McMAHAN & TAYLOR
ATTORNEYS LLC

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OCT 03 2019
S.C. SUPREME COURT

September 30, 2019

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: James Tytil Wright, #307354, v. State of South Carolina
2017-CP-07-1250

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Wright.

Best regards,

ASHLEY A. MCMAHAN
ATTORNEY AT LAW

AAM

cc: James Tytil Wright, #307354
Sara Elyssa Gunton, Asst. Attorney General
Beaufort County Clerk of Court
Office of Appellate Defense

P.O. BOX 5501 · WEST COLUMBIA, SC 29171
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STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
OCT 03 2019
S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable W. H. Seals, Jr., Circuit Court Judge

Case No. 2017-CP-07-1250

James Tytil Wright, #307354, ...Petitioner,

v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Applicant, James Tytil Wright, appeals the order of the Honorable W. H. Seals, Jr., dated September 14, 2019, and filed September 19, 2019.

Sept. 30th, 2019

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Opposing Counsel:
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Columbia, SC 29211-1549

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PROOF OF SERVICE

I, Ashley A. McMahan, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Sara Elyssa Gunton, Asst. Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

Sept 30th, 2019

ASHLEY A. McMAHAN, ESQUIRE
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FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2017CP0701250

James Tytil Wright		South Carolina State Of	
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by:		Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☒ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other: _PCR Denied & Dismissed

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ **See attached order** ☐ Statement of Judgment by the Court:

ORDER OF DISMISSAL

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/ W. H. Seals, Jr

Circuit Court Judge | **2157** (Judge Code) | 9/14/2019 (Date)

For Clerk of Court Office Use Only

This judgment was entered on **September 19, 2019**, and a copy mailed first class or placed in the appropriate attorney's box on **September 20, 2019**, to attorneys of record or to parties (when appearing pro se) as follows:

James Tytil Wright #307354 Mccormick Correctional Inst. 386 Redemption Way McCormick, SC 29899
Ashley A. McMahan PO Box 5501 West Columbia, SC 29171

Sara Elyssa Gunton PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

MMK

Court Reporter

Jerri Ann Roseneau - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FOURTEENTH JUDICIAL
COUNTY OF BEAUFORT	)	CIRCUIT
	)	
James Tytil Wright, #307354,	)	Case No.: 2017-CP-07-1250
	)	
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. In October 2010, the Beaufort County Grand Jury indicted Applicant for armed robbery (2010-GS-07-1926) and kidnapping (2010-GS-07-1927). Scott W. Lee, Esquire, represented Applicant. Solicitors Carra Henderson, Esquire, and Julie Kate Keeney, Esquire, prosecuted the case. On August 25-27, 2014, Applicant proceeded to trial before the Honorable Carmen T. Mullen. Applicant did not appear at his trial. The jury found Applicant guilty as indicted on both charges. Applicant was subsequently apprehended post-conviction, and was present for sentencing. Judge Mullen had sealed the sentences until Applicant was present for sentencing. On September 16, 2014, Judge Mullen sentenced Applicant to imprisonment for concurrent terms of twenty years for each charge.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on July 27, 2016. State v. Wright, Op. No. 2016-UP-385 (S.C. Ct. App. filed July 27, 2016). The remittitur was returned to the circuit court on August 15, 2016.

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. "Failure to object to the State relying upon the opinion of a unqualified police officer, John Foskey, who determined the quality of a copy of the surveillance tape he made and who callously took no effort to properly secure exculpatory evidence."
    b. "That trial counsel failed to object to several substantive and procedural rights that denied Applicant a fair trial; error or omission of trial counsel and the lack of a complete investigation impeded counsel to function effective at trial."
    c. "Was trial counsel ineffective when he failed to object to the State identification ID card of Applicant to identify him at trial was overly suggestive because it had his name on it."
2. "Chain of Custody"
    a. "The State hindered trial counsel to fully challenge the case because that police, John Foskey, failed to do a complete investigation, whereas, one of the victims informed police that, Terrence Brown (a friend of Tyshon Barnes) who mystery disappear."
3. "That police, John Foskey, made trial counsel ineffective for not fully challenging the case because Foskey did not do a complete investigation into Kenneth Barnes, Tyshon brother whom a victim picked out of the photo line-up as one of the robbers."
4. "Was trial counsel ineffective when the State failed to produce four (4) victims; hindered the defense to cross-examine his accusers: for description, i.e. built, weight, color of skin tone and to prove that an asportation occurred."
5. "New Evidence"
    a. "Too extensive for this section. See attached memorandum."[1]
6. Failure to request reconsideration of sentence.

On March 24, 2019, Applicant amended his application to include the following allegation:

1. Ineffective Assistance of Counsel as to Scott W. Lee:

    a. Counsel did not move to request a reconsideration of the sentence. Judge punished the Applicant in sentencing because the Applicant exercised his right to a trial. See Castro v. State, 417 SC 77, 789 SE2d 44 (2016).

Statement of Facts

On May 10, 2007, around 9:00 am, two men with guns robbed Chavis Moving Company on Bay Pines Road in Beaufort County. (R. p. 76; p. 84-86). The first man to enter was a young black male without a mask wearing a black and red jogging suit. (R. p. 103; p. 109-1 10). The

1 To date, Respondent has not received a supplemental memorandum containing factual support for Applicant's claim of newly discovered evidence.

second man was a black male with a ski mask wearing a black and yellow jogging suit. (R. p. 109-111). The robbers forced the five employees to get on the floor and later moved them to a storage room. (R. p. 103). During this time one of the robbers located a purse belonging to Nancy Hill, one of the victims, and, after rifling through it, found a debit card. (R. p. 103-105; p. 113). In this same purse was an unopened pack of cigarettes Ms. Hill purchased earlier that morning. (R. p. 102). Ms. Hill had purchased an entire carton of cigarettes before going to work that morning and then removed a single pack and placed it in her purse. (R. p. 102). No one touched the unopened pack of cigarettes except Ms. Hill and the robber who went through her purse. (R. p. 115). Police later determined that Appellant's fingerprints were on the cigarette pack. (R. p. 128; p. 225-227).

One of the robbers ordered Ms. Hill to provide them with her PIN number for the debit card and told her they would shoot her if she gave them the wrong PIN number. (R. p. 103). Ms. Hill gave them her correct PIN number, and after collecting some money, the robbers exited by way of the front door. (R. p. 86; p. 103). Ms. Hill learned a few 3 hours later that her debit card had been used at a nearby Food Lion store after the robbery. (R. p. 113-114). Detective John Foskey of the Beaufort County Sheriff s Office subsequently obtained a videotape from this Food Lion store and watched the tape. (R. p. 126-128). He was able to determine that there were three black males present at the ATM machine when the victim's debit card was used but was unable to definitively identify the men due to the poor quality of the tape. (R. p. 126-127; p. 144). Detective Foskey intended to send the tape to SLED to see if SLED's technicians could enhance it, but the tape was lost or misplaced at some point and he did not know what happened to it.1 (R. p. 127-128).

During the investigation of the robbery, Tyshon Barnes was developed as a suspect. (R. p. 125). Police created a lineup including Barnes, and two of the five victims identified him as the

first robber to enter Chavis Moving Company. (R. p. 125; p. 133). After Barnes confessed to his part in the crime and informed police that Appellant was the second robber, police created a lineup including Appellant. (See R. p. 132; p. 200-201). However, since Appellant had been wearing a mask, no one was able to identify him. (R. p. 132; p. 169). At trial, the State relied on Barnes' testimony identifying Appellant as the second robber and the fact that Appellant's fingerprints were found on the unopened pack of cigarettes in Nancy Hill's purse. (See R. p. 266-268). After deliberating for a little over an hour, the jury found Appellant guilty of both armed robbery and kidnapping. (R. p. 309-312). Since Appellant did not appear for trial, the judge sealed the sentences. (R. p. 323-325). The sentence of twenty years for each offense, concurrent, was later read on September 16, 2014, after Appellant was apprehended. (See 9/16/14 Sentencing Transcript, p. 4-7).

Prior to trial, Appellant made a motion to dismiss the case based upon the State's "failure to produce exculpatory evidence." (R. p. 18-20). Appellant's counsel stated that the police obtained a videotape from a Food Lion store which was less a mile away from where the armed robbery occurred. (R. p. 56). In the videotape, three men could be seen using an ATM card which was stolen during the armed robbery. (R. p. 18-19). Appellant's counsel stated that after looking at the video, the police sent the tape to SLED for enhancement, but "the trail kind of seems to end" there. (R. p. 18, lines 19- 22). He argued that the tape "may contain exculpatory evidence" since two of the people in the video using the stolen ATM card "had on identical clothing," some type of "work outfit," and the defense was "unable to look into that to see if it may be something that may be helpful to [Appellant]." (R. p. 18-19). Appellant's counsel made it clear that "we certainly are not alleging any bad faith on the part of law enforcement or the State or anybody else." (R. p. 19, lines 10-12). However, he stated, "I think we also can show that it may have exculpatory value." (R. p.

19, lines 12-13). Counsel then requested to have testimony regarding this issue and moved for dismiss the case. (R. p. 19-20).

In response, the State agreed with the general situation described by defense counsel but added that Investigator Foskey viewed the videotape and was unable to identify any of the individuals using the ATM card because the footage was "too grainy." (R. p. 20, lines 9-14). The State noted that SLED does not have the videotape or any records pertaining to the tape. (R. p. 20, lines 16-21). Counsel for the State also noted that the co-defendant, Mr. Barnes, denied going to Food Lion after the robbery, stated that he and Appellant - who did have possession of the ATM card - split up after they "got to the house," and that he did not know who went to Food Lion to use the ATM card. (R. p. 20, line 22 - p. 21, line 10). At that point, Appellant's counsel chimed in, pointing out that "if Mr. Barnes is on the tape, it would certainly be good impeachment, if he's lying about going to Food Lion." (R. p. 21, lines 11-13). Counsel for the State then concluded by arguing there was no evidence the tape was lost or destroyed in bad faith and that "even if we found it, we would not be able to determine the identity of the people on it." (R. p. 21, lines 15-19).

The State then called Investigator John Foskey to the stand. Investigator Foskey testified that he came into possession of a surveillance VHS tape from the Food Lion on Highway 116 on Lady's Island. (R. p. 23, lines 15-25). He reviewed the tape, but because the camera was at a distance, and because the area was not well-lit, he was unable to distinguish any facial features of the three individuals using the stolen debit card. (R. p. 24, lines 8-11). He also noted it was his belief the tape was not very clear because it was created on older equipment. (R. p. 27, lines 15-19). He was able to discern that the individuals using the stolen card were three black males, and two of them were wearing what appeared to be "work shirts" with a patch on the front. (R. p. 24,

lines 6-15). Investigator Foskey was unable to identify or read the patch. (R. p. 24, lines 16-17). He stated it had been his intention to send the tape to SLED to have it enhanced, and his report written on May 25, 2007, indicated the tape had already been sent to SLED. (R. p. 24-26; see Court's Exhibit # 1, Report). However, Investigator Foskey never saw the tape again, and the paper trail for the tape ended with the property receipt from Food Lion and his report indicating the tape had been sent to SLED. (R. p. 24-25). He did not know whether or not SLED would have been able to enhance the video and he did not receive a report back from SLED regarding the video. (R. p. 29-30).

After Investigator Foskey testified, defense counsel again argued that the videotape "could be very, very important" in light of the current methods for enhancing videotapes, and that it could "at least be some very favorable circumstantial evidence if [Appellant] is not one of the three guys walking around the Food Lion with this card that was taken from the robbery." (R. p. 32, lines 12-20). He noted it "also would be very helpful to [Appellant] if [co-defendant Tyshon Barnes] is one of the guys that is – it certainly would be very helpful if we could read the name tag on the people's shirts, that, you know." (R. p. 32, lines 21-24). He stated that it was very unfortunate for [Appellant] that he could not obtain the videotape "in an attempt to show the exculpatory nature of the evidence." (R. p. 33, lines 3-5). He also again made clear that he was not suggesting "for a second" that Investigator Foskey or anyone else purposely lost the tape or was trying to hide it from the defense. (R. p. 33, lines 6-8). The proper question, he contended, was whether or not the tape "has exculpatory value." (R. p. 33, lines 8-9). He argued that because the Food Lion was "a mile away" from the armed robbery location, and because the stolen card was used "very shortly thereafter," coupled with the fact that the only evidence tying Appellant to the crime was a "fingerprint from a pack of cigarettes and a lady's pocketbook" and "testimony from a co-

defendant," there was exculpatory value in the videotape. (R. p. 33, lines 9-25). He asserted that the fact that law enforcement was sending the take to SLED "would suggest to me that there would be some exculpatory nature to that video." (R. p. 34, lines 3-5). Accordingly, defense counsel again moved for dismissal of the charges "for failure to turn over exculpatory evidence." (R. p. 34, lines 5-7).

The State responded by pointing out that defense counsel used the terms "could" and "might" a lot and that speculation about whether or not something has exculpatory value is insufficient under *Arizona v. Youngblood*. 488 U.S. 51 (1988) and *State v. Adams*. 304 S.C. 302, 403 S.E.2d 678 (Ct. App. 1991). Counsel for the State pointed out that the exculpatory value must be apparent before the State loses the evidence. (R. p. 34, lines 14-17). In other words, counsel argued, there must be a definite, clear exculpatory value present before the evidence is destroyed. (R. p. 34, lines 18-21). Counsel argued there was no such definitive apparent exculpatory value in Appellant's case because Investigator Foskey testified that he was unable to positively identify anyone in the tape - other than race and gender - and speculation about the tape containing exculpatory evidence is insufficient under *Youngblood* and *Adams*. (R. p. 34, line 21 - p. 35, line 4). The State also pointed out that the videotape in question was not a recording of the actual armed robbery, but instead, merely a recording of the stolen card being used some time later at another location. (R. p. 35, lines 6-14).

The trial judge first ruled that "obviously" there was no bad faith surrounding the loss of the videotape in question. (R. p. 35, line 23 - p. 36, line 1). The question, the judge stated, was whether or not there was any apparent exculpatory value to the tape, and the fact that there "might" have been exculpatory value is not enough. (R. p. 36, lines 1-4). The judge pointed out that the tape pertained to an event that occurred after the armed robbery and not to the armed robbery itself.

(R. p. 36, lines 7-8). She also stated that, while she understood defense counsel's argument that the tape might potentially be used to impeach the co-defendant, "we don't know that." (R. p. 36, lines 8-11). She also noted that "we don't even know if SLED could have done anything with it," regardless of whether they received the tape or not. (R. p. 36, lines 12-14). Because the tape did not possess apparent exculpatory value at the time it was lost, the judge denied Appellant's motion to dismiss. (R. p. 36, lines 15-16). After some discussion, however, the judge ruled that defense counsel would be permitted to elicit testimony regarding the tape, if he chose to do so, in order to impeach the investigation. (R. p. 36-38).

Defense counsel did subsequently decide to use the lost tape to impeach the investigation and to try to create reasonable doubt. In his opening statement, defense counsel repeatedly warned the jurors to take into account all of the "stuff missing" and all of the "things that were lost." (R. p. 79-80). Defense counsel later raised issues related to the lost videotape during the testimony of three of the State's witnesses. First, during cross-examination of victim Nancy Hill, he established that the second robber (the one alleged by the State to have been Appellant) was wearing a black and yellow two-toned jogging suit. (R. p. 109-111). He also elicited testimony that $600.00 was stolen from her bank account shortly after the robbery when her stolen debit card was used at a nearby Food Lion ATM machine. (R. p. 113-114). Second, during the cross-examination of Detective Foskey, defense counsel established that the stolen debit card was used "fairly shortly" after the robbery at the nearby Food Lion; that the surveillance tape from the Food Lion had been obtained; that the tape depicted three black males - two of whom were wearing dark blue work shirts with a patch - using the card and that Detective Foskey could not testify that Appellant was the third man on the tape or that the third man in the tape was wearing what Appellant was alleged

to have been wearing during the robbery. (R. p. 142-144; p. 162-163; p. 168). Third, during the cross-examination of the co-defendant, Tyshon Barnes, defense counsel elicited testimony that Barnes and Appellant left the scene of the robbery and went straight back to Barnes' residence rather than going to Food Lion. (R. p. 198-199). Barnes testified that Appellant left his house at some point thereafter but also stated, "I don't think [Appellant] went to Food Lion." (R. p. 199, lines 2-5). Barnes stated he was not aware the debit card had been used at Food Lion, that he never had possession of the card, and that he did not see Appellant give the card to anyone else. (R. p. 199-200; p. 207).

After the State rested its case, defense counsel renewed his motion to dismiss for the State's failure to produce the Food Lion tape. (R. p. 247). Counsel reaffirmed that he was not alleging the tape was lost in bad faith, but stated he believed that "the exculpatory value and the prejudice to the defendant has bumped up a few notches" based on some of the testimony elicted at trial. (R. p. 249). He pointed out that the codefendant testified that neither he nor Appellant went to Food Lion immediately after the robbery; that Nancy Hill had provided a detailed description of the clothing Appellant was alleged to have worn during the armed robbery and that Detective Foskey could not testify that the third man in the tape was wearing such attire; and that since the card was used "within minutes" of the robbery Appellant would have likely been wearing the same clothes if he was one of the men using the debit card at Food Lion. (R. p. 248). Defense counsel stated that "without that tape, you know, again, we're not able to show these things that could have exculpatory value, because if we can say, look, we know the card was used, no question, in Bilo (sic) shortly after; and we know that ain't [Appellant], that is hugely exculpatory for [Appellant], and certainly circumstantial evidence that he wasn't there when the robbery happened, contrary to Mr. Barnes' testimony." (R. p. 249, lines 3-11).

The State responded that Detective Foskey's testimony did not contradict the notion that Appellant was the third man at Food Lion because he could not say the third man in the tape wasn't wearing the clothes Appellant was alleged to have been wearing, and that the co-defendant's testimony also did not contradict the notion that Appellant was the third man at Food Lion because he said Appellant left his house after they returned there following the robbery. (R. p. 250, lines 2-18). The State argued that nothing had changed since defense counsel initially made the motion to dismiss and that "we're still speculating" that the Food Lion tape contained exculpatory evidence and none of the trial testimony changed that. (R. p. 250, lines 19-23). The trial judge agreed with the State and again denied the motion to dismiss, stating it was still speculation that the tape contained "anything exculpatory" and noting that everyone was in agreement that there was "no bad faith" in the loss of the tape. (R. p. 250-251).

In closing argument, the State argued the missing Food Lion tape was a red herring since there was no information on the tape definitively identifying the black males who used the stolen debit card. (R. p. 268-269). The State argued that while Appellant could have been one of the men who subsequently used the debit card at Food Lion, it did not necessarily matter because "we know who stole it" since Appellant's fingerprints were on the victim's unopened pack of cigarettes. (R. p. 270-271). Defense counsel argued that the tape, which was "lost in the shuffle," created reasonable doubt because Detective Foskey did not testify the third person in the tape was wearing the clothes the second robber was wearing; because the co-defendant said he and Appellant did not go to Food Lion after the robbery but instead went back to his house; and that speculation about whether or not Appellant was one of the men at Food Lion using the stolen card created doubt about whether or not Appellant committed the armed robbery in the first place. (R. p. 276-277; p. 288; p. 290; p. 292).

Findings of Facts 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). 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, 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. Applicant's allegation is addressed fully below:

Failure to Object to John Foskey Testifying about Videotape

Applicant alleges that counsel was ineffective for failing to object Office John Foskey testifying as to the quality of the surveillance video that was lost in the case. Counsel testified that the State told him that the video had been lost. Counsel testified that there was a paper trail showing that the video was sent to SLED for analysis, but that the video itself could no longer be found. Counsel testified that (and the record so reflects) he moved to dismiss the case on the grounds that the State had failed to produce exculpatory evidence to the defense prior to trial. Counsel testified the judge denied the motion and that he renewed his objections after the ruling. Counsel was allowed to argue that the loss of the videotape impeached the State's investigation and brought in reasonable doubt. This issue was also raised on direct appeal, in which Applicant's convictions were affirmed by the Court. Applicant has failed to show any deficiency on the part of counsel and the record indicates that counsel did challenge the State for not producing the video. The record reflects that counsel was able to impeach the State's case for not producing the video and the testimony of the officer at trial was essentially that the video was of poor quality. The testimony of the officer was not detrimental to Applicant's case, as it did not

place him as being in the video. Therefore, this Court finds that Applicant has failed to meet his burden and this allegation is summarily dismissed.

Failure to Investigate

Applicant alleges that counsel failed to do proper investigation in this case into witnesses and other evidence in this case. Counsel testified that he thoroughly investigated this case and that the investigation was not good for Applicant. Counsel testified that the witnesses and potential witnesses would not have been helpful to Applicant's case. Counsel testified that other discovery, such as Applicant's fingerprint on the sealed carton of cigarettes in the victim's purse, were difficult to get around at trial. Counsel also testified that he had the complete file in the case and was sure he had everything in compliance with *Brady*. Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions...." Strickland, 466 U.S. at 691, 104 S.Ct. 2052. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690, 104 S.Ct. 2052. Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633–34 (Ct. App. 2014).

Based on these reasons, this Court finds plea counsel was not ineffective on this ground and this allegation is denied and dismissed with prejudice.

Failure to Object to State ID Card

Applicant alleges that counsel was ineffective for failing to object to the State's identification card that had his name on it. Counsel testified that he did not object to the photo lineup that included Applicant because no one was able to make an identification in this case. Counsel testified that it was helpful to Applicant that the victim was shown a photo lineup and was unable to make an identification. The record reflects that counsel was able to bring this information out on cross-examination in front of the jury. Counsel asked the investigating officer if a lineup was shown to the victim and if Applicant was identified, the answer was no. This Court finds that Applicant has failed to meet his burden and that counsel has testified to a valid strategy for not challenging the photo lineup.

Based on these reasons, this Court finds plea counsel was not ineffective on this ground and this allegation is denied and dismissed with prejudice.

Failure to Investigate Kenneth Barnes

Applicant alleges that counsel was ineffective for failing to conduct further investigation into Kenneth Barnes, who was identified by one of the victims in the case. Applicant testified that counsel did not do a sufficient job in cross-examining Barnes. Applicant testified that counsel should have gotten out that Barnes was testifying for a deal. Counsel testified that Barnes' testimony was not good for Applicant, but that he thoroughly impeached him on cross-examination. Counsel testified that he felt Barnes was fully impeached by his cross-examination. Counsel testified that he was aware of the deal Barnes had, but that it was for a downward departure in his Federal sentence.

.C. at 118, 386 S.E.2d at 625.

"Counsel'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). "[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.' What motions to file and 'whether to put on evidence so as to preserve the final word in closing argument' are also strategic and tactical decisions to be made by trial counsel." Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations omitted). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

Based on these reasons, this Court finds plea counsel was not ineffective on this ground and this allegation is denied and dismissed with prejudice.

Failure of Trial Counsel: State not Producing Victims

Applicant alleges that trial counsel was ineffective because the State failed to produce four victims, which hindered the defense from cross-examining his accusers. Counsel testified that he received full discovery in this case. Counsel testified that he would have welcomed the victims testifying, because they could have brought in reasonable doubt with them not being able to identify Applicant. Counsel testified that he made strategic decisions on who to call and how to try the case. Counsel testified that he was not able to discuss these decisions and strategies with Applicant because Applicant was set to take a plea and did not show up to court. Applicant testified that he took a bus up to Wisconsin to visit his Aunt and Counsel testified that Applicant was aware of the day he was supposed to be in court to take the plea. Applicant has failed to show how counsel was ineffective for the State failing to produce the victims at trial.

Based on these reasons, this Court finds plea counsel was not ineffective on this ground and this allegation is denied and dismissed with prejudice.

Failure to Request Reconsideration of Sentence

Applicant alleges counsel was ineffective for failing to request a reconsideration of the sentence. Counsel testified that he believes that, generally, motions to reconsider a sentence are generally not effective. Counsel also testified that he felt that there were no grounds that would support a reconsideration of the sentence. Counsel did not want to make a motion with no grounds, as it would have been frivolous. Applicant failed to show how counsel was ineffective for failing to make the motion. This Court finds that Applicant has failed to meet his burden.

Based on these reasons, this Court finds plea counsel was not ineffective on this ground and this allegation is denied and dismissed with prejudice.

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:

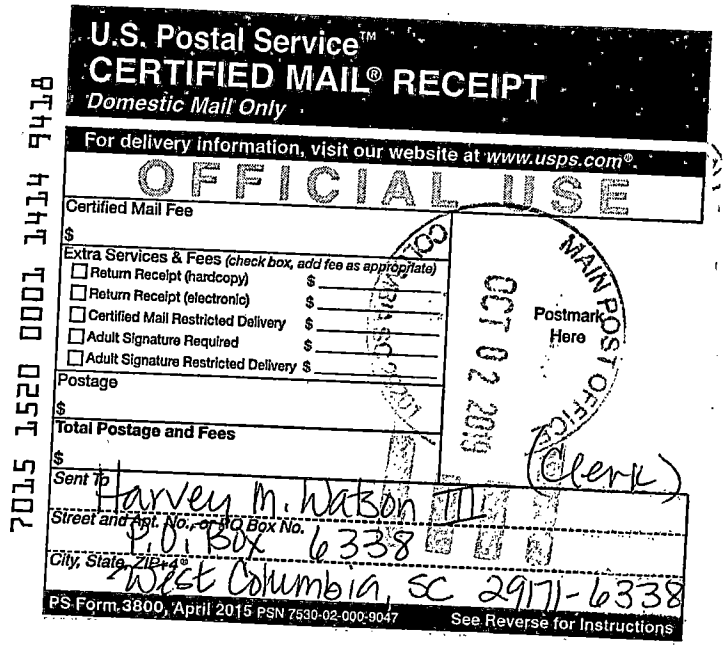
1. The application for post-conviction relief be denied and dismissed with prejudice; and

2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 14 day of September, 2019.

WILLIAM H. SEALS JR.
Presiding Judge

Marion, South Carolina



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