

FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF CHEROKEE  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2022CP1100261

Rajshun Bernard Foster		State Of South Carolina	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other: \_\_\_\_\_

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 CHEROKEE COUNTY, S.C.  
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NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order; (formal order to follow)  Statement of Judgment by the Court

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/Brian M. Gibbons	2168	3/31/2023
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on 03/31/2023, and a copy mailed first class or placed in the appropriate attorney's box on 03/31/2023, to attorneys of record or to parties (when appearing pro se) as follows:

Rajshun Bernard Foster  
Tommy Arthur Thomas PO Box 88 Irmo, SC 29063

State Of South Carolina

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ATTORNEY(S) FOR THE PLAINTIFF(S)

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ATTORNEY(S) FOR THE DEFENDANT(S)



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Court Reporter

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Brandy W. McBee - Clerk of Court

Court Reporter:

**E-Filing Note:** In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

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**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA )  
COUNTY OF CHEROKEE )

IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT

Rajshun Foster, #320680, )  
Applicant, )

Case No. 2022-CP-11-0261

v. )

**ORDER OF DISMISSAL**

State of South Carolina, )  
Respondent. )

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This matter comes before this Court by way of Applicant's post-conviction relief application filed April 14, 2022. Respondent made its return on June 2, 2022, requesting an evidentiary hearing be convened. An evidentiary hearing was held on October 18, 2022, at the Spartanburg County Courthouse. Tommy A. Thomas, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Tracy Racine, Esquire, 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-11-00878). Applicant was represented by Tracy Racine, Esquire. Deputy Solicitor Kim Leskanic of the Seventh Circuit Solicitor's Office prosecuted the case. On July 15-17, 2019, Applicant proceeded to trial before the Honorable R. Keith Kelly, circuit court judge, and a jury, where he

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was found guilty as indicted. Judge Kelly sentenced Applicant to thirty-five years' imprisonment.

Applicant filed a timely notice of appeal on September 16, 2019, that was perfected by Tommy A. Thomas, Esquire, through filing a brief, raising the following issue:

The circuit court erred, as a matter of law, in instructing the jury it could infer malice from the use of a deadly weapon.

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion, finding that this issue was not preserved on appeal. *State v. Foster*, 2022-UP-057 (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 Applicant and Franklin Dover ("Dover"), neither of whom lived in Connecticut Village Apartments Complex. The testimony at trial proved that Applicant 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 Applicant 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. (R. 93-113; 116-24; 128-33; 308-13).

On June 22, 2014, Applicant and Dover both drove to the complex in separate vehicles and confronted Victim. Eyewitnesses testified Applicant was the instigator of the confrontation and that Victim refused to fight Applicant and kept backing away from him. Then two different witnesses 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.

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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. (R. 177-93; 146-66; 198-207; 207-18; 263-67; 277-92 (Page 293 – Supp. ROA pg. 2); 308-13).

Applicant 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 Applicant said yes, to come with them to the complex. Applicant, Bonner, Studyvance, and Dover got in Applicant’s girlfriend’s car and headed to 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 Applicant’s girlfriend’s car where Bonner was seated. Studyvance was also armed with a pistol, seated in the front passenger seat, as the four men traveled to the Apartments with Applicant driving. (R. 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 22<sup>nd</sup>, in broad daylight. First, the men drove into the complex briefly and then turned around and left the parking lot. Applicant 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, a mask, and surgical gloves.

Studyvance was still armed with his pistol. Dover left 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 147 Supp. ROA page 1); 144-45; 146-66; 177-93; 207-18; 218-44; 245-63; 263-67; 277-92

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(Page 293 – Supp. ROA page 2); 314-63; 363-83).

Applicant and Bonner drove back into the complex immediately after dropping off Dover and Studyvance and parked the car near a dumpster. Applicant got out of the car and confronted Victim again, who was walking through the complex on foot. Several witnesses testified to seeing Applicant and Victim have another argument there, Applicant being the instigator, Victim walked away. Applicant 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. (R. 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 Applicant and Bonner pulled into the complex parking lot and parked next to the dumpster and when Victim was killed, there were three phone calls between Applicant and Dover on their cell phones. (R. 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



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Victim's body at the crime scene. After killing Victim, Dover and Studyvance then fled back up the path through the woods where they had been dropped off earlier by Applicant. An eyewitness saw two men flee from the area of the shooting up the wooded path immediately after the fatal shot was fired. (R. 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 Bonner, after Victim was shot, Applicant received a telephone call from Dover. Applicant and Bonner then left the complex in Applicant's girlfriend's car with Applicant still driving. Applicant 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 Applicant, "get me out of here fast, get me out of here fast." Applicant asked Dover where he shot Victim, and Dover stated: "in the chest area." Applicant drove the men to 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. (R. 363-383).

The State proved that Dover's cell phone pinged around the complex at the time of the murder, around 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. (R. 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. (R. 58-74; 363-383; 385-400).

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The State relied on accomplice liability [i.e. “the hand of one is the hand of all”] to prove Applicant’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. (R. 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 Counsel
  - a. Trial Counsel did not object when trial court charged the jury that it could infer malice from the use of a deadly weapon.

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

1. Ineffective Assistance of Counsel
  - a. Brevity of time in consultation.
  - b. Failure to secure a plea offer that did not involve cooperating with the State.
  - c. Failure to create a defense at trial.
  - d. Failure to review all discovery with Applicant.
  - e. Failure to hire a private investigator.
  - f. Failure to sequester trial.
  - g. For telling Applicant not to testify.
  - h. Failure to discuss mere presence and hand of one hand of all.
  - i. Failure to discuss lesser-included offenses and failure to request a jury instruction on these offenses.
  - j. Failure to object to jury instructions regarding inferring malice from use of a deadly weapon.

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 testified that he was incarcerated for murder. He stated he filed a PCR application. He stated he knew the relief available. He stated he was represented by Counsel. He



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stated he is serving a thirty-five-year sentence, day for day. He stated he was incarcerated for five to six months before making bond. He stated he was out on bond for about five years without being re-arrested.

He stated he had three co-defendants. He stated that two co-defendants went home, and he and Dover were sent to prison. He stated his first trial resulted in a hung jury. He stated that the retrial was about a month and a half after the first trial. He stated he wanted to know why there was a mistrial.

He stated that he met with Counsel two to three times. He stated he only met with Counsel when he also was meeting with the prosecutor regarding potential cooperations with the State. He stated he did not cooperate because he did not know what happened. He stated he was told to point the finger at Dover like Bonner did. He stated that to do this, he would have to lie. He stated he did not have a weapon. He stated he did not have a trial defense. He stated that he was found guilty based upon hand of one hand of all, even though two co-defendants went home. He stated that one co-defendant went home because he cooperated and the other was found not guilty at the first trial.

He stated that he only saw witness statements in his discovery; not the gunshot residue results. He stated there was not a private investigator working on this case. He stated he wanted his trial sequestered.

He stated he was offered two plea offers but he declined them. He stated the first offer was straight up to murder and the second was fifteen years' imprisonment in exchange for his cooperation with the State. He stated that Counsel told him not to testify because cross-examination would be damming. He stated that his prior record is not bad, but it exists. He stated he understood he had a right not to testify.

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He stated that he did not discuss the defense of mere presence with Counsel. He stated he only went to the complex to hang out with friends. He stated that multiple witnesses identified him, but he had no reason to hurt the victim. He stated he did not know about the issues between Dover and victim. He stated that they did not discuss lesser-included offenses. He denied driving the car and asking Dover where he shot Victim.

He stated that he filed an appeal and the Court found that the issue raised on appeal was not preserved. He stated he did not know why the appeal was denied.

### *Counsel Testimony*

Counsel testified that she represented Applicant on his murder charge. She stated she met with Applicant seven times, starting in August 2014. She stated Applicant did not have a working phone number for a while. She stated she went to the scene to talk to people. She stated that the State generally does not make offers before hearing the testimony. She stated that the defense was that Applicant did not know about the weapon and he was only there to buy weed. She stated the mistrial occurred because one juror refused to convict. She stated that Dover was the primary target. She stated that she did not think sequestered trials would be beneficial. She stated she did not recall discussing sequestered trials. She stated that Applicant was offered a deal involving cooperating with the State, but nothing specific regarding sentencing was mentioned. She stated she knew PCR Counsel was hired to handle the appeal. She stated that she did not object to the jury instruction which served as the issue on appeal because what was stated was proper law at the time.

### 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 Applicant's



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Cherokee County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the direct appeal records, the trial transcript, and the current PCR application. 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), SCRC ("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

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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.

#### *Brevity of Time*

Applicant alleges that Counsel was ineffective for failure to communicate with Applicant

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enough. “[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation.” *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating “how additional preparation or communication would have resulted in a different outcome.” *Id. See Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); *Skeen v. State*, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

Applicant has failed to establish how additional communication would have resulted in a different outcome at trial. Applicant has failed to meet his burden of proof and relief is denied accordingly.

#### ***Failure to Secure Plea Offer***

Applicant claims Counsel was ineffective for failure to procure a plea offer that did not require he cooperate with the State. “Prosecutors have broad powers in the plea bargain process[.]” *Reed v. Becka*, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999). *See Collins v. State*, 422 S.C. 250, 261, 810 S.E.2d 871, 877 (2018) (“[T]he decision whether to revive the expired plea offer rested exclusively with the solicitor.”); *State v. Langford*, 400 S.C. 421, 436 n.6, 735 S.E.2d 471, 479 n.6 (2012) (stating “[u]ndoubtedly, the solicitor has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain”); *see also Weatherford v. Bursey*, 429 U.S.

545, 561 (1977) (finding “there is no constitutional right to plea bargain; the prosecutor need not

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do so if he prefers to go to trial”).

“Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety.” *Reed*, 333 S.C. at 684, 511 S.E.2d at 400-01. “The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion; however, on occasion, it is necessary to review and interpret the results of the prosecutor’s actions.” *Id.* Yet, plea offers must be analyzed within the bounds of judicial restraint. *Id.*

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

Applicant is not entitled to a plea offer of his choosing and the State is not required to produce one. Accordingly, relief is denied on this ground.

#### *Trial Defense*

Applicant claims Counsel was ineffective for failure to prepare a trial defense. Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure

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to explore the decision was a strategic decision. *Strickland*, 466 U.S. at 680. If there is only one line of defense, counsel must conduct a “reasonably substantial investigation” into that line of defense. *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1252). However, if there are several lines of defense, counsel may still be effective even if every single line is not explored. *Id.*

“[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial.” *Id.* at 681 *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1255). Further, “[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Regarding failure to alert the Applicant of a defense specifically, Counsel will not be found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at the time of trial, or another avenue of defense existed. *See McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing); *Arnette v. State*, 306 S.C. 556, 413 S.E.2d 803 (1992) (stating that failing to inform of a defense was not ineffective when there was no evidence at trial that supported the defense); *Robinson v. State*, 308 S.C. 361, 417 S.E.2d 361, 417 S.E.2d 88 (1992) (stating that Counsel was not ineffective when failing to state a defense that was not recognized by the Court until six years later and was just recently acknowledged by the scientific community).

This Court finds Counsel’s approach at trial was reasonable. Applicant failed to present an alternate defense that would have changed the result at trial. Accordingly, relief is denied.

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*Failure to Review Discovery*

Applicant claims Counsel was ineffective for failing to review discovery. This Court finds this not credible. Further, Applicant has failed to meet his burden of proving prejudice on this ground because he has not pointed to any discovery specifically that would have changed the outcome at trial. Accordingly, relief is denied.

*Private Investigator*

Applicant claims Counsel was ineffective for failure to hire a private investigator. Applicant has failed to show what evidence, if any, the investigator would have uncovered or how it would have impacted the results at trial. Accordingly, Applicant has not met his burden of proof and relief is denied accordingly.

*Sequester Trial*

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

*Telling Applicant not to Testify*

Applicant alleges Counsel was ineffective for discouraging Applicant from testifying. "The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. However, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." *Brown v. State*, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations." "A defendant's decision to testify or not must be made with

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knowledge of the consequences of either choice.” *Id.*

Applicant was engaged in a thorough colloquy concerning his right to testify. (Tr. 405-07). After the colloquy, he elected not to testify. (Tr. 407). Applicant made this decision voluntarily and knowingly.

Further, Counsel’s advice not to testify because cross-examination would be damning, especially coupled with the fact that he had a prior criminal history, was reasonable advice. Additionally, this Court declines to find prejudice in light of the strength of the State’s case against him. Accordingly, relief is denied.

***Mere Presence/Hand of One, Hand of All***

Applicant claims Counsel was ineffective for failure to discuss mere presence and hand of one hand of all with him. Even if true, this Court declines to find this prejudiced him in any way. Accordingly, relief is denied.

***Lesser-Included Offenses***

Applicant alleges Counsel was ineffective for failure to explain lesser-included offenses to Applicant and for failure to request jury instructions on lesser-included offenses. 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). Counsel is not ineffective for failing to request a lesser included offense jury instruction when there is no evidence that the defendant committed the lesser, as opposed to the greater offense. *Bozeman v. State*, 307 S.C. 172, 176, 414 S.E.2d 144, 146 (1992).

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.

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*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).

This Court interprets this allegation to mean Applicant wanted communication about and a jury instruction on voluntary manslaughter. “Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation.” *State v. Cooley*, 342 S.C. 63, 67, 536 S.E.2d 666, 668 (2000). “Both heat of passion and sufficient legal provocation must be present at the time of the killing.” *Id.* “The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence.” *Id.* “[B]oth heat of passion and sufficient legal provocation must be present at the time of the killing.” *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010).

Counsel was not ineffective for failing to inform Applicant and request jury instructions on lesser-included offenses, voluntary manslaughter included. There is no evidence in the record to support the idea that the murder was carried out in a heat of passion upon sufficient legal provocation. Instead, the facts reflect a drawn-out, pre-meditated plot to kill the victim. Counsel is not deficient for failing to educate Applicant or request instructions on an inapplicable ground. Additionally, Applicant suffered no prejudice for not being told of the lesser-included offenses. Applicant also suffered no prejudice for Counsel’s failure request inapplicable jury instructions, as they would not have been given if requested. Accordingly, relief is denied.

***Failure to Object to Jury Instructions***

Applicant claims Counsel was ineffective for failure to object to the jury instructions stating that the jury could infer malice from use of a deadly weapon. Whether failure to object

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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*<sup>1</sup> was not decided until after this trial was held. Accordingly, the controlling law was *State v. Belcher*,<sup>2</sup> which permitted an

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



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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, 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

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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 exist 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 exist. 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.

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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

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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

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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.

**Conclusion**

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

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


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**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 \_\_\_\_\_ day of \_\_\_\_\_, 2023.

  
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BRIAN M. GIBBONS  
Presiding Judge  
Seventh Judicial Circuit

  
\_\_\_\_\_, South Carolina.

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