STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Holmes Simpson-Davis, #338441, Applicant, v. State of South Carolina, Respondent.	Case No.: 2020-CP-42-03130 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant's post-conviction relief application filed on September 14, 2020. Respondent made its return on January 14, 2021, requesting an evidentiary hearing, which was held on June 6, 2022, at the Spartanburg County Courthouse. Elizabeth Franklin-Best, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Lay witnesses Felshunti Clark, Patrice Posey, Thomas Davis, and Brittany Davis testified. Applicant's former attorney Christopher Thompson 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 from the Spartanburg County Clerk of Court. During its March 2016 term, the Spartanburg County Grand Jury indicted Applicant for attempted murder (count one) and possession of a weapon during a violent crime (count two) (2016-GS-42-1734), murder (count one) possession of a firearm during commission of a violent crime (count two) (2016-GS-

42-1735), and attempted murder (count one) and possession of a weapon during a violent crime (count two) (2016-GS-42-1736). Applicant was represented by Christopher P. Thompson, Esquire. Assistant Solicitors J. Edward Hunter and Allison M. Mabbs, Esquires, of the Seventh Circuit Solicitor's Office, prosecuted the case.

On September 5-6, 2017, Applicant appeared before the Honorable J. Derham Cole, circuit court judge, and a jury. On the murder charge, Judge Cole sentenced Applicant to life imprisonment but imposed no sentence for the related weapons possession charge. Applicant was also sentenced to thirty years' imprisonment on each attempted murder charge with five years' imprisonment on each related weapons possession charge. Each of the related weapons charges ran consecutively to its respective attempted murder charge, but the murder and attempted murder charges all ran concurrently with each other, as did the weapons possession charges.

Applicant filed a timely notice of appeal on September 25, 2017. The issue raised on appeal was:

> Did the trial judge err in failing to instruct the jury on voluntary manslaughter, a lesser-included offense of murder, where the undisputed evidence, including the deceased physically and verbally threatening Appellant, indicated Appellant acted in the sudden heat of passion based upon sufficient legal provocation?

Briefing was completed on February 27, 2019. The South Carolina Court of Appeals dismissed Applicant's appeal by written opinion. *State v. Simpson-Davis*, 2020-UP-13[illegible] (Ct. App. filed May 20, 2020). The remittitur was issued on July 8, 2020.

Summary of Relevant Facts

On July 25, 2015, Applicant murdered Robert Hull (hereinafter "the victim" or "deceased victim") at 1066 Howard Street in Spartanburg using a .45 caliber semi-automatic pistol. Applicant then turned and shot at two other individuals as they attempted to flee, both of whom were wounded. The motive for the murder and attempted murders resulted from an earlier

altercation at another location in which Applicant was not involved. (R. 10-106; 107-152; 153-174; 176-307; 309-331; 332-355; 357-458).

Shortly before midnight, July 24, 2015, the deceased victim and four of his friends and relatives were at a liquor house at 1070 Howard Street in Spartanburg, drinking. The men with the victim were James Kilgore ("Kilgore"), Bruce Brewton ("Brewton"), Travious Young ("Red"), and Christopher Brannon ("BooBee"). Neither the victim nor any of his companions were armed. While there, there was an altercation inside the liquor house between a person known as "Junior" and his parents, who owned the house. None of the men with the deceased victim were involved in this altercation. The deceased victim tried to calm the situation down by telling "Junior" to stop disrespecting his mother. Kilgore attempted to calm the situation down by grabbing "Junior" and escorting him outside the liquor house. (R. 107-152; 273-308; 236-38).

Once outside the liquor house, there was an altercation involving Felshunti Clark ("Clark") and "Pee Wee" on the one hand and Kilgore on the other. Clark and Pee Wee were associates of Junior and took offense to Kilgore escorting Junior outside. This altercation was brief and ended when Kilgore pushed both men [Clark and Pee Wee] and told them to "get up off me." Neither Applicant nor the deceased victim were involved. (R. 107-152; 273-308; 82-87; 101-06).

Eyewitnesses who lived in the neighborhood testified that around this time they saw two men, Clark and Pee Wee, walking down Howard Street coming from the direction of the liquor house and headed toward downtown Spartanburg. Clark was speaking with someone on a cell phone. (R. 82-87; 101-02; 39-50; 107-152; 273-308; 29-37; States' Ex. 16, 17, & 18).

Shortly after midnight, and around the same time that Clark and Pee Wee were walking down the street, the victim and his companions, including Kilgore, decided to go home. Brewton

agreed to give them a ride home. Most of the men got in Brewton's car, rode a short distance down Howard Street to the home of the victim's girlfriend's sister, Anitra Geter, and parked in the driveway. The victim had left a change of clothes at Ms. Geter's residence, and he actually walked from the liquor house to Ms. Geter's residence while the other four men rode in Brewton's car. (R. 107-152; 273-308; 80-87; 101-106).

The victim went inside Geter's home to change his shoes and grab his belongings. The victim's girlfriend, Angela Geter, and her sister, Anitra, were sitting on the porch. The other men with the victim stayed in Brewton's car. Brewton got out of the car to smoke a cigarette and was standing in the driveway near the porch talking to Ms. Geter and her sister while the victim got his things. (R. 107-152, 273-308; 80-87; 101-06).

A few minutes after the altercation, Clark called Applicant two times on his cell phone and Applicant eventually called Clark back and the two men spoke for several minutes. Applicant did not live in the surrounding area. Applicant arrived in a white Lexus minutes later with a loaded gun. (R. 29-37; 39-50; 80-87; 101-06; 107-152; 273-308).[1]

The car was parked down the street from Ms. Geter's residence in the direction of downtown Spartanburg. After Applicant arrived, Applicant, Clark, and at least three other men were seen walking back toward the liquor house. At least two of the men were armed with loaded pistols. (R. 39-50; 80-87; 101-06; 107-152; 273-308).[2]

[1] After Clark's arrest for his role in these crimes, police discovered Clark had attempted to delete only three phone calls from his cell phone. The three calls Clark attempted to delete were the two he made to Applicant and the one call he received from Applicant shortly after the altercation at the liquor house and shortly before Applicant arrived on scene armed. (R. 29-37, 207-10).

[2] An eyewitness who was visiting a home nearby saw five men walking up Howard Street toward the liquor house and Ms. Geter's home. Another witness told police there were more than five men total in this gang of men, perhaps seven or eight. (R. 107-152; 273-308; 80-87, 101-06, 39-50; Defendant's Ex. 1). It is undisputed there were at least five men.

Moments later, Clark, Applicant, and at least the three unknown men came walking up Howard Street from the direction of Spartanburg and walked up behind Brewton's car. Two of the men in back of Brewton's car were visibly carrying pistols. At least one of the men "Boobee," fled from the car when he saw the gang of men and went in or behind Geter's house. At this point, "Red" also got out of Brewton's car and crept behind Geter's house. Applicant was one of the men visibly armed. Clark, who was not displaying a firearm, "called Kilgore out" and Kilgore got out of Brewton's car unarmed. Clark immediately started talking to Kilgore about the altercation. The deceased victim was still inside his girlfriend's sister's house changing his shoes and grabbing his things. (R. 107-152; 273-308; 80-87; 101-06; 39-50).

Clark told Kilgore he wanted his "one." Kilgore thought Clark was challenging him to a fist fight and agreed. Kilgore believed he and Clark were going to fist fight until Applicant, who was still openly armed with a gun and standing next to Clark, said to Kilgore, "Nah, it ain't going to happen like that, get back on. . . . That's my partner." Kilgore backed away trying to reach Brewton's car after Applicant made this statement. Anitra Geter told the gang of armed men at the end of her driveway to leave and she was calling the police. She got up off her porch and went in her home and called 911.[3] Brewton, also unarmed, walked up to the gang of men and attempted to break up the situation by stating several things: "look man that's my cousin"; "Whatever ya'll got going on, y'all handle it another day;" and "I'm taking these boys home." Brewton believed he had calmed the situation when Clark said, "alright Little Bruce." (R. 80-87; 101-152; 273-308).

At approximately the same time, the deceased victim walked out on the porch and saw the gang of men, two of whom were openly displaying handguns, surrounding his relatives. The

[3] By the time Ms. Geter got 911 on the phone, the victim had been shot and killed. (State's Ex. 52).

victim yelled out a question: "Are you going to fight or shoot?" The victim stated out loud he was not afraid of the men and their guns and approached. The victim, who was unarmed, came face to face with Clark and Applicant and was cursing. Kilgore testified the victim was not afraid of people with guns if they are messing with his family. Brewton testified the victim would take up another family member's dispute, even if they were going to lose. The victim said to the men that he was not afraid of the men and their guns and that "they had guns too." Brewton testified that Applicant and the victim bumped up against each other several times.[4] Brewton testified that the deceased victim stated that he was going to go get his gun. Applicant, who still had his gun at his side, then raised his .45 caliber semi-automatic pistol and shot the victim in the face, killing him. Kilgore testified that the victim was face to face with Clark and said, "F y'all's guns." Kilgore stated that Applicant took a step to the side, raised his gun, and shot the victim in the face, killing him instantly. (R. 107-152; 273-308; 80-87; 101-06; 309-27; 39-50).

Applicant then turned and fired on the victim's companions who had turned and were fleeing beside Brewton's parked car in the driveway. Applicant fired at least six shots in all. Another armed man with Applicant and Clark fired his 9mm pistol at least sixteen times at the victim's companions or at the Geter' home after Applicant killed the victim. Kilgore and Brewton were both struck in the leg or foot as they fled. (R. 107-152; 273-308; 80-87; 101-06; 39-50, State's Ex. 1, 41-46 & 57).[5]

[4] According to the other eyewitness, Kilgore, the victim and Clark were facing each other but there was no physical contact between the two and there was no physical contact between Applicant and the victim. (R. 107-152; 80-87).

[5] After the crimes, police found six fired .45 caliber shell casings in Howard Street near the crime scene, all of which were all fired from the same gun. A fired .45 bullet was recovered from an oak tree in the front yard of 1066 Howard Street. This bullet was fired from the direction of the end of the driveway or Howard Street toward Ms. Geter's home. A fired .45 caliber bullet jacket and bullet core were recovered from Geter's driveway and yard. The bullets from the victim's spine, the tree, and the driveway/yard were all fired from the same gun. Geter's home was struck by at

The perpetrators fled on foot back toward downtown Spartanburg and, before leaving the area, stopped and fired more shots at the surviving victims who were hiding. This was witnessed by the surviving victims and the eyewitness. The victim's friend, "Red," came from the back side of Ms. Geter's house where he had been hiding and drove the two wounded victims to the hospital. (R. 107-152; 273-308; 80-87; 101-06; 39-50, State's Ex. 1 & 12).[6]

When the perpetrators reached the Lexus, a concerned citizen traveling directly behind them obtained the license plate number and called police and relayed the information. Some of the perpetrators then fled the area in the white Lexus that was identified by the concerned citizen. Others fled on foot through a wooded area. (R. 177-90; 164-74; 190-93; 39-50).

The license plate on the Lexus eventually came back to Applicant's girlfriend. Police later interviewed Applicant's girlfriend, who informed police she drove Applicant to a location near the crime scene shortly before the incident. She also informed police that before taking Applicant to the location, Applicant received a phone call and asked her to take him to the north side of Spartanburg. According to Applicant's girlfriend, after the crimes, Applicant later got in the car after she left the liquor house and she drove away. The State introduced Applicant's girlfriend's written statement at trial as substantive evidence and as a prior inconsistent statement. (R. 197-201; 246-64; 265-73).[7]

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least one bullet next to the front porch. (State's Ex. 8). A fired bullet jacket was recovered from her front porch which could have come from a .38, 357, .380 or 9mm. A fired bullet was found in Geter's yard in front of the front porch consistent with a .40 mm or 10mm auto. Sixteen fired 9mm shell casings were recovered in Howard Street near the end of Geter's driveway and back toward downtown Spartanburg. (R. 2-3, 89-101; State's Ex. 57).

[6] Four more fired 9mm shell casings were found in the middle of Howard Street closer to downtown Spartanburg. These four casings are not shown on the crime scene diagram [State's Ex. 57]. They are shown in a photograph. Twenty fired 9mm shell casings were recovered at the crime scene or further down Howard Street. (R. 2-3, 89-101; State's Ex. 1, 12, & 57).

[7] Applicant's girlfriend initially told police she had gone to the liquor house alone. After being confronted with phone records showing Clark called Applicant to the scene, and an eyewitness

Before trial, Applicant made four jail calls to his girlfriend, in which he instructed her to "take the 5th Amendment" if called to testify. Applicant told her that if she did not place him at the scene only Brewton and Kilgore could. Applicant told her to testify that her second statement to police in which she admitted dropping him off near the crime scene was a false statement induced by a threat of imprisonment. (R. 10-15; State's Ex. 51 [Jail Phone Calls]; 209-31).

Applicant used alibi as a trial defense, though he had not disclosed his alibi defense to the State as required by Rule 5 of the South Carolina Rules of Criminal Procedure. Judge Cole found the defense was alibi and granted a short recess in which defense counsel was required to inform the Solicitor of what his witnesses would testify to. (R. 332-37). Applicant called family members, including his father and his children's mother, to testify he was at home around the time of or at the time of the incident. His sister testified she had Applicant's phone so Clark could not have called Applicant to come to Howard Street with a gun. Applicant called a SLED agent to testify the deceased victim tested positive for gun primer residue on his hands; however, the agent also testified this was consistent with the victim being shot at relatively close range as testified to by the eyewitnesses. The SLED Agent also testified neither Brewton nor Kilgore tested positive for gun primer residue. Applicant chose not to testify. (R. 337-55). Applicant's girlfriend denied Applicant had the Lexus or that she took him to Howard Street. She said police coerced her into giving her fallacious, second statement that she drove Applicant to near the crime scene. (R. 197-201; 246-73).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully

had seen several men getting in her car after the murder, she admitted she dropped Applicant off near the liquor house and then picked him up after the shootings. (R. 197-201; 246-73).

because of ineffective assistance of counsel in that:

1. Ineffective assistance of counsel for:
    a. "failing to request to charge the law of alibi to the jury."
    b. "failing to mo[ve] for directed verdict on the insufficien[cy] of evidence and suspicion of guilt."
    c. "failing to object to the failure to give self-defense instructions before the jury retires."

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

1. Ineffective assistance of counsel
    a. For failure to call Felshunti Clark to testify at trial.
    b. For failure to request an alibi jury instruction.
    c. Failure to follow proper procedure in presenting an alibi defense.

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

Clark Testimony

Clark testified that the factual basis for the incident was that there was an altercation at the liquor house in which no one was injured. He testified he saw who initially fired the gun. He stated he talked to Applicant's sister that night, but never saw Applicant there. He testified that he was outside the courtroom on the day of Applicant's trial and stated he did not testify because Counsel told him he did not have to.

On cross-examination, Clark testified that he was by himself the night of the incident. He testified that he was not present at the trial but was sitting outside the courtroom. Clark testified that he was charged based upon the incident as well. He testified that he intended to go to trial on the charges but pled the day before trial.

Posey Testimony

Posey stated that on the day in question, she picked up the children, got some food, and took a nap. Posey stated that Applicant was supposed to go help his aunt move. She stated that

Applicant laid down in bed with his son that night and she thought he stayed there the rest of the night. On cross-examination, she stated she went to bed at midnight and that the shooting took place around 1:30 in the morning.

Thomas Davis Testimony

Davis testified that he was moving all day and that the last time he saw Applicant it was 1:30 in the morning. On cross-examination, Davis stated that at trial he stated he saw Applicant between 12:30 and 1:00 in the morning, but that his story changed to 1:30 in the morning at the PCR hearing. On re-direct, Davis stated that the incident occurred seven years ago and that his memory may have shifted over time.

Brittany Davis Testimony

Davis testified that her phone went dead, and she borrowed Applicant's phone instead. She stated it was late at night. She stated she picked up the phone around 12:30-1:00 in the morning and had it until about 2:00-2:30 in the morning. Davis stated that she saw Applicant when she returned the phone. On cross-examination, she testified that her answers at the PCR hearing were consistent with what she testified to at trial.

Counsel Testimony

Counsel testified that he met with Applicant about six or seven times. He stated he was not confident that an alibi was a valid defense because the timelines did not line up with the incident timeline to establish a full defense. He testified that Woodruff was the most damaging witness. He stated that the two surviving victims identified Applicant at trial. He testified that there was a built-in conflict with Clark because he was a co-defendant that was represented by counsel and was preparing to go to trial until the day before Applicant's trial. He testified that there were a lot of people at the liquor house that night. He stated that one person at the house

provided a tag number to the police and testified at trial. Counsel testified that he thought the stronger defense at trial was one of self-defense.

On cross-examination, Counsel testified that he was retained on this case and that this was his fifth murder trial. Counsel testified that Applicant gave him names of potential witnesses and that he interviewed some of the witnesses. He stated that the witnesses he called were intended to present an alibi defense "to a point." He testified that he did not recall what the lighting conditions were at the incident scene. He stated that there was evidence for an alibi charge. He stated that he thought Woodruff was a damaging witness. He stated that the judge let him put up alibi witnesses. He stated he did not recall if he stated that these witnesses were presented as character witnesses during closing argument.

On re-direct, Counsel testified that the trial strategy was self-defense. He thought that the self-defense defense was stronger than the alibi defense. He stated that requesting an alibi charge could have undermined his self-defense defense. He testified that the defense witnesses testified that Applicant was home until at least 12:30AM.

On re-cross, Counsel testified that he talked to Clark's attorney about Clark potentially testifying. He stated that he did not think Clark's testimony was necessary at Applicant's trial. He testified that he did not recall speaking to Clark directly.

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, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."

Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland,* 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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

Failure to Call Clark

Applicant claims Counsel was ineffective for failure to call witness Felshunti Clark. At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard. v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). One component of the duty to reasonably investigate the case includes a "duty [] to

investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). To show counsel was ineffective by failing to call a witness, the witness 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*, 315S.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).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State,* 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State,* 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover,* 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to Applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State,* 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

This Court finds Counsel was not deficient on this ground. Counsel testified there was a built-in conflict with Clark because he was a co-defendant that was represented by counsel and was preparing to go to trial until the day before Applicant's trial. Nevertheless, Counsel testified that that he talked to Clark's attorney about Clark potentially testifying. Additionally, Counsel testified that he thought Applicant's strongest defense was not an alibi defense, but rather that Applicant acted in self-defense. He testified that he did not think these defenses were consistent with one another and that presenting a stronger alibi defense could have undermined the self-defense defense. Counsel also stated that he did not think Clark's testimony was necessary at Applicant's trial. Counsel is not deficient for failing to call a witness with a built-in conflict to testify to a defense that undermines Counsel's chosen defense at trial. This Court finds Counsel acted reasonably in electing not to call this witness and declines to find Counsel deficient as a result.

Concerning prejudice, Clark's only testimony was that he did not see Applicant the night of the incident. This is not an alibi defense and does not otherwise exculpate Applicant because of Clark's inability to positively identify who the shooter was. Even if Counsel was able to call

Clark to testify, this Court finds that this testimony would not have made a difference at trial. Accordingly, relief is denied on this ground.

Failure to Request Alibi Jury Instruction

Applicant claims Counsel was ineffective for failing to request an alibi jury instruction. Concerning deficiency, Counsel must articulate a valid reason for employing a certain strategy, which is measured under an objective standard of reasonableness. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1992). "In evaluating whether a PCR applicant had suffered prejudice as a result of a jury charge, the jury charge must be viewed 'in its entirety and not in isolation." *Gibbs v. State*, 403 S.C. 484, 495, 744 S.E.2d 170, 176 (2013) (quoting *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009)).

Counsel was not deficient on this ground. Specifically, Counsel testified that his chosen defense at trial was a self-defense defense and that an alibi defense would have undermined that defense because they are inconsistent with one another. Counsel acted reasonably in not requesting a request that would undermine his client's case.

This Court finds Applicant has failed to establish prejudice as well. Even if the instruction has been given, this Court finds that Applicant almost certainly would not have been acquitted because the evidence was weak and almost entirely related to times outside of the time frame during which the shooting itself took place. Thus, this Court declines to find prejudice on this ground.

Failure to Follow Proper Procedure in Presenting Alibi Witnesses

Applicant claims Counsel was ineffective for failure to follow proper procedure in presenting an alibi defense. This claim is without merit. Counsel was given an opportunity to apprise the prosecution of the potential alibi testimony during a recess. Counsel's failure to

apprise the prosecution earlier, as required by the rule, did not impact his ability to call any of the witnesses he wanted to call at trial or to elicit any testimony he planned to present. In short, it had no impact on Counsel's performance or on what was presented at trial. Thus, Counsel's failure to apprise the prosecution earlier had no impact on the outcome of the trial. Thus, relief is denied.

Failure to Present an Alibi Defense

Applicant's claim of ineffective assistance of counsel for failure to present an alibi defense is without merit. Counsel testified he thought a self-defense defense had a higher chance of success at trial than an alibi defense. The alibi defense was weak, as noted above. Further, this Court finds that these witnesses were primarily presented to show that Applicant did not have a long-premediated plan to shoot but, instead, that the decision was instant. That supported the self-defense argument. Counsel acted reasonably in not pursuing an alibi defense in greater detail when a competing defense was preferable and Counsel, in his professional judgement, thought the other theory had a higher chance of success at trial. Thus, Counsel was not deficient in this regard.

Further, this Court finds no prejudice. All PCR hearing witnesses, except for Clark, were presented at trial and their testimonies were duplicative in nature, let alone could have successfully been presented at trial. Accordingly, no prejudice is found and 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 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 27 day of September, 2022.

WILLIAM A. MCKINNON
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina.

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CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX