at the time of the crime or trial. See, e.g., Bannister, 333 S.C. at 303, 509 S.E.2d at 809 ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . ."). This allegation is therefore denied and dismissed.

Issue #6 – Counsel did not properly challenge the testimony of Eric Moultrie, who testified against Applicant at trial pursuant to a proffer agreement.

Although not specifically raised in his application, at the hearing, Applicant testified Counsel and Mr. Anderson were deficient in their handling of the testimony of Eric Moultrie, who testified against Applicant at trial pursuant to a proffer agreement with the Fifteenth Circuit Solicitor's Office. Applicant testified Counsel never explained what a proffer agreement was or reviewed the State's list of potential witnesses with Applicant prior to trial. Applicant testified, however, Counsel asked him prior to trial if he knew someone by that name, but Counsel never explained the context of who Mr. Moultrie was or that he would be testifying against Applicant. Applicant gave conflicting testimony as to whether he knew Mr. Moultrie. Applicant testified he only recognized Mr. Moultrie once he entered the courtroom to testify, not by name, but he also testified he told Counsel he knew Mr. Moultrie because Mr. Moultrie had helped him with some legal paperwork while they were both at the Turbeville Correctional Institution.

Mr. Anderson testified he prepared the defense's cross-examination of Mr. Moultrie, and he had a copy of the proffer agreement and was aware of its contents. Mr. Anderson testified although he did not talk to Applicant about Mr. Moultrie, he prepared for Mr. Moultrie's testimony by listening to his interview, reviewing the proffer agreement and Mr. Moultrie's criminal history, and wrote out questions for cross-examination. Mr. Anderson further testified he thoroughly cross-examined Mr. Moultrie regarding the content and effect of the proffer agreement.

This Court finds Applicant has failed to prove either Counsel or Mr. Anderson rendered ineffective assistance regarding the testimony of Mr. Moultrie and their handling of the proffer agreement. Applicant has presented no evidence of any basis for Counsel or Mr. Anderson to challenge the testimony, and Mr. Anderson was thoroughly prepared to address the issue, which

he did at length on cross-examination. Therefore, this Court finds neither Counsel nor Mr. Anderson was deficient, nor was Applicant prejudiced in any way by Counsel or Mr. Anderson's handling of the issue.

Due Process Violation

Applicant alleges infringement of his rights under certain amendments to the United States Constitution, specifically a violation of his Fourth Amendment right to be free from unreasonable search and seizure, and claims Counsel should have challenged the search of his home. Applicant testified he brought up the issue of a potentially illegal search of his home with Counsel, but Counsel never filed any motions or otherwise raised it at trial. Mr. Anderson testified he and Counsel discussed the issue, but they agreed the search was not harmful to Applicant's case as nothing incriminating was found in the home.

This Court finds Applicant has failed to prove Mr. Anderson or Counsel was deficient in any way in their handling of the allegedly illegal search of Applicant's home. Applicant has offered no evidence the search was indeed illegal or that there was any meritorious motion his attorneys could have made at trial. Further, this Court finds credible Mr. Anderson's assessment the search was actually helpful to Applicant because nothing linking him to the crime was found. This allegation is hereby denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Neither Counsel nor Mr. Anderson was deficient, nor was Applicant prejudiced by any alleged deficiencies in Counsel's or Mr. Anderson's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from receipt 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), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, Applicant must serve and file a notice of appeal. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent.

AND IT IS SO ORDERED this 22 day of January 2018.

THOMAS A. RUSSO
Chief Administrative Judge
Twelfth Judicial Circuit

Florence, South Carolina.

FILED
2018 JAN 29 AM 10:07
MARION COUNTY SC
MICHRISTY MGRAY
CLERK OF COURT

Firm

FOWLER
Law Firm
Fowler Fights For You

Firm

FOWLER
Law Firm
Fowler Fights For You

[redacted]

US POSTAGE AND FEES PAID
FIRST-CLASS
Mar 15 2018
Mailed from ZIP 28451
3oz First-Class Pkg Svc

CommercialBasePrice 071S00850592

endicia.com

FIRST-CLASS PKG SVC

LAW FIRM
IN ST
37
Myrtle Beach SC 29582

0005

P TO:
SUPREME COURT
RK OF COURT
BOX 11330
UMBIA SC 29211-1330

USPS TRACKING #

Clerk of Court
SC Supreme Court
P O Box 11330
Columbia, SC
29211