

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
HONORABLE WILLIAM A. MCKINNON
2019-CP-42-2915

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COREY BROWN, SCDC# 368883

APPELLANT,

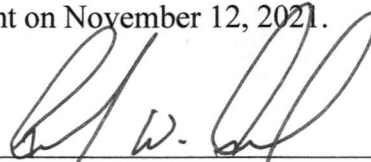
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Corey Brown appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable William A. McKinnon, Circuit Judge on September 15, 2021 an Order issued on October 20, 2021 and filed on October 27, 2021. The Appellant received notice of the judgment on November 12, 2021.



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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Corey Brown, #368883,)
Applicant,)

Case No.: 2019-CP-42-02915

v.)

ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

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This matter comes before this Court by way of Applicant's post-conviction relief application filed August 20, 2019. Respondent made its return on November 19, 2019, requesting an evidentiary hearing be convened. An evidentiary hearing was held on September 15, 2021, at the Spartanburg County Courthouse. Rodney W. Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsels J. Roger Poole and Paul Neely 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 Spartanburg County Clerk of Court. In October 2015, the Spartanburg County Grand Jury indicted Applicant for assault and battery of a high and aggravated nature (2015-GS-42-4752), kidnapping (2015-GS-42-4753), armed robbery (count one) and possession of a weapon during the commission of a violent crime (count two) (2015-GS-42-04754). J. Roger Poole and Paul Neely, Esquires represented Applicant. Solicitor Barry

Barnette, Esquire, prosecuted the case. On July 11-13, 2016, Applicant proceeded to trial before the Honorable R. Keith Kelly, circuit court judge, and a jury. Applicant was found guilty as indicted on all counts. Judge Kelly sentenced Applicant to thirty years' imprisonment for kidnapping, thirty years' imprisonment for armed robbery, ten years' imprisonment for first degree assault and battery, and five years' imprisonment for possession of a weapon, with the weapons possession charge running consecutively to all other sentences and the remaining sentences running concurrently.

Applicant filed a timely notice of appeal on July 25, 2016 that was perfected by Wanda Carter, Esquire, through filing a petition for writ of certiorari raising the following question:

1. The trial judge erred in allowing identification testimony into evidence that emanated from a suggestive pre-trial out-of-court identification based on a media representation where a store worker identified appellant as the perpetrator in the case because of the likely link between police and state action connected to the media coverage, which in turn meant that the identifications were unreliable and inadmissible at trial.

The initial brief of Respondent was filed on August 8, 2017. Briefing concluded on September 20, 2017. The South Carolina Court of Appeals filed an order affirming the decision of the circuit court. *State v. Brown*, 2018-UP-391 (S.C. Ct. App. filed Oct. 24, 2018). A petition for rehearing was filed on November 8, 2018, and denied on December 13, 2018.

A petition for writ of certiorari from the Court of Appeals was filed January 7, 2019. The return was issued on January 8, 2019. The South Carolina Supreme Court denied certiorari on March 7, 2019. The remittitur was issued March 18, 2019.

Summary of Relevant Facts

On August 7, 2015, Mindy Slotin ("Victim") went to Imagination Station, a toy store, to provide assistance to her husband, Mark Slotin, while he took a break. Upon arrival, Victim observed Mark attending to a male customer and a female customer, and

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indicated to her they were in the store for a long time. (Tr. 112). Mark assisted them for a few more minutes. they picked out an item, brought it to the check-out counter, and asked for it to be wrapped. (Tr. 112). The male customer then stated they had more shopping to do and would come back to pick up the gift. (Tr. 112). After they left, Mark left the store and Victim remained behind to tend to the store. (Tr. 166).

About fifteen minutes later, the male and female returned. (Tr. 166). The male approached Victim at the check-out counter, asked if Mark left, and Victim answered affirmatively. (Tr. 166-67). The male indicated he wanted to speak with her about something. He escorted Victim to the back of the store, and proceeded to discuss a specific toy. (Tr. 167). At that point, the male pulled out a gun, struck Victim in the head, and knocked her to the floor. (Tr. 167). He pointed the gun at her face, struck her again, bound her hands with duct tape, stole her rings, and directed her to the cash register at gunpoint. (Tr. 113-14, 167). He asked the female to lock the door and forced Victim to open the register. (Tr. 114, 168). After Victim complied, he directed her to a storage room at gunpoint, bound her arms and ankles with duct tape, and placed a piece of tape over her mouth. (Tr. 114, 168). He informed Victim he was going shopping, that he would kill her if she made a sound, and left her in the storage room. (Tr. 114, 168).

Victim ultimately broke free from the tape and fled out the back of the store. (Tr. 121, 168). She ran to a nearby store for help, and the people there alerted the police of the robbery. (Tr. 121-23, 168-69, 178, 186-87, 224-25). Officers proceeded to Victim's location, and Victim, who still had pieces of duct tape on her body, advised them of what occurred while describing the two robbers.¹ (Tr. 123-24, 187, 189, 224-25, 227, 251, 288). The officers quickly headed

¹ Regarding the descriptions, Victim indicated she described the robbers' clothing and ethnicity, and she stated she indicated the male robber was taller than herself. (Tr. 123-24, 187-89). Based on the information in the police report, Poole questioned Victim as to whether she described the

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over to the store, but the robbers had left with \$100 in cash, an iPad, and Victim's rings. (Tr. 171, 198-99, 227, 251, 288).

Shortly thereafter, forensic investigators went to the store and processed it for evidence. (Tr. 184-85, 227-28, 251). They located and collected a number of fingerprints, including from the front door, the cash register drawer, some toys, and a toy box and promptly submitted those fingerprints to a latent fingerprint examiner for analysis. (Tr. 227-28, 238-40, 242, 245, 251-53, 255-57). The latent fingerprint examiner determined two of the fingerprints collected from the cash register drawer were left by Applicant while the fingerprints collected from the toys and toy box were left by Sandra Pearson, Applicant's co-defendant. (Tr. 269-71, 283-85, 289).

The next day, officers travelled to Applicant's and Pearson's apartment. (Tr. 289-90). Pearson immediately surrendered to them, but Applicant ran up the stairs and barricaded himself inside. (Tr. 200, 205). He remained there for about an hour before surrendering. (Tr. 205). Officers conducted a search of the apartment and found a loaded gun, a box of ammunition, duct tape, various coins, and a wallet containing \$50 in cash. (Tr. 201, 182, 291, 300-01, 306).

A few days later, Victim observed Applicant's mug shot in the news and immediately recognized him as the perpetrator. (Tr. 115-16, 118, 124-26). Victim quickly contacted the police and alerted them of her positive identification of Applicant as the perpetrator. (Tr. 118, 126).

During pre-trial proceedings, Neely asked the judge to prevent Victim from identifying Applicant in the courtroom as her assailant, asserting that Victim's out-of-court identification was tainted and unreliable because Victim observed Applicant's mugshot on the news, which he contended would result in Victim simply identifying the person she saw on the news as the

male robber as "a black male with dark skin" who was about 5'10", weighed 160 pounds, and wearing blue jeans and a dark t-shirt. (Tr. 188). However, Victim stated she did not specifically remember providing all that information. (Tr. 188).

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robber. (Tr. 102-03). Neely contended the out-of-court identification resulted from police action, claiming the media must have obtained the mugshot from the police, and he argued permitting Victim to make an in-court identification under those circumstances would violate Applicant's due process rights. (Tr. 102-03, 106, 108). The prosecutor asserted there was no intentional police involvement with the media displaying Applicant's photograph, and, even if there was, Victim's identification was reliable under the totality of the circumstances. (Tr. 104-06, 108-10).

The judge conducted an *in limine* hearing on the matter, where Victim testified about the incident and her identification of Applicant as the perpetrator. (Tr. 111-27). During her testimony, Victim noted she was "[v]ery close" to the robber during the incident, which occurred around noon, and she observed him for at least ten minutes while inside the store. (Tr. 111, 114-15, 117). Victim testified she stared at the robber's face throughout the incident, stating she could never forget his face, and asserted there was "not a doubt in [her] mind" Applicant was the perpetrator. (Tr. 115-17). Victim noted she was never asked by the police to make an identification of Applicant and only identified him after seeing his mugshot. (Tr. 118, 125-27).

At the conclusion of Victim's testimony, Neely renewed his opposition to the identification's admission. (Tr. 128). However, the judge declined to exclude the identification, concluding there was no governmental involvement in Victim's out-of-court identification and ruled Victim would be permitted to identify Applicant during trial. (Tr. 128-30, 145).

Victim identified Applicant in the courtroom as the robber over defense counsel's objection, and indicated she was "[a]bsolutely without a doubt positive" of her identification. (Tr. 164-89). Additionally, Pearson testified about her role in the armed robbery, acknowledged she had pled guilty to an armed robbery charge, indicated Applicant was the perpetrator, and identified him in the courtroom. (Tr. 194-220). Furthermore, officers involved in the

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investigation testified about the discovery of Applicant's fingerprints on the cash register drawer from the store and the subsequent search of Applicant's nearby home, which led to the recovery of a loaded gun, duct tape, and cash. (Tr. 227-47, 251-53, 255-73, 281-85, 288-306).

Current Action before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Ineffective assistance of trial counsel, in that:
 - a. "Counsel failed to investigate and research Applicant's co-defendant background history, and properly impeached her testimony at trial."
 - b. "Counsel failed to investigate and research victim's Mindy Slotin's identification based off a mugshot on the news, [where] initially she could not provide a description of her assailant."
 - c. "Had Counsel properly investigated and research above issues, then Counsel could of properly cross-examine the co-defendant and victim. their testimony would of lack credibility, the outcome of trial would been different."

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

1. Ineffective assistance of counsel
 - a. Failure to investigate and properly cross-examine co-defendant.
 - b. Failure to investigate victim's identification of Applicant based on the mugshot shown on the news.
 - c. Failure to request and secure a plea offer.

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

Applicant Testimony

Applicant stated he is in prison for assault and battery, armed robbery, assault, and possession of a firearm. Applicant stated the incident took place at a business in Spartanburg. Applicant testified that a woman "supposedly was duct taped" and robbed, but that he did not do it. Applicant stated he was convicted in Spartanburg and represented by Roole and another

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attorney. Applicant stated he filed the PCR application based upon ineffective assistance of counsel and is now seeking a new trial. Applicant stated he understood that if granted relief he would have to start the process over again.

Applicant stated that Poole had a medical issue that impeded his ability to communicate with him about the case. Applicant testified that as soon as Counsel got out of the hospital he had to go to trial immediately. Applicant testified Poole told him he was not prepared on the day of trial because of his illness, but he brought Neely with him, who had done most of the investigation. He stated he spoke with Neely about the investigation, but no work had been done. He testified he had just gotten the paperwork two weeks prior.

Applicant stated that he did not commit the robbery and that, though he was there, he did not participate. He stated that he knew Pearson was at the store. He then backtracked saying he was not there when the robbery occurred, stating that individuals entered the store for a few minutes, and re-entered and robbed the place. He stated he was there for the first incident, but had to go to work, left, and his co-defendant came back with someone else. He told Counsels this and they told him they would investigate it. He did not see Poole again until a year later, and was told that he was not prepared but everything would be fine.

Applicant stated he did not discuss Victim's background with his lawyers. Nobody knew anything about her background or how to impeach her. Applicant claimed Counsels were ineffective for failing to investigate the victim's background. Applicant stated that Victim told different stories on this case and his attorneys did not mention anything about that. Applicant stated that Victim originally identified him and Pearson because of the mugshot shown on the news and that Victim assumed he was involved because they were both there together before the incident occurred. Applicant stated that Victim could not identify other distinguishing features

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about him, such as height, weight, or clothing. Applicant stated that Victim could not identify him based on a physical lineup and that the two people were at the store at different times.

Applicant stated that Pearson was instrumental in the case. Applicant stated he was in a relationship with the woman but did not provide them with any pertinent information they could impeach her with. Applicant testified that she had a record but he did not know anything about her criminal history until he was given the discovery materials. Applicant stated that the information was included in there but was not brought up in court. Applicant stated Pearson lied because she said in a written statement that they walked together into the store and he appeared to have a gun, but in court stated that he walked down the street openly carrying a gun, despite others saying that he did not have one. Applicant stated that Counsels should have investigated that identity and impeached credibility on that basis. Applicant stated that Pearson testified against him and blamed him for the crime. He stated Counsels told him that she took a deal to testify against him in exchange for a ten year sentence.

Applicant stated that he was never given a plea offer, despite asking for one. He testified that he was told by Counsels that nothing was offered. Applicant claims that if he was presented with an offer he would have considered taking it.

On cross-examination, Applicant stated that he met with Poole four or five times before he began experiencing health issues. He stated he met with Neely the day of trial. Applicant stated he received the discovery about two days before trial. He stated he was given a packet and then did not see him again until the day of trial. Applicant testified that they had a trial plan that was abandoned at trial. He stated Counsels did not ask Mindy or Sandra anything at trial. He stated he wrote on paper to ask them to do certain things but they did not do them.

Applicant stated that Victim stated she could identify him, because he was in the store

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earlier and they saw him before. Applicant stated that Victim saw his face on the news. He stated he knows it was raised, but does not recall how the judge ruled. He testified he did not know that the judge ruled the identification was admissible. Applicant testified that the victim could not identify him based on his physical characteristics but knew what the woman was wearing. After being refreshed, Applicant stated he remembered the victim stating at trial what their ethnicities were and what they were wearing.

Applicant stated Counsels were ineffective for failing to question Pearson more and for failing to properly impeach her. Applicant stated that he recalled Pearson being offered a plea deal in exchange for her testimony, though she denied being promised anything from the State.

Applicant conceded that his fingerprints were found under the cash register. Applicant stated that they were under the cash register because he went into the store and took the money, clarifying that though he took the money he did not rob anyone.

Applicant stated he wanted Counsels to raise the fact that he did not have a gun at the time. He stated he did not know if Victim testified that they saw him with a gun. However, after being refreshed, Applicant stated that Victim claimed he had a gun pointed at her face. He then stated he recalled her saying that, but he stated that if that was the case she should have been able to identify him, stating that she could not identify him at all.

On re-direct, Applicant stated he took the money when he was in the store. He also stated that Counsels told him he had a good chance of winning at trial.

Counsel Poole Testimony

Poole stated he was assigned to and represented Applicant while he was working at the Public Defender's office. Poole stated he met with Applicant on several occasions and provided him with a copy of the discovery. Poole stated that the testimony of the witnesses was obvious

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from the beginning. Poole stated he does not remember anyone telling Applicant he had a good case. Poole testified that the State had a good case, but Applicant was facing an uphill battle. Poole stated he requested a plea offer, but none were provided, given the strength of the State's case.

Poole stated he had Pearson's rap sheet, which showed an arrest for assault and battery in 2000 with no conviction and an arrest for prostitution with no disposition. Poole stated that these charges were inadmissible and could not be used for impeachment purposes. Poole stated that Applicant lived with Pearson for at least a year prior to the crime and that they did not discuss the dynamics of the relationship, other than the fact that children lived in the home as well.

Poole stated him and Neely split up the work associated with the case. Poole stated he did have health problems during the course of representation that have now led to his retirement. Poole stated Neely handled the identification issue in a *Biggers* hearing, but that the judge found there was not enough State action to arise to a *Biggers* issue. He testified that Applicant's mugshot was shown on the news and the news routinely uses mugshots not directly obtained from law enforcement.

Poole stated that one of the fingerprint expert witnesses testified at the trial and that it was her first time to become qualified as an expert at trial. Poole stated he objected on this basis, which was overruled by the judge. He testified that a lot of fingerprints were gathered, a couple of which belonged to Applicant. Poole stated he argued in closing that the prints were partials and that even a non-expert could have seen that they were unreliably ascribed to Applicant.

Poole stated that the first time he heard Applicant admit to stealing the money was at the PCR hearing. Poole stated that when they first interviewed him he admitted to committing the crime, but put most of the blame on Pearson, saying she had the guns and gave one to him.

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On cross-examination, Poole stated that he and Applicant met in September, December, April, May, June, and July prior to trial. Poole stated they discussed the case and the discovery. Poole stated that the State had Victim's identification, the fingerprints, and Pearson's testimony, who had secured a dismissal of the kidnapping charge in exchange for her cooperation.

Poole stated he could not remember whether he or Neely cross-examined Victim. Poole stated that Victim was pretty unflappable about who committed the crime, especially after seeing the mugshot on the news. He testified he did not think there was wiggle room on cross-examination because she appeared very confident that Applicant was the perpetrator and that he was unaware of anything in her background that he should have investigated further.

He testified that the cross-examination of Pearson consisted of the plea deal she secured and contradictions between her trial testimony and prior statements. Poole stated that they had a rap sheet and did not think further investigations into her background were needed.

Poole stated that he did not obtain a plea offer because the Solicitor would not give one. He stated that the elected Solicitor prosecuted the case personally, leaving him unable to ask for one further up the chain of command.

Counsel Neely Testimony

Neely stated he began working on this case when he arrived at the Public Defender's Office. Neely stated that he was aware of the facts of the case, that Pearson was cooperating with the State, that Applicant's fingerprints were found in the store, and that Victim identified Applicant. Counsel stated that no one told Applicant he had a good case in light of the facts and that he would never inform a client that he had a good case with the inculpatory evidence he had against him.

Neely stated that he and Poole split up the work associated with the case and he primarily

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handled Victim's identification. Neely stated he researched this issue. He stated he did not look into Victim's background. He testified that he grew up in Spartanburg and was familiar with the store and its owner. Neely stated that he did not have a rap sheet on the victim. Neely agreed that the description she gave law enforcement prior to Applicant's arrest differed some from Applicant's actual appearance. Neely stated that the victim called the police and identified Applicant as the perpetrator after seeing his mugshot on the news. He testified that this was the basis for the *Biggers* hearing and their strategy in Court as it pertained to the identification of Applicant. Neely stated that after seeing Applicant's mugshot in the news Victim was adamant that he was the perpetrator.

Neely stated that they argued at length while in chambers that Victim's in-court identification should be disqualified because her out-of-court identification was inadequate. Neely stated that the defense's position on the identification was that governmental action improperly influenced the identification. He stated that he gathered all the news sources available on the case, but the photographs stated they were "courtesy of Spartanburg PD." He stated that the Court disagreed with the defense in their position that the photograph constituted improperly governmental action. Neely stated he was present during meetings concerning the case held in May, June, and July and that Solicitor Barnette was unrelenting and refused to offer a plea offer.

Neely stated that he cross-examined a fingerprint expert at trial. Neely stated that the day of the evidentiary hearing was the first time he heard of Applicant stealing the money and that their entire theory of the case, namely that Applicant was at work at the time of the robbery and, thus, not present, would have been undercut by this statement.

On cross-examination, Neely stated that Applicant was one of eight fingerprints that popped up on the fingerprint database. Neely stated he did not remember which number hit he

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was, but would not be surprised if he was number one.

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 Spartanburg 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, 696 (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

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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.

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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 Investigate Victim's Background

Applicant alleges ineffective assistance of counsel for failure to investigate the victim's background. *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.* However, 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 1291, 1298 (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).

Applicant claims Counsels were ineffective for failing to investigate Victim's

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background. However, Poole credibly testified that he was unaware of anything in her background that would have caused him to investigate her background. Neely credibly testified that he was familiar with the owners of the toy store, Victim included, because he grew up in Spartanburg. Neely also credibly testified he was not provided with a rap sheet for Victim like they were with Applicant's co-defendant. Accordingly, no deficiency is found on the part of either counsel. Additionally, no prejudice is found because Applicant has failed to show anything would have been uncovered if Counsels further investigated her, what that information consists of, or how it would have impacted trial proceedings. Thus, relief is denied on this ground.

Failure to Impeach Victim's Identification

This Court finds that Counsels adequately challenged Victim's out-of-court identification of Applicant. Specifically, a pre-trial motion was held on this matter, where Neely asked the judge to prevent Victim from identifying Applicant in the courtroom as her assailant, asserting that Victim's out-of-court identification was tainted and unreliable because Victim observed Applicant's mugshot on the news, which he contended would result in Victim simply identifying the person she saw on the news as the robber. (Tr. 102-03). Neely contended the out-of-court identification resulted from police action, claiming the media must have obtained the mugshot from the police, and he argued permitting Victim to make an in-court identification under those circumstances would violate Applicant's due process rights. (Tr. 102-03, 106, 108). The judge conducted an *in limine* hearing on the matter. (Tr. 111-27). Neely renewed his opposition to the identification's admission after testimony was taken from the Victim in the pre-trial motion. (Tr. 128). However, the judge declined to exclude the identification, concluding there was no governmental involvement in Victim's out-of-court identification and ruled Victim would be permitted to identify Applicant during trial. (Tr. 128-30, 145). Victim identified Applicant in the

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courtroom as the robber over Neely's renewed objection, and indicated she was "[a]bsolutely without a doubt positive" of her identification. (Tr. 164-89). While cross-examining Victim, Poole highlighted discrepancies between the description given to the police following the incident and Applicant. (Tr. 187-90).

This was confirmed at the PCR hearing, where Poole stated Neely handled the identification issue in a *Biggers* hearing, but that the judge found there was not enough State action to arise to a *Biggers* issue. He testified that Applicant's mugshot was shown on the news and the news routinely uses mugshots that are not directly obtained from law enforcement. Poole stated that Victim was pretty unflappable about who committed the crime, especially after seeing the mugshot on the news.

Also at the PCR hearing, Neely agreed that the description she gave law enforcement prior to Applicant's arrest differed some from Applicant's actual appearance. Neely stated that Victim called the police and identified Applicant as the perpetrator after seeing his mugshot on the news. He testified that this was the basis for the *Biggers* hearing and their strategy in Court as it pertained to the identification of Applicant. Neely stated that after seeing Applicant's mugshot in the news Victim was adamant that he was the perpetrator. Neely stated that they at length while in chambers that Victim's in-court identification should be disqualified because her out-of-court identification was inadequate. Neely stated that the defense's position on identification was that police or governmental action improperly influenced the identification. He stated that he gathered all the news sources available on the case, but the photographs stated they were "courtesy of Spartanburg PD." He stated that the Court disagreed with the defense in their position that the photograph constituted improperly governmental action.

Based on the above, Counsels acted reasonably in handling the alleged unreliability of

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Victim's out-of-court identification. A pre-trial hearing on this was held and a finding reached by the trial judge that was unfavorable to Applicant. Counsels also objected to the identification during trial and engaged in a vigorous cross-examination of Victim concerning the alleged unreliability of the identification. Thus, Counsels acted reasonably regarding this issue and, accordingly, were not deficient on this ground.

Further, no prejudice is found given the sheer amount of evidence indicating guilt. Applicant's fingerprints were found under the cash register, his co-defendant testified against him, Victim was unflappable in her identification of Applicant, and an executed search warrant revealed cash, ammunition, a gun, and duct tape were located in Applicant's apartment. Further, as soon as the police arrived, Applicant fled and refused to surrender to them for about an hour, indicating guilt. Thus, even if Counsels were deficient, no prejudice is found on this ground. Accordingly, relief is denied concerning this allegation.

Failure to Impeach Co-Defendant

Applicant alleges Counsels were ineffective for failing to investigate Pearson's background and to properly impeach her at trial. However, this Court finds both Counsels credibly testified that they possessed her rap sheet, but that none of the charges on the sheet were admissible as impeachment material. Poole credibly testified he did not think further investigations into her background were needed. Additionally, Poole did engage with her on cross-examination, highlighting that the kidnapping charge was being dismissed against her in exchange for her cooperation with the State and that she is looking for a more favorable outcome in her case by testifying against Applicant and pointed out contradictions between her trial testimony and prior statements. (Tr. 208-19). Accordingly, this Court finds that Counsels acted reasonably under the circumstances and, thus, no deficiency is found.

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"[A] defendant has no constitutional right to plea bargain," *id.* (citing *State v. Easter*, 322 S.C. 333, 471 S.E.2d 745 (Cl. App. 1996), *aff'd as modified*, 327 S.C. 121, 489 S.E.2d 617 (1997)), and "a trial judge is not required to accept a plea. *Id.* (citing *Santobello v. New York*, 404 U.S. 257 (1971)). "A plea agreement is only an 'offer' until the defendant enters a court-approved guilty plea. A defendant accepts the 'offer' by pleading guilty. Thus, until formal acceptance of the plea by the court has occurred, the plea binds no one, not the defendant, the State, or the court." *Id.*, 333 S.C. at 688, 511 S.E.2d at 402 (citing *Harden v. State*, 453 So.2d 550 (Fla. Dist. Ct. App. 1984); *see also State v. Nesbitt*, 411 S.C. 194, 201 n.7, 768 S.E.2d 67, 71 n.7 (2015) (finding that "if the defendant enters into a negotiated plea agreement prior to the court's acceptance of his guilty plea, that agreement is a mere executory promise that, standing alone, has no constitutional significance, as it binds neither the government nor the defendant.")).

This Court finds Counsels were not ineffective on this ground because the State was unwilling to offer a plea deal to Applicant, despite their attempts at securing one. This was seemingly communicated to Applicant, who testified at the PCR hearing that Counsels told him they could not get the State to offer a deal. Poole credibly testified that because the prosecutor prosecuting the case was the elected Solicitor, he did not have wiggle room in attempting to reach out to someone up the chain of command for one after the prosecutor on the case refused to extend an offer. Accordingly, this Court finds that, despite Counsels attempts to secure an offer, none were offered and Applicant is not entitled to relief on this ground because he is not constitutionally entitled to an offer. Accordingly, relief is denied on this ground.

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 relief.

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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), SCRCR 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 PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 20 day of October, 2021.

William A. McKinnon
WILLIAM A. MCKINNON
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina.

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