THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2015-CP-32-02565

Roderquiz R. Cook, SCDC # 261587, ... Appellant

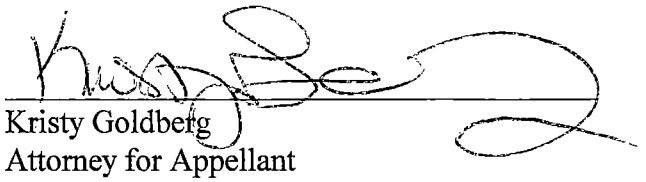
v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant Roderquiz R. Cook hereby appeals from the Order of the J. Derham Cole, presiding Judge for the 11th Judicial Circuit, filed May 14, 2020 and received by counsel for the Applicant on June 29, 2020.

July 6, 2020



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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	
Roderquiz R. Cook, S.C.D.C. No. 261587	)	C.A. No. 2015-CP-32-02565
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

This matter comes to the Court by way of an application for post-conviction relief (PCR) filed July 23, 2015. Respondent made its return dated May 23, 2016. An evidentiary hearing was held on February 23, 2018. Applicant was present and represented by Kristy Goldberg, Esq. Assistant Attorney General Susannah Cole of the South Carolina Attorney General's Office represented Respondent. Applicant, prosecutor Heather S. Weiss, of the South Carolina Attorney General's Office, and trial counsel Ernest Deon O'Neill Esq., testified. The Court had before it records from the Lexington County Clerk of Court and South Carolina Department of Corrections (SCDC), trial transcript, and relevant direct appeal documents.

Following review of testimony presented at the hearing and all other evidence, this Court finds Applicant received constitutionally effective assistance of counsel at all stages of the trial, and relief must be denied.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted by the June 2011 term of the Lexington County Grand Jury for Attempted Armed Robbery (2011-GS-

32-01505). Applicant was later indicted by the December 2012 term of the Lexington County Grand Jury for Conspiracy to Commit Armed Robbery and Murder (2012-GS-32-06042, 06044). He was represented by Deon O'Neill, Esquire. On April 8, 2014, Applicant proceeded to trial and was found guilty as indicted. The Honorable Lee S. Alford sentenced Applicant to imprisonment for twenty (20) years for Attempted Armed Robbery, five (5) years for Conspiracy to Commit Armed Robbery, and thirty (30) years for Murder.

A timely notice of appeal was filed and perfected on Applicant's behalf. Erica McElraeath, Esq., and Robert M. Dudek, Esq., represented Applicant on appeal. Counsel raised two issues on Applicant's behalf:

> Was the Defendant provided a fair trial when the prosecution withheld cell tower site records of the Defendant and co-conspirators until the day prior to the trial, withheld additional testimony of a co-conspirator explaining her role in the alleged conspiracy until the closing of pre-trial motions, withheld a confession by a different co-conspirator that he was the triggerman in the alleged murder until the closing of pre-trial motions, and withheld additional cellphone address records of the Defendant and co-conspirators until the second day of trial?

The South Carolina Court of Appeals dismissed the appeal. State v. Cook, 2015-UP-270 (Filed on June 3, 2015). The Remittitur was issued on June 24, 2015.

In his original *pro se* Application, Applicant alleged he was being held in custody unlawfully for the following reasons:

"Ineffective Assistance of Trial Counsel"

a. "Trial counsel was ineffective for lack of due diligence;"
b. "Trial counsel was ineffective in failure to fully investigate."

In the amended application filed by PCR counsel on February 19, 2018, Applicant raised the additional claims for relief:

(a) Ineffective assistance of trial counsel – counsel was ineffective for failing to move to suppress jail phone call evidence prior to the trial, pursuant to statute 17-30-10, et. seq.

(b) Ineffective assistance of trial counsel – counsel was ineffective in failing to properly object and preserve the record in regards to the fact that the State did not fully disclose the statements made by co-defendants and notify the Defense as to the substance of the statements prior to trial.

(c) Ineffective assistance of trial counsel – counsel was ineffective in failing to object when the Applicant's character was unfairly discredited by admission of irrelevant information that was prejudicial to the Applicant's case during the testimony of Tasha Matthews.

(d) Ineffective assistance of trial counsel – counsel was ineffective in thoroughly cross examining the co-defendants.

(e) Ineffective assistance of counsel – counsel was ineffective for failing to advise the Applicant to testify and failing to present evidence

At the hearing, Applicant proceeded on the grounds of ineffective assistance of counsel raised in the amended application.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record, and further had the opportunity to observe the witnesses presented at the evidentiary hearing, closely pass upon their credibility, and weigh their testimony accordingly. This Court finds the testimony of the prosecutor and trial counsel credible and should be afforded great weight, while also finding Applicant's testimony lacks credibility on the critical facts and allegations. Set forth below are the relevant findings of fact and conclusions of law pursuant to S.C. Code Ann. § 17-27-80.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in his application and establishing he is entitled to relief. *Goins v. State*, 397 S.C. 573, 726 S.E.2d 1, 3 (2012). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove "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, 686 (1984).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, counsel's performance is measured by its reasonableness under professional norms. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing *Strickland*, 446 U.S. at 688). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Moreover, where counsel articulates valid reasons for choosing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992); *see also Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding where counsel articulates a valid strategy, it is measured under an objective standard of reasonableness).

Second, the applicant must demonstrate prejudice and show there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Ard*, 372 S.C. at 331, 642 S.E.2d at 596. A reasonable probability is one sufficient to undermine confident in the outcome of the trial. *Id.* at 331, 642 S.E.2d at 596. When a conviction is challenged, "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. Importantly, overwhelming evidence of guilt negates any claim counsel's deficient performance could have reasonably affected the result of applicant's trial to the level of required prejudice. *Harris v. State*, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008).

After careful review of the record and testimony presented at the evidentiary hearing, and

based on the standard above, this Court denies and dismisses with prejudice the application for relief. The Court finds, as to all claims of ineffective assistance of counsel raised by Applicant, counsel had adequate and proper strategic grounds upon which to base his decisions. *See Ard*, 372 S.C. at 331, 642 S.E.2d at 596 (holding courts presume counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case). Counsel's performance was not deficient, there was no resulting prejudice to Applicant, and Applicant failed to carry his burden. Below are the findings related to each of the allegations raised in the PCR application:

Failure to Move for Suppression of the Jail Phone Calls Prior to Trial

Applicant first argues trial counsel was ineffective for failure to move to suppress the jail phone call evidence prior to trial in accordance with S.C. Code Ann. § 17-30-10, et. seq, or, the South Carolina Homeland Security Act (Wiretap Act), which generally prohibits the interception of communications. The phone calls in question were either made by Applicant while he was incarcerated or received by him prior to his incarceration from his co-defendants Meon Miller and Tasha Williams. (Tr. p. 80.) Trial counsel argued the calls were intercepted by the Lexington County Sheriff's Department in violation of Applicant's Fourth Amendment rights under the United States Constitution, the South Carolina Constitution, and the state Wiretap Act. (Tr. p. 80.)

The State argued the Wiretap Act required the motion to suppress to be made before a panel of judges of the South Carolina Court of Appeals. (Tr. p. 82.) In response, counsel argued the motion to suppress was still viable pursuant to his United States and South Carolina Constitutional claims. (Tr. p. 83.) Counsel argued the phone calls were an invasion of Applicant's right to privacy because he was not aware the calls were being recorded. (Tr. p. 83-

84.) The trial court found the calls admissible, noting that Applicant and the other were warned at the beginning of the calls they were being recorded and therefore Applicant waived any right to privacy in the conversations. (Tr. p. 86-87.)

At the PCR hearing, Cook testified he thought counsel would file a motion to suppress the jail calls, so he did not spend much time reviewing the calls with his co-defendants. (T. p. 14.) Cook said he believed the motion should have been made before a panel of judges, not the trial court. (T. p. 14.) Cook recalled trial counsel attempted to have the phone records suppressed on constitutional grounds. (T. pp. 27-28.)

Counsel testified he reviewed the discovery with Cook, and he specifically remembered bringing his laptop inside the dorm at the jail so they could listen to the jail phone calls. (T. p. 47.) Counsel testified he tried to get the jail phone calls suppressed based upon a particular statute and also based on constitutional grounds. (T. p. 48.) Counsel claimed Cook did not consent to the recording of the phone calls. Counsel said he argued that because Cook did not initially answer the phone during some of the calls, Cook did not hear the warning from the detention center that the calls were being recorded. (T. p. 48.) On Cross-examination, counsel said he did not move to suppress the records before an appellate panel, in accordance with the State statute because he was unaware that was a requirement under the Wiretap Act. Counsel said he would not have told Cook the calls would have been suppressed, but he would have given him an opinion on the strength of the argument. (T. p. 56.) Although counsel did not specifically recall what he told Cook, he believed he told him they "have a good shot at getting these dismissed but if we don't, this is the way we gonna try to maneuver around them still coming in." (T. p. 56.) Counsel acknowledged the phone calls originated from the jail and that at least one party to the conversation was aware of the recording, even if Cook was not. (T. p. 67.)

This Court finds Applicant suffered no prejudice from counsel's failure to move to suppress the jail phone calls prior to trial in accordance with the Wiretap Act, because the Act is inapplicable to the jail phone calls at issue. S.C. Code § 17-30-30 says:

> (B) It is lawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.

S.C. Code Ann. § 17-30-30. The testimony was without dispute that the phone calls were made from the jail and that the party initiating the phone call was informed the calls were being recorded. Accordingly, regardless of whether Applicant heard the recorded warning at the beginning of one of the calls, the other participant was aware and consented to the recording. Moreover, the record reflects trial counsel attempted to suppress the phone calls by making a Constitutional argument against their admission, but was ultimately unsuccessful because the trial court found Applicant had no expectation of privacy in the recorded calls.

This Court finds this claim of ineffective assistance of counsel is without merit. Applicant cannot demonstrate prejudice where trial counsel attempted to suppress the phone calls, argued alternative reasons for suppression, but failed in his efforts because the calls were properly admissible. *See Ard*, 372 S.C. at 331, 642 S.E.2d at 596 (holding to establish prejudice, an applicant must demonstrate the result of the proceeding would have been different but for counsel's errors). Therefore, this Court finds Applicant failed to meet his burden of proof and this allegation must be denied and dismissed.

Failure to Preserve the Objection to the Co-Defendant's Changing Statement

Applicant next alleges trial counsel was ineffective for failing to preserve his objection to Meon Miller's confession to the shooting from being admitted at trial. It is uncontested that number items of evidence, records, statements of witnesses and co-defendants, telephone

records, and other items were revealed by the State to the defense. During pretrial motions, on April 8, 2013, trial counsel filed a motion for disclosure of information from the prosecution including notes, statements, or changes from witnesses that may be useful for impeachment. (Tr. 64-65.)

Assistant Deputy Attorney General Heather Weiss responded that the State had turned over everything that had come into its possession. (Tr. 65.) As to any information from witnesses and co-defendants in response to the disclosure motion, the prosecutor stated they had turned over notes they had received from the co-defendant's attorneys. (Tr. 65-66.) Trial counsel then asked if any witnesses gave statements verbally contradicting their earlier statements. The prosecutor indicated there were no changes she was aware of. (Tr. 66.) After a break, the prosecutor brought to the court's attention that Miller had changed his testimony from witnessing Angelo Tucker shoot Jennings to describing that Miller himself had shot Jennings. (Tr. 133-145.) This new information varied from the September 15, 2011 statement of Meon Miller that defense counsel had been provided wherein he denied shooting and placed the blame on Tucker.

Trial counsel claimed the statement should be suppressed under Rule 5 and the U.S. Constitution because it changed his strategy. He claimed his strategy was that Meon Miller was clearly the triggerman from the evidence and that his statement in 2011 to the contrary revealed he was not a credible person. Counsel argued that Miller's admission made him more credible than less credible and therefore hurt the defense. Counsel complained that learning this information moments before the opening state changed the premise of his defense. (Tr. 133.)

The prosecution stated that they had just talked with Miller on March 29 when he revised his role to be the triggerman. She noted that Miller still asserted both (he and Tucker) were involved, but that he did the shooting. Assistant Attorney General Weiss stated under the hand

of one hand of all theory, it did not matter to the State whether Miller or Tucker was the triggerman because both were there and involved in the crime when Jennings was shot. (Tr. 133.) Further, Miller's statement now is essentially "I shot him, but I didn't mean to kill him." (Tr. p. 133-p. 134, l. 7.) The State contended that this new information could not change the defense.

Judge Alford agreed that Meon Miller's new version should have been given to the defense sooner than the day of trial since it was made approximately eight days previously. (Tr. 136-39.) Judge Alford stated Miller has now given different versions and his credibility is still at issue. (Tr. p. 138, ll. 9-15.) Judge Alford stated that since it was a surprise today, he would recess until the next day to give him time to work on his defense. (Tr. p. 138, ll. 16-21.) Judge Alford noted that he did not think the change made much difference at all, but will give him overnight to address it. (Tr. 138-19.)

When they returned the next day, the attorneys confirmed that they had met and discussed the versions of the oral statements and the inconsistencies with Miller and Matthews earlier statements. (Tr. 171-183.) In addition, Assistant Attorney General Cote advised the court that the additional cell phone tower information had just been made available to them and they provided it to the defense. (Tr. 184.) Further, the defense also stated that he was satisfied with the disclosure he had received about Tasha Matthews. (Tr. 184-88.) Later during Miller's testimony, counsel cross-examined Miller on his September 15, 2011 four page statement and the inconsistencies with his present testimony. (Tr. p. 525, p. 535, pp. 574-575, p. 584.) He said it was a lie in the statement when he said that the gun was in Tucker's hand when it went off and that he saw Tucker shot Mr. Jennings. (Tr. p. 535, l. 5-13; p. 595, l. 10-25.) As Miller stated to defense counsel concerning the September 2011 statement: "some of it's the truth, but it's a

lot of lies in it." (Tr. p. 537, l. 16-17.) He further stated he was lying in September 2011, because he was trying to get home. No objection was made to the testimony about the shooting by Miller.

At the PCR hearing, both prosecutor Weiss and trial counsel testified about this issue. Weiss said the State's theory of the case was that Cook was the mastermind of the robbery. Cook managed a McDonald's and devised a plan to have his young cousin surveil that McDonalds and wait for Cook to send out an employee to take out the trash. Miller would pretend to rob them victim, escort him back inside, then demand Cook give him the money from the night's sales. (T. p. 32.) From the statements given to police, the prosecution knew Tucker and Miller approached the victim, presented the weapon, and then the victim fought back. One of the men fired the gun at the victim and it ultimately killed him. (T. p. 33.) Miller and Tucker both admitted being present and part of the robbery plan, but each indicated the other man shot the victim. (T. p. 33.) Weiss said it did not matter to her which one of the men actually shot the weapon, because all three men were involved in the crime. (T. p. 34.) Weiss said she suspected Miller was the shooter because his clothes tested positive for gunshot residue, and he was the younger, more impressionable of the two men. (T. p. 34.)

Weiss testified that right before trial, when they were preparing Miller to testify, Miller finally admitted to being the one who shot the gun. Weiss said she was not surprised or phased by this admission, so she did not think much of it. She said she did notify trial counsel of the change of story at the beginning of the trial. (T. p. 35.) Weiss said when counsel objected and argued the change was crucial to the defense, it surprised her because her understanding of their defense was that Cook had nothing to do with the robbery. Weiss testified the trial court continued the case overnight to allow the defense an extra day to determine how the change

affected their trial strategy. (T. p. 35.) Weiss said she made her notes from the interview available to trial counsel to review, but there was no written statement from Miller that she could have turned over to the defense. (T. p. 35.)

Counsel also said he attempted to get Miller's statement suppressed because the foundation of the defense's case was that Miller was a liar and the only link between Cook's involvement and the crime was Miller's claim Cook planned it. (T. p. 49.) Counsel argued if Miller were lying about being the shooter, then he was lying about Cook's involvement. (T. p. 49.) Miller's changing story now made him look more truthful. (T. p. 50.) Counsel said he did not believe the trial court would dismiss the charges or order a new trial. (T. p. 50.)

Rule 5(a)(1)(C), SCRCrimP, provides for the disclosure of documents and other tangible items that are in the possession of the prosecution and are intended for use by the prosecution during its case in chief or are material to the defense. In addition, Rule 5 (a) (2) says the disclosure rule does not authorize discovery of internal prosecution documents made by the attorney or of statements made by prosecution witnesses or prospective prosecution witnesses. The Rule also allows that "the court may upon a sufficient showing require the production of any statement of any prospective witness prior to the time such witness testifies." Rule 5 (c) sets forth the continuing duty to disclose and recognizes that the disclosure to the other party should be "promptly" done concerning the existence of other material. The definition of "material" in Rule 5 has been found to be the same as in the *Brady*[1] line of cases. *State v. Moses*, 390 S.C. 502, 516, 702 S.E.2d 395, 402 (Ct. App. 2010). "Evidence is material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *State v. Frazier*, 394 S.C. 213, 223-224, 715 S.E.2d

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1 *Brady v. Maryland*, 373 U.S. 83 (1963).

650, 655 (Ct.App. 2011) (*quoting United States v. Bagley*, 473 U.S. 667, 682 (1985)).

The State proceeded to trial on the theory of accomplice liability. The defense's strategy was to show the co-defendants were not credible witnesses. As the trial court determined, Applicant has not shown he was entitled to the disclosure of Miller's admission he was holding the weapon when it fired because it would not have changed the result of the proceeding. Further, Applicant has failed to show counsel was deficient in any manner. Counsel attempted to have the testimony of Meon Miller suppressed, but was unsuccessful. The trial court did not believe the defense was harmed by the changing statement because the co-defendant's credibility was still at issue, but out of an abundance of caution, afforded Applicant time to review the statement and develop a new trial strategy, if necessary. Applicant has not shown how he was prejudiced by counsel's attempts to challenge the changing statement at trial or by counsel's failure to properly preserve the issue for appeal.

In determining whether a PCR applicant has established prejudice, the PCR court does not act as a finder of fact and substitute its judgment for that of the trial court. Rather, the PCR court must view the trial court's ruling through the same lens that would be applied on appeal, which here requires giving appropriate deference to the trial court's findings. *See State v. Khingratsaiphon*, 352 S.C. 62, 70, 572 S.E.2d 456, 459–60 (2002) (explaining that on appeal from a motion to suppress, an appellate court will only reverse the trial court if there is clear error, and will affirm if there is any evidence to support the ruling). The proper inquiry for determining prejudice in this case is whether there is evidence in the record to support the trial court's finding Applicant was not prejudiced from the changing statement. *Milledge v. State*, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018). If so, an appellate court would necessarily have affirmed the trial court's denial of the motion to suppress. Thus, because there is evidence in the

record to support the trial court's ruling, Applicant cannot show prejudice.

Failure to Object to Character Evidence

Applicant alleges counsel was ineffective when he failed to object to the admission of irrelevant information during the testimony of Tasha Mathews that he claims was prejudicial to his case. At trial, Mathews testified Applicant would sell marijuana as an additional source of income. (Tr. p. 272.) Mathews also testified she believed the men rode with her to pick up Applicant because they were likely selling drugs to someone. (Tr. p. 297.) Counsel did not object.

At the evidentiary hearing, prosecutor Weiss explained that during one of the jail phone calls, Cook can be heard instructing Mathews to say Miller and Tucker rode out to Batesburg to conduct a drug deal. (T. p. 39.) Counsel said Tasha Matthews' testimony was problematic for the defense because she testified that during her calls to Cook on the way to the McDonalds that night, Cook was agitated and only really cared about the timing of their arrival. (T. p.51.) Counsel said the number of phone calls between Matthews and Cook did not matter as much as the substance of the calls. (T. p. 51.) Counsel said that although a lawyer ordinarily would not want the jury to think their client is a drug dealer, in this case, he needed an explanation "as to why these two other individuals are riding all the way to Batesburg with your client's girlfriend just to pick him up." (T. p. 52.) Counsel said the strategy was to convince the jury Meon Miller was there to conduct a drug deal. (T. p. 52.) Further, Counsel said that although the drug references were negative character evidence, the references to drug sales helped the case because it help cast doubt on the State's theory of motive – that Cook was in financial trouble. (T. p. 64.) As to whether counsel should have objected to Mathews testimony the drugs in the car belonged to Cook and that she saw him smoking marijuana the day before, counsel said it was a judgment

call not to object because he did not believe it helped the State's case at all. (T. p. 64.)

Counsel articulated a valid reason for pursuing a trial strategy in which testimony was admitted concerning his client's involvement in drug sales. Counsel did not object to Mathews statements Applicant sold drugs because it provided a reason the men would accompany Mathews to Batesburg. The drug deal theory also explained why Applicant was agitated during his calls to Mathews and concerned about the timing of their arrival. Given the evidence against Applicant, Counsel's strategy was reasonable under the circumstances. Applicant has not overcome the presumption of effective assistance of counsel. He has shown neither deficiency on Counsel's part, nor prejudice from Counsel's election not to object to the testimony.

Failure to Cross-Examine Co-Defendants

Applicant alleges counsel was ineffective in thoroughly cross-examining his co-defendants. Applicant has not explained with specificity how Counsel was deficient in his cross-examination of the co-defendants, nor has he provided this Court with any testimony from the co-defendants to substantiate his claim.

At the evidentiary hearing, PCR Counsel explained Applicant previously asked her to contact his co-defendants, who might testify at the evidentiary hearing, but she was unable to reach the men. (T. p. 5.) The Court allowed Applicant to supplement the record following the evidentiary hearing in the event her discussions with the co-defendants provided relevant testimony. (T. p. 8.) By letter of March 9, 2018, Applicant informed this Court he would not present any further witnesses or evidence in this matter.

Applicant has failed to show how Counsel was ineffective in his cross-examination of his co-defendants. *See, e.g., Fugate v. Head*, 261 F.3d 1206, 1219 (11th Cir. 2001) ("The decision as to whether to cross-examine a witness is a tactical one well within the discretion of a defense

attorney..... Absent a showing of a single specific instance where cross-examination arguably could have affected the outcome of either the guilt or sentencing phase of the trial, a[n] [applicant] is unable to show prejudice necessary to satisfy the second prong of Strickland") (citations and internal quotation marks omitted); *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) ("the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish"); *Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998) (defendant's Sixth Amendment right to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable").

The record reflects Counsel thoroughly cross-examined Applicant's co-defendants. This Court finds that Counsel's strategic decisions of how to cross-examine witnesses were proper and reasonable. Furthermore, Applicant has failed to show exactly what information should have been elicited if the witnesses were properly cross-examined. "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). This Court cannot speculate as to what testimony could have been elicited upon a different strategy of cross-examination, and thus Applicant cannot meet his burden of proving prejudice.

Because Applicant has failed to meet either prong of the *Strickland* test, this allegation must be denied and dismissed with prejudice.

Failure to Advise Applicant to Testify or Present Evidence

Applicant alleges counsel was ineffective for advising him not to testify or present evidence. At the evidentiary hearing, Applicant said he intended to testify at his trial, but the

State's disclosure of Miller's admission "threw [the plan to testify] out the door. (PCR T. p. 17) Counsel recalled Applicant wanted to testify at the beginning of the trial, but did not recall why Applicant changed his mind. (PCR T. pp. 53-54.) Counsel said he would have given Applicant his opinion of whether he should testify, but would not have forced him to decide one way or the other. (PCR T. p. 54.)

The testimony at the hearing concerning counsel's advice to testify does not support Applicant's contention Counsel was ineffective for advising him not to testify or present evidence. Applicant has failed to show deficiency or prejudice with respect to this allegation. The trial judge fully advised Applicant of his right to testify at trial. (Tr. pp. 926-927.) Applicant initially indicated he wanted to testify, then appeared to change his mind during a break. (Tr. pp. 928-929.) The record indicates Applicant made a choice, of his own free will and volition, after having been fully advised of his rights and ramifications of testifying or, in the alternative, not testifying. Applicant ultimately chose not to testify. He has not met his burden of showing Counsel was deficient in his advice to Applicant or that he was prejudiced from his decision not to testify. Accordingly, with respect to this allegation, it is denied and dismissed.

III. ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his

application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 9th **day of** May, **2020.**

J. DERHAM COLE
Presiding Judge
Eleventh Judicial Circuit

Spartanburg, South Carolina