

term, the Spartanburg County Grand Jury indicted Applicant for three counts of attempted murder (2017-GS-42-0261, -0262, and -0266), attempted murder (count one) and possession of a weapon during the commission of a violent crime (count two) (2017-GS-42-0263), and unlawful carrying of a pistol (2017-GS-42-0265). Applicant was represented by Clay T. Allen, Esquire. Assistant Solicitors Spenser H. Smith and Jennifer A.J. Jordan, Esquires, of the Seventh Circuit Solicitor's Office prosecuted the case. On February 11-14, 2019, Applicant proceeded to a jury trial before the Honorable J. Derham Cole. Applicant was found guilty of the lesser-included offenses of assault and battery of a high and aggravated nature on the -0261 and -0266 offenses and as indicted on all other offenses. Judge Cole sentenced Applicant to twenty years imprisonment on the -0263 attempted murder offense, ten years imprisonment on the -0261, -0262, and -0266 offenses, five years imprisonment on the weapons possession offense, and one year imprisonment on the -0265 offense. The -0266 offense ran consecutive to all other sentences and was suspended to a sentence of five years probation.

Applicant filed a timely notice of appeal on February 25, 2019, that was perfected by Lara Caudy, Esquire. The South Carolina Court of Appeals filed an order, affirming the convictions. *State v. Thompson*, 2021-UP-370 (S.C. Ct. App. filed November 3, 2021). This matter was appealed to the South Carolina Supreme Court, who denied certiorari. The remittitur was issued on September 8, 2022.

SUMMARY OF RELEVANT FACTS

In the early morning hours of June 26, 2016, a shooting occurred outside a bar leaving four people injured. (R. 2-3). Ramone Smith testified that an unknown man began pouring beer at his feet which started an altercation. (R. 79). That man was later identified as Stephone Anderson. (R. 194). Smith told Anderson "if he had a problem they can take it outside." (R. 83). The two men

FILED
2022 JUL 17 PM 3:49
CLERK OF COURT
SPARTANBURG COUNTY
A 17 W 00X

went outside and begin arguing. (R. 83). Cassandra Rice testified she walked outside to get some fresh air, saw the altercation, and attempted to diffuse it. (R. 60-61). Smith stated that Applicant stepped in, stopped the altercation, and Applicant and Anderson walked off. (R. 80). Rice stated that she saw Applicant walking around pulling on his shirt, revealing a gun. (R. 61). Applicant began arguing with those around him. (R. 62). Rice testified that Applicant turned and shot at Corey Glenn. (R. 62). Rice testified that Applicant fired first and that no one else had a gun at the time the initial shots were fired. (R. 62). Rice took off running and was ultimately struck by a bullet. (State's Exhibit Nos. 157, 158, R. 63).

Smith testified he heard shots and looked up to see Applicant with a gun. (R. 84). Smith, who has a concealed weapons permit, reached for his gun and fired back at Applicant. (State's Exhibit No. 60, R. 84). Applicant took off running behind the building (R. 85). Smith then left the scene to take Glenn to the hospital. (R. 86). A few days later Smith went to the Sheriff's Office where he allowed officers to see his gun and his concealed weapons permit. (R. 87).

Renata Irby was injured during the shooting. She got in her car to head home and heard gunshots. (R. 111). She felt a burning sensation in her leg and realized that she had been shot. (R. 111). She left the scene in an ambulance. (R. 112). She did not have the bullet removed until two months later. (R. 116).

Daniel Gipson, an officer of the Wellford Police Department, was one of the first people on scene. (R. 169). He accompanied Jonathan Fowler, an officer of the Duncan Police Department, in conducting a sweep to secure the scene. (R. 178). Once other officers arrived on scene, Officers Gipson and Fowler followed a blood trail that led behind the building. (R. 169, 179). At the end of the blood trail was Applicant, who had been shot in the leg. Officer Gipson asked Applicant if he had any weapons to which Applicant responded, "no." (R. 169). A shirtless man (Anderson)

FILED
2022 JUL 17 PM 3:19
CLERK OF COURT
SPRINGFIELD COUNTY
GEORGIA

exited the woods and Officer Fowler placed him in investigative detention. (R. 179). Officer Gipson, who had prior Emergency Medical Training, rendered aid to Applicant until the ambulance arrived on scene. (R. 180). Once the ambulance took Applicant, Officer Fowler searched the area near where Applicant had been lying and found a .40 caliber handgun. (R. 172, 174, 181).

Lathier Graham, an investigator for the Spartanburg County Sherriff's Office, was also on scene. He recovered a .22 caliber pistol in Irby's car. (R. 32). Graham testified there were no shell casings indicating that the pistol or any .22 caliber gun were fired. (R. 33). He collected twenty-three .40 caliber fired cartridge casings from the scene. (R. 36-37, 40-41).

As far as injuries, Rice testified that the bullet "scraped" the skin near her temple. (R. 63). Photographs taken of her wound were admitted at trial. (R. 70). Irby was shot in the right leg and the bullet was not removed for two months. (R. 111, 116). The bullet was given to law enforcement and entered at trial. (R. 130). Sara Kruger, an officer with the Spartanburg County Sherriff's Office, testified Corey Glenn had been shot in the foot. She photographed his injuries, and those photographs were admitted at trial. (R. 153-54). James Armstrong, an expert in ballistic analysis, testified that the bullet fragments found in Irby and Glenn were not fired from Smith's gun; rather they possessed characteristics similar to bullets fired from Applicant's gun. (R. 232)

CURRENT ACTION BEFORE THIS COURT

Applicant filed an Amended post-conviction relief action on April 21, 2023. In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Trial Counsel was ineffective for properly subpoena and preparing his witness (brother).

FILED
2023 JUL 17 PM 3:40
CLERK OF COURT
SPARTANBURG COUNTY
SOUTH CAROLINA

- b. Trial Counsel was ineffective for not properly discussing plea offers with him.
- c. Trial Counsel was ineffective for failing to move for a continuance when he received body cam information on February 8, 2019 just prior to the jury trial.
- d. Trial Counsel was ineffective for failing to properly prepare the case for trial.
- e. Trial Counsel was ineffective for failing to request that Applicant's handcuffs be removed during trial.
- f. Trial Counsel was ineffective for failing to move to suppress statement when he was initially arrested
- g. Trial Counsel was ineffective for not hiring experts for Applicant's defense.
- h. Trial Counsel was ineffective for not pursuing self-defense.

STANDARD OF REVIEW

An applicant may seek PCR upon the following types of allegations:

- 1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
- 2. That the court was without jurisdiction to impose sentence;
- 3. That the sentence exceeds the maximum authorized by law;
- 4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- 5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
- 6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

2023 JUL 17 PM 3:49
 CLERK OF COURT
 SPARTANBURG COUNTY
 ARMY WAREHOUSE

FILED

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive



effective assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

The applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRPC. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of "were outside the wide range of competence" demanded of attorneys in criminal cases. Strickland, 466 U.S. at 688. To prove prejudice, the



2023 JUL 17 PM 3:49
CLERK OF COURT
PARTY SERVICE UNIT

FILED

applicant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Id. Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court further had the opportunity to observe the witnesses at the evidentiary hearing and evaluate their credibility, and the Court has weighed their testimony accordingly in its discussion below. This Court finds the combined record of the trial transcript, and the testimony and evidence presented at the evidentiary hearing, establishes Applicant received effective assistance of counsel. Accordingly, this Court denies relief and dismisses this application with prejudice. Set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code.

ALLEGATION TRIAL COUNSEL FAILED TO PROPERLY SUBPOENA AND PREPARE APPLICANT'S

BROTHER FOR TRIAL

Applicant alleges Trial Counsel was constitutionally ineffective for failing to properly subpoena and prepare Applicant's brother as a witness at trial. This Court finds Applicant's allegation is without merit.

This Court finds Applicant's trial attorney Mr. Allen credible in his testimony at the evidentiary hearing. Mr. Allen testified that he spoke with Applicant's brother, Horace Lamar Thompson, on the phone months prior to trial and before he was called to the stand. Furthermore, Applicant's brother was subpoenaed for trial, appeared, and testified consistent with Applicant's

2023 JUL 17 PM 3:49
CLERK OF COURT
PARMER BLDG COUNTY
FILED

theory of the case. Therefore, the Court finds that counsel was not deficient in preparing or presenting this witness.

This Court finds that Applicant has failed to show that Trial Counsel was constitutionally ineffective for failing to properly subpoena and prepare Applicant's brother for trial because he has failed to show any deficiency in Trial Counsel's performance and resulting prejudice. This claim for post-conviction relief is **DENIED** and **DISMISSED WITH PREJUDICE**.

PLEA OFFERS

Applicant alleges Trial Counsel was ineffective for failing to discuss plea offers with him. This Court find Applicant's allegation without merit.

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused" Missouri v. Frye, 566 U.S. 134, 145 (2012). Further, ineffective assistance is given "[w]hen defense counsel allow the [plea] offer to expire without advising the defendant or allowing him to consider [the plea]" Id. at 145.

When determining prejudice for failure to convey a plea, a case-by-case determination is made "assessing whether but for counsel's deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefited from the offer." Bell v. State, 410 S.C.436, 443, 765 S.E.2d 4, 7 (2014). Prejudice is found if Applicant "would have taken the plea offer had [he] been afforded effective assistance of counsel[,]" if "the plea would have been entered without prosecution canceling it or the trial court refusing to accept it[,]" and "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018)

FILED
JUL 17 PM 3:49
CLERK OF COURT
SPRINGFIELD COUNTY
GEORGIA

(quoting Frye, 566 U.S. 147) (quotations omitted). Presumed prejudice is reserved for limited situations. Bell, 410 S.C. at 443, 765 S.E.2d at 7.

Applicant testified that there was a purported five-year sentence, which Judge Knie may have informally discussed with a prior attorney before trial counsel undertook representation. As a threshold matter, the Court notes that Counsel was appointed to represent Applicant after previously retained attorneys had been relieved. Therefore, trial counsel was not responsible for any possible offers or sentences.¹ Applicant also testified that there was an offer of 10 years extended at the time of trial and that, had he been advised that credit for time served would have substantially reduced the actual time he was required to serve, he would have accepted that offer instead of risk trial. This Court finds the testimony of Applicant's trial attorney credible in that this offer was conveyed and explained to Applicant, and Applicant elected to continue to trial. Further, the unsupported and uncertainty of the testimony that an offer may have existed is not sufficient to meet Applicant's burden of proof.

This Court finds that Applicant has failed to show that Trial Counsel was constitutionally ineffective for failing discuss plea offers with him because he has failed to show any deficiency in Trial Counsel's performance and resulting prejudice. This claim for post-conviction relief is **DENIED** and **DISMISSED WITH PREJUDICE**.

CONTINUANCE

Applicant maintains that counsel was ineffective for failing to move for a continuance when body cam footage from Officer Fowler was received the week before trial. This Court finds Applicant's allegation lacks merit.

¹ Based upon the application and testimony at the evidentiary hearing, Applicant is referring only to his trial counsel Clay Allen.

2023 JUN 17 PM 3:49
CLERK OF COURT
PARSONS COUNTY

FILED

This Court agrees with Mr. Allen’s testimony that the untimely provision of discovery is problematic and quite frustrating. However, Mr. Smith explained that, with Mr. Allen having been the third attorney to represent Applicant, Mr. Smith was trying to ensure that all discovery had been provided to Mr. Allen which had previously been provided to prior counsel. Mr. Smith also testified that the Fowler video was substantially similar to another body cam video taken by an officer who was accompanying Fowler, and the Fowler footage was essentially cumulative to the previously disclosed body cam. Therefore, a continuance request was not warranted, Mr. Allen was not surprised by the new footage, and Applicant suffered no prejudice by the untimely disclosure. “The acquisition of requested documents at the last minute is not uncommon in the practice of law.” State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007).

This Court finds that Applicant has failed to show that Trial Counsel was constitutionally ineffective for not requesting a continuance because he has failed to show any deficiency in Trial Counsel’s performance and resulting prejudice. This claim for post-conviction relief is **DENIED** and **DISMISSED WITH PREJUDICE**.

TRIAL PREPARATION

In allegations “d” and “g”, Applicant maintains that the trial counsel did not properly prepare for trial. In his testimony, he alludes to counsel not retaining a firearms or DNA expert. He also states that he only met with Mr. Allen 3 times while in jail and failed to subpoena another witness, Applicant’s cousin. This Court finds Applicant’s allegation lacks merit.

To establish counsel failed to prepare for trial, Applicant must present evidence of what counsel would have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Moorehead v. State, 329 S.C. 496 S.E.2d 415 (1998) (failure to conduct an independent investigation does not constitute

2022 JUL 17 PM 3:49
FILED
CLERK OF COURT
SHERIFF
ANY WALKER

ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result). Where applicant fails to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial, relief will be denied. Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial; Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999) (trial counsel not ineffective for failing to timely request discovery because contents of documents were not presented at PCR hearing). Important to note, that "brevity of time spent in consultation, without more, does not establish counsel was ineffective." Easter v. Estelle, 609 F.2d 746, 759 (5th Cir. 1980).

"A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Ard, 372 S.C. at 331-32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted). Essentially, trial "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691.

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonable-bleness standard regarding counsel's duty to investigate. *See Ard*, 372 S.C. at 331, 642 S.E.2d at 597 ("Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation."). "[S]trategic choices made after thorough investigation of law and

2022 JUN 17 PM 3:49
CLERK OF COURSE
SPRIANE COUNTY
AW WASH DC

FILED

facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” Strickland, 466 U.S. at 690–91; see Byram v. Ozmint, 339 F.3d 203, 210 (4th Cir. 2003) (“ [T]he reasonableness of an investigation, or a decision by counsel that forecloses the need for an investigation, must be considered in light of the scarcity of counsel's time and resources in preparing for a sentencing hearing and the reality that counsel must concentrate his efforts on the strongest arguments in favor of mitigation.”) (quoting McWee v. Weldon, 283 F.3d 179, 188 (4th Cir. 2002)). Thus, in applying the Strickland standard to a claim of failure to investigate, counsel’s decision not to undertake a particular investigation must be evaluated with heavy deference to counsel’s judgment. Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 63 (Ct. App. 2014).

This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.” (emphasis added)). Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). “The applicant’s mere speculation what the witnesses’ testimony would have been cannot, by itself, satisfy the applicant’s burden of showing prejudice.” (footnote omitted)). Glover v. State, 318 S.C. 496, 498-499, 458 S.E.2d 538, 540 (1995). “We have no idea what Daughter’s answer or explanation for the Doe allegation would have been. Daughter did not testify at the PCR hearing. We do not see how we could find this alleged deficiency to be prejudicial without some sense of what Daughter’s explanation would have been.” Vanover v. State, 433 S.C. 31, 44, 856 S.E.2d 160, 167 (Ct. App. 2021).

FILED
2022 JUL 27 PM 3:50
CLERK OF DISTRICT
LEWIS & CLARK COUNTY
SPRINGFIELD, VA
WWW.LCCV.COURT.CC

Mr. Allen testified that the defense in this case was self-defense. This Court reviewed the direct and cross examination of James William Armstrong who was qualified as an expert witness in the field of ballistics. In light of the defense presented at trial and the evidence presented at the PCR hearing, hiring an independent firearms expert was unnecessary. Similarly, Applicant failed to demonstrate how hiring firearms or DNA expert would have aided his defense and did not offer an expert at the PCR hearing. Therefore, Applicant did not meet his burden.

Regarding Applicant's cousin not being subpoenaed, Applicant has failed to demonstrate how his testimony would have been relevant or how it would have altered the outcome of the trial. Further, his cousin did not testify at the PCR hearing, and therefore, Applicant did not meet his burden. This Court finds that Applicant has failed to show that Trial Counsel was constitutionally ineffective for not being prepared for trial because he has failed to show any deficiency in Trial Counsel's performance and resulting prejudice. This claim for post-conviction relief is **DENIED** and **DISMISSED WITH PREJUDICE**.

HANDCUFFS

Applicant maintains that Trial Counsel was deficient for allowing him to be handcuffed during trial and testified as to the same during the hearing. This Court finds that Applicant's allegation lacks merit.

Whether a defendant is tried in shackles is within the trial court's discretion. See Deck v. Missouri, 544 U.S. 622, 629, (2005) (holding the use of physical restraints visible to the jury are prohibited absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial); State v. Tucker, 320 S.C. 206, 209, 464 S.E.2d 105,

FILED
2022 JUL 17 PM 3:50
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

107 (1995) (providing that the trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security; whether a defendant is restrained during trial is within the trial judge's discretion; and the trial judge is the best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes).

This Court finds Mr. Allen and Mr. Smith's testimony more credible on this issue. Based upon their testimony, this Court finds that Applicant was not cuffed at any time while the jury was present. It was explained that, after a verdict is rendered, the security officers with the Spartanburg Sheriff's Department will customarily cuff a defendant if there is a guilty verdict. Neither Mr. Allen nor Mr. Smith recall Applicant being cuffed during the substantive trial.

This Court finds that Applicant has failed to show that Trial Counsel was constitutionally ineffective for not having his handcuffs removed because he has failed to show any deficiency in Trial Counsel's performance and resulting prejudice. This claim for post-conviction relief is **DENIED** and **DISMISSED WITH PREJUDICE**

MOTION TO SUPPRESS STATEMENTS OR PURSUE SELF DEFENSE

Applicant maintains that counsel was ineffective for failing to move to suppress statements Applicant made prior to his arrest and for not pursuing the defense of self-defense. This court finds that Applicant's allegations lack merit. The record supports that Trial Counsel did make a motion to suppress Applicant's statements, and Judge Cole ruled against Applicant and found that the statements were admissible. Furthermore, Trial Counsel did argue self-defense, and the trial court instructed the jury on self-defense.

2023 JUL 17 PM 3:50
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

FILED

This Court finds that Applicant has failed to show that Trial Counsel was constitutionally ineffective for failing to move to suppress statements Applicant made and for not pursuing self-defense because trial counsel did precisely both of those things. Therefore, Applicant has failed to show any deficiency in Trial Counsel's performance and resulting prejudice. This claim for post-conviction relief is **DENIED** and **DISMISSED WITH PREJUDICE**

DIRECTED VERDICT

At the PCR hearing, Applicant moved at the close of the hearing to add the ground that Appellate Counsel should have briefed and argued the failure of the trial court to grant his directed verdict motion. This Court finds that this ground lacks merit.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396-97 (1985) (citing Douglas v. California, 372 U.S. 353 (1963)). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 752-53 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .")).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). When a claim of

FILED
2022 JUL 17 PM 3:50
SPARTANBURG COUNTY
SOUTH CAROLINA
CLERK OF COURT
AMY W. COX

ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

This Court has reviewed the transcript, and on page 366, trial counsel did move for a directed verdict and argued the absence of specific intent to kill. On page 374, Applicant also asked trial counsel to move for a directed verdict motion based upon the holding in State v. Cain, 419 S.C. 24, 795 S.E.2d 846 (2017). This Court has reviewed Cain, the ruling in Applicant's appeal (2021-UP-370, November 3, 2021), and the trial record. It would appear that trial counsel did not renew his directed verdict motion at the close of all the evidence although he did object to the trial court's failure to instruct the jury on assault and battery first and second degree (See Page 504).

To the extent that trial counsel should have renewed all motions at the close of the case and/ or that appellate counsel should have briefed the issue of the trial court's denial of directed verdict, this Court finds that Applicant has suffered no prejudice. The trial court's rulings were correct under the law, and sufficient direct and circumstantial evidence existed to support Applicant's conviction by the jury. Accordingly, assuming some deficiency was present in trial or appellate counsel's representation, Applicant suffered no prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. The Court finds Trial Counsel's representation was neither deficient nor prejudicial. Therefore, this application for post-conviction relief **must be denied and dismissed with prejudice.**

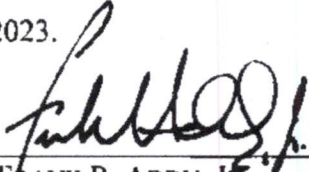
FILED
2023 JUL 17 PM 3:50
CLERK OF COURT
SPRINGFIELD COUNTY
SPRINGFIELD, MO

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

IT IS THEREFORE ORDERED:

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

IT IS SO ORDERED this 11th day of July, 2023.


FRANK R. ADDY, JR.
Presiding Judge
Twelfth Judicial Circuit

FILED
2023 JUL 17 PM 3:50
CLERK OF COURT
SPARTANBURG COUNTY
AMY VL GRIX