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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
Steven L. Williams, #157166,	)	Case No.: 2019-CP-23-0485
Applicant,	)	
v.	)	
	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Steven L. Williams on February 1, 2019. An evidentiary hearing was held on September 13, 2021, at the Greenville County Courthouse. Applicant attended virtually. R. Mills Ariail, Jr., was present and represented Applicant. Assistant Attorney General Taylor Z. Smith represented the State. At the close of the evidentiary hearing and in a conditional Form 4 order on September 17, 2021, this Court found Applicant had failed to carry his burden of proof; however, the Court determined that it would allow the record to remain open for a limited time for Applicant to present potential evidence on plea offers, if any. The Court also directed counsel for Respondent to submit a proposed order based on its ruling but noted it would allow completion of the record to ensure all matters were addressed. A subsequent hearing was held on March 29, 2023, by video and telephone. The Court received additional testimony regarding plea negotiations. At the conclusion of the hearing, this Court reaffirmed that it is denying relief on the prior addressed claims, and then denied the remaining claim "as to the failure to relate an offer." This Court directed counsel for the State to prepare an order addressing all claims as indicated in his rulings on the record. [1]

[1] Mr. Smith left the Office in May 2023. The undersigned allowed new counsel for the State time to review the transcripts and prepare the order. New counsel for the State provided the

After consideration of the testimony given at the hearings, and after reviewing and considering the record, arguments presented by counsel, and the controlling case law, this Court finds that Applicant has failed to carry his burden of proof. Consequently, this Court DENIES relief for the specific reasons set out in this order.

General Procedural History

Applicant is presently confined in the South Carolina Department of Corrections in Lee Correctional Institution pursuant to orders of commitment of the Greenville County Clerk of Court. During its March of 2015 term, the Greenville County Grand Jury indicted Applicant for armed robbery (2015-GS-23-00238), first-degree assault and battery (2015-GS-23-00241), possession of a weapon during the commission of a violent crime (2015-GS-23-00238), and possession of a firearm by a person convicted of a violent crime (2015-GS-23-00240). Applicant was also indicted for attempted murder (2015-GS-23-0239). C. Carlyle Steele, Esq., represented Applicant on the charges.

A jury trial was held on May 11-12, 2016. The Honorable Letitia H. Verdin presided. During trial, Applicant pleaded guilty only to possession of a firearm by a person convicted of a violent crime, and his sentencing was deferred until the conclusion of trial.[2] At the conclusion of trial, Applicant was convicted as indicted of armed robbery, first-degree assault and battery, and possession of a weapon during the commission of a violent crime. He was found not guilty of attempted murder. Judge Verdin sentenced Applicant to imprisonment for life for armed robbery,

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proposed order along with copies of the trial and PCR hearing transcripts to opposing counsel and the undersigned to aid in review of the proposed final order of dismissal.

[2] A stipulation was read to the jury that "the defendant Steven Levon Williams stipulated and admitted that he was in possession of the revolver in evidence in this case on June 6th, 2014." (Tr. 291).

ten years for first-degree assault and battery, five years for possession of a weapon during the commission of a violent crime, five years for possession of a firearm by a person convicted of a violent crime, with all sentences running concurrently, and with credit for time served. On May 16, 2016, the solicitor, in his discretion, dismissed an additional charge of criminal conspiracy. Applicant timely appealed.

Appellate Defender John H. Strom of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Applicant on appeal. Appellate counsel perfected the appeal in the form of an *Anders*[3] brief. After the required review, the Court of Appeals dismissed the appeal by unpublished opinion. *State v. Williams*, Unpublished Opinion No. 18-UP-151 (S.C. Ct. App. filed April 11, 2018). The Court of Appeals issued the remittitur on April 30, 2018.

Post Conviction Relief Allegations

The original *pro se* application was filed on February 1, 2019, and raised the following claims as paraphrased by Respondent:

1. An illegal search and seizure occurred in obtaining the gun [found in Applicant's car after arrest], and due process required the trial court suppress the gun as evidence;

2. Ineffective Assistance in failing to call witnesses favorable to the defense;

3. Ineffective Assistance of counsel for failing to disclose Rule 5 pictures;

4. Ineffective Assistance for failing to secure a plea deal before trial when defendant faced a life without parole sentence.

On January 14, 2020, Applicant's appointed PCR counsel filed an amended application alleging:

1. Golden Rule Violation;

2. Prosecutorial Misconduct;

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3 *Anders v. California*, 386 U.S. 738 (1967).

3. Trial Court Error in which the Judge [included] a provision where she expressed her own opinion in the charge.

At the beginning of the first PCR hearing, this Court reviewed the allegations to be presented with counsel, phrasing the claims as:

> There was alleged violation of the Golden Rule, there's prosecutorial misconduct, the judge [e]xpressed her personal opinion in the final charge, the judge should have suppressed the gun, [and] also ineffective assistance of counsel for failing to call a witness, failing to get proper Rule 5 pictures and failure to secure a plea.

(PCR Tr. 4).

Counsel for the State objected and asserted he had received notice of only two issues that would be presented: the Golden Rule argument and the challenge to the trial court's instruction. (PCR Tr. at 5). This Court resolved that the issues as reviewed at the beginning of the hearing would be heard. (PCR Tr. at 5).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to carefully considering the record and the arguments presented by counsel, this Court has also had the opportunity to consider the testimony presented at the PCR evidentiary hearings and has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance Claims

For claims that trial counsel provided ineffective assistance, this Court is guided by the familiar test: To show a violation of the Sixth Amendment, an applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington,* 466 U.S. 668, 694 (1984); *Simpson v. Moore,* 367 S.C. 587, 595–96, 627 S.E.2d 701,

706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland,* at 694. It is presumed that counsel made all decisions in exercise of reasonable judgment. *Strickland,* at 689. It is the applicant's burden to prove, by a preponderance of the evidence, that he is entitled to relief. Rule 71.1 (e), SCRCP. *See also Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("the burden of proof is on the applicant to prove the allegations in his application").

General Summary of Facts from Trial

A few minutes before 6:00 pm on June 6, 2014, while the victim, Juan Cabrera, was preparing to close the tire shop where he worked, he saw Applicant stop his black Mercedes sedan nearby. (Tr. 294-295 and 283). As the 6:00 pm closing time approached, Applicant pulled the Mercedes into the shop. The victim saw two black males exit the vehicle. (Tr. 296). He had never seen either of the two men before. (Tr. 303). The victim asked Applicant (who he identified in court) if he could help him. (Tr. 296). Applicant demanded money in response, while the passenger[4] came around toward the victim and shot him with a stun gun. (Tr. 297-298). Applicant pulled out a black revolver and again demanded money. (Tr. 297-298). The victim was pushed back toward the building, and decided to give the robbers the money that he had in his pocket, approximately $150.00 dollars, but rather than handing the money over, he threw the bills into the air, some landing on a fan. (Tr. 299-300 and 279). Applicant began to pick up the bills. (Tr. 300-301, 318). The man with the stun gun began to hit the victim, but, as they fought, the victim was able "to put him on the ground," after which the victim felt blows to his back. Applicant used the

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[4] The passenger, also referenced as the "second man," was co-defendant Leviticus Young. (*See* Tr. 123-124, defense opening statement). The defense contended that Young and the victim had a prior "beef," and Young assaulted the victim. (Tr. 124). However, the evidence at trial supported that Appellant and Young worked together to commit armed robbery. And, as noted, the victim testified he did not know the men before the robbery. (Tr. 303).

revolver to hit the victim in the back of head. (Tr. 300). Applicant then went to back to the Mercedes. At some point, the second man threw tires toward the victim. (Tr. 305). The victim picked up a piece of metal and hit the second man. (Tr. 301-302). The second man finally got to the car and he and Applicant left in the Mercedes. (Tr. 303). The victim testified that he did not have his phone with him to call the police, so he got in his car and followed the Mercedes. (Tr. 320-321).

During the chase, the victim stopped to ask a bystander to call for help. (Tr. 306. 310). Eventually, after the victim "bumped" the Mercedes with his own car, Applicant hit a telephone pole, stopping the car. (Tr. 310). After the bump, but before hitting the pole, Applicant shot at the victim. (Tr. 311). The victim drove off to find help. (Tr. 312). He went back toward the tire shop but met officers responding. (Tr. 312). The victim explained what had happened and they took him back to the Mercedes where he could identify the robbers. (Tr. 312).

Stephanie Bishop testified she saw the chase, and the victim stopped "desperate for help," so she called 911. (Tr. 142-144). Another witness, Robert Cullum, heard a shot, saw the Mercedes lose control, and called 911 for assistance. The passenger ran, but the driver, Applicant, remained in the seat. (Tr. 157-161). Cullum's mother, Karen Brown, also saw the car hit the telephone pole, and one man running away. (Tr. 168-169). Emergency personnel eventually arrived at the scene. A fireman, while attempting to aid the driver in the Mercedes, saw a small revolver under the driver's seat. (Tr. 179-181). The fireman alerted law enforcement and a deputy similarly saw the gun "sticking out" from the under the driver's seat. Inspection of the gun allowed the deputy to determine only one shot had been fired. (Tr. 195 and 204). As part of the investigation, security video from the tire shop area was recovered. (Tr. 240).

Applicant was taken into custody from the Mercedes. At booking, he had $130.79 in cash,

but no wallet. (Tr. 329).

Golden Rule Argument

At the first evidentiary hearing, Applicant testified that the solicitor made a golden rule argument when he used "you" while addressing the jury. (PCR Tr. 22-23). Applicant referenced the State's arguments at the following trial transcript pages: 370, line 4; 371, line 15; 375, line 5; and 378, line 11. (PCR Tr. 22-24).[5] Applicant contended that the solicitor committed prosecutorial misconduct based on presenting an improper, golden rule argument.

Former counsel testified that he was aware of what constitutes a golden rule argument, essentially one that "ask[s] the jurors to put themselves in the place of the victims," but that he did not view the argument as such. (PCR Tr. 35-36; *see also* 39-40). The questions posed to counsel indicated to this Court that Applicant was attempting to raise an ineffective assistance of counsel claim based on a failure to object. Consequently, this Court evaluates the claim as one of ineffective assistance of counsel.

At the close of the hearing, having reviewed the arguments identified by Applicant, this Court agreed with counsel. (PCR Tr. 45). The argument referenced reflected only that the solicitor used a neutral reference to "you" as describing an individual generically. (Tr. 370-371 and 375-378). He did not ask the jurors to put themselves in the victim's shoes. This does not constitute a golden rule argument.

A good guide to what constitutes a "golden rule" argument may be found in how our Supreme Court has defined the argument:

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[5] Applicant also identified a portion of the trial judge's instruction as support of a golden rule argument. (PCR 24, citing Tr. 406). First, the judge's instructions to the jury are not argument. Second, the instruction is an ordinary instruction defining "express malice" which does not ask the jurors to place themselves in the place of the victim. This portion of Applicant's argument fails to show support for his ineffective assistance claim.

> Jurors are sworn to be governed by the evidence, and it is their duty to consider the facts of the case impartially. A Golden Rule argument *asking the jurors to place themselves in the victim's shoes* tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice.

State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (emphasis added) (citations omitted). A "'Golden Rule' type argument" is one asking the jury "to 'speak for' the victim ... to set aside their impartiality and, instead consider the evidence from the subjective position of the ... victim." *Brown v. State*, 383 S.C. 506, 516–17, 680 S.E.2d 909, 915 (2009). In essence, though precise wording may differ, the concern remains whether the perspective is skewed by an argument such that emotion displaces impartiality. *See Von Dohlen v. State*, 360 S.C. 598, 610, 602 S.E.2d 738, 744 (2004) (acknowledging that an argument asking to view the evidence from the victim's position may not be labeled a "Golden Rule" argument, but if it appeals to emotion and affects impartiality, it is a "Golden Rule" argument and improper).

This Court, in light of the above guidance from our Supreme Court, has again reviewed those complained of portions[6] of the argument and finds counsel was not deficient in failing to raise an objection. The portions of the State's closing argument identified include:

> "I don't know if you noticed this picture. ... you want to rob a place that has money. It doesn't necessarily have to be a lot of money but you want an easy target" and continues in the scenario with references to "you want" "you know" or "You had a gun"

(Tr. p. 370, lines 4-11).

> ... I'm kind of trying to break this down in the simplest terms I can for you is that if you caused injury to another person during the

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[6] To fairly assess the complained of portion, the argument must be considered in context, and not just the immediate context, but in context of the entire trial record. *Reese*, 370 S.C. at 38, 633 S.E.2d at 901. This Court considered such context when evaluated the portions cited by Applicant.

> commission of a robber, you have committed assault and battery in the first degree.

(Tr. 371, lines 13-18).

> ... Someone says give me your money. I'm not just going to hand over my money. But you pull out the stun gun, which you're not going to bring out, then you point a gun in my face and you say give me your fucking money. You know it's serious. You know its's real. And it's two against one in that little space.

(Tr. 375, lines 5-11).

> ... After you just committed a robbery, you probably don't want to be on the main roads. It makes sense you want to take back roads, which they did towards Steven Williams' house.

(Tr. 378, line 11-15).

Notably, these arguments in large measure do not involve the victim at all, but what the robbers likely thought. This Court finds that those arguments do not and could not constitute a golden rule argument at all. One portion of the argument identified on p. 375 tends to refer to the victim not wanting to give up his money, but that is proper argument on the facts and inferences from the testimony, most specifically, the victim's testimony. That is not improper as it never veers from objective consideration of the evidence. *See Von Dohlen*, 360 S.C. at 612-613, 602 S.E.2d at 745-746 ("golden rule arguments urg[e] the jury to subjectively analyze a case solely or primarily from the victim's view point" and essentially encourage "jurors to abandon their impartiality"). Further, the argument is squarely based on the victim's testimony:

> Q: ... you said he pulled the gun on you and said, give me the fucking money. What happened after that?
>
> A: After that, I tried to go back to the building because they tried to push me back. I was in the middle of the building. And I decided give the money because he put the gun on me, in my face.

(Tr. 299). Essentially, the argument goes to the credibility of the victim's testimony which

supported that the money was given over to the robbers – a point that the solicitor is certainly entitled to make. *See State v. Busse*, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023) ("A prosecutor arguing forcefully during closing argument that the jury should believe a particular witness is well within her proper role as a zealous advocate, so long as the argument is based on evidence admitted during trial."); *see also Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004) ("A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony."); *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (a solicitor's argument "should stay within the record and reasonable inferences to it"). Notably, this is a logical and limited response to the defense's argument in closing.

The defense had indicated to the jury in the opening statement that there was some sort of "beef" between Young and the victim. (*See* Tr. 124). In cross-examination of the victim, the defense had the victim acknowledge that he never called the police, and essentially challenged why the victim gave chase rather than calling the police. (*See* Tr. 321). The victim explained he did not have his cell phone and he did not want the robbers to get away. (Tr. p. 321-322). In closing, the defense emphasized that the victim admitted not calling the police and posited "if these events had occurred the way Mr. Cabrera said they occurred he wouldn't have done that" but would have called the police. (Tr. 359-360).

In response, the State argued: "Why would Juan not call 911? He was just robbed at gun point, beat on the head with a gun, hit with a stun gun, kicked in the back and he was in fear for his life and he was mad." (Tr. 368). In other words, the State argued that the victim was logically and reasonably fearful and decided to give up his cash against his will even though he still later

gave chase attempting to stop the two men.[7] The State later made the neutral reference to "you" simply as underscoring the credibility of the testimony, again, merely arguing the facts of record and the logical reaction to the events as related in the testimony. There is no deficient performance in not objection to the closing argument.

Critically though, for purposes of this analysis, a careful review of the argument, in context, does not lead to finding there was an appeal to emotion or any encouragement to abandon impartiality. Consequently, counsel was not deficient in failing to object to any of these arguments as improper, golden rule arguments. Applicant has failed to carry his burden under *Strickland.* 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

To the extent that Petitioner would argue that he was not attempting to raise an ineffective assistance claim, but a freestanding claim of prosecutorial misconduct, Applicant's issue would be barred by the Simmons doctrine and S.C. Code § 17-27-20(b).

The scope of this Court's jurisdiction for PCR matters is set out in S.C. Code Ann. § 17-27-20 (A), which provides, in relevant part, for claims "[t]hat the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State." S.C. Code Ann. § 17-27-20 (A)(1). However, Section (B) places limits on those claims by providing that, "[t]his remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(B).

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[7] *See generally State v. Keith*, 283 S.C. 597, 598, 325 S.E.2d 325, 325–26 (1985) ("Armed robbery occurs when a person commits common law robbery while armed with a deadly weapon. S.C.Code Ann. § 16-11-330 (1976). Robbery is the crime of larceny accomplished with force, *State v. Brown*, 274 S.C. 48, 260 S.E.2d 719 (1979), while larceny is the 'felonious taking and carrying away of the goods of another' against the owner's will or without his consent. *Id.*" Consequently, the facts as referenced go directly to the charge of armed robbery.

It is intended that a PCR action "take[] the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence" and that PCR "shall be used exclusively in place of them." *Id.*

Because a PCR action is not a substitute for other available proceedings and/or remedies, particularly those at trial and direct appeal, a PCR applicant cannot assert any issues in his PCR action that could have been raised at trial and on direct appeal. This prohibition has long been recognized. *Simmons v. State,* 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."); *see also Drayton v. Evatt,* 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The Simmons rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

While previously heard or unheard freestanding trial or direct appeal issues are not cognizable, the general factual basis for the previously unheard issues may be reached by and through an allegation of ineffective assistance of counsel. *Drayton,* 312 S.C. at 9, 430 S.E.2d at 520 ("Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel.") Ineffective assistance of counsel claims constitute the general nature of issues appropriate for post-conviction relief actions. *See, e.g., Al-Shabazz v. State,* 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (discussing jurisdiction pursuant to S.C. Code § 17-27-20(A), and finding "A typical PCR

claim of ineffective assistance of counsel falls into this category...."). Consequently, the freestanding claim is barred. [8]

However, the related ineffective assistance claim is denied based on Applicant's failure to carry his burden of showing deficient performance. Applicant has failed to show a golden rule argument at all; thus, there could be no ineffective assistance in not interposing an objection on the basis of an improper, golden rule argument. Applicant is not entitled to any relief.

Jury Instructions: Alleged Trial Comment on the Facts

Applicant testified that the trial judge indicated her opinion on the facts when, while instructing the jury as to attempted murder, she gave examples of a deadly weapon. (PCR Tr. 20-21). Applicant directed attention to p. 403 of the trial transcript. He testified that charge was repeated on p. 407. (PCR Tr. 20-21). Applicant claimed trial court error.

Former counsel testified that in the opening comments to the jury, Judge Verdin told the jury that they would be determining the facts and to disregard anything that they may take as the judge having an opinion on the facts, and that instruction was repeated at the close of trial as well. (PCR Tr. 33-34). He testified that he did not recall Applicant having any concern at trial, nor did he. (PCR Tr. 34, 40). Counsel considered the charge regarding examples of deadly weapons to be

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[8] There are limited exceptions recognized for this rule, neither of which are applicable here. For an exception to the rule, there should be a showing that the freestanding claim was not available for proper objection and presentation on direct appeal, *see, for example, Jones v. State*, 440 S.C. 14, 24, 889 S.E.2d 590, 596 (2023) (applicant "precluded from raising ... issue during the plea proceeding because conditional guilty pleas are not permitted"), or an objection was made but the issue was still not adequately addressed, *Fortune v. State*, 428 S.C. 545, 559, 837 S.E.2d 37, 44–45 (2019) ("full extent and effect of the assistant solicitor's misconduct in this case, however, is now subject to review only in a claim for a Fifth and Fourteenth Amendment due process violation. Under these circumstances, we find this is one of the cases we contemplated in Al-Shabazz and other cases"). Here, a golden rule argument is not new, an objection was simply not warranted because there was no error in the argument under a gold rule analysis.

standard, "right out of the charge book." (PCR Tr. 40). Counsel testified that he saw no cause to object. (PCR Tr. 40).

As with the proceeding claim, it appeared to this Court from the nature of the questions asked at the hearing, and the presentation of the case, that Applicant was attempting to raise this claim as a claim of ineffective assistance of counsel for failure to object to the judge's charge. Consequently, this Court evaluates the claim as one of ineffective assistance of counsel.

At the close of the hearing, this Court indicated the instruction was standard and not an expression of an opinion. (PCR Tr. 45). Having once again reviewed the charge at issue, this Court again finds counsel was not ineffective for failing to object to the charge as expressing a personal opinion on the facts.

As part of her charge on the offense of armed robbery, Judge Verdin instructed the jury as follows:

> ... the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon during the robbery. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.
>
> The following are examples of instruments that may be deadly weapons: a pistol, a shotgun, a rifle, a dirk, a dagger, a knife, a slingshot, metal knuckles, a razor, gasoline, a fire bomb or Molotov cocktail, and lighter fluid. A gun may be a deadly weapon even if it is not operating.

(Tr. 403).

Judge Verdin also instructed on the concepts of express malice and inferred malice as part of the charge on attempted murder. She explained:

> Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great

> bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.
>
> Again, the following are examples of instruments which may be deadly weapons: a pistol, a shotgun, a rifle, a dirk, a dagger, a knife, a slingshot, metal knuckles, a razor, gasoline, a fire bomb or Molotov cocktail, and lighter fluid. A gun may be a deadly weapon even if it is not operating.

(Tr. 407).

Judges are prohibited from commenting on the facts in the case. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). "A jury instruction is a comment on the facts when it expresses the court's opinion of a case, thereby imposing the court's belief on the jury in a way likely to influence it. " *State v. Brown*, 438 S.C. 146, 151, 881 S.E.2d 771, 774 (Ct. App. 2022). In essence, "a trial judge should refrain from all comment which tends to indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused." *State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). However, should an instruction offend this prohibition, it is still required that "prejudice must be shown to require reversal." *Litchfield Co. of S.C. v. Sur-Tech, Inc.*, 289 S.C. 247, 253, 345 S.E.2d 765, 768 (Ct. App. 1986).

Nothing indicates any particular "deadly weapon" should be considered over any other. The instruction is a neutral definition with a variety of examples, not setting one example over the others. Further, there is no suggestion included for what findings should be made. This is an instruction on the law, not a comment on the facts. *See generally State v. Philips*, 73 S.C. 236, 53 S.E. 370, 371 (1906) ("In properly defining a reasonable doubt, it cannot be successfully contended that the presiding judge charged upon the facts."). Given that Applicant has failed to show a comment on the facts, there could be no ineffective assistance in not interposing an objection based on same.

That counsel is not deficient ends the *Strickland* inquiry. *Strickland*, at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). It does so here. However, this Court finds, in the alternative, that if deficient performance could be shown, Applicant cannot show prejudice.

The weapon at issue, according to the testimony, was the revolver Applicant possessed during the robbery, and later used to shoot at the victim from the Mercedes. There was no question Applicant possessed the gun: a stipulation was read to the jury that "the defendant Steven Levon Williams stipulated and admitted that he was in possession of the revolver in evidence in this case on June 6th, 2014." (Tr. 291). The listing of examples, one of which was a gun, did not unfairly underscore or show preference for finding Applicant had possession of a gun – it was a point he conceded. There could be no prejudice. *Strickland,* at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial); *see also Litchfield, supra* (similarly requiring a showing of prejudice where instruction veers into a prohibited comment on the facts).

Further, to the extent Applicant should maintain that he wishes to raise a claim of trial court error, such a claim is barred, without exception, by the Simmons doctrine and the statutory provision in S.C. Code Ann. § 17-27-20(b).

However, as to an ineffective assistance claim, the claim is denied based on Applicant's failure to carry his burden of showing deficient performance. Applicant is not entitled to any relief.

Ineffective Assistance: Motion to Suppress

Applicant testified at the PCR hearing that his counsel, Mr. Steele, discussed the facts of the case with him and, after those discussions, filed a motion to suppress the gun recovered from the Mercedes after the wreck. (PCR Tr. 8). Applicant testified that he told his counsel how "[t]he fireman said he went in the car to secure the car," and saw "the gun up under the seat." (PCR Tr.

at 11). Applicant testified that [t]he officer who actually retrieved the gun had to "go in the car and get the gun from under the seat," thus, in Applicant's view, this fact demonstrated an "illegal search and seizure because the gun - - the gun was not in plain sight." (PCR Tr. 12).

At the conclusion of the testimony, this Court found there was "really no evidence" to support a potential suppression motion apart from Applicant's testimony. (PCR Tr. 45). Further, a review of the trial testimony tended to support the gun would be admissible under the "plain view" theory. (PCR Tr. 45).

Having reviewed the transcript again, this Court affirms its conclusion. The record shows that counsel was not deficient. He moved to suppress the gun, specifically arguing that it "was in his automobile. It was not in plain sight." (Tr. 51). Counsel called Applicant at the pre-trial hearing on the motion, and Applicant was allowed to testify that the gun was "up under the seat." (Tr. 53). The State presented the fireman who noticed the gun, Joey Smith. Mr. Smith testified in the pre-trial hearing that he did not initially notice anything while Applicant was sitting in the car; however, after Applicant was removed from the vehicle, when Mr. Smith was checking the car for safety, *i.e.*, turned off and not going to roll, Mr. Smith observed: "... the gun was noticeably under the seat in plain view." (Tr. 61-62). The gun was in a compartment, but that compartment door was open. (Tr. 67). Mr. Smith informed law enforcement. (Tr. 63). Deputy Chris McAlmont testified that the gun handle was "sticking out from underneath the driver's seat." (Tr. 71). The deputy confirmed that he did not open the door to the compartment, rather, it was already open when he saw it. (Tr. 72). The deputy identified pictures of the car that showed the open compartment and the gun. (Tr. 71-73). The trial judge found, based on the testimony and the pictures, that the gun would have been visible, but also denied the motion "on the basis of

inevitable discovery because it most certainly would have been ... located during an inventory search of the vehicle when it was towed." (Tr. 77). [9]

Based on the evidence of record, there is no basis for finding counsel was deficient. As discussed with his client, counsel filed a motion and argued the motion. The motion was denied based on the facts and law being against suppression and not from ineffective assistance. Applicant has not indicated any fact or circumstance that he contends has changed since the time of the motion, or was unknown at the time of the motion, or that counsel failed to present and argue. He has failed to show any deficient performance in counsel's handing of the motion to suppress. Consequently, Applicant has failed to carry his *Strickland* burden of proof and is not entitled to any relief.

Ineffective Assistance: Failure to Call Witness

Applicant testified at the PCR hearing that counsel failed to call a witness that he had asked counsel to contact. Applicant testified that he gave counsel Brittany Bryant's name as a witness who would testify for him in his defense. Applicant testified that he told counsel that Ms. Bryant would testify that there was no armed robbery, but simply "two grown men fighting over this female." (PCR Tr. 9-10). Applicant testified that his "so-called co-defendant, was going to testify to the same thing." (PCR Tr. 11). Applicant did not present either witness at the hearing, nor other acceptable substitutes to reflect the potential testimony.

Counsel testified at the PCR hearing that he did not recall the mention of "an individual by the name of Brittany Bryant" as "a witness to the incident." (PCR 37). Neither did he recall any

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[9] Applicant has not contested this finding of inevitable discovery. This forms a separate basis for admissibility and, being uncontested, prevents a finding of prejudice as to any challenge to the findings regarding the plain view doctrine. Essentially, there could be no reasonable probability of a different result as required under *Strickland* to establish prejudice.

mention of her "in any of the reports or any information [counsel] had gotten." (PCR 37). Counsel testified he had reviewed his file but had not reviewed specifically for a reference to her. (PCR 37). He did not recall any conversation with his client as to a potential witness at the scene of the armed robbery. (PCR 37). Counsel testified that if he had known about another witness to the event, he would have "tried to find that person." (PCR 37). He testified his file did not reflect disclosure or investigation of a Ms. Bryant. (PCR 38).

At the close of the hearing, this Court indicated that the claim "has not been substantiated" because Applicant failed to present the witness at the PCR hearing. (PCR Tr. 45). This Court concludes again that Applicant has failed to carry his burden of proof.

Primarily, Applicant has not shown counsel was deficient in failing to investigate and potentially call Ms. Bryant as a witness as there is no credible evidence that Ms. Bryant was a witness. Applicant's PCR testimony was not credible, especially in light of no prior mention of another witness in either a report or trial testimony. Further, counsel credibly testified that had he learned of a potential witness, he would have attempted to find that witness. Petitioner failed to show deficient representation. *See generally Strickland*, at 691 (" counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances...."). Having failed to show deficiency, no further analysis is required. *Id.*, at 700. However, this Court finds in the alternative that even if considered, Petitioner cannot carry his burden of showing *Strickland* prejudice.

It is Applicant's burden to "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." *Bannister v. State*, 333 S.C. 298, 303, 509

S.E.2d 807, 809 (1998). Applicant did not. Rather, he rested on mere speculation. Applicant has failed in his burden of proof of showing *Strickland* deficient performance and prejudice. *Id. See also Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (where "witnesses" the Applicant "claimed could have provided an alibi defense did not testify at the PCR hearing," the Applicant "could not establish any prejudice from counsel's failure to contact these witnesses."). *Accord Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) ("conjecture" as to testimony insufficient to show omission "would probably change if a new trial" granted).

But again, Applicant is required to prove his PCR allegations by a preponderance of the evidence and Applicant failed to show any deficiency by counsel in regard to the alleged witness. Thus, Applicant is not entitled to any relief.

Ineffective Assistance: Failure to Provide Pictures Pursuant to Rule 5

Applicant testified at the PCR hearing that pictures used at his trial were "blurred all the way through," were "black and white," and failed to show anything. (PCR Tr. 12). Petitioner testified "these pictures of the inside of the car and pictures of the outside of the car" failed to show anything of relevance. (PCR Tr. 12-13). He asserted the pictures were "improper Rule 5 pictures." (PCR Tr. 12). Applicant asserted that the car photos were irrelevant because he was "charged … for armed robbery inside th[e] shop…." (PCR Tr. 13). Though not clear, based on Applicant's PCR testimony, his reference to Rule 5 apparently relates to a failure to explain relevance within the Rule 5 disclosure. (*See* PCR Tr. 15).

Counsel was briefly questioned about pictures generally but did not recall an issue involving clarity of the pictures or importance of the pictures to the case. (PCR Tr. 38).

At the close of hearing, this Court indicated that the precise claim Applicant wished to raise with the allegation of a "failure to give the Rule 5 pictures was unclear," but even so, no specific

photographs were identified, and none were offered to the Court to review. No basis for finding any deficiency by counsel was presented. This Court affirms its ruling.

In the absence of any clear claim, and the absence of any proof in support of that claim, the claim must necessarily fail. Thus, Applicant has failed in his burden of proof under *Strickland*, and is not entitled to any relief.

Ineffective Assistance: Failure to Secure and/or Relate a Plea Offer Before

Applicant testified at the first PCR hearing that counsel had visited him approximately "four days before the trial," and informed Applicant that he found a plea offer directed to the prior lawyer, Mr. Culbertson, "for ten to 30" years. (PCR Tr. 18). According to Applicant, counsel wished to "tie up all the loose ends," but Applicant responded that counsel (Mr. Steele) had not yet provided Applicant a plea offer. (PCR Tr. 18). Applicant testified that counsel (Mr. Steele) "ain't never brought no plea agreement to me, period." (PCR Tr. 26). Applicant asserted that Mr. Culbertson "never did show me no plea deal either." (PCR Tr. 19). Applicant testified that he was not alleging that counsel failed to convey a plea offer, but that "[h]e never did get one." (PCR Tr. 18).

Counsel testified that he recalled Applicant wanting him to look into a plea offer, and further testified he "would have done it whether he wanted me to or not." (PCR Tr. 30). Counsel recalled an offer from the State "to take life without parole off," but he did not recall the specifics otherwise. (PCR Tr. 30-31). Counsel testified that he advised Applicant he "didn't think he ought to run the risk," but Applicant maintained his innocence and "wanted to go to trial." (PCR Tr. 31; *see also* 39). Counsel testified he had Applicant "sign a little piece of paper" from the "file that says, quote, we decline the offer and want to go to trial." (PCR Tr. 31; Respondent's Exhibit 1). Counsel further testified that "[d]uring the trial [Applicant] asked me could we get back to a plea without

life without parole," and counsel asked the prosecution, but the State declined. (PCR Tr. 32-33).[10] Counsel admitted that he did not have the specifics of the plea offer, but was sure that the offer involved taking life without parole off of the table. (PCR Tr. 42). He testified he was also sure that Applicant had rejected that. (PCR Tr. 43). Counsel testified that he did not know about a plea offer to former counsel, and further testified "they must have offered to come off life without parole." (PCR Tr. 38). Counsel testified Applicant could have taken the offer prior to trial, but he did not. (PCR Tr. 39).

At the close of the evidence, this Court was noted that the testimony indicated Applicant did not receive anything from prior counsel on the prior plea offer and allowed the record to remain "open for the State and Mr. Ariail to consult with the prosecutor as well as [former defense counsel] Mr. Culbertson" and report back to finalize the matter. (PCR Tr. 45-47).

On March 29, 2023, this Court reconvened the hearing and heard additional testimony. Applicant again testified Mr. Culbertson, who only briefly represented him before Mr. Steele, "never came to me with no deal period." (Mar. 2023 PCR Tr. 6, lines 2-3). Applicant's PCR counsel introduced a letter dated Jan. 26, 2015, that reflected an offer to plead with "no recommendation as to sentence" in exchange for Applicant's cooperation in the trial of the co-defendant. The letter also cautioned that Applicant was facing life without the possibility of parole if he went to trial. (Mar. 2023 PCR Tr. 6, lines 16-19). Applicant testified he never saw that letter. (Mar. 2023 PCR Tr. 6). On cross-examination, Applicant complained that he never received

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[10] Though Applicant has not claimed error regarding this mid-trial negotiation specifically, this Court observes that there could be no ineffective assistance, either deficiency or prejudice, as "the solicitor would have been under no obligation whatsoever to revive the expired offer." *Collins*, at 262, 810 S.E.2d at 877.

a "good plea offer" and had he received one, he "might have even took the plea." (Mar. 2023 PCR Tr. 10).

Mr. Culbertson also testified at the second PCR hearing. He agreed with Applicant that his representation was brief. (Mar. 2023 PCR Tr. 11). He did not recall the State withdrawing the notice of seeking life without the possibility of parole but testified that he would have conveyed an offer by the prosecution. (Mar. 2023 PCR Tr. 11-13).[11] He recalled that Applicant "was not interested in any sort of offer that included an LWOP sentence." (Mar. 2023 PCR Tr. 12).

The Court also heard from two prosecutors in the matter, Walker Miller, Esq., and Mark Moyer, Esq. Mr. Miller testified he came on to the case as it was being prepared for trial and would not have extended any offers, however, he recalled that "what was indicated" to him by Mr. Steele "the whole time was essentially Mr. Williams wasn't going to plead to anything and it was just a trial." (Mar. 2023 PCR Tr. 15). Mr. Moyer, who handled the co-defendant's case, was eventually assigned this case, as well. (Mar. 2023 PCR Tr. 16). Mr. Moyer testified he made a "standard" plea offer "for someone who's eligible for life without parole," that the State would allow a plea prior to serving notice if the defendant would "plead guilty and … cooperate with the codefendant if necessary," though, at the time, it was not certain that cooperation was even needed. (Mar. 2023 PCR Tr. 16). That offer went to Mr. Culbertson. (Mar. 2023 PCR Tr. 16). When Mr. Steele assumed representation, "[t]he same offer was made to Mr. Steele." (Mar. 2023 PCR Tr. 17). Mr. Moyer testified that a note from his file dated August 24, 2015, indicated "per Carlyle

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[11] Mr. Culbertson's file was missing at the time the hearing. It had been previously turned over the Public Defender's Office. The Public Defender's Office advised counsel for the State that "whatever noted Mr. Culbertson would have put in the file were handed over to Mr. Carlyle Steel, who's passed away since we had our hearing in 2021, and at this point his file is missing. So we don't know what happened with that." (Mar. 2023 PCR Tr. 13, lines 19-25).

Steel dash trial." (Mar. 2023 PCR Tr. 17, 20).[12] Mr. Moyer testified that after that time, Applicant wrote directly to the Solicitor, to another prosecutor who previously had been assigned the case, and to him essentially "making plea offers" on Applicant's own terms, which involved a plea to a non-violent charge and "probation or very minimal time." (Mar. 2023 PCR Tr. 17). Mr. Moyer testified: "I believe we extended the … offer right up until trial" to withdraw "the life without parole notice, and it continued to be rejected." (Mar. 2023 PCR Tr. 17). He explained that "lifting the notice" would leave a maximum sentence of 30 years, but he did not recall any recommendation for a 10 to 30 year sentence. (Mar. 2023 PCR Tr. 17 and 19-20). He noted that a 10 to 30 range would have to assume concurrent sentences, as well. (Mar. 2023 PCR Tr. 20). Mr. Moyer recalled speaking with Mr. Steele on the matter, but "heard back that - - that Mr. Williams was just not interested in pleading guilty, and that, again, that was kind of confirmed in the letters that we received from him." (Mar. 2023 PCR Tr. at 20). As to any offers at the time of trial, Mr. Moyer testified, "I know we had several conversations with Mr. Steele leading up to the trial in which he just said that Mr. Williams just was not interest in a plea of any kind." (Mar. 2023 PCR Tr. 21).

In reply, Applicant maintained he never received an offer to take a life sentence off the table, and faulted defense counsel because "nobody … came up with no plea agreement period." (Mar. 2023 PCR Tr. 23).

At the conclusion of the testimony, this Court reaffirmed its ruling on the other claims and addressed the ineffective assistance in plea bargaining allegations related to the remaining claim. (Mar. 2023 PCR Tr. 23-24). Specifically, this Court found Applicant's testimony that there was a term of years offered was not credible, and, though there was no evidence the January 2015 letter

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12 The trial was held May 11-12, 2016.

was given to Applicant, that fact did not matter as Mr. Steele assumed representation while the offer was still viable, and the offer was rejected. (Mar. 2023 PCR Tr. 24-25). The Court reaffirms that ruling in this Order with additional explanation.

"The United States Supreme Court has held that '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.'" *Collins v. State*, 422 S.C. 250, 261, 810 S.E.2d 871, 876 (2018) (quoting *Missouri v. Frye*, 566 U.S. 134, (2012)). "Generally, where defense counsel does not communicate such an offer to the defendant, counsel has rendered ineffective assistance." *Id,* at 261, 810 S.E.2d at 876–77.

In this case, at the first PCR hearing, Mr. Steele produced a document from his file that, while not reflecting the specifics of the offer, confirmed that Applicant, by his signature, acknowledged a plea was offered and rejected. Further, counsel was sure that the deal was for something other than life without the possibility of parole, and that counsel was "thoroughly in favor of it …." (PCR Tr. 39). In the March 2023 hearing, that was confirmed by the notes in the prosecution's file. Mr. Steele's testimony, especially supported by the contemporaneous to trial document, and further supported by the note in the prosecution's file and Mr. Moyer's testimony, is credible and determinative. Petitioner's testimony on this matter wholly lacks credibility. There is nothing that supports a specific sentencing range was ever offered. While Petitioner has testified that he would have pled to such an offer, he cannot plead to an offer that was never extended. *See* Rule 14(b), SCRCrimP ("A defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge.").

Further, as to the offer that was extended, which was viable at the time of Mr. Steele's representation, Applicant affirmatively rejected that offer. Again, the Court finds Mr. Steele's

testimony credible for the reasons cited above. This Court also finds credible Mr. Moyer's testimony as to the plea offer and his testimony that Petitioner was attempting to obtain a favorable plea offer with minimal time and essentially a different, non-violent charge. This further convinces this Court that Applicant was aware of the no-recommendation offer but wished to have a better deal offered. Applicant's own testimony supports this – it was not that he would have accepted the no-recommendation deal, it was "*if* he had gave me *a good plea offer*, I *might* have even took the plea." (Mar. 2023 PCR Tr. 10) (emphasis added). In fact, he admitted "[t]hey didn't give no recommendations whatsoever." (Mar. 2023 PCR Tr. 10).

"To show prejudice under *Strickland*, a defendant must demonstrate a reasonable probability that: (1) he 'would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;' (2) 'the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;' and (3) '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*, at 262, 810 S.E.2d at 877 (quoting *Frye*, 566 U.S. at 147). As found above, Applicant had an offer prior to trial but rejected that offer. Mr. Culbertson may well not have provided a copy of the letter with the offer to Applicant before Mr. Steele assumed representation. That simply is of no moment because the offer was still viable, and Mr. Steele conveyed that offer. Applicant chose to reject that offer. Applicant has not carried his burden of showing deficiency in Mr. Steele's representation, and cannot, at any rate, show prejudice in regard to allegation against Mr. Culbertson.[13] Applicant is not entitled to any relief.

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[13] This Court acknowledges Mr. Culbertson's testimony that he would have conveyed any offer, but Applicant maintains that he did not see the January 2015 letter produced at the March 2023 PCR hearing. (*Compare* Mar. 2023 PCR Tr. 12 with 6). Counsel is presumed to have rendered competent representation, *Strickland,* at 689; however, the evidence appears to favor Applicant in this Court's view on this narrow point. Even so, Applicant must establish both

CONCLUSION

For the above stated reasons, this Court finds that Applicant failed to carry his burden of proof. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

IT IS THEREFORE ORDERED:

1. Applicant's application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant is remanded to the custody of Respondent for completion of his sentence.

AND IT IS SO ORDERED this 8th day of February, 2023. 2024 RCM

R. LAWTON McINTOSH
Presiding Judge

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Attorney General MB/mills Am 2/JF
on 2 / 21 / 2024.

deficiency and prejudice from that deficiency. *Id.*, at 694. The lack of prejudice here is plain and dispositive. *Strickland* even indicates that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, … , that course should be followed." *Id.*, at 697. This Court finds that Applicant has failed to show *Strickland* prejudice in these circumstances. He is not entitled to any relief.