STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Ebon Roberts, #299062 Applicant,	)	Case No.: 2017-CP-26-7381
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before this Court by way of Applicant's post-conviction relief application filed November 9, 2017. Respondent made its Return on February 26, 2018, requesting an evidentiary hearing be convened. An evidentiary hearing was held on November 14, 2019, at Horry County Courthouse. Matthew S. Swilley, Esquire, represented Applicant. Assistant Attorney General Jacob A. Isenberg represented Respondent. At the hearing, Applicant testified on his own behalf. Officer Michael Cavallini, Counsel J.M. "Buddy" Long, and character witnesses Monique Alston and Latasha Aklin also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. During the May 2015 term, the Horry County Grand Jury indicted Applicant for Armed Robbery (2015-GS-26-01888), two counts of Kidnapping (2015-GS-26-01889 and -01890), and Unlawful Possession of a Pistol (2015-GS-26-01891). J.M. "Buddy" Long, Esquire represented Applicant. Assistant Solicitor James Austin Thomas, Esquire prosecuted the case. On September 15-16, 2015, Applicant

proceeded to trial before the Honorable Larry B. Hyman, circuit court judge, and a jury. Applicant was found guilty as indicted on September 16, 2015. Judge Hyman sentenced Applicant to imprisonment for concurrent terms of life without parole for the armed robbery and kidnappings, and one consecutive term of five years for unlawful possession of the pistol.

Applicant filed a timely Notice of Appeal that was perfected by Susan B. Hackett, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Roberts*, Op. No. 2017-UP-085 (S.C. Ct. App. filed Feb. 15, 2017). The Remittitur was issued on March 3, 2017.

Summary of Relevant Facts

Around three in the morning on December 8, 2014, Rebecca Kennedy, a Wendy's employee in Conway, South Carolina, was sitting in her car outside the restaurant waiting on her co-worker and boyfriend Shaun Cain to finish closing the store. (Trial Tr. 60-61, 86.) Applicant approached Kennedy's vehicle, pointed a gun at him, forced himself into the back of the car, and duct-taped Kennedy. (Trial Tr. 60-61.) When Cain approached the vehicle, Applicant jumped out, captured him, and forced Cain to grant entry into the restaurant's office, who deliberately entered an access code incorrectly to trigger a security alarm. (Trial Tr. 61, 86-88, 99-100). Applicant forced Cain to crawl to the office, while Kennedy was made to follow by walking with her head down. (Trial Tr. 61, 91). Applicant duct-taped the two together and demanded money, but was frustrated by a largely inaccessible time-locked safe. (Trial Tr. 61-62, 91-92, 98). When security called the restaurant about the late entry, Applicant gave the phone to Cain, who deliberately gave an insufficient answer in order to raise an alarm. (Trial Tr. 62-63, 92). Applicant attempted to exit the Wendy's using Cain's uniform after realizing law enforcement

was on scene, but the ruse was not successful, and Applicant was immediately taken into custody by Conway police. (Trial Tr. 63-65, 92-93, 97, 139-44, 156-58, 163-67). The weapon and duct tape were both recovered. (Trial Tr. 186-89).

Current Action Before This Court

In his initial PCR Application, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Denial of effective assistance of counsel."
   a. "Counsel failed to investigate the facts of the case."
   b. "Counsel advised to waive preliminary hearing."
   c. "Counsel was laboring under conflicting interest."

Through Counsel, Petitioner, in his first amended application dated November 7, 2019, alleged:

1. "Trial Counsel was ineffective for failing to call witnesses favorable to Applicant that would have substantiated his testimony at trial that Applicant knew Shaun Cain and Rebecca Kennedy prior to the incident involving the alleged robbery and kidnapping despite Cain and Kennedy's claim of not knowing Applicant, specifically Monique Alston and Latasha Atkins could attest to the aforementioned."
2. "Trial Counsel was ineffective for failing to cross-examine a lay witness, Rebecca Kennedy (a.k.a. Rebecca Harrington) concerning a prior criminal conviction which was admissible under the rules of evidence. (Shoplifting, Myrtle Beach Municipal Court Case No.: 34168AO)."
3. "Trial Counsel was ineffective for failing to cross-examine all law enforcement officers as to whether they undertook any investigation into Applicant's side of the sequence of events that led to his being charged with the crimes for which he was convicted."
4. "Trial counsel was ineffective for failing to advise Applicant that he had absolute right to proceed pro se if he did not wish to have trial counsel represent him at trial or advise the trial judge of Applicant's request."
5. "Trial counsel was ineffective for failing to communicate to the Court that Applicant wished to proceed pro se if he had to choose between representing himself pro se and having trial counsel represent him."
6. "Trial counsel was ineffective in failing to cross-examine witnesses Cain and Kennedy about their prior drug use and abuse."

In his second amendment to the PCR application, dated November 12, 2019, Applicant, through PCR Counsel, added another allegation: "[t]rial counsel was ineffective for failing to

interview and call as a witness Officer Michael Cavallini with the City of Conway Police Department."

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Failure to call Officer Cavallini as a witness at trial.
2. Failure to call character witnesses Monique Alston and Latasha Atkins to testify at trial.
3. Failure to cross-examine Kennedy regarding a twenty year old misdemeanor shoplifting conviction and alleged drug use.
4. Failure to cross-examine Cain regarding a pending criminal conviction in Florida and alleged drug abuse.
5. Failure to cross-examine law enforcement officers regarding Applicant's version of the story.
6. Failure to investigate the evidence and discovery.
7. Failure to investigate, prepare and properly assert Applicant's defense that Cain and Kennedy bought drugs from Applicant and were his co-conspirators in his plan to rob Wendy's.
8. Failure to request a preliminary hearing when Applicant stated he wanted one.
9. Failure to adequately advise Applicant and communicate to the court that Applicant wanted to proceed *pro se*.
10. Failure to communicate with Applicant concerning updates on the case and new information.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Michael Cavallini Testimony

Cavallini testified he was employed with the Conway City Police Department on December 8, 2014. (PCR Tr. 7). Cavallini stated he was on patrol and noticed three people standing in the back of Wendy's parking lot. (PCR Tr. 8). Cavallini stated he promptly pulled in to the parking lot. (PCR Tr. 8). He testified that when he observed the individuals, the three individuals were moving quickly moving to get inside the building and saw a gentleman, whom he thought was Applicant, with a pistol to another person's back. (PCR Tr. 8-9, 15). Cavallini also testified that it looked like Applicant forced a victim to manipulate the alarm inside the

store. (PCR Tr. 8). Cavallini stated that, based on his eight years in law enforcement, it looked like an armed robbery. (PCR Tr. 8).

Cavallini did not think anyone spotted his police car. (PCR Tr. 13). Cavallini stated he pulled out of the lot, notified dispatch, and pulled into a nearby gas station, justifying this by stating that he was trained not to get too close to an armed robbery incident to avoid creating a hostage situation. (PCR Tr. 8-9). Cavallini testified that most of the county police showed up to assist him with the incident and Applicant was eventually arrested and transported back to jail. (PCR Tr. 9). Cavallini testified he did not remember being called or subpoenaed as a witness at trial, but stated he had to go out of town for a funeral that day. (PCR Tr. 11-12).

J.M. "Buddy" Long ("Counsel") Testimony

Counsel testified that in 2014 he was employed with the Horry County Public Defender's Office and was appointed as Applicant's Counsel. (PCR Tr. 18). Counsel testified that he began practicing law in 1987, about three quarters of his practice is criminal defense, and has handled many armed robbery cases and several kidnapping cases over the years. (PCR Tr. 42-43).

Counsel testified he first met with Applicant shortly after the arrest. (PCR Tr. 18-19). Counsel testified that Applicant was in custody throughout the entirety of his representation. (PCR Tr. 19). Counsel stated he was familiar with the elements and defenses of each charge Applicant was charged with and felt comfortable discussing it with Applicant. (PCR Tr. 43). Counsel testified that he did not remember having a preliminary hearing. (PCR Tr. 38).

Regarding potential defenses, Counsel testified that the Applicant told Counsel that the victims bought dope from him before and were his co-conspirators. (PCR Tr. 21). Counsel stated that Applicant told him that he told the responding officers this the night of the incident, but the idea that they were co-conspirators was not in the incident reports or other discovery paperwork.

(PCR Tr. 22). Counsel stated he did not remember if he asked Applicant if he knew of anyone who could attest to the alleged pre-existing relationship and did he not remember Applicant providing him with information from a third party who could testify to the existing relationship between the victims and Applicant. (PCR Tr. 22-23, 55, 124). Counsel testified that when he asked follow up questions, Applicant never provided evidence supporting the defense other than his own assertions. (PCR Tr. 21-22, 47). Counsel stated that if this information was provided, someone from the office would have investigated the potential witness. (PCR Tr. 23). Counsel testified that other attorneys in his office assisted with the case, but did not remember utilizing the in-house investigator. (PCR Tr. 38). Counsel stated that no character witnesses approached him at trial to testify, but that he would have called them as witnesses if he knew they existed and could corroborate Applicant's story. (PCR Tr. 124).

Counsel stated that Applicant did not offer specific instances he had with them, nor did Applicant show Counsel text messages, phone calls, or any other physical evidence supporting this contention. (PCR Tr. 47). Counsel noted that inmates are not allowed to have cell phones in prison, but testified that he has previously tried cases where other incarcerated clients had text messages come into evidence while the client was in jail. (PCR Tr. 56).

Counsel testified to remember conversations about subjecting Applicant to a polygraph test, but does not remember whether or not one was taken. (PCR Tr. 30). Counsel stated if Applicant was subjected to a polygraph test, he would have been there, absent a conflict and he would have received a copy of the results. (PCR Tr. 31).

Counsel stated that he reviewed discovery with Applicant. (PCR Tr. 44). Though Counsel stated he was unsure if he reviewed all discovery with Applicant, he said they reviewed the important parts together. (PCR Tr. 44). Counsel testified he did not recall receiving a report from

the State Office of Victim Assistance specifically, but stated if it was in the discovery, he received it. (PCR Tr. 39-40). Counsel stated he remembered reading about how the victims were impacted long-term and on anxiety medication. (PCR Tr. 40).

Counsel testified there was no audio or video evidence implicating Applicant at the Wendy's and all evidence presented at trial was testimonial by nature. (PCR Tr. 29-30). Counsel stated that, when asked to give a statement, Applicant asserted his Fifth Amendment right to remain silent. (PCR Tr. 29-30). Counsel testified he was given memorialized statements only in writing from the victims. (PCR Tr. 30).

Counsel stated he never interviewed the alleged victims, but both individuals provided statements to the police included in discovery. (PCR Tr. 22). Counsel stated he independently reviewed these statements prior to trial and did not find any leads or evidence indicating a prior relationship. (PCR Tr. 47-48). Counsel stated there was no indication Cain voluntarily gave his shirt to Applicant. (PCR Tr. 48). Further, Cain's trial testimony made it clear that the victims were duct taped. (PCR Tr. 48). Counsel testified to remembering the victims testifying at trial, including their testimony that Applicant had a gun on him the entire time they were in the parking lot, which he pointed at them and used to force them inside. (PCR Tr. 32).

Counsel testified that he did not remember communications with Cavallini concerning the incident prior to the PCR hearing. (PCR Tr. 31). Counsel stated he remembered Cavallini filing two incident reports concerning his activities that night. (PCR Tr. 31-32). Counsel testified after hearing Cavallini's testimony at the PCR hearing, he would not have called him at trial because he was favorable to the State and would have corroborated the victims' testimonies. (PCR Tr. 33, 49-50). Counsel stated Cavallini's testimony that he saw Applicant with a gun pointed at the victims inside the Wendy's was problematic for the defense. (PCR Tr. 50).

Counsel testified to a break down in attorney-client privilege, stating that Applicant was very intelligent, demanding, and made clear that the process was not moving fast enough for him. (PCR Tr. 25). Counsel testified he did not remember whether or not Applicant moved to have him relieved as attorney or if a Judge addressed this issue, but remembered a breakdown in communication between Counsel and Applicant around the time of trial. (PCR Tr. 25-26). Counsel testified he did not remember speaking with Applicant about the possibility of Applicant proceeding *pro se*. (PCR Tr. 26). Counsel also testified that he did not remember if a colloquy regarding this issue occurred. (PCR Tr. 26-27).

Counsel testified that plea negotiations occurred, which included an offer of twenty five years on a violent charge of an armed robbery or kidnapping. (PCR Tr. 19). Counsel testified that he communicated this to Applicant. (PCR Tr. 19). When asked if he advocated that Applicant take the plea offer, Counsel stated he generally does not advocate for his clients to take plea offers, but told him that if it proceeds to trial he will be sentenced to life without parole instead of the twenty five years stated in the offer, and encouraged him to take that into account when making his decision. (PCR Tr. 54). Applicant decided he wanted to go to trial. (PCR Tr. 54).

Counsel did not specifically recall discussing a Life without Parole (hereafter "LWOP") provision or Applicant being served with a LWOP notice, but thought it was Applicant's third conviction for an armed or violent robbery. (PCR Tr. 20). Counsel testified that for someone to be subject to LWOP, a notice must be served and is traditionally served on defendants, usually when in court, orally or in writing. (PCR Tr. 20, 44-45). When asked if he told Applicant that he would face life without parole if found guilty at trial, Counsel answered "I'm sure we discussed it." (PCR Tr. 21, 46). When shown a copy of the notice, Counsel stated he thought it was either served or presented to Applicant in court and before trial. (PCR Tr. 45-46). Counsel also stated

that he usually talks to clients after the notice is served about how if they go to trial, the Judge has no choice but to sentence them to LWOP once convicted. (PCR Tr. 46).

Counsel stated the strategy at trial was for Applicant to testify credibly about prior dealings with the victims and their agreement to rob the Wendy's which, hopefully, would get rid of one or more of the elements of an armed robbery and kidnapping charges. (PCR Tr. 52-53). Counsel stated that since Applicant's defense could not be readily corroborated, Applicant would have to seem credible and polished to present the defense effectively. (PCR Tr. 44). Counsel did not remember how much time they spent preparing Applicant's testimony at trial. (PCR Tr. 44). Counsel stated that he did not remember whether Applicant's actual testimony deviated from the anticipated testimony. (PCR Tr. 53). When asked if he thought there was something he should have done differently at trial, retrospectively, Counsel stated that there is in every case, but he thought the main things were accomplished. (PCR Tr. 54).

Counsel testified he did not remember impeaching the alleged victims at trial, but if he did it would be reflected in the trial transcript. (PCR Tr. 23-24). Counsel testified he did not think he impeached Kennedy by bringing up a twenty year old misdemeanor shoplifting conviction because it was irrelevant and barred by the Rules of Evidence. (PCR Tr. 24, 50). When asked if there was an issue regarding Cain's out-of-state criminal charge concerning whether he was already convicted at the time, Counsel stated he could not recall. (PCR Tr. 25, 51-52). However, Counsel stated he put the charge and desire to question concerning the issue on record, but the Judge ruled that there was no disposition. (PCR Tr. 52). Counsel stated that after the Judge rules on an issue, raising it again risks "ire of the court", which Counsel tried to avoid. (PCR Tr. 52).

Counsel testified that he thought it was admissible to ask the victims if they purchased

drugs from Applicant. (PCR Tr. 27-28). Counsel testified he did not remember cross-examining them about drug use as it relates to Applicant. (PCR Tr. 28). Counsel stated he did not investigate potential drug abuse histories on the victims because he was unaware of what an investigation would look like, since drug use is something people keep private. (PCR Tr. 50-51). Counsel also stated that there was nothing in discovery indicating the victims' drug use. (PCR Tr. 51). Counsel stated asking about a supposed history of drug abuse at trial without evidence to back it up would be unnecessary. (PCR Tr. 51). Counsel conceded that a successful impeachment of the victims would have favored the defense. (PCR Tr. 28-29).

Counsel testified he did not remember cross-examining the alleged victims about a pre-existing relationship with Applicant consisting of a drug buy. (PCR Tr. 27). Counsel stated that the victims testified that they did not know Applicant prior to the robbery and that Applicant testified to the contrary. (PCR Tr. 28). When asked if he thought cross-examining the victims would have undermined their credibility, Counsel stated that at trial, the jury decided that the victims were credible and Applicant was not. (PCR Tr. 28).

Counsel testified that the officers never indicated that the victims stated they had connection to Applicant before the robbery. (PCR Tr. 39). Counsel testified he did not remember cross-examining law enforcement officers about whether Applicant knew the alleged victims, but it would be reflected in the trial transcript if he did. (PCR Tr. 25). Counsel stated that no additional follow up of officers was conducted because depositions of officers cannot be taken in criminal cases, but stated he obtained all of discovery materials from the officers, including incident reports. (PCR Tr. 49).

Monique Alston Testimony

Alston testified that Applicant is his uncle and has known Applicant all of his life. (PCR

Tr. 58, 64). He stated he thought Applicant knew Kennedy and Cain for probably a month before he was arrested and that Alston personally knew them since the October prior to the incident. (PCR Tr. 63-64). Alston stated that Applicant sold drugs to the alleged victims probably three times: first, at a Smith-Jones Recreation Center; second, at the Wendy's; and, third, at an apartment complex. (PCR Tr. 65).

Alston stated he first saw Applicant and the victims together was at the Smith-Jones Recreation Center. (PCR Tr. 59). Alston stated he drove Applicant to the center and Applicant entered to sell weed and pills to the victims. (PCR Tr. 60, 66). He also stated he was present at a second meeting between the victims and Applicant in the Wendy's parking lot, where the victims met with Applicant to purchase marijuana and pills. (PCR Tr. 60-61, 64). Alston stated the third occurrence was at an apartment complex where he and Applicant arrived, sold the victims drugs, and left. (PCR Tr. 66).

After Applicant was arrested, Alston stated he received a call from him from inside the jailhouse. (PCR Tr. 67). Applicant did not tell Alston who the alleged victims were and did not ask Alston to testify. (PCR Tr. 67-68). Alston testified this call was the only conversation Alston had with Applicant prior to trial. (PCR Tr. 68).

The next time Alston saw Kennedy and Cain was at trial. (PCR Tr. 66). Alston stated he was present throughout the entirety of Applicant's trial. (PCR Tr. 61). Alston stated he remembered being present at trial during Kennedy's and Cain's testimonies. (PCR Tr. 62). Though he stated he did not remember exactly what they testified to, he remembered them stating that they did not know Applicant prior to the incident. (PCR Tr. 62). Alston stated he could have contradicted their testimonies if he was asked to testify and his testimony would have corroborated Applicant's defense theory. (PCR Tr. 62-63).

Alston stated he reached out to Counsel prior to trial regarding the previous relationship between the parties once he realized they were the alleged victims. (PCR Tr. 67). Alston stated that no one reached out to him for an interview or to testify and he was never on a witness list. (PCR Tr. 61-62). Alston stated he did not approach Applicant or Counsel at trial and volunteer to testify because he did not know he could volunteer to testify. (PCR Tr. 68-69).

Latasha Aklin Testimony

Aklin stated she was Applicant's friend and they had an on- and off-again relationship. (PCR Tr. 70-71). Aklin stated she saw Kennedy and Cain one time when they met Applicant and her at the recreation center so Applicant could sell the victims drugs. (PCR Tr. 71, 75). During this incident, she and Applicant rode with Alston because Applicant needed a ride to sell the drugs. (PCR Tr. 75). Aklin testified that the recreation center incident occurred in the fall of 2014, probably around October. (PCR Tr. 73, 75).

Aklin testified Applicant was arrested in December 2014. (PCR Tr. 76-77). Aklin did not talk to Applicant while he was in prison awaiting trial beyond writing letters. (PCR Tr. 77). Aklin testified that he never asked her to testify and never wrote to her concerning the victims. (PCR Tr. 77). She testified that she never spoke to Applicant at the trial or after the trial and the PCR hearing is the first time she saw Applicant since. (PCR Tr. 78).

Aklin stated the next time she saw the victims was at trial. (PCR Tr. 76). Aklin stated she observed the trial voluntarily and was not subpoenaed to appear. (PCR Tr. 74). She stated she recognized both victims and could have testified that they were the same people at the center, but stated she was not asked to testify and did not know volunteering to testify was an option. (PCR Tr. 72-74). She testified to recalling Cain and Kennedy saying they did not know Applicant and that she could have contradicted that statement. (PCR Tr. 73).

Ebon Roberts Testimony

Applicant stated the first time he made contact with Counsel was when he sent Counsel a letter in February and that their first meeting occurred in February or March. (PCR Tr. 79-80).

Applicant stated that he sold Kennedy and Cain drugs a handful of times and they had an amiable relationship before the robbery. (PCR Tr. 108, 112). Applicant stated he and the victims conspired together to rob the Wendy's. (PCR Tr. 108). He stated the plan was for the victims to open the door and Applicant to tie them up in case there were cameras in the building. (PCR Tr. 108-09). Applicant stated that he expected for the money from the drawers to be sitting on the counter. (PCR Tr. 109-10). Applicant stated the plan was for him to get half the money and the other two to get a quarter each. (PCR Tr. 86).

Applicant stated he took the gun to make the allegedly staged hostage situation look realistic. (PCR Tr. 112-13). He stated that he never pulled the gun out in the parking lot and never exposed it to the victims, but thought it might have fallen out of his pocket when they entered Wendy's. (PCR Tr. 113). When asked if he remembered testifying that he took the gun out, he said he may have had it on his side, but never pointed it at them. (PCR Tr. 113).

When Applicant arrived, both victims were in the parking lot. (PCR Tr. 110). Applicant stated he was angry because the money was not readily available and the door unopened. (PCR Tr. 110). Applicant stated that the victims did not agree to let Applicant inside because at that time the police showed up and they all instinctually ran inside. (PCR Tr. 111). Applicant stated that he thought Cain unlocked the door and went to the alarm system to try to punch it in, but the alarm never went off. (PCR Tr. 111-12). Applicant stated that because the police were there, he was preoccupied with trying to figure out how to get away and decided that the best plan of action was to put on Cain's clothes and try to pretend to be an employee. (PCR Tr. 112, 114).

Applicant stated Cain voluntarily gave him his clothes when asked because Applicant was unsure if Cain had an extra uniform available. (PCR Tr. 114-15). Applicant stated he never held the victims against their will. (PCR Tr. 86).

During their first meeting, Applicant stated he told Counsel his only defense was that the victims were his co-conspirators. (PCR Tr. 80-81). Applicant stated he told Counsel the victims' testimonies regarding the potential ties to Applicant prior to the robbery were false. (PCR Tr. 101-02). Applicant stated that once he was caught, he figured Kennedy and Cain would testify against him, but did not expect them to deny knowing him prior to the incident. (PCR Tr. 82). When asked if anyone could corroborate his theory, Applicant stated he told Counsel no because only he, Cain, and Kennedy knew of the planned robbery. (PCR Tr. 81-82). Applicant never told Counsel that Alston and Aklin accompanied him on drug deals and could attest to the prior relationship between the victims and Applicant because Counsel never asked. (PCR Tr. 82, 116-17). Applicant stated that if Counsel had asked the "right questions" he would have better understood what information to give him. (PCR Tr. 117).

Applicant stated that he submitted, in writing, that he wanted a preliminary hearing. (PCR Tr. 87). When he told Counsel he wanted one, Applicant testified that Counsel told him that he should waive the hearing. (PCR Tr. 87-88). Applicant stated that Counsel told him he could not attend the preliminary hearing because he was out of town. (PCR Tr. 95).

Applicant stated he told Counsel and the bond hearing judge that both victims had drug issues. (PCR Tr. 83). Applicant stated that he told Counsel at the meeting about Cain's charges in Florida. (PCR Tr. 81). Applicant stated he asked Counsel to further investigate into the alleged victims, but Counsel never followed up with Applicant on whether the investigation occurred. (PCR Tr. 84). Applicant stated he told Counsel at trial that he did not think he adequately

investigated the case or try to strengthen the case. (PCR Tr. 97-98).

Applicant stated that he had a chance to go through all of the discovery in the case, including the SOVA report. (PCR Tr. 83-84). Applicant stated he reviewed the discovery, expected Cavallini to testify at trial, and was upset Counsel did not call him so Applicant could cross-examine his accuser. (PCR Tr. 96-97).

Applicant stated he would submit to a polygraph test and a test was scheduled as a result. (PCR Tr. 88). Applicant stated that he assumed the State set up the test because they had doubts about his narrative. (PCR Tr. 102). Applicant stated that no one took his statement and, instead, assumed what happened based upon their officers' observations. (PCR Tr. 102). Applicant stated that the police never interviewed him and only asked where the gun was. (PCR Tr. 103). Applicant said he told the officers that it was in the office, but they did not find it there. (PCR Tr. 103). Applicant stated that the police never interrogated him. (PCR Tr. 103). Applicant stated he thought that the State was never informed of his account of what happened. (PCR Tr. 103).

Applicant testified that there was a breakdown in the attorney-client relationship. (PCR Tr. 87). Applicant stated that Counsel only visited him in jail two or three times and all other communication between them consisted of a phone call or letter. (PCR Tr. 84). Applicant stated that Counsel did not regularly communicate with him about the case and never offered a response when Applicant asked if there were new leads or information discovered. (PCR Tr. 95). Applicant stated he spent one and a half to two months trying to contact Counsel and Counsel never responded. (PCR Tr. 95). He stated that he did not see Counsel until the Friday or Monday before trial. (PCR Tr. 95).

Before trial, Applicant stated Counsel told the judge that they were "having a situation" and the Judge advised that Counsel maintain representation of him, because Counsel was there

and already prepared. (PCR Tr. 98). Applicant testified that he would have proceeded *pro se* if given the option, but would have rather his attorney sit off to the side and assist him with the case, but was told either Counsel represented him or he would have to represent himself. (PCR Tr. 99). Applicant stated he asked for a couple months continuance so he could familiarize himself with the law, but Counsel denied the continuance because it was already pending for nine months. (PCR Tr. 99).

Applicant stated that the jury deliberated for a continuous ten hours or so. (PCR Tr. 104). Thereafter, Applicant testified that they wanted to hear his testimony again about something and also asked if the State had prior knowledge that it may have been an inside job. (PCR Tr. 104). Applicant stated that when the jury asked for a replay of Applicant's testimony they heard part of it. (PCR Tr. 106). Applicant stated that the SOVA report was admitted at trial, but the lady who drafted the report did not testify. (PCR Tr. 104). Applicant stated that he felt like if Counsel asked the "right questions" at trial, the jury would have concluded that a pre-existing relationship between him and the alleged victims existed. (PCR Tr. 106-07).

Additionally, Applicant stated he drafted a letter that he sent to the public defender's office concerning his version of the story that was admitted into evidence. (PCR Tr. 105). Applicant testified that in the letter he said this action was a mistake and stated that he would take ten years in drug court and ten years of probation and pay restitution, but the letter was never passed on to the State. (PCR Tr. 105).

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Horry County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial

transcript, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "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 v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of

representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland,* 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Failure to Call Witnesses

Here, Applicant's allegations that Counsel was ineffective for failing to call character witnesses Alston and Aklin and Officer Cavallini are without merit. At a minimum, counsel must

interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard. v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented, consistent with the rules of evidence. *Glover v. State,* 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." *Buckson v. State,* 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). Thus, counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State,* 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State,* 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover,* 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that

counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State,* 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

Officer Cavallini

Applicant's allegation that Counsel was ineffective for failing to call Officer Cavallini, the arresting officer, to testify is without merit. Counsel was not deficient because he utilized a valid trial strategy in deciding not to call Officer Cavallini as a witness. At the PCR hearing, Cavallini testified that he was on patrol when he drove past the Wendy's, saw Applicant with a gun to Cain's back, forcing Cain to manipulate the alarm and that, based on his eight years in law enforcement, it looked like an armed robbery was underway and Applicant was the perpetrator. (PCR Tr. 8, 15). When Counsel was asked if, after hearing the testimony, he would have called the Officer to testify, Counsel stated he would not have called him because he was a State witness, he corroborated the victims', not Applicant's, narrative of what happened, he stated he saw Applicant with a gun to the victim's back, and that this testimony would have hurt the defense. (PCR Tr. 33, 49-50). This Court finds that Counsel was correct in his assessment that Cavallini's testimony would have been favorable to the State, not the defense, and, thus, choosing not to call Cavallini as a defense witness was a valid trial strategy. Thus, because the decision not to call Cavallini was a part of a valid trial strategy, Counsel was not deficiently.

Further, Applicant was not prejudiced by Counsel's alleged failure to call the officer as a witness. This court finds that Counsel's assertion that, if this testimony had an impact at trial it would be negative towards the defense and would not have changed the proceeding's results.

Neither deficiency nor prejudice can be found here and, consequently, Counsel was not ineffective in his decision not to call Officer Cavallini to testify.

Character Witnesses

Counsel was not ineffective for failing to call the character witnesses, Monique Alston and Latasha Aklin, who allegedly would have testified that the victims and Applicant had a prior relationship. This Court finds Aklin's, Applicant's, and Alston's testimonies incredible.

Counsel credibly testified that Applicant never told him about any potential witnesses who could testify to the existing relationship between the victims and Applicant. (PCR Tr. 22-23, 55). Counsel stated that Applicant did not offer specific instances he had with them, nor did Applicant show Counsel text messages, phone calls, or any other physical evidence supporting this contention. (PCR Tr. 47). Counsel also stated that if this information was provided, someone from the office would have investigated the potential witness, but could not recall if this information was provided. (PCR Tr. 23). Counsel stated that no character witnesses approached him at trial to testify, but he would have called them as witnesses if he knew they existed and could corroborate Applicant's story. (PCR Tr. 124).

Counsel was not expected to know of witnesses that could corroborate Applicant's theory without being inform that such witnesses exist. Further, this Court finds it highly unlikely that if a relationship did exist between the parties, that Applicant would not have mentioned it to Counsel or the judge at trial. Additionally, if both character witnesses attended the trial proceedings and heard information from State's witnesses that directly contradicted what they knew, this Court finds it implausible that neither character witness nor Applicant felt behooved to set the record straight at the time. Thus, this Court finds that the theory presented was presumably not made known to the character witnesses until after trial proceedings and,

consequently, this Court finds their testimonies incredible. Accordingly, because these witnesses were not made known to Counsel leading up to trial, presumably because the testimonies presented at the PCR hearing were incredible and later fabricated through the PCR process, Counsel was not deficient for failing to call them to testify.

Further, because Aklin's and Alston's testimonies presumably did not exist before the conclusion of trial and are otherwise incredible, Applicant was not prejudiced by any alleged failure on Counsel's part. This is particularly true given the contradictory statements presented by the victims and officer and the absence of any connection between the two parties in all physical evidence and reports. Additionally, because Applicant repetitively claimed that the character witnesses knew of an alleged connection between the parties and that connection ultimately culminated into a plan to commit an armed robbery, the witnesses presented would have no impact on the jury's finding that Applicant was guilty of armed robbery and unlawful possession of a pistol because this point is inherently conceded due to the nature of the defense presented. Thus, because deficiency nor prejudice can be found, Counsel was not ineffective.

Failure to Cross-Examine Witnesses

Applicant's allegations that Counsel was ineffective for failure to cross-examine law enforcement officers and the alleged victims are without merit. "Where trial counsel articulates a valid reason for employing a certain trial strategy, counsel will not be deemed ineffective." *McKnight v. State*, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008) (citing *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)). Counsel can be deficient when examining witnesses if they fail to elicit testimony key to a petitioner's defense. *Miller v. State*, 379 S.C. 108, 116, 665 S.E.2d 596, 600 (2008), abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (finding counsel was deficient in failing to elicit testimony about similarities

between armed robberies from a witness who could corroborate where the applicant's key defense was third party guilt).

To prove prejudice, a petitioner must first provide evidence of what testimony would have been revealed absent Counsel's ineffectiveness without speculation. *See Glover v. State,* 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995).

Law Enforcement Officers

Applicant's allegation that Counsel was ineffective for failing to cross-examine law enforcement officers about if they investigated Applicant's side of the story while on scene is without merit.

Counsel was not deficient for failing to cross-examine officers concerning Applicant's theory of defense. Counsel stated he did not recall cross-examining officers regarding the potential relationship between Applicant and victims. (PCR Tr. 39). Counsel stated that no additional follow up of officers was conducted because depositions of officers cannot be taken in criminal cases, but stated they had all of the discovery materials from the officers, including incident reports. (PCR Tr. 49). Counsel stated he remembered Applicant implicating both victims to law enforcement and was aware of Applicant's allegation that the alleged victims were involved in the incident since reading over the discovery. (PCR Tr. 41-42). Counsel stated that he independently reviewed discovery prior to trial and did not find any leads or evidence indicating a prior relationship with Applicant. (PCR Tr. 47-48). Counsel stated that Applicant told him that he told the responding officers this the night of the incident, but the idea that they were co-conspirators was not in the incident reports or other discovery paperwork. (PCR Tr. 22). Based upon Counsel's review of the discovery, only Applicant's unsubstantiated statements supported the defense itself. Cross-examining officers about this issue when nothing in the

discovery indicated Applicant's claim could be corroborated would presumably draw further attention, by the jury, to the fact that Applicant's theory was unsubstantiated. Further, because the discovery from that night strongly indicated that the victims and Applicant did not know each other before the robbery, asking about a potential relationship would presumably undermine Applicant's defense. Not wanting to draw attention to the fact that Applicant's allegations were otherwise unsubstantiated is a valid strategy and Counsel is not deficient for utilizing it.

Regarding prejudice, the jury found Applicant's theory of the defense, as presented at trial, incredible. Cross-examining law enforcement officers about this theory that no one other than Applicant substantiated would not have made a difference at trial. The jury found the defense incredible and most likely do so again, even if Counsel cross-examined law enforcement officers to elicit a response that, at most, would have led to an officer restating Applicant's defense that was not communicated to the officers by anyone else on scene. Thus, this cross-examination would not have made a difference at trial and, consequently, Applicant was not prejudiced by any alleged deficiency by Counsel. Because deficiency nor prejudice can be found, Counsel was not ineffective on this ground.

Cain and Kennedy

Applicant's allegation that Counsel was ineffective for failing to cross-examine and impeach Cain and Kennedy is without merit. Counsel's decision not to impeach Cain and Kennedy was a strategic decision.

Counsel decision not to cross-examine the victims about alleged drug use and abuse issues was not deficient. Though Counsel stated that a successful impeachment of Kennedy and Cain would be favorable to the defense, he stated that nothing in the discovery indicated drug use on behalf of either victim and that, at trial, the victims were already deemed more credible than

Applicant, which presumably would not be undermined by a fishing expedition during cross-examination for damming evidence on an issue that the record did not show existed. (PCR Tr. 28-29, 51). Thus, this decision not to cross-examine was strategic by nature and, as a result, Counsel was not deficient for executing it.

Additionally, Counsel's decision not to impeach Kennedy based on her criminal history was strategic. Counsel testified he did not impeach Kennedy by bringing up a twenty year old misdemeanor shoplifting conviction because it was irrelevant and inadmissible according to the Rules of Evidence. (PCR Tr. 24, 50). His recollection of this rule of evidence is accurate. *See* S.C.R. Evid. 609(b). Refusing to explore a line of questioning that is inadmissible and barred by the Rules of Evidence does not constitute deficient performance.

Counsel's decision not to impeach Cain based upon his out-of-state criminal charge was strategic and, thus, Counsel was not deficient. Counsel stated that he put it on record that he was aware of the charge and was going to potentially ask about it, but the Judge ruled against allowing admission. (PCR Tr. 52). Counsel's decision not to disobey a direct holding of the court was strategic and not deficient.

Applicant failed to call the witnesses or otherwise present evidence indicating what the cross-examination would have entailed, absent his own speculation. Thus, Applicant has failed to established he was prejudiced by Counsel's alleged failure to cross-examine Kennedy and Cain concerning the three issues addressed above.

Failure to Investigate, Assert a Defense, and Prepare for Trial

Applicant alleges ineffective assistance of counsel for failure to investigate and assert a defense. *Strickland* makes clear that counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691.

When highlighting failure to investigate as a ground for a larger ineffective assistance of counsel claim, judicial determination of this claim's validity is evaluated for "reasonableness [under] all the circumstances" with "a heavy measure of deference to counsel's judgments" applied. *Id.* That said, counsel is required to, at minimum, "interview potential witnesses and make an independent investigation of the facts and circumstances of the case", *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quoting *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), *aff'd*, 828 F.2d 670 (11th Cir.1987)), including aggressively re-examining all the government's forensic evidence and conducting analyses of all other available forensic evidence." *Id.* (quoting *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases, reprinted in* 31 Hofstra L.Rev. 913, 1015 (2003) (emphasis added)).

Counsel is not obligated to "investigate lines of defense that he has chosen not to employ at trial." *Strickland*, 466 U.S. at 682 (quoting *Washington v. Strickland*, 693. F.2d 1243, 1255 (5th Cir. 1982)). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

This Court finds that Counsel properly investigated and reviewed the discovery provided to him. Counsel stated he remembered Applicant implicating both victims to law enforcement and was aware of Applicant's allegation that the alleged victims were involved in the incident since reading over the discovery. (PCR Tr. 41-42). Counsel testified that other attorneys in his office assisted with the case, including conducting investigations, but did not remember utilizing the in-house investigator. (PCR Tr. 38). Counsel stated that he independently reviewed victims' statements prior to trial and did not find any leads or evidence indicating a prior relationship with

Applicant. (PCR Tr. 47-48). Counsel testified he did not recall receiving a report from the State Office of Victim Assistance specifically, but stated if it was in the discovery, he received it. (PCR Tr. 39-40). Thus, this Court finds Counsel properly requested and investigated all evidence before him and advised Applicant of the contents, when appropriate.

Counsel was not deficient in any alleged failure to investigate Applicant's chosen defense that Applicant allegedly knew the victims because they bought dope from him a couple times and that he and the alleged victims were co-conspirators in a plan to rob the Wendy's. (PCR Tr. 21). Counsel credibly testified that when he asked follow up questions, Applicant never provided information regarding how he knew the alleged victims besides stating that they previously bought drugs from him. (PCR Tr. 21-22). In fact, the only evidence supporting Applicant's theory, according to Counsel, were Applicant's unsubstantiated assertions themselves. (PCR Tr. 47). Both Counsel and Applicant stated that Applicant never gave Counsel a name of a potential witness who could testify to the alleged relationship between Applicant and the victims. (PCR Tr. 22-23, 55, 116-17). Counsel also stated that if this information was provided, someone from the office would have investigated the potential witness, but could not recall if this information was provided. (PCR Tr. 23).

Further, as stated above, because Applicant's defense of how the victims were conspirators in the armed robbery, the defense Applicant claims Counsel was ineffective for failing to assert would have inherently caused Applicant to concede he was guilty of all crimes, besides the kidnapping charges. Counsel's decision not to pursue a defense that would cause Applicant to admit guilty to half of his charges was inherently tactical and, thus, not deficient.

Thus, Counsel was not deficient in his investigations of this claim. As addressed above, Counsel appropriately asked Applicant, seemingly several times, if he had any witnesses or

evidence that corroborated his theory. This court finds Applicant's excuse that he did not provide names of character witnesses throughout the entirety of the trial process because Counsel did not ask the question in a certain way implausible. Counsel was not expected to act clairvoyantly when investigating into such theories, but, instead, was required to act reasonably. He did so through conversations with Applicant and cannot be found deficient now for no other reason than that Applicant did not feel compelled to share evidence, if existent, with Counsel until after trial.

Additionally, though Applicant alleged that Counsel failed to properly investigate the case, he failed to show what would have been uncovered if further investigation occurred, other than the character witnesses addressed about that this court deems incredible. Applicant has failed to establish Counsel was deficient or Applicant prejudiced and, thus, Counsel is not ineffective on this ground.

Waiver of Preliminary Hearing

Applicant also claims Counsel was ineffective for waiving the preliminary hearing. In South Carolina, there is no constitutionally protected right to a preliminary hearing. *State v. Keenan*, 278 S.C. 361, 296 S.E.2d 676 (1982). Additionally, a preliminary hearing is not held if the defendant is indicted by a grand jury or waives presentment before the preliminary hearing occurs. Rule 2(b) SCRCrimP. Further, a preliminary hearing can be waived through "[p]lea negotiations and silence before the trial court regarding the desire for a preliminary hearing when entering a guilty plea. *O'Neil v. State*, 277 S.C. 230, 231, 285 S.E.2d 352, 353 (1981) (citing *Bonnettee v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981)).

Though Counsel testified that he did not remember having a preliminary hearing, Applicant testified that he requested one in writing. (PCR Tr. 38, 87-88). Applicant stated that when he told Counsel he wanted a preliminary hearing, Applicant testified that Counsel told him

that he should not worry about scheduling preliminary hearing and should waive it. (PCR Tr. 87-88). Applicant did not produce the document he allegedly signed, requesting a hearing.

This Court finds that this allegation is without merit. First, as per *Keenan* there is no constitutionally protected right to a preliminary hearing. *Keenan*, 278 S.C. 361, 296 S.E.2d 676. Additionally, Applicant proceeded to trial without notifying the trial judge about his desire for a hearing and, thus, was waived. Because Applicant waived his right by proceeding to trial, he cannot reassert this claim now. Applicant's allegation on this ground lacks merit and is denied.

Failure to Advise to Proceed Pro Se

Applicant's allegations that Counsel was ineffective for failure to advise Applicant on his right to proceed *pro se* and failure to inform the judge on Applicant's intent to proceed *pro se* are without merit. "It is well-established that an accused may waive the right to counsel and proceed *pro se*." *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). This right must be honored even if it is to the defendant's detriment and must be asserted prior to trial. *Id.* If asserted after trial has begun, the grant or denial to proceed *pro se* is within the judge's discretion, who is then required to weight the prejudice to the legitimate interests of the defendant against the potential disruption of proceedings in process. *State v. Winkler*, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010) (citing *United States v. Wesley*, 798 F.2d 1155, 1155-56 (8th Cir. 1986); *United States v. Stevens*, 83 F.3d 60, 66-67 (2d Cir. 1996)). The right to counsel must be waived knowingly and intelligently, with an understanding of the consequences. *Id.* The trial judge has the responsibility to guarantee the waiver of Counsel is done knowing and intelligently. *State v. Barnes*, 407 S.C. 27, 36, 753 S.E.2d 545, 550 (2014). Further, a defendant competent enough to stand trial is competent enough to waive the right to counsel. *Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). Additionally, a trial judge is not required to permit hybrid representation, a situation

where applicant proceeds partially *pro se* and partially by counsel. *Id.* at 43, 503 S.E.2d at 751.

Counsel testified he did not remember whether or not Applicant moved to have him relieved as attorney or if a Judge addressed this issue, but remembered a breakdown in communication between Counsel and Applicant around the time of trial. (PCR Tr. 25-26). Counsel testified he did not remember speaking with Applicant about the possibility of Applicant proceeding *pro se*, but Applicant stated Counsel told the judge that they were "having a situation" and the Judge advised that Counsel maintain representation of him, because Counsel was there and already prepared. (PCR Tr. 26, 98). Applicant testified that he would have proceeded *pro se* if given the option, but would have rather his attorney sit off to the side and assist him with the case, but was told either Counsel represented him or he would have to represent himself. (PCR Tr. 99).

This testimony is supported by the trial transcript. (Trial Tr. 6-7). When Applicant requested to relieve Counsel and proceed *pro se*, the judge refused to continue the case and strongly suggested Applicant not proceed *pro se*. (Trial Tr. 9). Ultimately, because Applicant did not provide a sufficient enough reason to allow him to proceed *pro se* and continue the case, the Judge denied Applicant's motions to relieve Counsel and to proceed *pro se*. (Trial Tr. 10). The judge seemingly weighed the prejudices against Applicant but, because he could not give a valid reason for why he wanted to withdraw representation and the continuance Applicant alleged was required for him to familiarize himself with the law to represent himself would have been very disruptive to the trial set to take place on that date, the judge acted within his discretion when denying Applicant's motions.

Regardless, Counsel was not ineffective for failure to inform the Court or Applicant of his right to proceed *pro se*. Applicant clearly knew this right existed when he attempted to assert

it on trial day. Further, the right allows for Applicant to petition the court for the right to proceed *pro se*; not for Counsel to assert the right on Applicant's behalf. Additionally, when Applicant attempted to assert this right, the judge denied the motion, leaving the matter out of Counsel's hands altogether. Finally, though Applicant stated he wanted hybrid representation, this is not a right that the judge must honor. Thus, Applicant has failed to show Counsel was ineffective on this point and, thus, this Court finds the argument lacks merit.

Failure to Communicate

Applicant's allegation that Counsel was ineffective for failure to maintain regular contact with him lacks merit. Applicant alleged that Counsel failed to regularly communicate with him about the case, never discussed new leads with him or stated if there was more information revealed. (PCR Tr. 95). Additionally, Applicant stated that he spent a couple months trying to get in contact with Counsel, but Counsel did not respond until a couple of days before trial. (PCR Tr. 95). Applicant did not, however, specifically state what they would have discussed or how further communications would have affected his decision making concerning proceeding to trial or the outcome at trial.

"[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating "how additional preparation or communication would have resulted in a different outcome." *Id. See Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); *Skeen v. State*, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective

assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

This court finds that Applicant's allegation concerning failure to communicate is without merit. Counsel was not deficient in failing to communicate with Applicant. Counsel met with Applicant shortly after the arrest, went over all the important parts with Applicant. (PCR Tr. 18-19, 44). Counsel communicated the plea offer to Applicant, including telling him he would get twenty five years imprisonment with a plea and life imprisonment at trial, but Applicant decided to go to trial. (PCR Tr. 54). Counsel also stated that he took part in plea negotiations, which included an offer of twenty five years on a violent charge of an armed robbery or kidnapping that he discussed with Applicant. (PCR Tr. 19). A notice of an intent to seek life without parole was served on Applicant and Counsel stated he was "sure [they] discussed it." (PCR Tr. 21, 45-46).

Even if the time spent together was brief, this fact alone does not render Counsel ineffective for failing to communicate. This Court finds that Counsel communicated the discovery, evidence, plea offers, defenses and strategies to Applicant. Thus, Counsel was not deficient in communicating with Applicant. Further, because Applicant did not show what impact, if any, further communication would have had on the outcome of the proceedings, prejudice is not found. Thus, Applicant failed to show deficiency or prejudice existed and, as such, Counsel was not ineffective regarding this issue.

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within

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

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 10 day of _____, 2020.

GEORGE M. MCFADDIN, JR.
Presiding Judge
Fifteenth Judicial Circuit

_____, South Carolina.