STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

SEP 21 2020

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

2017-CP-40-00045

Christopher Broadnax, # 099356,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Christopher Broadnax, # 099356, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed September 2, 2020, issued by the Honorable Jocelyn Newman, Presiding Judge, Fifth Judicial Circuit.

Jonathan D. Waller

Waller Law Group
SC Bar No.: 76290
1116 Blanding Street
Suite 2B
Columbia, SC 29201
803-520-7278 (phone)
jonathan@wallergroupsc.com
ATTORNEY FOR PETITIONER

September 14, 2020

Other Counsel of Record:
Samuel L. Key, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP4000045

CHRISTOPHER BROADNAX (SCDC #99356) — STATE OF SOUTH CAROLINA

PLAINTIFF(S) — DEFENDANT(S)

Submitted by: NEWMAN, J.	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

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

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

RICHLAND COUNTY
FILED
2020 SEP -2 AM 11: 24
JEANETTE W. McBRIDE
C.C.P., G.S., & F.C.

ORDER INFORMATION

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

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

Circuit Court Judge	2757 **Judge Code**	August 26, 2020 **Date**

SCRCP Form 4C (12/2016)

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

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

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

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	FOR THE FIFTH JUDICIAL CIRCUIT
Christopher Broadnax (SCDC #99356),	Civil Action No. 2017CP4000045
Applicant,	
v.	**ORDER OF DISMISSAL**
State of South Carolina,	
Respondent.	

RICHLAND COUNTY FILED
2020 SEP -2 AM 11:24
JEANETTE W. McBRIDE
C.C.P., G.S., & F.C.

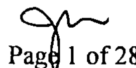
This matter comes before the Court upon Application for Post-Conviction Relief ("PCR Application") filed by Applicant Christopher Broadnax on January 5, 2017, and amendments filed on January 24, 2017, March 15, 2018, and March 16, 2018. Respondent filed its Return and and Partial Motion to Dismiss on July 14, 2017. On December 4, 2018, an evidentiary hearing was conducted at the Richland County Judicial Center. Applicant was present along with his counsel, Jonathan D. Waller, Esquire. The State was represented by Assistant Attorney General Kelly Oppenheimer.

For the reasons set forth below, the Application for Post-Conviction Relief is DENIED; and this matter is DISMISSED WITH PREJUDICE.

FACTUAL AND PROCEDURAL HISTORY

I. Conviction and Appeal

Applicant is currently confined at the South Carolina Department of Corrections ("SCDC") pursuant to orders of commitment from the Richland County Clerk of Court. He was indicted at the September 2009 term of the Richland County Grand Jury in indictment 2019-GS-40-04540 for Kidnapping. During its November 2009 term, he was indicted for two additional counts of



Kidnapping (in indictments 2009-GS-40-04541 and 2009-GS-40-04542) and one count of Armed Robbery (indictment 2009-GS-40-04539). Applicant was represented on these charges by James Hunter May, Esquire ("Attorney May") and Charles William Cochran, Esquire ("Attorney Cochran").

Applicant was tried by a jury beginning on June 10, 2010. On June 16, 2010, following deliberations, Applicant was convicted of all charges as indicted. The Honorable G. Thomas Cooper, Jr., imposed concurrent sentences of life without the possibility of parole ("LWOP") on all charges.

A timely Notice of Appeal was filed, and Appellate Defender LaNelle Cantey DuRant ("Appellate Counsel") perfected the appeal on Applicant's behalf. On appeal, Applicant raised the following issues:

> 1. Did the trial court err in admitting Applicant's three prior armed robbery convictions for impeachment purposes according to Rule 609(a)(2), SCRE, during his testimony when the admission was overly prejudicial under Rule 403, SCRE, and a violation of his due process right to a fair trial?
>
> 2. Did the trial court err in denying Applicant's motion to withdraw the life without parole notice due to the arbitrary use of the prosecutor's discretion in the plea bargaining process which was a violation of the Fourteenth Amendment's guarantee to due process?
>
> 3. Did the trial court err in denying Applicant's motion to withdraw LWOP because there is no standard to guide solicitors in when to seek a sentence of LWOP pursuant to SC Code section 17-25-45 which is a violation of the Equal Protection Clause of the Fourteenth Amendment?
>
> [and]
>
> 4. Did the trial court err in denying Applicant's motion that the jury be informed that Applicant was facing the mandatory sentence

> of LWOP which denied Applicant his due process right to a fair trial?

Following briefing and oral argument, the South Carolina Court of Appeals reversed Applicant's convictions and sentences and remanded to the lower court for a new trial. *State v. Broadnax*, 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013). In its opinion, the Court of Appeals found the trial court erred in admitting Applicant's prior convictions of armed robbery pursuant to Rule 609(a)(2), SCRE, as armed robbery is not a crime of dishonesty. The Court of Appeals further found the admission of these prior armed robberies created a high degree of prejudice, but declined to address Applicant's remaining arguments.

On March 25, 2013, Respondent filed a Petition for Writ of Certiorari at the Supreme Court of South Carolina. In its Petition, Respondent made the following arguments:

> 1. The Court of Appeals erred in holding that armed robbery is not a crime of dishonesty under Rule 609(a)(2), SCRE;
>
> 2. Additionally, the Court of Appeals erred when it refused to remand the case to the trial court in order for the trial court to conduct an on-the-record Rule 609, SCRE, balancing test as required by *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000);
>
> [and]
>
> 3. Furthermore, the Court of Appeals erred in not applying the harmless error standard because any error in admitting Applicant's armed robbery convictions was harmless due to the overwhelming evidence of guilt.

By order dated June 12, 2014, the Supreme Court granted the Petition for Writ of Certiorari. Following briefing and oral argument in the Supreme Court, the Supreme Court reversed the decision of the Court of Appeals in part, and affirmed the Court of Appeals' decision in part. *State v. Broadnax*, 414 S.C. 468, 779 S.E.2d 789 (2015). Specifically, the Supreme Court affirmed the finding that armed robbery is not a crime of dishonesty or false statement for purposes of

impeachment under Rule 609(a)(2), SCRE. However, the Supreme Court determined that the error in admitting such evidence was harmless beyond a reasonable doubt, as there was overwhelming evidence implicating Applicant in the crimes.

After issuing a Remittitur on July 24, 2015, the Supreme Court recalled it by Order dated July 29, 2015. On the same date, the Supreme Court refiled its decision in this matter. Again, the decision of the Court of Appeals was reversed in part and affirmed in part on the same grounds.

On August 6, 2015, Applicant filed a "Petition for Rehearing or for Remand to the Court of Appeals to Consider Unadjudicated Issues." On September 8, 2015, the Supreme Court issued an Order denying the petition for rehearing with respect to the harmless error issue but granting the petition for rehearing to determine whether the matter should be remanded to the Court of Appeals to consider the other arguments set forth in the original appeal.

The matter was ultimately remanded to the Court of Appeals. After considering Applicant's remaining arguments, the Court of Appeals affirmed Applicant's convictions and sentences. *State v. Broadnax*, Op. No. 2016-UP-258 (S.C. Ct. App. filed June 8, 2016). The Remittitur was issued on June 29, 2016.

II. PCR Application and Amendments

On January 5, 2017, Applicant filed the instant PCR Application, in which he alleges that he is being unlawfully detained based on the following allegations:

1. Ineffective Assistance of Trial Counsel;

   (a) failure to investigate and thereby erroneously arguing during pretrial motions hearing to exclude or suppress evidence found in vehicle under a Fourth Amendment violation;
   (b) failing to investigate [Applicant's] allegation of police malfeasance when obtaining search and arrest warrants, thereby entitling [Applicant] to an evidentiary

hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 155-156, 171-172 (1987) to determine whether the warrants were issued in reliance on a deliberately or recklessly false affidavit; [and]

(c) failure to object to witness Danny Weaver's identification of [Applicant's] clothing as that which the robbery suspect wore during the commission of the crime.

2. Trial Court Error

(a) improperly restricting defense counsel's cross-examination designed to show bias on the part of a prosecution witness (during the cross-examination of witness Charles E. Green).

By amendment filed on January 24, 2017, Applicant asserted claims of ineffective assistance of appellate counsel. He alleged that Appellate Counsel failed to raise all issues on appeal and specifically failed to argue that the trial court erred in restricting defense counsel's cross-examination of witness Charles E. Green.

Applicant amended his PCR Application again on March 15, 2018. This time he made the following allegations:

1. As to representation rendered by James May, Esquire and Charles Cochran, Esquire:

(a) Counsel was ineffective for failing to ensure that Applicant was not viewed by the jury pool while shackled;

(b) Counsel was ineffective for failing to contemporaneously object to Arthur Haynes, who had not made an identification of Applicant at that point, referring to the robber by Applicant's name;

(c) Counsel was ineffective for eliciting improper testimony from Jonathan Brayboy after vigorously objecting to the same testimony on direct examination; [and]
(d) Counsel was ineffective for failing to object to jury charge after Applicant's requested charge was not presented to the jury.

2. As to appellate representation rendered by LaNelle Cantey DuRant, Esquire:

(a) Counsel was ineffective for failing to adequately petition the Supreme Court for rehearing following its Order Affirming in Part and Reversing in Part the Court of Appeals; [and]

(b) Counsel was ineffective for failing to raise the meritorious issue of the trial court's overruling trial counsel's objection to the in-court identification given by Donald Kirby of the Applicant as the robber due to it being a violation of both *Brady*[1] and *Riddle*.[2]

Applicant filed a final amendment on March 16, 2018, in which he alleged contends that Appellate Counsel (1) failed to challenge the Supreme Court's finding that there was overwhelming evidence against him; and (2) failed to challenge the "falsified evidence [admitted] during the course of the trial."

At the evidentiary hearing, Applicant proceeded forward on the allegations of ineffective assistance of counsel, as well as an allegation that Appellate Counsel was ineffective for failing to raise a *Doyle*[3] issue on appeal.

III. Trial Testimony

On May 24, 2009, Applicant entered a Church's Fried Chicken restaurant and held four of the employees at gunpoint while he stole money from the cash register. At trial, Respondent presented testimony from two of the four victims, both of whom positively identified Applicant as the armed assailant. They both testified that the robber pointed a silver automatic gun at them and described the robber as a black male with a lazy eye, who wore a striped shirt and put a mask on

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).
[2] *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006).
[3] *Doyle v. Ohio*, 426 U.S. 610 (1976).

his face when he entered the building. After the robber exited the building, one of the victims saw him walk towards a gray Dodge truck.

Within minutes of the robbery, law enforcement conducted a traffic stop on a gray Dodge truck just a few blocks from the Church's Fried Chicken. Inside the vehicle, they found Applicant crouching on the floorboard over a plastic bag. Applicant, who was wearing a striped shirt and had a lazy eye, was lying on top of a silver gun, money, and a mask. One of the victims, Arthur Haynes ("Haynes"), was brought to the scene and confirmed that the gray truck was the same one he had seen. Haynes also immediately identified Applicant as the perpetrator based on his clothing and physical features, specifically noting the lazy eye.

Applicant's co-defendant, Charles Green ("Green"), also testified at trial. Green stated that he drove Applicant to the Church's Fried Chicken in his gray Dodge truck that afternoon. He saw Applicant, who was wearing a striped shirt, enter the restaurant with a plastic bag. When Applicant returned to the truck and got in, he sat upright in the passenger's seat, but Applicant crouched down on the floorboard once he saw police cars.

Green was described as "a black male, older black male with a gray beard and a red shirt," whose appearance was drastically different than that of Applicant. Haynes and the other victim, Donald Kirby, Jr. ("Kirby") testified that Green, the man driving the truck, was not the robber. In addition, a police officer testified that he had seen no other gray Dodge trucks in the area during law enforcement's pursuit of Green and Applicant.

IV. Testimony at Evidentiary Hearing

At the evidentiary hearing, Applicant testified on his own behalf and presented the testimony of Attorney May, Attorney Cochran, and Appellate Counsel. The Court also had before it a copy of Applicant's trial transcript, the records of the Richland County Clerk of Court

regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, and the record on appeal.

A. Attorney May

Attorney May testified that he has practiced criminal law since November 13, 2007 and, at the time of Applicant's conviction, was employed by the Richland County Public Defender's Office. He was appointed to represent Applicant and met with Applicant at the county jail immediately, within a week of his arrest. Throughout the representation, Attorney May met with Applicant "a lot" and wouldn't let a month pass without having a meeting.

Attorney May was assigned as "first chair" on this case and did most of the research, but he did have assistance from his co-counsel, Attorney Cochran. Attorney May filed discovery motions pursuant to Rule 5, SCRCrimP, and *Brady v. Maryland*, 373 U.S. 83 (1963). In response, he received substantial information from Respondent, including police incident reports, statements from each of the victims, and video footage of Applicant's arrest. He reviewed all of the discovery materials with Applicant.

He also had an early meeting with the prosecutor assigned to Applicant's case. According to Attorney May, Applicant stated during their initial meeting that he was willing to plead guilty as charged as long as his sentence would be less than twenty-five or thirty years. Attorney May requested a plea offer from the prosecutor, but she declined to agree to a sentence of less than twenty-five years. The prosecutor would only allow Applicant to plead to a life sentence, and she refused to withdraw the LWOP notice previously served on Applicant.

Based on Attorney May's review of the case, he believed that Applicant had no viable defenses to the charges. Applicant was identified by a co-defendant and at least two of the victims and was arrested near the scene within minutes of the robbery with a gun, a mask, and cash, all in

plain view. Attorney May also testified that the descriptions given by the victims were consistent with one another and that Applicant's lazy eye was a distinctive feature. Nevertheless, Attorney May was committed to raising any issues he could raise to defend Applicant.

Attorney May objected to the introduction of Applicant's numerous convictions for prior armed robberies (a factor which was ultimately the key issue in Applicant's appeal). He also ensured that a hearing was conducted pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972), for one witness's show-up identification. Finally, because Applicant remained in leg shackles during the trial, Attorney May made a motion pursuant to *Deck v. Missouri*, 544 U.S. 622 (2005). As a remedy, the trial court placed Applicant on the witness stand outside the presence of the jury. Attorney May could not recall a time when the jury was able to see Applicant's ankle shackles.

He testified that throughout the trial, he made numerous objections and motions in an effort to get Respondent to make a plea offer. According to Attorney May, he did everything he could to preserve issues for appeal. He also objected to the jury charge and renewed all previous motions and objections at the appropriate time. Following Applicant's conviction, Attorney May (or someone in his office) filed a Notice of Appeal on Applicant's behalf; and, although he was not actively involved in the appeal, Attorney May had some communication with the Office of Appellate Defense regarding issues to raise on appeal.

B. Attorney Cochran

Attorney Cochran, also employed by the Richland County Public Defender's Office at the time, became involved in the case during the month leading up to the trial. He was the "second chair" on Applicant's case and was involved in drafting pre-trial motions on Applicant's behalf, although Attorney May did most of the investigation. He testified that he met Applicant only once at the county jail, but they met a few more times at the courthouse. Attorney Cochran visited the

crime scene with Attorney May. They also reviewed discovery with the prosecutor, and he reviewed all documents relevant to the trial witnesses which he cross-examined.

According to Attorney Cochran, their defense at trial was simply to create reasonable doubt as to the victims' identifications of Applicant. This was difficult, however, as he explained that the victims recounted the assailant wearing a ski mask and having a lazy eye, which was distinctive. The victims' description of the assailant's clothing was also consistent with Applicant's attire that night.

Attorney Cochran did not recall any issue arising at trial concerning Applicant invoking his Fifth Amendment privilege or Respondent attempting to comment on the same. He did, however, recall Applicant testifying at trial that he ate drugs immediately prior to his arrest. Attorney Cochran's involvement ended with Applicant's conviction, as he had no contact with Appellate Counsel.

C. Applicant

Naturally, Applicant's recollection of the prosecution was slightly different. He testified that although he was arrested in May, counsel was not appointed to represent him until July or August. He remained detained in the county jail for nearly a year before trial. Applicant also disputed that he wanted to plead guilty. He testified that he has always professed his innocence and "wanted to go to trial from day one." According to Applicant, a twenty-five-year guilty plea was Attorney May's idea, not his.

Applicant testified that he wrote three letters to Attorney May about certain issues in discovery. Attorney May visited him to discuss the evidence, including the victims' identifications. Applicant pointed out two which he thought to be defective. Specifically, Applicant testified that Danny Weaver ("Weaver") only described Applicant's clothing but did not

identify him specifically, while Gracious Tucker did not identify Applicant at all. Applicant also recalled that two people did show-up identifications of him, not just one. He believed that the show-up identifications were unlawful and wanted Attorney May to challenge that evidence.

He also believed that Haynes' identification was deficient. Applicant could not understand how Haynes could have identified him as the perpetrator if the person was wearing a ski mask. Instead, according to Applicant, Haynes identified him by his shirt and pants only. Ultimately, however, Applicant conceded that Haynes recognized his lazy eye, as did each of the victims. Applicant also conceded that he did not provide Attorney May with the names of any witnesses or other leads to investigate in his defense, claiming that he didn't know of any way to contact potential witnesses because they were all "street drug dealers."

Another issue Applicant discussed with Attorney May was the search of the gray Dodge truck. Applicant believed that law enforcement lacked probable cause to make a traffic stop on the truck because the driver had not committed any traffic violations. He also believed that the search warrant affidavit (which led to the search of Green's truck) was defective, making the search illegal. Applicant wanted Attorney May to challenge the veracity of the statements made in the affidavit. He admits that Attorney May did move to suppress the evidence found in the truck, but the motion was denied. Applicant pointed out that he was simply a passenger in the truck and that the truck didn't belong to him, making an effort to distance himself from its contents but also undermining his argument for suppression.

Next, Applicant complained that the shackles on his legs were visible to the jurors. Specifically, he testified that the jury pool was seated behind him during *voir dire* and jury selection. He also stated that he walked around in his shackles in front of the jury but only during breaks. He recalled some potential jurors being in the courtroom during those breaks.

Applicant also complained about Respondent's use of his prior convictions for Armed Robbery. Although Respondent attempted to introduce all four convictions, the trial court only admitted the three 1991 convictions into evidence and excluded a conviction from 1979.

Following his conviction, Applicant spoke to Appellate Counsel about an appeal but has no recollection of discussing the appeal with Attorney May or Attorney Cochran. According to Applicant, he identified for Appellate Counsel several potential appellate issues, including three motions for a mistrial, but Appellate Counsel told him that the issues which would ultimately be raised would be in her discretion. Applicant testified that he was not informed of the contents of the appeal until after it had been filed. He raised concern that she omitted his suggestions, but Appellate Counsel again responded that she used her discretion to determine which arguments to make. Applicant testified that she told him to file a PCR Application if he was dissatisfied.

D. Appellate Counsel

Appellate Counsel was the final witness to testify at the evidentiary hearing. This case was assigned to her when she worked at the Office of Appellate Defense. She explained the constraints of the appellate court rules, which restrict appeals to issues contained within the trial transcript and accompanying exhibits. Appellate Counsel believed that Attorneys May and Cochran did a good job objecting at trial, noting that Applicant's trial had more objections than she had seen in during her twelve-year tenure with the Office of Appellate Defense.

Appellate Counsel raised for issues on appeal, which she believed to be the strongest arguments. In her experience it is best to choose "winning issues" based on the law and her knowledge of the courts, trying to choose issues that will make a difference. Generally, she tries to do what her client asks of her as much as possible, but she also explained that she must balance those requests with applicable legal principles.

According to Appellate Counsel, she spoke to Applicant several times by phone and wrote him a letter explaining appellate procedure. She also testified that she spoke to Applicant briefly before submitting the appellate brief but did not recall him mentioning any specific appellate issues at that time.

Appellate Counsel testified about the initial success they found at the Court of Appeals before having that swept away by the Supreme Court. She states that although she's not required to, she filed a petition for rehearing after receiving the Supreme Court's opinion because she felt very strongly about this case. She also explained that she requested remand to the Court of Appeals because Applicant wanted rulings on the outstanding appellate issues. Appellate Counsel believed that she did all she could (within the confines of the law and appellate rules) to overturn Applicant's conviction. Ultimately, however, his lazy eye proved problematic.

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 evidentiary hearing. The Court has also had the opportunity to observe each witness who testified at the evidentiary hearing, to closely pass upon their credibility, and to weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. §17-27-80 (2003).

Trial Counsel

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Where a PCR Application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.*

at 686; *see also Butler v. State*, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland,* 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State,* 321 S.C. 238 (1996); *see also Cherry v. State*, 300 S.C. 238 (1989).

The court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18. "The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1(e), SCRCP.

I. Investigation

Applicant's first allegation is that Attorneys May and Cochran failed to properly investigate his case. He contends that because trial counsel didn't procure testimony of favorable witnesses or investigate his allegations of "police malfeasance when obtaining search and arrest warrants," Attorneys May and Cochran made improper arguments as to pre-trial motions and deprived him of an evidentiary hearing. The Court disagrees.

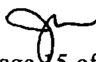
"'Although counsel should conduct a reasonable investigation into potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client.'" *Tucker*, 350 F.3d at 442 (quoting *Green v.*

French, 143 F.3d 865, 892 (4th Cir. 1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691; *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Moreover, "failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." *Porter*, 368 S.C. at 385-86, 629 S.E.2d at 357, *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836 (citing *Moorehead v. State,* 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

As to the lack of witnesses favorable to Applicant, Applicant admits that he did not give his attorneys any leads or witnesses to investigate prior to trial. In fact, Applicant testified that he had no contact information for the potential witnesses he would have wanted counsel to call, as they were drug dealers. Therefore, this Court finds that Applicant has failed to establish any deficiency on the part of counsel.

The remainder of Applicant's argument on this issue is that the statements made by law enforcement in support of the search warrant and arrest warrant in this case were untrue, and counsel should have investigated that. However, this allegation is unsupported. Applicant did not provide the Court with a copy of the search warrant in question or demonstrate how it was defective. And while the Court has reviewed the arrest warrants, they are facially valid. Applicant has not offered any evidence – by testimony or otherwise – to support his allegations and, therefore, cannot demonstrate that counsel was deficient.

Applicant has also failed to establish any prejudice resulting from the alleged deficiencies. There is a complete absence of evidence as to what additional investigation counsel should have



done or how it would have been beneficial to Applicant's case. Therefore, this allegation must be denied and dismissed with prejudice.

II. Suppression of Evidence

In connection with the allegation of counsel's failure to investigate, Applicant also alleges that counsel was ineffective for failing to suppress the evidence found in the gray Dodge truck. Specifically, Applicant argues that Attorney May presented this issue to the trial court as a Fourth Amendment violation when he should have argued that the search warrant affidavit was defective. The Court disagrees, as the search warrant was superfluous and not necessary to support the introduction of evidence.

"In general, a police officer 'may [] stop and briefly detain a vehicle if they have reasonable suspicion that the occupants are involved in criminal activity.'" *Robinson v. State*, 407 S.C. 169, 182, 754 S.E.2d 862, 868 (2014) (quoting *State v. Pichardo*, 367 S.C. 84, 97-98, 623 S.E.2d 840, 847 (Ct. App. 2005)). Reasonable suspicion requires that there be an objective, specific basis for suspecting that the person stopped is engaged in criminal activity. *Id.* at 182, 754 S.E.2d at 869 (citation omitted). This can be based on an officer's reasonable inferences in light of his experience and in conjunction with articulable facts that "'reasonably warrant' the intrusion." *Id.* at 182, 754 S.E.2d at 869 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 27 (1968)).

Furthermore, law enforcement officers may search an automobile without having obtained a warrant so long as they have probable cause to do so. *Collins v. Virginia*, 138 S.Ct. 1663, 1670 (2018) (citing *California v. Carney*, 471 U.S. 386, 392-93 (1985)). Indeed, "'if there is probable cause to search a vehicle, a warrant is not necessary so long as the search is based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained.'" *State v. Tynes*, 402 S.C. 211, 217, 740 S.E.2d 512, 515 (Ct. App. 2013). Moreover, "'objects

falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence.'" *Robinson*, 407 S.C. at 186, 754 S.E.2d at 870-71 (quoting *State v. Wright*, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011)).

Attorney May testified that he and Attorney Cochran did everything that they could to find some error issue in Applicant's case. They researched various ways to argue for suppression of the evidence found in the gray Dodge truck. Based on his research, Attorney May concluded that Applicant lacked standing to challenge the search because he was not the owner of the truck. In addition, as indicated above, Applicant has failed to offer any evidence to support his allegation that the search warrant affidavit was defective.

Applicant also fails to meet his burden of proving that Attorney May was deficient in failing to challenge probable cause for the traffic stop which led to Applicant's capture. During the suppression hearing (of which Applicant complains), a law enforcement officer testified that he was approximately three-quarters of a mile from Church's when police dispatch alerted him of the armed robbery and the suspect fleeing in a gray Dodge truck. Just fifteen or twenty seconds later, the officer noticed the truck occupied by Applicant. Because of the timing, the proximity to the crime scene, and the matching vehicle description, the officer certainly had the requisite reasonable suspicion and was justified in conducting the traffic stop. Therefore, Applicant cannot prove any deficiency on the part of counsel.

Finally, Applicant is unable to prove prejudice resulting from this alleged deficiency. In fact, his argument fails because the allegedly defective search warrant was not the basis of the Court's admission of evidence. First, the search warrant was rendered unnecessary by the officer's probable cause to search the truck. In addition, the evidence in question was in plain view on the passenger's side floorboard of the vehicle. Finally, as predicted by Attorney May, the trial court

found that Applicant lacked standing to challenge the search warrant because he didn't own the vehicle. Accordingly, this allegation must be denied and dismissed with prejudice.

III. Weaver's In-Court Identification

Applicant's next argument is that counsel was ineffective for failing to object to a witness's in-court identification of the robber's clothing. Unfortunately, Applicant is misinformed, as this identification never occurred.

The testimony of the witness, Weaver, was initially proffered by Respondent outside of the jury's presence. Weaver stated that he identified Applicant as the robber after he saw Applicant at the police station in handcuffs. Respondent conceded that the manner of Weaver's identification was overly suggestive and agreed not to allow Weaver to make an in-court identification of Applicant. Instead, when Weaver testified before the jury he relied on his recollection of the robber's clothing, describing it as "greenish looking pants and this like stripey shirt." He stated that Applicant's clothing was "consistent with" what he saw at the crime scene, which is proper. However, there was no in-court identification for Applicant to object to and, therefore, no deficiency on the part of Attorney May.

Applicant has also failed to prove any prejudice resulting from the alleged deficiency. All four of the victims described the clothing Applicant was wearing during the robbery – green pants and a striped shirt. Applicant's co-defendant testified that Applicant was wearing a striped shirt and light colored pants on the day of the robbery. In addition two of the victims, who both stated that they got a clear look at the robber's face, described the robber as having a lazy eye. Applicant admitted both at trial and at the evidentiary – and this Court observed – that he does, in fact, have a lazy eye. Based on the foregoing, this Court finds this allegation must be denied and dismissed with prejudice.

IV. Leg Shackles

Applicant also alleges that counsel was ineffective for failing to ensure that jurors did not see the shackles on Applicant's legs. He contends that he walked around during breaks in view of potential jurors who could see the shackles. The Court finds no support for this allegation.

"The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need." *Deck v. Missouri*, 544 U.S. at 626. That special need may be physical security, escape prevention, or courtroom decorum. *Id.* at 628 (citations omitted). If such a special need exists, the trial court must make a determination that visible shackles are justified; otherwise, the accused may suffer a due process violation. *Id.* at 629.

First, Attorney May did, in fact, make a motion to preclude shackling of Applicant pursuant to *Deck v. Missouri*. In response, the trial court make the requisite determination that there was a security need for Applicant to wear leg shackles but agreed to remove his wrist shackles so that jurors could not see the restraints. That appears to have worked, as Attorney May could not recall a time when jurors could see the shackles on Applicant's ankles. Although Applicant testified that jurors could see him walking around during breaks, this Court finds that Applicant's testimony lacks credibility. Such a scenario would be highly unusual, does not comport with typical courtroom procedure and logistics, and is not corroborated. Therefore, Applicant cannot sustain his burden of proof; and this allegation must be denied and dismissed with prejudice.

V. Haynes' Identification

Applicant complains that trial counsel should have objected when witness Haynes referred to Applicant by name during his testimony. He contends that during an in-court identification,

Attorney May should have objected when Haynes used Applicant's name. The Court finds no prejudice.

At trial, Haynes testified that he noticed the robber's eyes, remarking that the robber's left eye was "kind of messed up, slanted like." He also stated that he could clearly see the robber, who was about eight feet away from him, and described his clothing. He later gave law enforcement a description of the robber and the getaway vehicle. When Applicant was apprehended, Haynes was taken to the roadside where he identified the gray Dodge truck and identified Applicant based on his clothing and his "slanted eye, messed up eye." He testified that he had no doubt that Applicant was, in fact, the robber.

Based on the foregoing, this Court finds Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency. Accordingly, this allegations must be denied and dismissed with prejudice.

VI. Officer Brayboy's Testimony

According to Applicant, Attorney Cochran vigorously objected to certain testimony from Officer Jonathan Brayboy during Respondent's direct examination then elicited that same objectionable testimony during his cross-examination. However, Applicant presented no evidence whatsoever regarding this allegation during the evidentiary hearing. Therefore, the Court deems this allegation abandoned and denies and dismisses it with prejudice.

VII. Jury Charge

Next, Applicant asserts that trial counsel was ineffective for failing to object to the jury charge at trial. Applicant contends that when his requested jury charge was not read to the jury, trial counsel should have objected. The Court disagrees that this amounts to ineffective assistance of counsel.

A jury charge which is substantially correct and covers the law does not require reversal. *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996). Furthermore, "the substance of the law is what must be charged to the jury, not any particular verbiage." *Adkins*, 353 S.C. at 318-19, 577 S.E.2d at 464 (emphasis added).

Here, trial counsel made every effort to modify the jury charge to benefit Applicant. Counsel requested a charge on mere presence, to which the State had no objection. However, counsel requested the trial court modify its standard charge to replace "scene" with "arrest location." The trial court ultimately declined to use "arrest location," but agreed to modify the charge to refer to "scene and vicinity." Counsel replied that they would prefer only "vicinity" being charged. Ultimately, the trial court declined to modify the charge, stating "I think it's one and the same." Thereafter, the trial court charged the jury on mere presence as follows:

> Now, mere presence at the scene or in the vicinity of a crime is not sufficient to prove someone guilty of a crime. The burden is on the State to prove every element of the crime charged. If you find after reviewing all the evidence that the State has proved that the defendant was only present at the scene or in the vicinity of a crime and that they have not proved beyond a reasonable doubt any other participation in the crime, then you must find the defendant not guilty. The law is that proof of mere presence at the scene or in the vicinity of a crime is not sufficient to find someone guilty.

This Court, therefore, finds Applicant has failed to establish any resulting prejudice from this alleged deficiency, as counsel was successful in getting a jury charge on mere presence. The trial court's mere presence charge substantially covered the law, and Applicant is not entitled to any specific verbiage within his requested charge. Accordingly, this allegation must be denied and dismissed with prejudice.

Appellate Counsel

A defendant is also entitled to effective assistance of appellate counsel. *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing *Southerland v. State,* 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. *Southerland*, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. *See, e.g., Ezell v. State*, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); *Southerland*, 337 S.C. 615-16, 524 S.E.2d at 836. *See also Simpkins v. State,* 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

Although ineffective assistance of appellate counsel claims for failure to raise a particular issue on direct appeal can be successful, the United States Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." *Thrift v. State,* 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing *Jones v. Barnes,* 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." *Jones,* 463 U.S. at 754.

Additionally, the Supreme Court of South Carolina has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. *Tisdale*, 357 S.C. at 476, 594 S.E.2d at 167. "'Generally, only when ignored issues are clearly stronger than those

presented, will the presumption of effective assistance of counsel be overcome.'" *Smith v. Robbins*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). In order to meet his burden, an applicant must establish a reasonable probability that, but for appellate counsel's failure to raise a specific issue on appeal, he would have prevailed on his appeal. *Id.* at 285-86.

I. Petition for Rehearing

Applicant's first complaint about Appellate Counsel is that she failed to adequately petition the Supreme Court for rehearing following its Order affirming the Court of Appeals in part and reversing in part. The Court finds no error here.

Here, Appellate Counsel filed a petition for rehearing following the Supreme Court's order finding any error at trial by presenting evidence of Applicant's three prior armed robbery convictions was harmless due to overwhelming evidence of Applicant's guilt. In particular, Appellate Counsel asked the Supreme Court "to reconsider its ruling that the error was harmless in light of the overwhelming evidence of guilt; or in the alternative, to remand his case to the Court of Appeals for a ruling on the three remaining issues that the Court of Appeals did not address because they had reversed on the first issue." She also argued that "the harmless error standard was not proper in [Applicant's] case as the admission of the three prior armed robbery convictions was highly prejudicial, especially in light of the fact that he was on trial for armed robbery." Finally, Appellate Counsel argued "[s]hould this Court affirm its decision, in the alternative, [Applicant] asks this Court to remand his case to the Court of Appeals for a ruling on his three remaining issues not reached in their decision."

Based on the foregoing, this Court finds Applicant has failed to establish any deficiency on the part of Appellate Counsel. Similarly, this Court finds that Applicant has wholly failed to

establish any resulting prejudice from the alleged deficiency. He has not identified anything more than Appellate Counsel should have argued in order to have the Supreme Court grant her petition for rehearing with respect to the harmless error issue. Furthermore, following a review of the petition for rehearing, the Supreme Court issued an order denying the petition for rehearing with respect to the harmless error issue but granted the petition for rehearing with respect to the issue of whether it should remand to the Court of Appeals to consider the three remaining issues not previously decided. Appellate Counsel was, therefore, successful in getting part of the petition granted. This Court finds this allegation must be denied and dismissed with prejudice.

II. *Brady* and *Riddle* Violations

Applicant's next argument is that Appellate Counsel was ineffective by failing to raise "the meritorious issue of the trial court's overruling trial counsel's objection to the in-court identification given by Kirby of the Applicant as the robber due to it being a violation of both *Brady* and *Riddle*." The Court disagrees.

The uncontroverted testimony is that Appellate Counsel raised the four strongest issues she could have raised on appeal. Indeed, Appellate Counsel was successful in changing well-established law, in that armed robbery is no longer considered a crime of dishonesty which can be used to attack a witness's credibility under Rule 609(a), SCRE. Furthermore, Appellate Counsel testified that although she considers all issues raised by her clients, she still must make a determination of which issues to raise based on the law. Based on the foregoing, this Court finds Applicant has failed to establish any deficiency on the part of Appellate Counsel.

Similarly, this Court finds that Applicant has failed to establish any prejudice resulting from the alleged deficiency. "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or

punishment, irrespective of the good faith of the prosecution." *Brady*, 373 U.S. at 87. Evidence is material "if there is a 'reasonable probability' that the result of the proceeding would have been different had the information been disclosed." *Riddle*, 369 S.C. at 44-45, 631 S.E.2d at 73 (citation omitted). When determining whether suppressed evidence was material under *Brady*, a court must consider the collective impact of the undisclosed evidence. *Id.* at 46, 631 S.E.2d at 74 (citation omitted).

Here, Kirby testified that he gave a statement to law enforcement describing the robber as a tall, dark man, approximately five feet nine inches tall, with a cock eye. He further described the robber as wearing pants and a striped shirt. Kirby stated that he got a good look at the robber while he was in the Church's and could clearly see the robber's face. He was paying attention to what the robber looked like "[b]ecause I wanted to give a good description. If the police asked how he looked, I wanted to be able to give a good description of him." At trial, Kirby identified Applicant as the man who robbed the Church's. On cross-examination, Kirby testified that he was never shown any photo lineups and was not taken to the scene of the traffic stop for a show-up identification. He reiterated he was never shown a picture of Applicant prior to trial.

Based on the foregoing, this Court finds no evidence that Respondent had any indication prior to trial that Kirby would specifically identify Applicant as the robber. Rather, the evidence suggests that Respondent knew only that Kirby had described the robber and his clothing to police. The identification was not evidence in the State's possession prior to trial and, therefore, was not subject to disclosure pursuant to *Brady*. In addition, the Court finds it highly unlikely that an appellate court would have reversed Applicant's conviction on this issue, particularly in light of their finding of overwhelming evidence of Applicant's guilt. Therefore, this allegation must be denied and dismissed with prejudice.

III. *Doyle* Violation

Applicant's final complaint is that Appellate Counsel was ineffective for failing to argue that Respondent violated *Doyle*. However, Appellate Counsel testified that she raised the four strongest issues on appeal, and she was successful in changing well-established law at the time. Accordingly, this Court no deficiency here.

When an individual is taken into custody, "procedural safeguards must be employed to protect the privilege [against self-incrimination] . . . to assure that the exercise of the right will be scrupulously honored." *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966). Therefore, "he must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479. "Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." *Doyle v. Ohio*, 426 U.S. 616, 617 (1976). Therefore, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618.

At trial, Applicant testified that he saw Green driving down the street after Applicant had purchased some crack cocaine and gave Green the "universal sign to stop." He stated that shortly after getting into Green's truck, law enforcement pulled up behind them, so Applicant crouched down in the truck and attempted to eat the crack cocaine. On cross-examination by Respondent, Applicant testified he never asked law enforcement why he was being detained after they stopped the truck or why he was being arrested for armed robbery.

Doyle applies only after *Miranda* warnings have been given and after the arrestee invokes his right to silence. Here, Respondent merely asked Applicant why he didn't ask any questions of

police or assert his innocence when he was initially detained. At that time, *Miranda* warnings were neither given nor necessary, and *Doyle* does not apply. This Court finds it highly unlikely that an appellate court would have reversed Applicant's conviction on this issue, particularly in light of their finding of overwhelming evidence of Applicant's guilt. Therefore, this allegation must be denied and dismissed with prejudice.

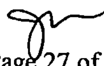
Overwhelming Evidence

In addition to the other findings, this Court agrees with the Supreme Court's determination that overwhelming evidence of Applicant's guilt was presented at trial. In support of this finding the Supreme Court noted the following evidence against Applicant:

> [Applicant] was positively identified by several employees who recalled [Applicant's] distinctive facial features and clothing. Furthermore, one of the employees watched as [Applicant's] accomplice drove him away from the scene in a dented gray truck, which the police stopped [ ] only a short distance away within minutes after the employees reported the robbery. Inside the getaway vehicle, police found [Applicant] crouching in the floorboard area, sitting adjacent to a gun and a bag of money matching the employees' descriptions.

Broadnax, 414 S.C. at 479, 779 S.E.2d at 794.

In summary, not only has Applicant failed to meet his burden of proving any deficiencies by Attorney May, Attorney Cochran or Appellate Counsel, but he has also failed to establish any prejudice resulting from the alleged deficiencies. Because the evidence against Applicant was overwhelming, there is no reasonable probability the result of any of the proceedings would have been different absent the alleged deficiencies.



CONCLUSION

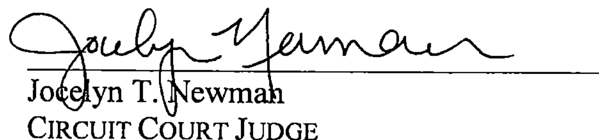
Based on the foregoing, the Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant the requested relief. Therefore, the Application for Post-Conviction Relief is denied in its entirety.

The Court notes that Applicant must file and serve a notice of appeal within thirty (30) days from receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS, THEREFORE, ORDERED that the Application for Post-Conviction Relief is DENIED, and this matter is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Applicant be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED.



Jocelyn T. Newman
CIRCUIT COURT JUDGE

August 26, 2020
Columbia, South Carolina.