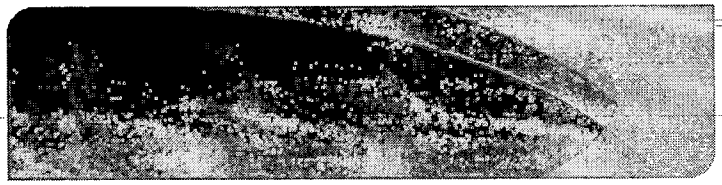

Rodney D. Davis
101 Meeting Street, 5th Floor
Charleston, SC 29401
Phone: 843-882-50653 Fax: 843-958-1860
E-Mail: Davis@LowcountryLawOffice.com

March 6, 2019

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Sequoia McKinnon v. State of South Carolina, Case No.: 2017-CP-10-2656

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

(1) Proof of service of the Notice of Appeal on the respondent;

(2) The Order of Dismissal &

(3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,

Rodney D. Davis
South Carolina Bar #: 12396
101 Meeting Street, 5th Floor
Charleston, SC 29401
(843) 882-5065
Davis@LowcountryLawOffice.com

CC: Benjamin Limbaugh
Assistant Attorney General

Paula Murdoch
Appellate Division, SCCID

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAR 12 2019
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No.: 2017-CP-10-2656

Sequoia McKinnon, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Sequoia McKinnon appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable G. Thomas Cooper on December 4, 2018. Applicant's attorney received a copy of the Order of Dismissal on or about February 19, 2019.

3/6, 2019

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Attorney for Appellant

Other Counsel of Record:
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Columbia, SC 29211-1549
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No.: 2017-CP-10-2656

Sequoia McKinnon, Appellant,

v.

State of South Carolina, Respondent.

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3/6, 2019

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Attorney for Respondent

RECEIVED
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No.: 2017-CP-10-2656

FILED
2019 MAR -6 PM 3:36
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Sequoia McKinnon, Appellant,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, Benjamin Limbaugh, P.O. Box 11549, Columbia, South Carolina 29211-1549, on 3/6, 2019.

3/6, 2019

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Attorney for Appellant

Other Counsel of Record:
Benjamin Limbaugh, Assistant Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Sequoia McKinnon, #368688,	)	Case No.: 2017-CP-10-2656
	)	
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before this Court by way of an application for post-conviction relief filed on May 25, 2017, by Sequoia McKinnon (Applicant), alleging he was entitled to post-conviction relief based on constitutionally ineffective assistance of counsel. Respondent served its return on July 31, 2017, requesting an evidentiary hearing be convened on the application.

An evidentiary hearing was held on December 4, 2018, before this Court at the Charleston County Courthouse. Applicant was present and was represented by counsel Rodney Davis. Respondent was represented by Assistant Attorney General Benjamin Limbaugh of the South Carolina Attorney General's Office. At the hearing, testimony was taken from plea counsel Andrew C. Carroll and Applicant.

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

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its October 2010 term,

the Charleston County Grand Jury indicted Applicant for murder (2014-GS-10-1103) and possession of a weapon during the commission of a violent crime (2014-GS-10-131). C. Andrew Carroll, Esquire, represented Applicant. Assistant Solicitor Stephanie Linder, Esquire, prosecuted the case.

On June 22, 2016, Applicant appeared before the Honorable Deadra Jefferson and pled guilty to the lesser-included offense of voluntary manslaughter and as indicted to possession of a weapon during the commission of a violent crime.

Pursuant to negotiations between Applicant and the State, Judge Jefferson sentenced Applicant to imprisonment for concurrent terms of thirty years for murder and five years for possession of a weapon during the commission of a violent crime. Applicant did not appeal his conviction or sentence.

II. ALLEGATIONS

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
    a. "Witness/Suspect Kareem McPherson has wrote several statements that contradicts each other. The record also reflects that there was a eyewitness that was running from the crime scene that trial counsel never interviewed. Without witness Kareem McPherson, the State had no other witness to prosecute and arrest Defendant McKinnon, therefore, it should be without question that trial counsel was ineffective for failing to interview the only eyewitness the State had to prosecute the defendant."

At the evidentiary hearing, Applicant proceeded on the allegation that counsel was ineffective for failing to investigate this potential eyewitness.

TESTIMONY PRESENTED

Applicant's Testimony
Direct Examination

Applicant testified that he met with counsel in person four to five times at the detention center and met with him another two times at the courthouse. Applicant testified that he also met in person with counsel's paralegal eight or nine times at the detention center. Applicant testified that he would call counsel on the jail phone asking him to visit, but that counsel would give him updates during the phone call. Applicant testified that he received discovery, but that counsel never went over the elements of the offenses with him. Applicant testified that counsel did not explain serious or most serious offense, but that he did discuss eighty-five percent possibility. Applicant testified that counsel did explain the possible sentences for murder and that he'd likely get thirty years if he plead guilty. Applicant testified that counsel told him he thought he would get a life sentence if convicted at trial, so he decided to take the plea to avoid that possibility. Applicant testified that he accepted a plea offer to thirty years, but decided during a recess that he did not want to accept the plea any longer. Applicant testified that during the recess he was convinced into taking the plea by plea counsel and another attorney he did not know.

Applicant testified that eight or nine months before his plea, his co-defendant sent him a statement that he didn't actually commit the crime. Applicant testified that he gave the statement to counsel and that he would look into it. Applicant testified that this is why he wanted to go to trial, to be able to cross-examine this witness. Applicant testified that counsel came back and told him that the co-defendant had agreed to testify against him and showed him the statement implicating him in the crime. Applicant testified that witnesses claimed they saw a man running and dropped a cell phone, also, that the co-defendant was the only one who gave an eye witness identification of the Applicant. Applicant testified that he never discussed with counsel how

they'd try to impeach the co-defendant at trial. Applicant was unaware if counsel ever spoke with the co-defendant. Applicant testified that he never discussed with counsel about how to raise third party guilt at trial and was not sure if counsel interviewed the third party. Applicant testified that he would have gone to trial if there had been a plan for impeach the co-defendant and for bringing in third party guilt.

Cross Examination

Applicant testified that counsel did not review all of the discovery with him, but that he did review the statements and the video. Applicant testified that he asked counsel to try and get him a plea offer after reviewing the video. Applicant testified that he remembers asking counsel to investigate the co-defendant's statements. Applicant testified that he recalled his plea proceeding and Judge Jefferson explaining that the charges would be day for day and that he should expect to serve all of his sentence. Applicant testified that he remembers agreeing to the facts as read by the solicitor, including where he was quoted as saying: "I got him, Unc." Applicant testified that he remembered agreeing that there were no witnesses to the actual shooting. Applicant testified that he remembered agreeing that he was dropped off, committed the murder, then returned to the co-defendant's vehicle. Applicant testified he remembered telling the court that nothing need to be changed or added to the facts. Applicant testified that he remembered turning himself in to police after seeing a news report about the incident.

Counsel's Testimony

Direct Examination

Counsel testified that he did not meet with the co-defendant about the statements because he was represented by an attorney. Counsel testified that he did discover that the co-defendant was definitely cooperating with the State and was very firm that Applicant was the shooter.

Counsel testified that he investigated everything that Applicant asked him to. Counsel testified that he discussed the elements of Applicant's charges and the potential sentences. Counsel testified that Applicant asked him to get the best deal possible and that Applicant was wanting to get twenty years. Counsel testified that two police officers and civilian witnesses saw Applicant run from the vehicle and drop the cell phone. Counsel testified that records showed a phone call to his uncle, which matched the statement by the co-defendant that he called his uncle and said; "I got him, Unc." Counsel testified that he discussed possible defenses at trial and that he conferred with a cell phone expert about the possibility of attacking the State's cell phone evidence. Counsel testified that he explained the risks of Applicant testifying at trial and that he did not believe it was a good idea.

Cross Examination

Counsel testified that it was ultimately Applicant's choice to plead guilty. Counsel testified that he gave Applicant his opinion about taking plea, his opinion on the evidence against him, and the challenges that they would face at trial. Counsel testified that he believed Applicant would be convicted at trial and receive a minimum sentence of thirty years. Counsel testified that he received the May 8th and May 15th letters from co-defendant, but that he had a number of concerns. Counsel testified that he did not see a valid strategy for using both letters because they had different handwriting, were contradicted by co-defendant's video statement to law enforcement, and issues concerning their validity. Counsel testified that the person mentioned in the letters had also been killed, so he could not interview him as to the validity of the claims. Counsel testified that that he spoke with every witness he could find.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the credibility presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant has alleged numerous instances of ineffective assistance of counsel against trial counsel, Andrew Carroll. Each allegation is addressed fully below.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (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 [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a " 'reasonably competent attorney.' " 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. See generally Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however,

calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687; Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so 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. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt

might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations.

Allegation: Failure to Interview Eyewitness (Failure to Investigate)

Applicant alleges plea counsel was ineffective for failing to interview a potential witness to the crime. Specifically, Applicant alleges:

> Witness/Suspect Kareem McPherson has wrote several statements that contradicts each other. The record also reflects that there was a eyewitness that was running from the crime scene that trial counsel never interviewed. Without witness Kareem McPherson, the State had no other witness to prosecute and arrest Defendant McKinnon, therefore, it should be without question that trial counsel was ineffective for failing to interview the only eyewitness the State had to prosecute the defendant.

Plea counsel testified at the evidentiary hearing that he had a number of concerns with using the statements provided by Kareem McPherson and that he interviewed every witness he could locate. Counsel and Applicant both testified that the State had evidence other than co-defendant's statements with which to convict Applicant. The record from Applicant's plea proceeding and from the evidentiary hearing directly refute the allegations made by Applicant in his application for post-conviction relief. Counsel testified that he did not interview the co-defendant because he

was represented by counsel and was cooperating with the solicitor's office in their case against Applicant. Counsel testified that he examined the statements given by the co-defendant and could not find a useful way to use them at trial, as they were inconsistent and appeared to be written by different people. Counsel testified that he could not interview the person who was named in co-defendant's statement because that person had recently been killed. Counsel testified that he interviewed every witness that he could find in this case. Counsel provided a more than valid reason as to why he could not have interviewed the co-defendant and for why he did not believe using the statements at trial would have been useful to Applicant. Therefore, counsel was not deficient in his performance for not interviewing the co-defendant.

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. Counsel was not deficient, nor was Applicant prejudiced by Counsel'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 PCR counsel's 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, PCR counsel must serve and file a notice of appeal on Applicant's behalf. 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 be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 8 day of February, 2019.

G. THOMAS COOPER
Presiding Judge
Ninth Judicial Circuit

STATE OF SOUTH CAROLINA)	IN THE SUPREME COURT OF SOUTH CAROLINA
)	
COUNTY OF CHARLESTON)	
)	Case No.: 2017-CP-10-2656
)	
SEQUOIA MCKINNON,)	
Applicant.)	
)	
-versus-)	REQUEST FOR REPRESENTATION ON APPEAL
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	

FILED
2019 MAR -6 PM 3:36
JULIE J. ARMSTRONG
CLERK OF COURT
BY

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;

2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;

3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;

4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;

5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,

Rodney D. Davis
South Carolina Bar #: 12396

3/6, 2019
Charleston, South Carolina.

STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF CHARLESTON)

PERSONALLY appeared before me, Rodney D. Davis, being first duly sworn, deposes and says that he has read the foregoing *Request for Representation on Appeal* on behalf of Sequoia McKinnon and the same is true of his knowledge except those matters alleged on information and belief, and as to those matters, he believes them to be true.

Rodney D. Davis
South Carolina Bar #: 12396

SWORN to and subscribed to me
this 6 day of March, 2019.

Notary Public for South Carolina
My Commission expires 7/28/24

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REET, 5TH FLOOR
, SC 29401-2214

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211