THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Edward W. Miller, Circuit Court Judge

Case No.: 2015-CP-07-1903

Rajerick Knight, 353409, Petitioner,

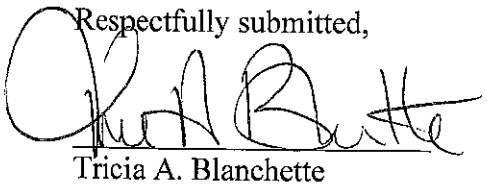
vs.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Rajerick Knight, Petitioner, appeals the Order of Dismissal issued by the Honorable Edward W. Miller on November 16, 2021, which was filed on November 23, 2021. Petitioner, through counsel timely filed a Rule 59, SCRCP, Motion. Thereafter, the Court issued an Order Denying Rule 59 Motion on July 29, 2022, which was filed on August 1, 2022. Petitioner, through counsel, received notice of the entry of the Order on August 9, 2022.

Respectfully submitted,



Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

September 7, 2022

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS 15TH JUDICIAL CIRCUIT
Rajerick Knight, 353409, Applicant, V. State of South Carolina Respondent,	)	CASE NO.: 2015-CP-07-1903 **ORDER DENYING RULE 59 MOTION**

This matter comes before the Court upon the Applicant's Rule 59 motion to reconsider the order filed on November 23, 2021. The Court finds that a hearing will not be necessary to render a decision on this matter. The Court finds that the Plaintiff has not shown a basis to amend or alter the previous Order and therefore, Plaintiff's Motion is denied and the previous Order shall be the final judgment of the Court.

IT IS SO ORDERED!

JUL 29 2022

The Honorable Judge Edward Miller
Presiding Circuit Court Judge

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO.: 2015-CP-07-1903
Rajerick Knight, #353409	)	
	)	ORDER OF DISMISSAL
Applicant,	)	
V.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before me by application filed on August 3, 2015 upon Applicant's request for post-conviction relief ("PCR"). The Applicant, Rajerick Knight, made several arguments in support of his claim of ineffective assistance of trial counsel. Those arguments and the Court's findings on each are discussed below.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Beaufort County Clerk of Court's orders of commitment. The Applicant was indicted by the October 2011 term of the Beaufort County Grand Jury for one (1) count of Murder and one (1) count of Possession of a Weapon During the Commission of a Violent Crime (2011-GS-07-1673, -1674). Arie Bax, Esquire, represented him. On November 26, 2012, the Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable D. Craig Brown sentenced the Applicant to confinement for life for the count of Murder and five (5) years for the count of Possession of a Weapon During the Commission of a Violent Crime. The sentences run consecutively.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v California 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals

affirmed Applicant's conviction and sentence. State v. Knight, Op. No. 2015-UP-170 (filed on April 1, 2015). The Remittitur was issued on April 1, 2015.

CURRENT APPLICATION

On September 25, 2018, Applicant filed an initial application for post-conviction relief, as well as an amended application for post-conviction relief, dated September 3, 2019. Applicant's amended application for post-conviction relief alleges that he is being held in custody unlawfully as he received ineffective assistance of counsel for the following reasons that were pursued during the hearing of this matter:

a. Ineffective assistance of trial counsel
b. Violated the 6th and 14th Amendment

Applicant subsequently filed an amended application on March 12, 2020 alleging the following:

a. Ineffective assistance of trial counsel for failure to obtain all necessary information to properly strike jurors, which resulted in the seating jurors with media exposure and the denial of the motion for change of venue.
b. Ineffective assistance of trial counsel for failure to effectively present Applicant's primary defenses, to include failure to effectively utilize a mental health expert in trial sentencing
c. Ineffective assistance of trial counsel for failure to object to improper burden shifting statements to the jury by the court and the State's waive of first closing argument
d. Ineffective assistance of trial counsel for failure to offer further testimony regarding the 2011incident to the jury
e. Ineffective assistance of trial counsel for opening the door to the Solicitor's cross-examination of Applicant regarding a prior shooting incident
f. Ineffective assistance of trial counsel for failure to request a proper inferred malice instruction and failure to object to the instruction given to the jury

STATEMENT OF FACTS ADDUCED AT TRIAL

The State's Case

At Appellant's trial, the State presented evidence, including eyewitness testimony and surveillance video, that Appellant shot Travis Holmes (Victim) in the middle of a Subway restaurant in Beaufort, South Carolina on July 26, 2011.

Sierra Thomas, who worked at the Subway where Victim was killed, testified Appellant came into the restaurant with a female. (R. p. 89, line 1–p. 90, line 25). Thomas testified that she made Appellant's subs and then rang up his order. (R. p. 90, line 25–p. 92, line 9). Around that time, Victim walked into the Subway. (R. p. 92, lines 10–14). Appellant and the female then left the Subway. (R. p. 91, line 19–p. 92, line 14). According to Thomas, her co-worker, Demetria Green, started making a sub for Victim. (R. p. 92, line 10–p. 93, line 16). Thomas then noticed Appellant re-enter the restaurant and walk up to Victim. (R. p. 93, lines 17–24). Thomas heard a gunshot. (R. p. 93, line 24). According to Thomas, at that point Victim jumped on the counter, and Thomas ran away. (R. p. 93, line 24–p. 94, line 2).

Demetria Green also testified about what she witnessed on the day of the shooting. Green knew Victim—they had gone to elementary school together but had not seen each other since then. (R. p. 95, line 20–p. 96, line 6). Green and Victim caught up as she made him a sandwich. (R. p. 95, line 11–p. 96, line 22). Right as Victim was about to pay, Green saw Appellant come back up to Victim. (R. p. 96, line 21–p. 97, line 8). Green thought Appellant was going to greet Victim, but, instead, she heard a gunshot and saw part of a gun. (R. p. 97, lines 9–14). Green then ran to the back of Subway and hid. (R. p. 97, line 14–p. 99, line 11).

Jeannie Salleme, a customer who was in line at Subway when the shooting occurred also testified. (R. p. 100, line 16–p. 104, line 15). Salleme worked at the Golden Corral in Beaufort, and she recognized Appellant on the day of the shooting because she had seen him "a handful of

times" at Golden Corral. (R. p. 100, line 25–p. 104, line 3). When Salleme was going into Subway, Appellant was leaving. (R. p. 103, lines 6–15). But Salleme saw Appellant again when he returned to the restaurant. (R. p. 104, lines 8–19). According to Salleme, Appellant "just goes up to the other gentleman and then I heard a bang and that was it." (R. p. 104, lines 20–22). Before the shooting, Salleme did not see any argument or words exchanged, nor did she see a fight. (R. p. 104, line 23–p. 105, line 2). Later, Salleme spoke to the police and told them what she had witnessed. (R. p. 106, lines 7–19). She also identified Appellant as the person she had seen in Subway at the time of the shooting. (R. p. 106, line 20–p. 109, line 25).

Shiecarra Smalls, the female who was with Appellant at Subway on July 26, 2011, also testified for the State. (R. p. 111, line 6–p. 114, line 7). According to Smalls, Appellant picked her up from work, and they went to pick up subs from Subway for Appellant and his girlfriend. (R. p. 112, line 15–p. 114, line 15). After Appellant and Smalls got their subs, Victim walked in the door. (R. p. 114, line 24–p. 115, line 8). As Appellant and Smalls were leaving Subway, Smalls spoke to Victim, and he responded, but Smalls did not hear any words exchanged between Appellant and Victim. (R. p. 115, lines 10–20). After Appellant and Smalls left Subway, Smalls got in the car, but Appellant went back in to the restaurant. (R. p. 115, line 25–p. 116, line 16). Smalls testified, "I asked him if he had—if it was something going on and he said that, yeah, he was going back in there." (R. p. 116, lines 13–14). A short time later, Appellant walked out of Subway and got in the car, and Appellant and Smalls left. (R. p. 116, line 16–p. 117, line 1). Before leaving Smalls saw Victim run out of Subway and fall to the ground. (R. p. 117, lines 2–8). In the car Smalls heard Appellant tell someone on the phone that he had shot Victim. (R. p. 117, lines 13–17).

In addition to the eyewitness testimony of Thomas, Green, Salleme, and Smalls, the State also introduced eyewitnesses who saw Victim come out of Subway and drop to the ground. For example, James Powell testified that he saw Victim collapse, and he called 911 and gave information about a car that was seen leaving the scene. (R. p. 130, line 13–p. 135, line 24). Tanya Terry was also standing outside of Subway at the time of the shooting, and she saw a man come out of Subway right before Victim and jump into a car. (R. p. 136, line 17–p. 138, line 15). Terry then relayed to Powell information about the license tag of the car the man got into. (R. p. 138, line 13–p. 139, line 11).

The State also presented a video recording of the shooting from Subway's surveillance cameras. (R. p. 77, line 10–p.83, line 20; State's Ex. 10).

The Defense's Case

Appellant testified that he believed that Victim had been involved in a shooting of his home that took place on May 30, 2011. (R. p. 311, line 24–p. 321, line 19). Appellant was across the street at a neighbor's home at the time of the May 30th shooting, but Appellant's girlfriend, who was pregnant at the time, and his adopted son were at his home when the shooting occurred. (R. p. 313, line 2–p. 315, line 24; R. p. 333, lines 1–9). According to Appellant, the shooting lasted for "two to three minutes" during which there were "too many [shots] to count." (R. p. 315, lines 10–15). Appellant's girlfriend miscarried as a result of the shooting. (R. p. 318, line 4–p. 319, line 5). Appellant testified that he learned that Victim and another person were involved in the May 30th shooting. (R. p. 321, lines 14–19).

Appellant also testified that he knew Victim was a dangerous person and that Victim was known to "tote a gun and is a shooter." (R. p. 321, line 20–p. 322, line 3). Appellant further testified that the shooting scared him and took away his sense of security. (R. p. 322, lines 4–11).

He did not feel safe at home and moved to another residence. (R. p. 322, lines 8–11; R. p. 323, line 25–p. 324, line 10).

Appellant also testified about the shooting on July 26, 2011. According to Appellant, he first noticed Victim after he got his subs and turned to leave. (R. p. 325, lines 8–16). Appellant testified that, as he and Smalls tried to rush out of the store, Victim was staring him down. (R. p. 325, lines 17–21). Smalls said hello to Victim, but, according to Appellant, "he barely acknowledge her. He walk pass me and just was like, [']Man, I'm gone kill you boy.[']" (R. p. 325, line 21–p. 326, line 4). Appellant and Smalls exited the Subway, and, as they were walking to the car, Appellant talked to Smalls about Victim. (R. p. 326, lines 8–18). He testified to the following:

> And I was just explaining to her like did you hear what he said just now. Like, man, he just gone keep trying to kill me. You know, Travy, you know what type of guy he is. And I was just keep telling her that. I told her he just shoot up the house. He just took a son from me.

(R. p. 326, lines 11–16). By the time Appellant and Smalls reached the car, Appellant had decided he "couldn't live like that any more, hiding, running and from Mr. Holmes and just always being a victim to Mr. Holmes." (R. p. 326, lines 20–23). Appellant then went back into Subway, put a gun right up against Victim, and shot him. (R. p. 327, line 18–p. 328, line 17). Appellant then left Subway and got back into his car. (R. p. 328, lines 18–20). He then dropped Smalls off at her home. (R. p. 329, lines 1–6).

After the shooting, Appellant and his girlfriend fled to Jacksonville, Florida, and Appellant cut his shoulder-length dreadlocks so as "not to be noticed." (R. p. 329, line 7–p. 330, line 9). In early August of 2011, two officers from the Beaufort City Police Department picked Appellant up from Florida. (R. p. 140, line 9–p. 142, line 18).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the credibility presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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, the 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, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a " 'reasonably competent attorney.' " 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. See generally Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that

counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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 an 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). The 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 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687; Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result

would have been different. Id. at 696. 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." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Each allegation is addressed fully below:

Failure to obtain necessary information to strike jurors and failing to change venue

Applicant alleges trial counsel was ineffective for failing to acquire all information needed to strike jurors and for failing to have the venue of the trial changed. However, trial counsel enumerated a valid trial strategy for his handling of the jury voir dire and therefore was not ineffective.

Trial counsel testified that he recalled there being a significant amount of media attention on the case. Trial counsel testified that he always viewed this case as having potential for the venue to be changed. Trial counsel testified that there were some articles in the Island Packet concerning the trial and that social media was not as much of a concern back during this time. Trial counsel testified that he spoke with Applicant and other people working with him on the case about the fact change of venue motions are nearly impossible to have granted and that you need specific evidence when it came to the jury. Trial counsel testified that he informed the judge that he would be making the motion and that Judge Brown was not receptive to the motion, he essentially knew in advance that the motion would be denied. Trial counsel proceeded to elaborate on his strategy for seating jurors, he needed to have African-Americans on the jury. Trial counsel testified that the

only African-American jurors available to him were jurors that had some level of media exposure, so he had to weigh that in his strategy. Trial counsel testified that this case had racial overtones and that having a diverse jury was important to his trial strategy. Trial counsel clarified that he does not remember if all of those jurors were African-American, but they all had something he needed included in the jury.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.' What motions to file and 'whether to put on evidence so as to preserve the final word in closing argument' are also strategic and tactical decisions to be made by trial counsel." Abney v. State,

408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations omitted). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

Applicant has failed to meet his burden in proving ineffectiveness on the part of trial counsel or any prejudice resulting, therefore this allegation is denied.

Failure to utilize mental health expert in trial and sentencing

Applicant alleges trial counsel was ineffective for failing to effectively present Applicant's primary defenses, to include failure to effectively utilize a mental health expert in trial and sentencing. Applicant failed to meet his burden of proof and this allegation is denied.

Trial counsel testified that he utilized an expert at trial, Dr. Martin. Trial counsel testified that he wanted to use the expert to help Applicant's defense and that this was not the kind of case where you could just rest after the prosecution's case, especially not with the video evidence in this particular case. Trial counsel testified that the expert testified that Applicant knew what he was doing and that he understood that it was wrong. Trial counsel testified that Applicant was criminally responsible for his actions. Trial counsel testified that the expert never provided him with a diagnosis for any mental disorders. Trial counsel testified that he likely discussed potential testimony with the expert for the purposes of sentencing.

"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) (citing Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64-65 (2011) (deferring to trial counsel's strategic considerations); Jackson v. State, 329 S.C. 345, 350, 495 S.E.2d 768, 770-71

(1998) (same); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (same)). This Court's "analysis of [C]ounsel's strategic decisions must be 'highly deferential' to counsel's judgment, and 'a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.'" Id. at 320-21, 815 S.E.2d at 440 (quoting Strickland, 466 U.S. at 689).

"[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include which jurors to accept or strike, *which witnesses should be called on the defendant's behalf*, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined." Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations and quotations omitted) (emphasis added).

This Court finds credible Counsel's testimony as to his strategy and reasoning in attempting to present the testimony of the expert witnesses. This Court further finds Applicant has failed to show any prejudice resulting from the expert's testimony. Applicant fails to show prejudice in two key ways. First, Applicant has failed to show that the testimony of another expert would have resulted in a different outcome at trial. Applicant had Dr. Maddox testify during the PCR hearing. Dr. Maddox essentially testified to the same key components as Dr. Martin, with the addition of a PTSD diagnosis. Dr. Maddox testified that Applicant was criminally responsible for his actions, that he understood that what he was doing was wrong, and that Applicant had the ability to just walk away from the situation. This testimony is not any more helpful to Applicant than the potential testimony of Dr. Martin. Second, the video evidence in Applicant's case results in a high bar as to what would be sufficiently prejudicial. Therefore, this Court finds that Applicant has failed to meet his burden and this allegation is dismissed.

Ineffective assistance of trial counsel for failure to object to improper burden shifting statements to the jury by the court and the State's waiver of first closing argument

Applicant alleges trial counsel was ineffective for failure to object comments by the Court referring to seeking the truth and finding the true facts. Further, Applicant alleges trial counsel was ineffective for failing to object to the State waiving first closing argument. This Court finds that Applicant failed to prove any prejudice resulting from trial counsel's failure to object to either the Court's comments on truth or the State's waiver of closing argument, therefore, the allegation is dismissed with prejudice.

In *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d. 248 (2000), the South Carolina Supreme Court held that jury instructions on reasonable doubt which also charge the jury to "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant, but nonetheless found there was no reversible error in the charge given there because the "seek the truth" language was given in conjunction with the credibility charge, and not with either the reasonable doubt or circumstantial evidence charge.

Recently, the South Carolina Supreme Court again considered the use of "truth seeking" language by the trial court in *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018).[1] The *Beaty* Court concluded:

> [A] trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven

[1] Applicant's trial took place in 2015, well before this *Beaty* decision.

> the defendant's guilt beyond a reasonable doubt. Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal.

Id. The *Beaty* opinion signified the first time the Court issued a general and blanket admonishment to the bench and bar that such "truth-seeking" language should be avoided at any point during the trial, but nonetheless found a harmless error analysis applied if such charges or commentary was given by the trial court. Trial Counsel testified the judge made "a mention of the truth" during his jury charges. Trial Counsel testified he did not recall a reason for not objecting to the comments. This Court finds Counsel's testimony as to this issue very credible.

In both *Aleksey* and *Beaty*, the South Carolina Supreme Court determined that while the trial court's use of "truth seeking" language was improper, the error was not significant enough to warrant reversal of the convictions. This Court finds the same holds true in Applicant's case. At the time of Applicant's trial in 2012, the trial court's opening charge included truth-seeking remarks that were widely-used by the bench and was similar to the approved charges as prepared by the Supreme Court and given to the bench for reference. Once again, Applicant's trial took place in 2012, well before the blanket admonishment in 2018 from *Beaty*. To find that trial counsel was constitutionally deficient for failing to object to something that was standard practice at the time of Applicant's trial and which the our appellate courts had not expressly advised the bench and bar not to use goes against the principles of *Strickland* and its progeny that counsel's actions be evaluated based on a standard of reasonableness at the time of an applicant's trial. *See Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law."); *see also Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456

(1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law . . . " (citing *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes*, 310 S.C. at 309–10, 426 S.E.2d at 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

This Court finds Applicant's reliance on *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), to argue that our Supreme Court had advised the bench to stop using truth-seeking language in 2012, is not dispositive, as the Court's admonition in *Daniels* focused on the trial court's use of language that the jury's duty was to return a verdict that is "just" or "fair", a fundamentally different scenario than Applicant's case. *See Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) ("Although the issue is not preserved, we instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. Moreover, to a lay person, the "all parties involved" in a criminal case may well extend beyond the defendant and the State, and include the victim.").

Moreover, here, when "truth seeking" comments are viewed in conjunction with the record as a whole, the trial court properly advised the jury of the State's burden of proof and did not impermissibly shift the burden to Applicant. Because the jury instructions as a whole were proper, this Court finds Applicant cannot establish any resulting prejudice. *See Brown v. Stewart*, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Ct. App. 2001) ("In reviewing jury charges for error, we construe the court's charge as a whole in light of the evidence and issues presented at trial. If the instructions

of the trial court, construed as a whole, correctly state the law, there is no reversible error. To entitle an appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial, and the enumeration of hypercritical exceptions will not suffice to overthrow a jury's verdict." (internal citations omitted)).

Additionally, Trial Counsel repeatedly and effectively reminded the jury in his closing argument that the State firmly held the burden of proof and must establish beyond a reasonable doubt that Applicant was guilty. Based on this, in conjunction with the proper jury instructions on the State's duty to prove Applicant's guilt beyond a reasonable doubt, Applicant cannot establish deficiency of counsel or prejudice. Therefore, This Court denies and dismisses this allegation with prejudice.

Further, Applicant argued counsel was ineffective for failing to object to the State waiving first closing argument. Applicant has argued no law at the time of trial that required the State to close first nor has Applicant proved prejudice resulting from counsel not objecting to the State's waiver. Trial counsel also testified that his strategy for not objecting is that he did not want the jury to hear from the State twice if possible, once was enough. Therefore, this allegation is dismissed with prejudice.

Ineffective assistance of trial counsel for failure to offer further testimony regarding the 2011 incident

Applicant alleges trial counsel was ineffective for failing to offer further testimony from additional witnesses in regards to an unrelated shooting incident in 2011. This Court finds that trial counsel was not ineffective for failing to present testimony of which he was not aware and that was wholly irrelevant to any issue at Applicant's trial.

Trial counsel testified that he was not aware of anyone with first-hand knowledge that Travis Holmes committed the shooting that occurred in 2011 and was not related to this incident. Trial counsel testified that if he had someone who was willing to say that they saw Travis Holmes commit that shooting he would have called that person. Deshaunaka Allen, who testified at the PCR hearing, was on the witness list at trial. Allen testified at the PCR hearing that she knew that Travis Holmes committed the shooting and that she would have testified to that. Allen also testified that she never told Applicant that Holmes committed the shooting and he was not directly aware of that fact. Trial counsel testified that Allen's statement, same as her testimony, does not sound familiar and that if he had that information he would have tried to put her up on the stand. Allen also testified that she did meet with trial counsel's office. This Court finds that trial counsel was not ineffective for failing to call a witness who was interviewed at the time of trial, did not provide this information at the time of trial, and whose testimony would not have been dispositive as to any issue at trial. This Court finds that the witness' testimony would not have been helpful to Applicant's claim of voluntary manslaughter, because as the South Carolina Supreme Court found in this case his state of mind did not matter because he did not shoot the victim in a sudden heat of passion. Therefore, this allegation is dismissed with prejudice.

Ineffective assistance of counsel for opening the door in regards to a prior shooting incident

Applicant alleges trial counsel was ineffective for opening the door to the Solicitor's cross-examination of Applicant regarding a prior shooting incident. Applicant alleges trial counsel was ineffective for asking Applicant to clarify a few things about his prior pointing and presenting charge. This Court finds Applicant has failed to meet his burden of proof and trial counsel was effective in his representation as to this allegation.

Trial counsel testified that the reason he asked Applicant to clarify a few things was due to Applicant's own testimony that he had never done something like this before. Trial counsel testified that he anticipated that that testimony would be one that would open the door to the State questioning him on cross-examination as to his prior charge. Trial counsel also testified that he recalled discussing with Applicant what charges would be admissible and so it was anticipated that the pointing and presenting charge would come up. Trial counsel testified that ultimately he was trying to defuse the bomb of his prior charge before the State was able to set it off. This Court finds trial counsel's testimony to be credible and that his strategy was wholly valid. This Court finds that Applicant opened the door on his own and that trial counsel was simply trying to defuse the situation before it was made out worse on cross-examination. Therefore, this Court dismisses this allegation with prejudice.

Ineffective assistance of trial counsel for failure to request a proper inferred malice instruction and failure to object to the instruction given

Applicant alleges trial counsel was ineffective for failing to request a proper inferred malice instruction and for failing to object to the instruction given. Applicant argues that an attorney is always deficient for failing to object to an inferred malice instruction that lacks the general permissive inference instruction. However, an objection to such a charge is only warranted when the instruction's language risks shifting the burden of proof from the State to the defendant. Such was not the case here, and therefore no objection from Petitioner's trial counsel was necessary. Because trial counsel did not need to object, his failure to do so cannot possibly be considered deficient performance under *Strickland*.

The general permissive inference instruction's intent is to prevent the burden shifting effects of inferred malice instructions by clarifying to the jury that it may determine the weight of

such an inference. *Gibson v. State*, 416 S.C. 260, 264, 786 S.E.2d 121, 123 (2016); *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983) (overruled on other grounds). The classic example of the general permissive inference instruction curing the risk of burden shifting is the case where a jury is charged with inferring malice solely from evidence that a defendant used a deadly weapon to commit a homicide. *See State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (finding that the general permissive inference instruction must be given when the jury is instructed to infer malice from the intentional use of a deadly weapon.); *But see also State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) (finding that a deadly weapon malice instruction is improper, even with the general permissive inference instruction). The South Carolina Supreme Court has explicitly found that a "trial judge's instruction on the presumption of malice from the use of a deadly weapon constituted a mandatory presumption rather than a permissive inference" and therefore necessitates the general permissive inference instruction. *Elmore*, 279 S.C. at 421, 308 S.E.2d at 784. Regardless of whether the court instructs the jury on the use of a deadly weapon, an "appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it." *State v. Mattison*, 276 S.C. 235, 238, 277 S.E.2d 598, 600 (1981).

At the time of Applicant's trial, a jury instruction on implied malice derived from the use of a deadly weapon was prohibited when the defense presented evidence that would reduce, mitigate, excuse, or justify the killing. *Belcher*, 385 S.C. at 610, 685 S.E.2d 809. A Maryland Court has referred to this as a "half-truth" because malice includes the absence of justification, excuse, and mitigation. *Glenn v. State*, 68 Md.App. 379, 511 A.2d 1110 (1986). Since Petitioner's trial, such an instruction has been explicitly disallowed by this Court. *Burdette*, 427 S.C. at 504, 832

S.E.2d at 583. It was said to be particularly harmful because it amounts to a direct commentary and emphasis on certain facts of the case by the trial court. *Id.* 427 S.C. at 503, 832 S.E.2d at 582.

Specifically, there is no error despite the lack of a general permissive inference instruction where the "instructions on the law of implied malice made it clear that any presumption or inference of malice was rebuttable and whether malice had been proved was an issue of fact for the jury to determine under all of the evidence." *Mattison*, 276 S.C. at 238, 277 S.E.2d at 600. It is clear that the general permissive inference instruction is not itself a mandatory instruction that must be given every time a jury is instructed on implied malice. Instead, it is necessary to ensure that the presumption of malice, when inferred through evidence other than the defendant's express actions, may nevertheless be rebutted by other evidence presented by the defense. Since a charge was not given stating that malice could be inferred through evidence other than the defendant's express actions, the permissive inference instruction was not necessary. Therefore, this Court finds that Applicant has failed to meet his burden of proof and dismisses this allegation with prejudice.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's 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,

PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this _____ day of NOV 16 2021, 2021.

EDWARD W. MILLER
Presiding Judge
Ninth Judicial Circuit