STATE OF SOUTH CAROLINA COUNTY OF AIKEN	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
Rayquan McCorkle, #378805, Applicant, v. State of South Carolina, Respondent.	Case No.: 2020-CP-02-0085 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant's post-conviction relief application filed January 9, 2020. Respondent made its return on September 1, 2020, requesting an evidentiary hearing be convened. An evidentiary hearing was held on January 31, 2022, before this Court in the WebEx Virtual Courtroom. Applicant was present at the hearing and represented by Vicki Koutsogiannis, Esquire. Assistant Attorney General Michael J. Neubauer of the South Carolina Attorney General's Office represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Plea Counsel Keith B. Johnson and Applicant's mother Sharon Patterson also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Aiken County Clerk of Court regarding the subject convictions, and the pleadings in this case. 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 Aiken County Clerk of Court. During its January 2018 term, the

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Deputy Clerk

Aiken County Grand Jury indicted Applicant for Murder (2018GS-02-0171); two counts of Attempted Murder (2018-GS-02-0173, -0174); Burglary, 1st Degree (2018-GS-02-0175); and Armed Robbery (2018-GS-02-0176). Applicant, who was fifteen years old at the time of the crime, was initially charged as a juvenile, but following a waiver proceeding in family court, was waived to the court of general sessions. Keith B. Johnson, Esquire, (Counsel) represented Applicant. Second Circuit Solicitor James Strom Thurmond, Jr. prosecuted the case.

Following negotiations between Applicant and the State, Applicant entered into a plea agreement with the State, where in he would plead guilty as indicted for a negotiated sentences of thirty five years for Murder, and thirty years for each of the remaining charges, all to run concurrent.

On January 10, 2019, Applicant appeared before the Honorable Clifton Newman, circuit court judge, and entered a guilty plea pursuant to the plea agreement. Judge Newman sentenced Applicant to thirty-five years of imprisonment for murder and thirty years of imprisonment for each of the remaining charges to be served concurrently. Applicant did not appeal his pleas or sentence.

Summary of Relevant Facts

The underlying facts of the crime for which Applicant is incarcerated were articulated by the State during the plea proceedings as follows:

> On November 18, 2016, six young men in two vehicles, having been involved in an earlier drive-by shooting in Aiken, traveled to a part-time residence of Connor Clemmons, an alleged marijuana dealer. Tr. p. 8. Undraize Dixon had been an invited guest in the residence and the men devised a plan to rob Clemmons of money and narcotics. Tr. p. 9. Dixon knocked on the door but two minors told him Clemmons was not home so he returned to the vehicles.
>
> Applicant and two other men rushed into the apartment with handguns and were dressed in all black with bandanas and masks. Tr. p. 9. During the robbery

Applicant shot Shores in the head at least three times and attempted to shoot another resident. The men fled the scene in the same vehicles and Applicant took a Sony PS4 video game system with him. Tr. p. 10.

One of the vehicles, driven by Dixon, was stopped after a high-speed chase and two of the men were arrested. Multiple statements implicated Applicant. He was arrested at school and his cellphone was seized on November 21, 2016. Tr. p. 10-11.

Applicant agreed with the facts presented by the Solicitor during his guilty plea. Tr. p. 13.

Current Action Before this Court

In his PCR application, filed by retained counsel James R. Snell, Jr., Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
    a. Plea Counsel failed to interview witnesses disclosed by the Petitioner.
    b. Plea Counsel did not seek or retain a ballistics expert.
    c. Plea Counsel failed to review complete discovery with Petitioner.

On January 19, 2022, Applicant, through his counsel, filed an amended application for post-conviction relief restating the prior allegations raised in Applicant's original application for post-conviction relief, and raising the following allegation.

1. Ineffective Assistance of Counsel
    a. Plea Counsel failed to retain an expert forensic psychologist or obtain a comprehensive psychological examination prior to Plaintiff's plea.

At his evidentiary hearing, Applicant proceeded with the allegations raised in his original application, along with the additional allegation raised in his amended application.

Findings of Fact and Conclusions of Law

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the

attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When 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 v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, *Hill v. Lockhart* extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. 52; *cf. Padilla*, 559 U.S. at 373 (recognizing the

guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that counsel's deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. *Hill*, 474 U.S. 52.

The analysis of counsel's performance under the first prong of *Strickland* remains unchanged—the applicant must show counsel's representation fell below the objective standard of reasonableness demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 58–59; *accord Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56.

The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 58–59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. This inquiry "focuses on a defendant's decision making" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. *Lee v. United States*, 582 U.S. ___, 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. *Turner v. State*, 335 S.C. 382, 385, 517 S.E.2d

442, 444 (1999).

Surmounting *Strickland*'s high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." *Lee*, 582 U.S. ___, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); *cf. Hill*, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.'"). Reviewing "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. *Lee*, 582 U.S. ___, 137 S. Ct. at 1967. Rather, judges should "look to contemporaneous evidence to substantiate a defendant's expressed preferences. *Id.* In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. *Harres*, 282 S.C. at 134, 318 S.E.2d at 361.

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

1. Failure to Interview Witnesses

Applicant's allegation of ineffective assistance of counsel due to Counsel's failure to interview potential witnesses disclosed by Applicant is without merit. At Applicant's evidentiary hearing, Applicant testified he told Counsel about a Facebook posting where someone else indicated they were involved in the crime. Applicant testified he asked Counsel to look into the information from Facebook. Applicant testified Counsel told him that he hired a private investigator, who never met with any possible witnesses. Applicant testified he believed that Counsel had hired an investigator. Applicant testified Counsel told him that Counsel's private investigator could not find anything about the Facebook post. Applicant testified he told his mother about the Facebook post, and that Applicant believed the Facebook post would have been helpful to Applicant's case. Applicant testified Counsel spoke with him about other co-defendants.

At Applicant's evidentiary hearing, Counsel testified he was retained to represent Applicant in June of 2017. Counsel testified while preparing for Applicant's case he spoke with Applicant's mother regularly. Counsel testified he never told Applicant or his mother that he had a private investigator or expert witnesses at his disposal. Counsel testified he does not know what a private investigator would have done in this case, or how a private investigator would have been helpful to Applicant's defense. Counsel testified the events that led to Applicant's conviction all happened at one location, and the co-defendant's had counsel so he could not speak with them without permission from their attorneys. Counsel testified he spoke with Applicant regarding the Facebook post, however following his review of this post he found there was no validity to this claim. Counsel testified he reached out to speak with Applicant's co-defendants prior to Applicant's plea and was aware that Applicant's co-defendants had given statements implicating Applicant. On cross-examination, Counsel testified he looked into the Facebook post and talked to Applicant's mother to gain more information. Counsel testified he would have tried to bring this

issue up in trial but Applicant plead guilty. Counsel testified he was never able to identify anybody based on the Facebook post. Counsel testified he looked into potential alibi witnesses, and after his investigation he determine none of the witnesses would be helpful.

As an initial matter, this Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*, 466 U.S. 668). "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard*, 372 S.C. at 331–32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted).

However, our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. *See, e.g.*, *id.* at 331, 642 S.E.2d at 597 ("Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation."). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91; *see id.* ("In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").Thus, in applying the

Strickland standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 63 (Ct. App. 2014). To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented, consistent with the rules of evidence. *Glover v. State,* 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." *Buckson v. State,* 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Applicant has failed to establish any evidence to support his assertion that Counsel failed to interview witnesses disclosed by Applicant. Applicant testified he told Counsel about a Facebook post which may exonerate Applicant. Counsel confirmed he was told of this Facebook post, and reached out to Applicant's mother for additional information about the post. Counsel testified he reviewed the post, and was unable to identify anyone related to the post. Counsel testified he would have pursued issues with this post if Applicant went to trial, however Applicant decided to plead guilty instead. Counsel testified he sought witnesses who could help establish an alibi for Applicant, however after talking to these witnesses Counsel determined none of the potential witnesses could establish an alibi for Applicant, and that none of these witnesses had any relation to the Facebook post provided by Applicant. Counsel pursued all possible witnesses presented to him and attempted to locate additional witnesses related to the Facebook post Applicant provided. However, after an investigation, Counsel determine none of these witnesses

were helpful and ceased investigation into these witnesses.

Applicant has failed to present any additional information that could have been discerned through further investigation, additionally, Applicant's allegation that Counsel failed to interview witnesses is disproved by Counsel's testimony. Further, Applicant has failed to present the testimony of any witnesses Counsel could have spoken to in preparation for Applicant's case. Applicant has failed to establish how Counsel's performance was deficient, or how Applicant has prejudiced by Counsel's performance. Therefore, this allegation is denied and dismissed with prejudice.

2. Failure to review discovery

Applicant's allegation Counsel was ineffective for failing to review discovery is without merit. At Applicant's evidentiary hearing, Applicant testified Counsel was hired by his family to represent him on his pending charges, and met with Counsel to discuss his charges shortly after Counsel was hired. Applicant testified during his first meeting with Counsel they did not discuss Applicant's case because Counsel did not have paperwork on Applicant's case. Applicant testified he only met with Counsel two times, and let Counsel guide him through the whole process as Applicant did not understand the legal proceedings. Applicant testified Counsel never showed him discovery, but described it to him. Applicant testified he did not receive any of his discovery until he was in prison, and it consisted of "a lot of papers." On cross-examination Applicant testified Counsel mailed him a copy of his discovery while he was still in the Aiken Detention Center, and after reviewing the discovery he did not "really understand" what the discovery contained. Applicant testified Counsel told him that there was no possible way to win his case at trial, and if convicted Applicant could face a life sentence. Applicant testified he ultimately plead guilty because he did not want to receive a life sentence, and believed that by pleading guilty he would

avoid the possibility of a life sentence. Applicant testified his decision to plead guilty was due to the strong evidence against him, and the possibility of a life sentence if convicted at trial. Applicant testified he believed the main evidence against him was the ballistics evidence and the google searches from his phone on the night of the crime.

At Applicant's evidentiary hearing, Counsel testified he represented Applicant for a year and a half prior to Applicant's guilty plea. Counsel testified three of Applicant's co-defendants made statements implicating Applicant in the robbery and indicated that Applicant was the shooter. Counsel testified in addition to these statements there was physical evidence linking Applicant to the crime, including a shell casing found at the scene that matched a handgun gathered from Applicant's brother's car. Counsel testified law enforcement searched Applicant's phone and the search showed google searches from the night of the robbery where Applicant searched for news articles about the robbery, the price of a PlayStation 4, and whether police could track a PlayStation 4. Counsel testified there was a mountain of physical evidence, along with the statements from Applicant's co-defendants who were willing to testify against Applicant. Counsel testified he provided Applicant with a copy of the discovery, and discussed all evidence with Applicant at the Aiken County Jail. Counsel testified that in addition to discussing discovery with Applicant, he sent a copy to Applicant's mother for her to review. Counsel testified discovery was an ongoing process, and as Counsel received additional items he would mail Applicant and his mother a copy as well as explaining each item in detail. Counsel testified he believed that Applicant understood the evidence the State had against him. On cross-examination, Counsel testified he met with Applicant at least ten times.

Applicant's allegation that Counsel was ineffective for failing to review discovery with Applicant is without merit. Though Applicant testified he did not discuss discovery with Counsel.

Applicant testified he received a copy of discovery while in the Aiken County Detention Center and reviewed the discovery himself. Further, Counsel testified he discussed discovery with Applicant initially, and further discussed discovery with Applicant as he received additional pieces of information. Additionally, Counsel indicated he provided both Applicant and his mother with a copy of the discovery in his case. Counsel testified he believed Applicant understood the evidence the State had against him prior to his guilty plea and that Applicant was provided with a copy of all evidence in this case. Though Applicant asserts he did not review the completed discovery with Counsel, Applicant has failed to establish any evidence to support this allegation. Applicant was provided with a copy of all discovery in his case and had an opportunity to discuss all evidence with Counsel prior to entering his guilty plea. Applicant has failed to show how Counsel's performance was deficient, or how her was prejudiced as a result of Counsel's performance. Therefore, this allegation is denied and dismissed with prejudice.

3. Failure to seek or retain a ballistics expert and failure to retain an expert forensic psychologist or obtain a comprehensive psychological examination prior to Plaintiff's plea

Applicant's allegation Counsel was ineffective for failing to retain the assistance of expert, and for failing to obtain a comprehensive psychological examination prior to Applicant's guilty plea is without merit. At Applicant's evidentiary hearing, Applicant testified he spoke with Counsel and alleges Counsel never discussed a trial strategy. Applicant testified Counsel told him that he hired a private investigator, who never met with any possible witnesses. Applicant testified Counsel told Applicant that he hired a ballistics expert to review the physical evidence in this case and claims that Counsel indicated the outcome "didn't look good." Applicant testified Counsel told him the ballistics expert that was hired by Counsel said the same thing the State's ballistics expert said.

Counsel testified he never told Applicant, or Applicant's mother that he had a private investigator. Counsel testified he suggested hiring a private investigator or ballistics expert in this case, however Applicant was unable to afford the services of these experts. Counsel testified he did not know what a private investigator would have done in this case or how one would have helped. Counsel testified the ballistics evidence in Applicant's case was between two different guns, and the ballistics evidence was inconclusive from an evidentiary standpoint. Counsel testified he felt there was sufficient evidence to convict Applicant absent any DNA or ballistics evidence. Further, Counsel testified he did not think it was necessary to seek expert funding in this case due to the overwhelming amount of evidence linking Applicant to the crime.

Regarding his mental health and the need for a psychological examination, Applicant testified he remembers going to Aurora[1] in Aiken County when he was around ten years old. Applicant testified he does not remember why he went to Aurora, but he was there for two weeks and then had to regularly attend counseling for a period of time. Applicant testified he told Counsel about his counseling, and the time he spent in Aurora, and claims Counsel said that it could not be used as a defense.

Applicant's mother, Sharon Patterson testified when Applicant was eight years old he went to Aurora because he was hearing voices at night and claimed they were telling him to do things. Ms. Patterson testified she never got a diagnosis of Applicant's condition, but he went to a mental health center for counseling twice a week for two years. Ms. Patterson testified Applicant's prior counsel Ola Johnson obtained a copy of Applicant's records from Aurora. Ms. Patterson testified when Counsel was retained she informed Counsel of Applicant's mental health issues and told Counsel to get a copy of Applicant's records from Ola Johnson. Ms. Patterson testified she did not

[1] Aurora Mental Health Center in Aiken, South Carolina.

have any of Applicant's records, except for his discharge records, and would only get appointments times for Applicant's counseling. Ms. Patterson testified Applicant eventually ended counseling but she was unsure why. Ms. Patterson testified she was told that Applicant did not need counseling anymore. On cross-examination, Ms. Patterson testified she never got a diagnosis regarding Applicant's mental health.

Counsel testified he does not recall ever being told about Applicant's mental health treatment. Counsel testified he did not have any reason to doubt Applicant's competency throughout his representation of Applicant. Counsel testified he did not see a viable defense in Applicant's case based on Applicant's mental health. Counsel testified Applicant is a very intelligent young man, and he had a good working relationship with Applicant where they spoke candidly about Applicant's case. Counsel testified he went through every scenario with Applicant to ensure that Applicant understood what was happening in his case. On cross-examination, Counsel testified Applicant's mother informed him that Applicant tried to stab someone with scissors when he was younger. Counsel testified he never received any medical records from Aurora or any other mental health facility. Counsel testified he made a professional judgment that Applicant did not need a competency evaluation. Counsel testified he has previously requested competency evaluations for other clients, but he did not feel one was necessary in Applicant's case. Counsel testified he always had good candid conversations with Applicant, and Applicant appeared to understand what Counsel was telling him.

As an initial matter, this Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 596. "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all

reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. at 46, 661 S.E.2d at 360. "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard*, 372 S.C. at 331–32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted). Essentially, trial "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. *See Ard*, 372 S.C. at 331, 642 S.E.2d at 597 ("Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation."). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91; *see id.* ("In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Thus, in applying the *Strickland* standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 63 (Ct. App. 2014).

"Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (quoting *Harrington*, 562 U.S. at 106–107). "Such decisions are particularly difficult because

certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." *Id.* (quoting *Harrington*, 562 U.S. at 108). Thus, [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). "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.' " *Dunn*, 594 U.S. ___, 141 S. Ct. at 2410 (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen.*" *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24).

Regarding Applicant's allegation that Counsel failed to hire expert witnesses, Applicant has failed to establish that counsel was ineffective for failing to hire expert witnesses. Though Applicant and his mother claim that Counsel told them he had experts at his disposal, Counsel testified he never told Applicant or his mother that he had a private investigator, or that he hired expert witnesses. Counsel testified he discussed expert witnesses with Applicant and his mother, however he knew that Applicant's family could not afford to hire experts in this case. Counsel testified he did not know what a private investigator would do in Applicant's case. Further, though Counsel testified he felt that though a ballistics expert and DNA expert may have assisted in Applicant's case, Counsel testified there was sufficient evidence to convict Applicant absent the DNA and ballistics evidence. Counsel testified he did not think it was necessary to see expert funding in Applicant's case because of the substantial evidence against Applicant. Based on the testimony presented at this hearing, Applicant has failed to present any evidence suggesting that

the assistance of expert witnesses would have changed the outcome in Applicant's case.

Regarding Applicant's allegation that Counsel was ineffective for failing to hire a forensic psychologist or obtain a comprehensive psychological examination prior to Applicant's plea, this Court finds Applicant's allegation is without merit. Though Applicant and his mother testified they informed Counsel of Applicant's prior mental health issues, Counsel testified he does not recall being provided this information. Counsel testified he believed Applicant was an intelligent young man and that Applicant understood what was happening with his case. Counsel testified he made a professional judgment based on his discussions with Applicant, that a competency evaluation was not necessary in this case. Counsel testified he always was able to have good candid conversations with Applicant, and that Applicant understood their conversations.

Applicant has failed to present any evidence to suggest that Counsel's performance was deficient, or that Counsel's performance prejudiced Applicant. Pursant to *Hill v. Lockhart*, Applicant must establish that Counsel's performance affected the outcome of the plea process, and that but for Counsel's deficient performance he would not have plead guilty but instead proceeded to trial. *Hill*, 474 U.S. at 58-59. At his evidentiary hearing Applicant testified he plead guilty on the advice of Counsel, but further testified repeatedly that he plead guilty because the State had strong evidence against him and he did not want to go to jail for the rest of his life. Applicant has failed to meet his burden in showing that Counsel's performance was deficient, and that Counsel's deficient performance prejudiced Applicant. Therefore Applicants allegation is denied and dismissed with prejudice.

Conclusion

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

application. Therefore, this PCR application must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 11 day of April, 2022.

ROBERT J. BONDS
Presiding Judge
Second Judicial Circuit

Walhalla, South Carolina.