THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY

Court of Common Pleas

HONORABLE DANIEL D. HALL

2022-CP-11-0158



FRANKLIN DOVER, SCDC# 380802

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**NOTICE OF APPEAL**

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Franklin Dover appeals the denial of his Post-Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Daniel D. Hall, Circuit Judge on August 8, 2022 an Order issued on March 13, 2023 and filed on March 15, 2023. The Appellant received notice of the judgment on March 19, 2023.

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| STATE OF SOUTH CAROLINA<br>COUNTY OF CHEROKEE | IN THE COURT OF COMMON PLEAS<br>FOR THE SEVENTH JUDICIAL CIRCUIT |
| Franklin Dover, #380802,<br>Applicant,<br><br>v.<br><br>State of South Carolina,<br>Respondent. | Case No.: 2022-CP-11-0158<br><br>**ORDER OF DISMISSAL** |



This matter comes before this Court by way of Applicant's post-conviction relief application filed March 3, 2022. Respondent made its return on June 23, 2022, requesting an evidentiary hearing be convened. An evidentiary hearing was held on August 8, 2022, at the Spartanburg County Courthouse. Rodney Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Michael Morin 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 Cherokee County Clerk of Court. During its September 2014 term, the Cherokee County Grand Jury indicted Applicant for murder (2014-GS-11-00875). Applicant was represented by Michael Morin, Esquire. Kimberly Leskanic and G. Matthew Kendall, Esquires, of the Seventh Circuit Solicitor's Office prosecuted the case. On July 15, 2019, Applicant proceeded to trial before the Honorable R. Keith Kelly, circuit court judge, and

a jury, where he was found guilty as indicted. Judge Kelly sentenced Applicant to life imprisonment.

Applicant filed a timely notice of appeal on July 26, 2019, that was perfected by Robert Dudek, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Dover*, 2022-UP-060 (S.C. Ct. App. filed Feb. 9, 2022). The remittitur was issued on February 25, 2022.

**Summary of Relevant Facts**

Timothy Blair ("Victim"), known by the nickname "Slick," was murdered on June 22, 2014, in the Connecticut Village Apartments in Gaffney. The two main perpetrators were Rajshun Foster and Dover, neither of whom lived in Connecticut Village Apartments Complex. The testimony at trial proved that Foster and Dover had been looking for Victim for several days prior to Victim's death because they believed Victim had stolen something, likely either drugs or money, that belonged to them. Several witnesses testified Foster and Dover were actively looking for Victim in the days leading up to Victim's murder and had threatened Victim. Foster and Dover had told the witnesses to tell Victim they were looking for him. (ROA. 93-113; 116-24; 128-33; 308-13).

On June 22, 2014, Foster and Dover both drove to the complex in separate vehicles and confronted Victim. Eyewitnesses testified Foster was the instigator of the confrontation and that Victim refused to fight Foster and kept backing away from him. Then two different eyewitnesses heard Dover state out loud to Victim that: "he would get him [Victim] one way or the other." Victim walked away from the confrontation with the two men with his head down. One eyewitness saw Dover armed with a rifle, standing in the doorway of his vehicle, when he made

the verbal threat that he would get Victim one way or the other. (ROA. 177-93; 146-66; 198-207; 207-18; 263-67; 277-92 (Page 293 – Supp. ROA pg. 2); 308-13).

Foster and Dover both left the complex in their respective vehicles and drove to a nearby mobile home park where Dover lived with his girlfriend. The two men talked to Studyvance (aka "T") in front of one of the homes. Terrance Bonner (aka "Red") walked up and saw the three men conversing. Bonner asked if anyone knew where they could get some marijuana, and Foster said yes, to come with them to the complex. Foster, Bonner, Studyvance, and Dover got in Foster's girlfriend's car headed for the complex. Before getting in the car, Dover got his rifle and at least one surgical-type glove out of his own car and got in the back of Foster's girlfriend's car where Bonner was seated in the back seat. Studyvance was also armed with a pistol, seated in the front passenger seat, as the four men traveled to the Apartments with Foster driving. (ROA. pp. 308-400; 93-103; 58-74; 146-66; 277-92 (Page 293 – Supp. ROA pg. 2); 308-13; 314-63).

The four men arrived shortly before 5:00 p.m., on June 22nd, in broad daylight. First, the men drove into the complex briefly and then turned around and left the parking lot. Foster drove up a nearby paved road and dropped Dover and Studyvance off at a wooded path that led down to the back of the complex and directly to the back door of Victim's girlfriend's apartment. When he got out of the car, Dover was carrying his loaded rifle and had with him a mask and surgical gloves. Studyvance was still armed with his pistol. Dover then snuck on foot to a location near the Victim's girlfriend's apartment. Studyvance followed Dover. Once at the back of the complex near Victim's girlfriend's apartment, Dover laid in wait for Victim. (R. 93-125; 58-74; 128-42; (page 143 – Supp. ROA page 1); 144-45; 146-66; 177-93; 207-18; 218-44; 245-63; 263-67; 277-92 (Page 293 – Supp. ROA page 2); 314-63; 363-83).

While Dover waited, Foster and Bonner drove back into the complex immediately after

dropping off Dover and Studyvance. Once they drove back into the complex, Foster parked the car near a dumpster. Foster got out of the car and confronted Victim again, who was walking through the complex on foot. Several witnesses testified to seeing Foster and Victim have another argument there, Foster being the instigator, Victim walked away. Foster got back in his girlfriend's car and he and Bonner sat in the front seat where they could see Victim. They did not leave. Victim then began walking to his girlfriend's apartment. (R. 58-74; 128-42; (Page 143 – Supp. ROA page 1); 144-66; 177-93; 198-207; 207-18; 219-44; 263-67; 277-92; (Page 293 – Supp. ROA page 2); 308-13; 314-63; 385-400).

While walking, Victim stopped at another female friend's apartment and told her he was afraid for his life. She told Victim to go to his girlfriend's apartment, get his clothes and personal things, return to her apartment, and she would help him get safely out of the complex. Victim left her apartment to get his things. (ROA. 128-42 (Page 143 – Supp. ROA page 1); 144-45; 207-18; 219-44; 245-63; 263-67; 277-93; 314-63).

Phone records introduced at trial proved between the time Foster and Bonner pulled into the apartment complex parking lot and parked next to the dumpster and when Victim was killed, there were three phone calls between Foster and Dover on their cell phones. (ROA. pp. 58-74; 146-166; 219-244; 245-263; 263-267; 277-292 (Page 293 – Supp. ROA page 2); 314-363; 385-400).

While walking to his girlfriend's apartment, Victim rounded a corner. When he did, Dover shot Victim once through the lungs with the rifle killing him while unarmed. Dover was wearing a mask and gloves when he shot victim. An eyewitness saw Dover, wearing a mask and surgical type gloves carrying a rifle just moments before the fatal shot was fired, lurking around the side of one of the apartment buildings. Police later found a fired 7.62 shell casing near

victim's body at the crime scene. After killing the victim, Dover and Studyvance then fled back up the path through the woods where they had been dropped off earlier by Foster. An eyewitness saw two men flee from the area of the shooting up the wooded path immediately after the fatal shot was fired. (ROA. 93-125; 128-42; (Page 143 – Supp. ROA page 1); 1446-66; 177-93; 198-267; 270-292; (Page 293 – Supp. ROA page 2); 308-83).

According to co-defendant Bonner, after Victim was shot, Foster received a telephone call from Dover. Foster and Bonner then left the complex in Foster's girlfriend's car with Foster still driving. Foster drove back to the same location he had dropped Dover and Studyvance out at earlier and picked up Dover and Studyvance, who hurriedly jumped in the back door of the car. As soon as he got in the car, Dover stated to Foster, "get me out of here fast, get me out of here fast." Foster asked Dover where he shot Victim, and Dover stated: "in the chest area." Foster drove the men to the Dover's girlfriend's residence. (R. 58-74; 93-125; 128-142; (Page 143 – Supp. ROA page 1); 144-45; 219-63; 270-93; 308-83; 385-400).

Dover's former girlfriend testified Dover then changed clothes in her house and put the clothes he removed in a shoe box. Dover instructed her to call a friend of his to come and pick up the box. The friend complied. The former girlfriend and Dover drove to Westgate Mall and went inside so Dover could set up an alibi for himself. (ROA. 363-383).

The State proved that Dover's cell phone pinged around the complex at the time of the murder, in his girlfriend's mobile home before the four men left for the complex to commit the crime, and along the path away from the crime scene and back to his girlfriend's home shortly after the crime. (ROA. 58-74; 363-383; 385-400). Cell tower information also showed Dover's phone pinged along I-85 after leaving his girlfriend's mobile home and arriving at Westgate Mall shortly before 6:00 p.m. (ROA. 58-74; 363-383; 385-400).

The State relied on accomplice liability [i.e., "the hand of one is the hand of all"] to prove Foster's guilt because he drove Dover to the scene, knew what Dover was going to do, was complicit and aided and abetted in the murder, and then picked up Dover after the murder. (ROA. 58-73; 93-142 (Page 143 – Supp. ROA page. 1); 144-166; 176-94; 197-267; 269-92; 308-400; 410-28; 451-69).

**Current Action Before this Court**

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

1. Ineffective assistance of trial counsel:
    a. For not requesting the prior trial transcript to hold the state witness to consistency of their prior trial testimony.
    b. For failure to object to allowing Applicant to be tried with his alleged co-defendant, Rajshun Foster, when a severed trial was required.
    c. For failure to object to the hand of one hand of all theory of accomplice liability because no evidence supported the charge.
    d. Failure to argue Applicant's motion properly and conclusively for directed verdict.
    e. Failure to recognize the State scheme, his co-defendant's counsel scheme to piggyback on Rajshun Foster inference of guilt upon Applicant as third-party guilt, when the state never proved common scheme or plan that Applicant had intent to commit a crime.
    f. For not making a pretrial motion challenging the sufficiency of the indictment.
    g. For failing to object to the testimony of Rajshun Foster purchasing marijuana; "bad act" that prejudiced Applicant.
2. Ineffective assistance of appellate counsel:
    a. For failure to properly address trial counsel's motion for directed verdict when the evidence was insufficient to find Applicant guilty of murder.
    b. For failure to address a 6th amendment violation to the right to confront witnesses, when trial counsel objected to the prejudicial effect of Jasmine Hudson testimony elicited by co-counsel's cross-examination, violated the Confrontation Clause of 6th and 14th Amendment.

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

1. Ineffective Assistance of Counsel.
    a. Failure to object to the charge that malice could be inferred from use of a deadly weapon.
    b. Failure to effectively impeach witnesses with prior testimony offered at the mistrial.

c. Failure to move to sever the trial from his co-defendant's.
d. Failure to object to the indictments.
e. Failure to effectively move for a directed verdict.
f. Failure to object to prior bad acts evidence concerning an alleged drug deal.
g. Failure to object to hand of one hand of all charge.
h. Failure to properly cross-examine the State's witnesses.
i. Failure to object to Bonner's testimony concerning a deal in exchange for testimony.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

**Summary of the Testimony**

***Applicant Testimony***

Applicant stated he was represented by Counsel at trial. He stated he thought Counsel was ineffective and that he wants a new trial as a result. He stated that jury instructions were provided at the end of his trial. He stated that the Court charged that malice can be inferred from use of a deadly weapon. He stated that he thought Counsel should have objected on this basis. He stated that he was familiar with the appellate court's decision in *Burdette* that rendered the charge given at his trial improper. He stated that his trial occurred before the case came out, but that he wanted the case to benefit him because his direct appeal was pending when this decision was released.

Applicant testified that he had two trials. Applicant stated that he thought the testimony changed from one trial to the other and Counsel should have reviewed the previous transcript to hold witnesses to their previous testimony. Applicant testified that he wanted a motion to sever his trial from his co-defendants. Applicant stated that he only now has his prior transcript because he asked for complete file transcript and Counsel gave it to him while he was in prison. Applicant also alleged that he wanted Counsel to file pre-trial motions to not be tried with his co-defendants, motion for a directed verdict, make objections to indictments, an objection to State

using prior bad acts by co-defendant, and an objection to the charge "hand of one hand of all" due to lack of supporting evidence. On cross-examination, Applicant insisted that witness Bonner was not a credible witness because she didn't identify him immediately.

Applicant acknowledged that many witnesses from the complex testified, and mentioned a woman named Susan testified at the second trial but had not done so at the first. Applicant also acknowledged that a passenger in the car with him testified as well, Rajshun Foster, but he believed that his testimony was false. Applicant stated that he also believed Counsel should have raised objection to Bonner's testimony and that he received "some kind of deal" in exchange for him "telling all kinds of lies". Applicant testified to seeing his girlfriend after the incident and changing his clothes so that they could attend a cook-out. Applicant stated the transcript regarding a "shoe box" that his clothes were deposited in was a false statement and that he actually had his clothing in a bag.

Applicant stated that he wanted the trial to be severed and he thinks he would have had a better outcome if he had his own trial. Applicant stated that he didn't know that it was a joint trial until a few days beforehand. Applicant answered that the bad act that he wanted to be excluded was the reference to going to the site of the incident to buy drugs, and any discussion of weed had nothing to do with him.

***Counsel Testimony***

Counsel testified that Applicant proceeded to two jury trials, the first of which was a mistrial. He stated that he heard the jury instructions given at Applicant's second trial and stated that the instruction is improper today. However, Counsel testified that the case was tried a week or two before the case rendering the instructions incorrect came out. Counsel stated that he filed the notice of appeal on July 26, 2019, and that he typically files it right away.

Counsel testified that he did not think a motion to sever would have been granted or proper. He testified that one of Applicant's co-defendants were acquitted at the first trial. He stated he thought Applicant was in a better position than the remaining co-defendant because Applicant was not the shooter. He stated that he never discussed a severance with Applicant, but thought they made progress after the mistrial and Applicant's co-defendant was acquitted.

Counsel testified that he did not object to the accomplice liability charge, but stated he thought it was a valid charge because the State's allegation was that the defendants went there to shoot the victim. He stated that Bonner testified to this. Counsel testified that he did not see any issues with the indictments. Counsel testified that he did not recall testimony from Rashad concerning his decision to buy marijuana but stated that there was evidence that they went to the apartment complex to buy marijuana, which is not unusual for that housing development.

Counsel testified that he had portions of the mistrial transcript where people testified. Counsel testified that he placed the transcript portions on top of their statements in his trial notebook so that he could compare them as they testified. He did not recall whether he informed Applicant of this.

Counsel testified that he sent everything in Applicant's file to him, including the mistrial transcript. He stated that he did not think the directed verdict should have been granted because the State had two witnesses that identified Applicant as the shooter.

Counsel testified that Applicant's co-defendant, Mr. Bonner, claimed that he was with Applicant and two others in a car and that Applicant, and another man left the car and went down a pathway with a large rifle. He testified that a witness claimed she saw a man whose clothes matched Applicant's at the complex. He stated that he hired an investigator who went with him to walk the complex and talk to eyewitnesses. He stated he thought he discredited her

identification, but Bonner's identification was fatal. Specifically, Bonner stated that Dover had the gun going from and to the car. He also testified that Bonner said that Dover made an incriminating statement. He testified that Bonner's testimony fluctuated wildly and that he had pending charges at the time of the trial. He stated he thought Bonner testified he became involved because he thought they were going to buy weed.

Counsel stated that he did not consider a severed trial because the last trial was joint. He stated that his trial strategy was attaching Bonner's and the other woman's credibility by pointing out inconsistent statements. He stated that the law supported the jury charge at the time of trial.

**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 Cherokee 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. *See also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland,* 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695.

Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86. 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; 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.

***Jury Instructions – Inferring Malice***

Applicant claims Counsel was ineffective for failure to object to jury instructions stating they could infer malice from use of a deadly weapon. If failure to object constitutes deficient, performance generally hinges on whether a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

Counsel has never been required "to be clairvoyant or anticipate changes in the law which were not existent at the time of trial." *Gilmore v. State*, 314 S.C. 453, 456, 445 S.E.2d 454, 457 (1994), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). *See generally e.g. Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (citations omitted); *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992); *Arnette v. State*, 306 S.C. 556, 413 S.E.2d 803 (1992); *Kirkpatrick v. State*, 306 S.C. 359, 412 S.E.2d 389

(1991).

In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in a way that violates the Constitution. *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 740 (2009). The law to be charged must be determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

Here, Counsel was not deficient because *State v. Burdette*[1] was not decided until after this trial was held. Accordingly, the controlling law was *State v. Belcher*,[2] which permitted an implied malice instruction so long as there was no evidence of mitigating circumstances presented. The charge given at Applicant's trial was appropriate at the time and this fact was recognized on direct appeal by Applicant himself. (R. 400-477) (See also FBOA, p. 10, ll. 2-5)("Trial counsel could not have known that the court [the South Carolina Supreme Court] would rule on this issue mere days after trial. At the time of trial, they were following the jurisprudence laid out in *Belcher* which allowed implied malice, so long as there was no evidence of mitigating circumstances presented. The jury instruction as issued on that day was appropriate."). Counsel is not deficient for failing to object to the jury instruction that were both appropriate at the time and where Counsel never could have anticipated the change in law. *See e.g. Thornes*, 310 S.C. at 309-10, 426 S.E.2d at 765-66 ("[t]his court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of trial."). Counsel acted reasonably in refraining from objecting to good and current law at the time and, accordingly,

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[1] 427 S.C. 490, 502-03, 832 S.E.2d 575, 582-83 (2019).
[2] 385 S.C. 597, 685 S.E.2d 892 (2009).

should not be found deficient.

Furtherance, no prejudice has been established because any alleged error in the instructions was harmless. This is the case for three primary reasons. First, Applicant's case does not present a concern of possible jury confusion because there is no evidence that Applicant was entitled to a lesser-included offense instruction or that a relevant defense, such as self-defense or defense of others, was applicable.

This runs counter to *Burdette*, where there was evidence reducing the crime from murder to voluntary or involuntary manslaughter and instructions on both lesser-included offenses were given. The Supreme Court found in *Burdette* that the instruction there was not harmless because the trial court failed to instruct the jury that voluntary manslaughter was an intentional killing without malice, so it was impossible to tell if the jury relied on the permissive inference or not when it convicted the defendant of voluntary manslaughter. *Id.*

Here, that did not occur. There was no instruction on any lesser-included offense. (R. 451-69). Foster and Dover either committed murder or they were innocent, and no lesser-included offense or defense instructions were requested or given.

Second, the trial judge gave two alternative definitions of "malice" that support a conclusion that the killing was malicious:

> Now, each of these defendants is charged with murder. And in order to prove this crime, the State must prove each defendant killed another person with malice afore-thought, either expressed or implied.
>
> Malice has been defined as hatred, ill will, hostility to another. It is the intentional doing of a wrongful act without justification or excuse and with an intent to kill that the law will infer an evil intent.
>
> Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exists in the mind of the defendant before and at the time the act was committed. Therefore, there must be a combination of previous evil intent and the act itself.

> Malice aforethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice, but merely the means and manner in which malice may be shown to exists. It is either by direct evidence or by inference from the facts and circumstances.
>
> Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person.
>
> Malice is wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. It is the doing of a wrongful act intentionally without just cause or excuse.
>
> Intent means intending the result which actually occurred and not accidentally or involuntarily.
>
> Intent may be shown by acts and conduct of each defendant and other circumstances from which you may naturally and reasonably infer intent.
>
> Evidence of the character of the act, the character of the instrument used, the manner in which was used, the purpose to be accomplished and resulting wounds or injuries, may be considered in determining intent.

(R. 459-60).

The above definitions are supported by South Carolina case law. *See, e.g., Margolis v. Telech*, 239 S.C. 232, 238, 122 S.E.2d 417, 419-20 (1961) ("Malice is the deliberate, intentional doing of a wrongful act without just cause or excuse"); *Id.* at 238, 122 S.E.2d at 420 ("Malice 'is implied where it shows a disregard of the consequences of the injurious act, without reference to any special injury which he may inflict on another', and 'in doing some illegal act for one's own gratification or purposes, without regard to the rights of others or the injury he may inflict on another'"); *State v. Murphy*, 86 S.C. 268, 68 S.E. 570, 570 (1910) ("'Malice is a term of art, implying wickedness, and excluding a just cause or excuse. It is implied from an unlawful act, willfully done, until the contrary be proved.' It has also been defined to be the willful or intentional doing of a wrongful act, without just cause or excuse"); *McBride v. Sch. Dist. of*

*Greenville Cty.*, 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App. 2010) ("malice is 'the deliberate intentional doing of a wrongful act without just cause or excuse'") (quoting *Eaves v. Broad River Elec. Coop., Inc.*, 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982) (internal quotation omitted)); *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 437, 629 S.E.2d 642, 649 (2006) (" malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person"); *State v. Young*, 238 S.C. 115, 124-25, 119 S.E.2d 504, 509 (1961), *overruled on other grds*, *State v. Torrence*, 305 S.C. 45, 60-69, 406 S.E.2d 315, 323-28 (1991) (Toal, J., (concurring in result) (abolishing in favorem vitae review). *See also, e.g.*, *State v. Cottrell*, 421 S.C. 622, 644, 809 S.E.2d 423, 435 (2017) (finding trial judge properly instructed jurors that malice could be inferred from conduct showing a total disregard for human life); *State v. Oates*, 421 S.C. 1, 20, 803 S.E.2d 911, 921 (Ct. App. 2017)("Malice can be inferred from conduct [that] is *so reckless and wanton as to indicate a depravity of mind and general disregard for human life*") (emphasis in original); *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957); *In re Tracy B.*, 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010). Each definition above fits the facts of this case because there was both express malice and inferred malice in this case. There were threats made to Victim and there was "lying in wait" for Victim and there was a clear intent to kill or injure Victim. Thus, the instructions given were appropriate and fit the facts of the case.

Third, the charge was harmless because of the facts of this case because the evidence of malice was overwhelming. Therefore, the permissive inference of malice from a deadly weapon instruction was harmless. *See Stanko*, 402 S.C. 252, 264-65, 741 S.E.2d 708, 714-15 (erroneous instruction of permissive inference of malice arising from the use of a deadly weapon was harmless where there was overwhelming evidence of malice and given the entire jury instruction

including definition of malice); *State v. Brooks*, 428 S.C. 613, 627-33, 837 S.E.2d 236, 241-44 (Ct. App. 2019)(permissive inference of malice instruction was harmless beyond a reasonable doubt after considering jury instruction as a whole and other evidence of malice independent of the use of a deadly weapon)(citing *Stanko*, *supra*).

In short, there was overwhelming evidence of malice and of a premeditated plot to kill or wound Victim. Foster and Dover searched for Victim for several days before finding him under the belief that Victim stole something from them. They had told more than one witness to tell Victim they were looking for him. (R. pp. 93-113; 116-124; 128-133; 308-313). There were threats communicated to Victim heard by witnesses. Foster dropped the shooter off before and picked up the shooter after the murder. The shooter laid in wait for Victim wearing a mask and gloves. (R. 58-74; 93-125; 128-142; (Page 143 - Supp. ROA page 1); 144; 145; 146-66; 177-193; 198-207; 207-218; 219-244; 245-263; 263-267; 270-76; 277-292; (Page 293 – Supp. ROA page 2); 308-313; 314-363; 363-383; 385-400). The challenged instruction could not have impacted the jury's verdict. *Stanko*, 402 S.C. at 264-65, 741 S.E.2d at 714-15; *Brooks*, 428 S.C. 613, 627-33, 837 S.E.2d 236, 241-44. Because there was overwhelming evidence, the result at trial and on direct appeal was not impacted by the instructions given, even if the Court finds them erroneous. Applicant still would have been found guilty at trial had different instructions been given. The Court had no duty to provide different instructions because they were legally correct at the time. Additionally, Applicant would not have met his burden of proof on direct appeal because of the overwhelming evidence, rendering the same result as was reached, even if the issue was preserved. Accordingly, no prejudice has been established and relief is denied on this ground.

***Jury Instructions - Hand of One Hand of All Charge***

Applicant claims Counsel was ineffective for failure to object to the jury instructions regarding hand of one hand of all. However, Counsel credibly testified that he did not object because he thought that the instructions were proper. Counsel is not ineffective for failure to launch frivolous objections. Additionally, even if he objection, there is no evidence supporting the fact that the objection would have been sustained or the change in instructions would have changed the outcome at trial. Accordingly, relief is denied.

***Impeach and Cross-Examine Witnesses***

Applicant claims Counsel was ineffective for failure to properly cross-examine and impeach the State's witnesses. Counsel credibly testified he obtained the mistrial transcript and attached each witness's testimony at the mistrial to the section in his trial binder, so he had it readily available during cross-examinations. The transcript reflects that Counsel impeached witnesses when he could do so. This Court declines to find anything unreasonable in Counsel's approach when cross-examining witnesses. Further, this Court finds nothing Counsel could have done that would have resulted in a different outcome at trial. Accordingly, relief is denied.

***Move to Sever***

Applicant claims Counsel was ineffective for failure to move to sequester the trial. Counsel credibly testified that he did not think a sequestered trial would have made a different concerning the results of the proceedings. Accordingly, relief is denied on this ground.

***Indictments***

Applicant is alleging he is entitled to PCR relief because there were "flaws in the indictment process." Challenges to the indictment must be raised before a jury is sworn in. S.C. Code Ann. § 17-19-90 (2003). If non-jurisdictional defects apparent on the face of the document are not raised before then, they are waived. *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211, (2003),

*overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *State v. Young*, 243 S.C. 187, 133 S.E.2d 210 (1963). Sufficiency of indictment is found when the offense is stated with enough specificity that the court knows what judgement to announce and the defendant knows what he has to answer to and whether he can plead acquittal or conviction upon it and whether it apprises defendant of offense that is intended to be charged. *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) *citing State v. Wilkes*, 353 S.C. 462, 465, 578 S.E.2d 717, 19 (2003).

This Court has been provided with no evidence that the indictments were deficient. This is substantiated by Counsel's credible assertion that he saw no issues with the indictments. Further, even if issues existed, challenges to the indictment have been waived. Accordingly, relief is denied on this ground.

***Directed Verdict***

Applicant claims Counsel did not effectively move for a directed verdict. The record clearly reflects that Counsel moved for a directed verdict based upon the uncertainty surrounding the identity of the shooter, claiming that the jury would have to speculate concerning guilt. (Tr. 401-02). This was a reasonable argument. Additionally, there has been no showing that another argument could have been successful. Accordingly, relief is denied.

***Prior Bad Acts***

Applicant claims Counsel was ineffective for failing to object to Foster's prior bad acts. This Court finds any alleged failure was non-prejudicial because of the strength of the State's evidence against him. This Court finds this especially true, given the fact that the bad acts pertained to his co-defendant, not him. Accordingly, relief is denied on this ground.

***Bonner Testimony Concerning Deal***

Applicant claims Counsel was ineffective for failing to object to Bonner's testimony as being induced by his cooperation with the State. Testimony about this witness hoping the State would take his cooperation into account during sentencing was elicited at trial. (Tr. 351-52, 360-61). Thus, any failure on Counsel's part to raise this issue or objection is non-prejudicial because the jury was well informed of these biases at the trial anyway. Accordingly, relief is denied.

**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 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 13th day of March, 2023.

DANIEL D. HALL
Presiding Judge
Seventh Judicial Circuit

York, South Carolina.

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C.
2023 MAR 15 A 11:37
BRANDY W. MCBEE