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SEP 25 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Daniel Coble, Circuit Court Judge

Case No. 2019-CP-40-01125

Keylan J. Durham,Petitioner,

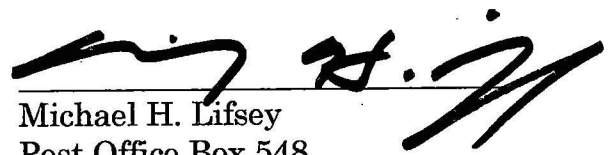
v.

State of South Carolina,Respondent.

NOTICE OF APPEAL

Petitioner, Keylan J. Durham, appeals the order of the Honorable Daniel Coble, dated August 29, 2023 and filed September 12, 2023. Petitioner received written notice of entry of this order on September 18, 2023.

9/21, 2023



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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
 Keylan J. Durham, #347264,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT

CASE NO. 2019-CP-40-1125

ORDER OF DISMISSAL WITH PREJUDICE

2023 SEP 12 PM 2:05
 RICHLAND COUNTY
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This matter comes before the Court by way of Keylan J. Durham's (Applicant) application for post-conviction relief (PCR) filed on February 26, 2019, challenging his trial for three counts of Attempted Murder, two counts of Kidnapping, one count of Assault and Battery—1st Degree, one count of Carjacking, and one count of Possession of a Weapon During the Commission of a Violent Crime. On April 12, 2019, Applicant filed *pro se* amendments to his PCR application. Respondent, the State of South Carolina, made its Return on July 15, 2019, requesting an evidentiary hearing to resolve the claims as set forth in the application.

An evidentiary hearing was convened on May 9, 2023, at the Richland County Courthouse before the Honorable Daniel Coble. Applicant was present and represented by Michael H. Lifsey, Esquire. Assistant Attorney General D. Russell Barlow, II, represented Respondent. At the hearing, Applicant proceeded on the claims in his original and amended applications. In support of these claims, Applicant testified on his own behalf, and Respondent presented testimony from Assistant Public Defender Tracy E. Pinnock, Esquire (Trial Counsel).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any

constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismissed this action with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is confined in the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court orders of commitment. Applicant was indicted at the January 2015 term of the Richland County Grand Jury for three counts of Attempted Murder (2015-GS-40-0006, -0007, -0008), two counts of Kidnapping (2015-GS-40-8388, -8389), Assault and Battery—1st Degree (2015-GS-40-0001), Carjacking (2015-GS-40-0005), and Possession of a Weapon During the Commission of a Violent Crime (2015-GS-40-0004). Applicant was represented by Assistant Public Defenders Tracy E. Pinnock (Trial Counsel), J. Rhodes Bailey, and Rebecca S. Williams, all from the Fifth Circuit Public Defender's Office.

Applicant's case proceeded to a jury trial on April 11–14, 2016, before the Honorable Clifton Newman. The jury convicted Applicant as indicted on the following charges: two counts of Attempted Armed Robbery, two counts of Kidnapping, Carjacking, Assault and Battery—1st Degree, one count of Attempted Murder, and Possession of a Weapon During the Commission of a Violent Crime. The jury convicted Applicant of the lesser-included offense of Assault and Battery—1st Degree on the second Attempted Murder charge. The jury acquitted Applicant of the third Attempted Murder charge. Judge Newman sentenced Applicant to concurrent terms of imprisonment for ten years for each Assault and Battery—1st Degree; twenty-two years for each Kidnapping; twenty years for Carjacking; twenty-four years for Attempted Murder; and five years for Possession of a Weapon During the Commission of a Violent Crime.

Applicant filed a timely notice of appeal. Appellate Defender Susan B. Hackett (Appellate Counsel) perfected Applicant's appeal by filing an Anders¹ brief to the court of appeals. The South Carolina Court of Appeals dismissed the appeal in an unpublished decision. State v. Keylan J. Durham, Op. No. 2018-UP-149 (Ct. App. filed April 11, 2018). The Remittitur was returned to the circuit court on April 27, 2018.

FACTS GIVING RISE TO THE CONVICTION

Applicant's charges stem from events that occurred on August 4 and 6, 2014. On August 4th, Applicant approached a car idling in the parking lot of the In-Town Suites. Marck Drastich (Drastich) and his wife, Lashonda Edwards (Edwards), were talking inside the car, a mid-nineties Oldsmobile. The couple had just returned home from the Ale House. Edwards was in the driver's seat, and Drastich was in the passenger seat. Applicant approached Drastich wearing a white shirt, wig, hat, and glasses, and brandishing a silver handgun. Drastich told Applicant he did not have any money and tried to exit the car. When Drastich tried to exit, Applicant struck him in the face with the gun. Applicant then turned his attention towards Edwards, and Drastich was able to escape. Edwards exited, and Applicant took¹ the Oldsmobile. (Trial Tr. pp. 134-42, 180-89). Drastich identified Applicant out of a photo lineup and also made an in-court identification of Applicant as the person who robbed him. (Trial Tr. pp. 147-51). Edwards was unable to identify the assailant. (Trial Tr. p. 196).

Officer Jason Van Valkenburgh (Van Valkenburgh) responded to the carjacking call. Drastich informed him there was a "blacked out sports car" waiting nearby during the Carjacking. (Trial Tr. pp. 162-64). While conducting his investigation, Van Valkenburgh learned of a call concerning a civil disturbance at Paces Brook Apartments, which was across the street from In-

¹ Anders v. California, 386 U.S. 738 (1976).

Town Suites, involving a black Camaro. (Trial Tr. p. 164). Then, Van Valkenburgh saw a black Camaro drive by at a high rate of speed. Van Valkenburgh then began chasing the Camaro. (Trial Tr. pp. 165–66). In addition to his testimony regarding the pursuit, the State introduced the dash-cam video from Van Valkenburgh's patrol car into evidence. (Trial Tr. pp. 166–68). The Camaro eventually wrecked, and the two occupants fled on foot. After an ensuing foot chase, the officers caught one of the men, Devontae Bryant (Bryant). (Trial Tr. p. 170). Once arrested, Bryant implicated Applicant as the driver of the Camaro. (Trial Tr. p. 271).

Bryant testified at trial, that he and Applicant went to In-Town Suites in the Camaro. According to Bryant, Applicant told him he was "about to go handle something." (Trial Tr. p. 271). Bryant did not see Applicant exit the Camaro with a gun or wig. (Trial Tr. p. 272). However, the next time Bryant saw Applicant, Applicant was in "an old kind of car" at a gas station; Bryant was driving the Camaro. (Trial Tr. p. 272). Bryant followed Applicant from the gas station to Wal-Mart, and Bryant saw Applicant go inside Wal-Mart while Bryant waited in the Camaro. Thereafter, Bryant followed Applicant to a hotel, where Applicant parked the older-looking car. Applicant then got back into the Camaro, and Bryant moved to the passenger seat. Applicant then drove the Camaro to an apartment complex. (Trial Tr. pp. 272–74).

At the gas station, Cullen Bennecker (Bennecker) and Zane Harris (Harris) asked Applicant to buy them some beer. Applicant was driving an Oldsmobile. Applicant agreed but asked them to follow him to Walmart. When Applicant and Harris went inside Wal-Mart, Bennecker stayed in the parking lot and noticed a black Camaro pull up. Additionally, Bennecker noticed a silver pistol holster in the Oldsmobile's driver seat. When Harris and Applicant returned, Applicant invited Harris and Bennecker to join him at Ale House. (Trial Tr. pp. 173–76, 212–15). Bennecker and Harris agreed; however, instead, they went to Waffle House. Thereafter, they returned to

Harris's apartment at Paces Brook. Upon exiting their car, they saw headlights enter the complex's parking lot. The Camaro entered the parking lot, and Applicant and another man tried to waive Bennecker and Harris down. Bennecker and Harris ran into the apartment and called the police. (Trial Tr. pp. 176–77, 215). Harris identified Applicant as the man he interacted with that night. (Trial Tr. pp. 216–17).

The Camaro pulled into Paces Brook, and Applicant exited the car. Soon after, a police officer approached Applicant. Applicant ran back to the Camaro, which started the high-speed chase. The Camaro wrecked during the chase. A search of the Camaro revealed a camera still in its box, allegedly stolen from Walmart. (Trial Tr. p. 372).

Officer Mark Sjolund spotted the Oldsmobile in the parking lot of the Wingate Inn two days later, on August 6. (Trial Tr. pp. 244–45). The police found a brown wig in the Oldsmobile. (Trial Tr. p. 377).

Applicant's girlfriend, Kiane Warner (Kiane), testified for the State at trial. She recalled seeing Applicant in a black Camaro but could not remember a timeframe seeing him in the car. (Trial Tr. p. 252). Kiane testified that Applicant told her he had just taken the cops "on a high-speed chase, and when he got on the highway, he hit a curb" on August 4, 2014. Applicant also told Kiane he climbed over Bryant to exit the car. Additionally, Applicant gave Kiane some European currency. (Trial Tr. pp. 253–56).

On August 6, the police arrived at Kiane's apartment looking for Applicant; however, Applicant was not there. Kiane told them that Applicant was in her car with her brother, Quinten Warner (Warner). (Trial Tr. pp. 256–61). Several officers arrived at Warner's apartment looking for Applicant. In the parking lot of Warner's apartment complex, Applicant tried to evade law enforcement again, this time in Warner's car. However, he struck a light pole and was

apprehended. Before he wrecked, Applicant struck Officer Marcus Brown (Brown) in his attempt to flee. (Trial Tr. p. 293). Brown then fired several shots into the car. (Trial Tr. p. 293). Investigator Justin Britt and Agent Keith Thrower were at the scene to locate Applicant, and also testified Applicant nearly struck them with the car as Applicant was trying to flee. (Trial Tr. pp. 327, 452).

CURRENT ACTION BEFORE THIS COURT

In his application for post-conviction relief, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel;
2. The trial court erred by instructing the jury it could infer malice from the use of a deadly weapon;
3. Counsel erred by not objecting to the improper charge; and
4. Counsel failed to investigate the factual and legal circumstances surrounding the case.

On April 12, 2019, Applicant filed *pro se* amendments to his PCR application, adding additional claims for relief:

1. Ineffective Assistance of Counsel
 - a. Failure to provide complete discovery and to review discovery before trial;
 - b. Failure to properly investigate and prepare Applicant for trial;
 - c. Failure to object to the shoplifting video being played for the jury;
 - d. Failure to impeach witnesses for contradictory testimony;
 - e. Failure to give Applicant advice about the Jackson v. Denno hearing;
 - f. Failure to make all contemporaneous objections; and
 - g. Failure to advise Applicant of the new evidence brought in the day trial started.
2. Ineffective Assistance of Appellate Counsel
 - a. Failure to raise all meritorious issues.

Before this Court are Applicant's application for post-conviction relief, Applicant's amended PCR application, the Richland County Clerk of Court general sessions records from the

underlying conviction, the complete trial transcript, Applicant's complete records from his appeal, and Applicant's records from the South Carolina Department of Corrections.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act² (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based 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[.]

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

² S.C. Code Ann. §§ 17-27-10 to -160.

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), SCRCP; 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)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384

(1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be

substantial, not just conceivable." Richter, 562 U.S. at 112.

Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel and ineffective assistance of appellate counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

As a matter of general impression, this Court finds Trial Counsel's testimony at the evidentiary hearing credible and persuasive, where she presented well-recalled testimony of relevant background, facts, and discussions leading up to and during the trial. This Court finds Applicant's testimony at the evidentiary hearing not credible. This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant that she rendered adequate assistance and exercised reasonable professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, supra). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689, 104 S.Ct. 2052; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS ON THE MERITS

Allegation 1a: Failure to provide complete discovery and to review discovery before trial.

Allegation 1g: Failure to advise Applicant of the new evidence brought in the day trial started.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to review and provide a copy of his discovery. Applicant also alleges Trial Counsel failed to advise him of the new evidence brought in the day trial started. This Court finds these allegations are without merit.

An applicant who alleges his or her defense attorney was ineffective in failing to spend more time preparing or providing a copy of the discovery materials must demonstrate prejudice by showing what evidence could have been discovered or what other defenses could have been pursued. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)), abrogated on other grounds by Smalls, 422 S.C. 174, 810 S.E.2d 836. Furthermore, an applicant must also show how the new evidence or defenses would have resulted in a different outcome. Id. (citing David v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

At the evidentiary hearing, Applicant testified on direct examination that Trial Counsel showed him the discovery the third time she met with him. (PCR Tr. p. 8). Applicant testified that he only knew of his co-defendant's first statement and did not know about the five other statements the co-defendant wrote. (PCR Tr. p. 12). Applicant testified that those statements were brought in on the day of trial. (PCR Tr. p. 12).

On cross-examination, Applicant testified that they reviewed discovery, but it was not the

complete discovery. (PCR Tr. p. 19).

On direct examination, Trial Counsel testified that she met with Applicant at least eighteen times. (PCR Tr. p. 26). Trial Counsel testified that she received discovery and reviewed it with Applicant. (PCR Tr. p. 26).

On cross-examination, Trial Counsel testified that the statements on the co-defendant were given to them the day trial started. (PCR Tr. pp. 32 – 33). Trial Counsel testified she did not think the jury was sworn, but they provided the remaining statements the day the trial process started. (PCR Tr. p. 33). Trial Counsel testified that she did not request a continuance. (PCR Tr. p. 34).

This Court finds Applicant has failed to overcome the strong presumption that Trial Counsel rendered adequate assistance. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. In addition, Applicant has not presented any new evidence or defenses that could have been discovered by Trial Counsel's further review of the discovery, nor has he explained how further review would have changed the outcome of his trial. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where applicant 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).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1b: Failure to properly investigate and prepare Applicant for trial.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to investigate and prepare Applicant for trial. This Court finds this allegation is without merit.

To prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris, 377 S.C. at 75–76, 659 S.E.2d at 145–46 (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Harris, 377 S.C. at 75–76, 659 S.E.2d at 145–46. Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

On direct examination, Applicant testified that he believed they could have come up with a better trial strategy than the one they had. (PCR Tr. p. 20). Applicant testified that he could not "really complain too much" about Trial Counsel because she "fought a little bit."

This Court finds Applicant has failed to overcome the strong presumption that Trial Counsel rendered adequate assistance. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. In addition, Applicant has not presented any new evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared, nor has he explained how further review would have changed the outcome of his trial. See Harris, 377 S.C. at 75–76, 659 S.E.2d at 145–46 (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)); 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).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1c: Failure to object to the shoplifting video being played for the jury.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to the shoplifting video being played for the jury. This Court finds this allegation is without merit.

On direct examination, Applicant testified that Trial Counsel should have said something about the video.

On cross-examination, Applicant testified that he did not remember that Trial Counsel objected to the video multiple times throughout the trial.

This Court finds that the record refutes Applicant's claim that Trial Counsel did not object to the video evidence. In fact, Trial Counsel objected multiple times during the trial to the video evidence. (Trial Tr. pp. 72 – 78; 223 – 226; 228 – 229). Consequently, this Court finds Applicant has failed to overcome the strong presumption that Trial Counsel rendered adequate assistance. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. This Court finds the record conclusively refutes any merit to this allegation, and Applicant has failed to meet his burden.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1d: Failure to impeach witnesses for contradictory testimony.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to impeach witnesses for contradictory testimony.

Applicant failed to present any evidence, testimony, or legal authority at the evidentiary hearing regarding this allegation. Therefore, the Court deems it abandoned. "When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue." Palmer v. State, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (citing State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011)).

Allegation 1e: Failure to give Applicant advice about the Jackson v. Denno hearing.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to give advice on the Jackson v. Denno hearing. This Court finds this allegation is without merit.

On cross-examination, Applicant testified that Trial Counsel should have had a Jackson v. Denno hearing on the mugshot used. (PCR Tr. p. 20). Applicant testified that he did not recall the trial court pausing so that Trial Counsel could explain the Jackson v. Denno hearing. (PCR Tr. p. 21).

This Court finds that the record refutes Applicant's claim. The trial court took a break so that Trial Counsel could explain the Jackson v. Denno hearing. This Court finds Trial Counsel was able to thoroughly cross-examine and recross-examine the witness. (Trial Tr. pp. 546, l. 1 – 551, l. 3; 551, l. 19 – 554, l. 6). Ultimately, the trial court found Applicant's statement was given freely and voluntarily. (Trial Tr. p. 554, l. 16 – 20). Applicant has the burden to prove every allegation in his application. See Butler, 286 S.C. at 441, 334 S.E.2d at 814. This Court finds Applicant has failed to meet his burden.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1f: Failure to make all contemporaneous objections.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to make all contemporaneous objections.

Applicant failed to present any evidence, testimony, or legal authority at the evidentiary hearing regarding this allegation. Therefore, the Court deems it abandoned. "When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue." Palmer v. State, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (citing State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011)).

Allegation 1h: Failure to object to the trial court's instructing the jury it could infer malice from the use of a deadly weapon.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to the trial court's jury instruction that it could infer malice from the use of a deadly weapon. This Court finds this allegation is without merit.

Prior to Applicant's trial, in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), the South Carolina Supreme Court addressed the "half-truth" created by charging that malice could be inferred from the use of a deadly weapon when there was evidence in the record to reduce, mitigate, excuse or justify the killing. After a lengthy discussion, the Court overruled prior precedent and held:

Under our policy-making role in the common law, we hold that the "use of the deadly weapon" implied malice instruction has no place in a murder (or assault and batter with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with the intent to kill).

Belcher, 685 S.E.2d at 809.

This Court finds that Trial Counsel erred in failing to argue that the lower court should not have given the inference of malice instruction involving a deadly weapon when evidence was presented that could reduce, excuse, justify or mitigate the homicide. On direct examination, Trial Counsel testified that she was familiar with Belcher, but she did not object because she missed it. (PCR Tr. p. 31).

On cross-examination, the following colloquy occurred:

- Q: All right. I want to ask you about the jury charge, and I don't want to beat that dead horse, but it's a kind of important issue here. I mean, your theory in this case as to the attempted murders was -- I mean, what, what was your theory? Didn't y'all argue sort of the police provoked some of this?
- A: I think we did. I know part of our thing was -- or part of our position was the officers were responding for an arrest, you know, having knowledge and information about Mr. Durham. You know, they responded to the scene with twenty-plus different law enforcement, jumped in front of a moving car, and then claimed that their lives had been threatened by somebody when they were the ones that jumped in front of the moving car. So, that's how we were kind of looking at that particular case.
- Q: If the jury had believed that as to all the counts, that would reduce mitigating -- or excuse Mr. Durham's conduct, correct?
- A: Correct.
- Q: And State v. Belcher, which I know the court knows, but if I could just for the record indicate that Belcher -- I am referring to State v. Belcher, 385 SC 597, 685 SE 2d 802, was a 2009 case prior to this trial --
- A: Yes.
- Q: --- correct, and at the time of the trial, the rule was a, excuse me, a -- that, that if the jury's not allowed -- judges are not supposed to charge malice being inferred from the use of a deadly weapon when evidence is presented that would reduce mitigating excuse or justified. Is that correct?
- A: Correct.

(PCR Tr. pp. 35 – 36).

Whether 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"). Here, Trial Counsel did not articulate a valid strategy in not objecting to the jury charge. Thus, this Court finds Trial Counsel was deficient for not objecting to the jury charge.

In determining whether a defendant was prejudiced by improper jury instructions, the court must find that by 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).

While this Court finds Trial Counsel was deficient in failing to object to the jury charge of malice, this Court cannot find that Applicant suffered any prejudice from the erroneous jury charge. Further, this Court finds Trial Counsel's error to be harmless error. Here, Applicant was charged with three counts of attempted murder, and the jury only found Applicant guilty of one count of attempted murder. Importantly, the jury convicted Applicant of the lesser included assault and battery—1st on one of the attempted murder charges and acquitted Applicant on the other attempted murder charge. This Court highlights the jury's conviction of the lesser included assault and battery—1st because malice is not an element of this charge. This Court finds that there is **not** a reasonable likelihood that the jury applied the improper instruction in a way that violates the Constitution.

Moreover, the implied malice from the use of a deadly weapon was not the only implied malice evidence presented at the trial. Officer Marcus Brown (Brown) testified that he thought they had Applicant blocked in a parking space when he got out of his unmarked patrol car. (Trial Tr. p. 292). Brown testified to the following events:

Well, he was in a parking space. You parked in the space and my partner came in at an angle like this. So as I got out the vehicle, I guess, her front bumper was probably a couple of feet away from his rear bumper off to As I exited the vehicle, I looked the side catercorner. at the -- at that time I can only see one person. I was keying in on the driver because that's who we had the I thought we had them pretty well blocked warrants for, so I was thinking he was just going to run off and in, jump out the car and start running. And I'm a little bit quicker than my partner, so I thought I could quickly get to him as he was exiting the car and tackle him or something right there in the parking lot. So as I'm getting out of the vehicle, I look at the rear of the vehicle , I'm looking at the driver in the side mirror. He looks down in the mirror, then I see the red lights come on - - not red lights reverse lights. I hear the car engine like he's gunning the motor. And as he throws it it clicks into gear and I see the back end raise in gear, up and it's coming straight back for me. At that time I jumped to the side as far as I could because I'm next to the patrol car. I was sandwich in between the vehicle. The rear bumper hit me and spun me around to the patrol car. He was trying to turn out. So when he turned out, the side of the car pinned me up against the vehicle and the mirror clipped my arm and broke the mirror off. He kept on going pass me. I was able to draw my gun at that time or probably around the same time and I fired several shots as he drove pass me. He hit a tree. It impacted -- he was going so fast the impact of the tree, the car went up the tree, so the back of the vehicle was up off the ground and we closed in. At that time another officer was coming at the same time to try to catch him. As he pulled in and he got out his vehicle, the vehicle came down off the tree and spun around and came back at us again. We fired again. The other officer fired and it hit a parked car, kept going until it hit. As he hit the parked car, between hitting another car because he almost hit another officer and that's when that officer fired again, fired his shots. In between him hitting a tree and hitting a I fired again because he was coming at the parked car, other officer. When he hit the parked car and spun he went at another officer and I fired again, around, fired some more, went through the telephone pole, cut it completely in half.

(Trial Tr. pp. 292 – 294).

Based on this testimony, the malice, in this case, was not proven solely or necessarily from the use of a deadly weapon – because a vehicle is not necessarily a deadly weapon – rather, malice is implied from the Applicant's actions when he made the decision to put the vehicle in reverse and gun it in the direction of Brown. Applicant did not stop after he hits the officer and a tree—rather, he continues to attempt to flee while striking a parked car and then a light pole, all while officers are around his vehicle. Applicant's actions and conduct clearly demonstrated a "wanton or reckless disregard for human life." See State v. Wilds, 355 S.C. 269, 276-77, 584 S.E.2d 138 (Ct. App. 2003) ("Implied malice is when circumstances demonstrate a 'wanton or reckless disregard for human life' or 'a reasonably prudent man would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act.'") (internal citations omitted). Therefore, this Court finds that even though the deadly weapon instruction was objectionable, there is no reasonable probability that instruction affected the result of the proceeding.

Accordingly, this Court finds Trial Counsel was deficient for not objecting to the jury charge of implied malice from the use of a deadly weapon; however, Applicant has failed to show any prejudice from Trial Counsel's deficiency. Thus, this allegation must be **DENIED** and **DISMISSED**.

ALLEGATIONS NOT ENUMERATED IN APPLICATION BUT RAISED AT THE PCR HEARING

Allegation: Failure to move to sever trial.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to motion to sever the trial. This Court finds this allegation is without merit.

On direct examination, Applicant testified that he did not think he ever said anything to Trial Counsel about both trials being tried together, but he should have. (PCR Tr. pp. 13 – 14).

Applicant testified that they railroaded him and killed his character. (PCR Tr. p. 14).

On direct examination, Trial Counsel was asked if there was a strategic reason for not moving to sever, and she testified that she could not recall if she discussed it with Applicant, but she did discuss the consequences of severing the trials. (PCR Tr. p. 29). Trial Counsel testified that it would have opened Applicant up to life without parole. (PCR Tr. p. 29).

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily account for the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a particular defendant. 466 U.S. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for her action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

This Court finds Trial Counsel clearly articulated a strategy in which she did not move to sever the trials because the consequences to Applicant were the possibility of life without parole. As this strategy was objectively reasonable, this Court will not second guess counsel's tactics. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.").

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and

DISMISSED.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Allegation 2a: Failure to raise all meritorious issues.

Applicant alleges Appellate Counsel was constitutionally ineffective for failing to raise all meritorious issues. This Court finds this allegation is without merit.

Applicant failed to present any evidence, testimony, or legal authority at the evidentiary hearing regarding this allegation. Therefore, the Court deems it abandoned. "When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue." Palmer v. State, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (citing State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011)).

[CONCLUSION PAGE FOLLOWS]

CONCLUSION

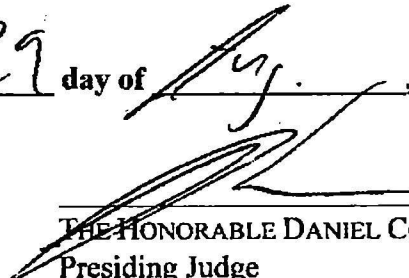
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 29 day of Aug., 2023.



THE HONORABLE DANIEL COBLE
Presiding Judge
Fifth Judicial Circuit

Richland County, South Carolina