BOSTIC & BOYD LLC
ATTORNEYS AT LAW
Antoine T. Bostic, Esquire | Bertila I. Boyd, Esquire

October 17, 2016

Supreme Court of South Carolina
The Honorable Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, South Carolina 2921

RE: James Keion Span, #286321 v. State of South Carolina
Case Number, 2012-CP-43-00311

Dear Mr. Shearouse,

Please find enclosed my Notice of Appeal and Proof of Service for the above-mentioned case. Please return a filed copy of documents in the stamped envelope provided.

If you have any questions or require further information, please do not hesitate to contact me.

Best regards,

Bertila Boyd-Bostic

Bertila Boyd-Bostic, Esquire
Enclosures –as stated

CC: South Carolina Attorney General Office
South Carolina Office of Appellate Defense

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RECEIVED
OCT 19 2016
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C. James, Jr., Court of Common Pleas Judge

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Case No. 2012-CP-43-00311

James Keion Spann, #286321 Petitioner

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

The Petitioner, by and through his attorney appeals the Honorable George C. James, Jr.'s September 29, 2016 order dismissing the Petitioner's post-conviction relief application. Undersigned counsel received notice of entry of the order on September 29, 2016. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

Bertila Boyd Bostic

Bertila Boyd-Bostic, Esquire
Post Office Box 211472
Columbia, South Carolina 29221
Ph.: (803) 556 – 6509
Attorney for Petitioner

RECEIVED

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S.C. SUPREME COURT

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Case No. 2012-CP-43-00311

James Keion Spann, #286321 — Petitioner

v.

State of South Carolina, — Respondent.

PROOF OF SERVICE

PERSONALLY comes the undersigned, who says on oath that on the 15th day of October, 2016, she served the following documents:

1. **Notice of Appeal; and**
2. **Proof of Service**

in the above case, by causing same to be deposited in an authorized United States mail box; that the envelopes containing said documents were properly addressed, securely wrapped and sealed, and bore the proper postage; and that said envelopes were addressed to the following addresses:

South Carolina Attorney General Office
The Honorable Alan Wilson
P.O. Box 11549
Columbia, SC 29211

South Carolina Office of Appellate Defense
P.O. Box 11433
Columbia, SC 29211

Bertila Boyd-Bostic

BERTILA BOYD-BOSTIC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT

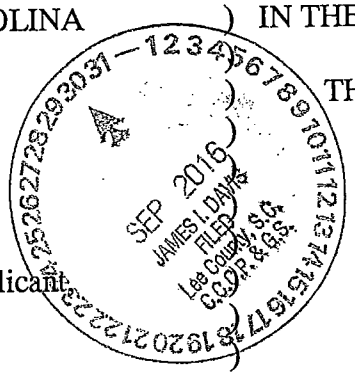
James Keion Spann,) 2012-CP-43-00311
S.C.D.C. No. 286321)

Applicant,)

v.) **ORDER OF DISMISSAL**
(with prejudice)

State of South Carolina,)

Respondent.)



This matter comes before the Court by way of an application for post-conviction relief (PCR) from James Keion Spann (the Applicant), which was filed on December 31, 2012. Respondent's Return is dated June 28, 2013. A hearing into the matter was convened on April 16, 2015, at the Sumter County Judicial Center. The Applicant was present and represented by Bertila I. Boyd, Esquire. Daniel Gourley, Esquire, appeared on behalf of the Respondent. John T. Davis, Jr., an investigator hired by the Applicant's trial counsel, testified. Deborah Butcher, Esquire, the Applicant's trial counsel, testified. After this hearing, the court left the record open to hear the testimony of Clayton Antonio Plowden and Michael Spann. The hearing reconvened on April 26, 2016, over the Respondent's objection. Mr. Gourley and Julie Coleman, Esquire, appeared for the Respondent. Mr. Plowden and Mr. Spann testified.

The court has had the opportunity to review the record in its entirety and has considered the testimony presented at the post-conviction relief hearings. The court notes that counsel for both parties were very well-prepared and very ably presented the issues to the court. Upon careful consideration of the facts, arguments, and record, the court concludes the Applicant has not satisfied his burden of establishing his allegations of ineffective assistance of counsel.

PROCEDURAL HISTORY

The Applicant is currently incarcerated in the South Carolina Department of Corrections pursuant to the Lee County Clerk of Court's orders of commitment. The Lee County Grand Jury indicted the Applicant for murder, burglary in the first degree, and possession of a weapon during the commission of a violent crime (2009-GS-31-00073). Attorney Butcher represented the Applicant.

After the State called the case to trial, the Applicant was found guilty of all three offenses. On March 31, 2010, the Honorable R. Ferrell Cothran, Jr., sentenced the Applicant to life without the possibility of parole on the murder and burglary counts and to a term of 5 years for possession of a weapon during the commission of a violent crime. All sentences are being served concurrently.

A notice of appeal was filed at the South Carolina Court of Appeals. LaNelle Cantey Durant, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. *State v. Spann,* Op. No. 2012-UP-207 (S.C. Ct. App. filed March 28, 2012). The Remittitur was issued on April 13, 2012. The application for post-conviction relief, which forms the basis for this order, followed.

PROCEDURAL STANDARD

The Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 669 (1984).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under this prong, the court reviews counsel's performance by its "reasonableness under professional norms." *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). The second prong requires a showing that counsel's deficient performance prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*, at 117, 386 S.E.2d at 625.

ISSUES PRESENTED

In his amended application, the Applicant sets forth three grounds for relief: (1) trial counsel failed to present favorable witnesses; (2) trial counsel failed to investigate critical evidence and the Applicant's defense when preparing for trial; and (3) trial counsel and appellate counsel failed to appeal the denial of the Applicant's motion for a new trial. Specifically, the Applicant claims in his amended application that trial counsel failed to call certain witnesses who would have provided an alibi defense for the Applicant and that trial counsel failed to properly investigate allegations of juror misconduct. The Applicant also submits in his amended application that trial counsel should have submitted more detailed *voir dire* concerning whether any prospective juror had "any relationship" with the victim and his family.

The allegations pertaining to trial counsel's failure to call witnesses concern witnesses identified as Clayton Antonio Plowden ("Plowden"), Michael Spann ("Michael Spann"), and Shontrell Scarborough ("Scarborough"). When the hearing was reconvened on April 26, 2016, only Plowden and Michael Spann appeared to testify. The court therefore cannot consider the purported testimony of Scarborough.

Testimony of Clayton Plowden and Michael Spann

The State contends that the court should not have allowed the record to remain open to take the testimony of Michael Spann and Plowden. The court disagrees and concludes that it exercised proper discretion in reconvening the hearing. The original reason for leaving the record open was that at the first PCR hearing, trial counsel testified without objection as to what the two absent witnesses would have testified to if they had been called at trial. The court originally (and mistakenly) concluded that the State's failure to object to trial counsel's testimony of what witnesses Michael Spann and Clayton Plowden would have testified to relieved the applicant's burden of producing their testimony in accordance with the rules of evidence. In light of the holding in *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998), the court was mistaken in so concluding. If the court had ruled in the Applicant's favor without hearing Michael Spann's and Plowden's testimony, that would have been error. The court left the record open to hear their testimony and evaluate it for credibility and relevance purposes. Even though the court was incorrect in its initial conclusion that the testimony had essentially been presented through trial counsel's PCR testimony, the court still had the discretion to leave the record open.

Since Plowden's testimony and Spann's testimony are now in the record, the court will address their testimony and counsel's performance in relation to the factors announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). First, the Applicant must establish by the greater weight of the evidence that counsel's performance did not rise to the level of prevailing professional norms. Second, the Applicant must establish that as a result of counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. A "reasonable probability" in this context is "a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. The *Strickland* Court observed:

> [A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 690.

The parties have consistently referred to witnesses Plowden, Scarborough, and Michael Spann as alibi witnesses. As noted above, the court cannot consider Scarborough's purported testimony since he did not testify at the PCR hearing; therefore, the category of his testimony is irrelevant. Plowden would have been an alibi witness if called at trial. Michael Spann was not an alibi witness; the scope of his testimony would have been in the form of offering extrinsic evidence of a prior inconsistent statement allegedly made to him by Mary Ann Lovely.

The court will review the PCR testimony of Plowden and Michael Spann below. Before doing so, the court will review case law concerning the requirement that trial counsel articulate a valid strategic reason for doing or not doing certain things during the course of a criminal trial. The articulation of a valid trial strategy is relevant to the first *Strickland* prong, i.e., whether trial counsel's performance rose to the level of accepted professional norms. If trial counsel's decision to do something or not do something was the result of the exercise of a valid trial strategy, then a PCR applicant cannot satisfy the first *Strickland* prong. Our appellate courts have recognized that trial counsel must articulate a valid trial strategy during the PCR proceedings. In *Smith v. State*, 386 S.C. 562, 689 SE2d 629 (2010), trial counsel failed to object to inadmissible hearsay and to

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testimony that bolstered the credibility of a child victim of CSC. Trial counsel gave no reason for not objecting. The Supreme Court stated the well-settled rule that courts should be wary of second-guessing counsel's trial tactics, and that where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. However, the court stated "[t]he presumption of adequate representation based on a valid trial strategy disappears when trial counsel acknowledged there was **no** trial strategy in mind" when he failed to object to the inadmissible testimony. 386 S.C. at 568 (emphasis in original).

In *Bruno v. State*, 347 S.C. 446, 556 S.E. 2d 393 (2001), trial counsel did not object to a prosecution witness's testimony that the witness took a polygraph exam. During the PCR proceeding, trial counsel gave absolutely no reason for failing to object. The PCR court still found there was a valid trial strategy not to object. However, the Supreme Court held that because there was no evidence in the PCR record to support the finding that the failure to object was trial counsel's valid strategic decision, the PCR court's finding of a valid strategic reason could not be upheld.

In *Gilchrist v. State*, 350 S.C. 221, 565 S.E. 2d 281 (2002), trial counsel failed to object to a comment made by the solicitor during his opening statement. Trial counsel testified at the PCR hearing that it was his strategy to not object but "never articulated any strategy at all." 350 S.C. at 228, fn. 2. The PCR court found there was a valid strategic reason for not objecting. The Supreme Court reversed the denial of the application, holding that a blanket statement by trial counsel that he employed "strategy" does not automatically insulate trial counsel from being found ineffective. The Court found that since no strategy was articulated, there was no evidence to support the PCR judge's finding that there was a valid strategic reason for trial counsel's failure to object.

In *Weik v. State*, 409 S.C. 214, 761 SE 2d 757 (2014), the Supreme Court reviewed a death sentence rendered by a jury after trial counsel failed to pursue mitigation evidence during the sentencing phase. The PCR court ruled that the failure to pursue mitigation evidence was a valid strategy. The Supreme Court reversed, holding that there was no evidence that trial counsel made any reasoned, strategic decisions as to which mitigation witnesses would testify and holding that the PCR court's invocation of the "strategic decision" doctrine to justify trial counsel's failure to pursue mitigation evidence "resembles more a post-hoc rationalization of counsel's conduct rather that an accurate description of [counsel's] deliberations ..." 409 S.C at 236.

The import of these cases is that even though someone on the sidelines of a PCR proceeding might, after the fact, be able to pinpoint several very good strategic reasons for doing or not doing something, trial counsel must articulate the strategic reasons. Neither the PCR court nor the Attorney General can pluck possible strategic reasons from the realm of possibilities and employ them to conclude or argue that the first *Strickland* prong has not been satisfied.[1] In other words, an unarticulated strategy is not to be considered by the PCR court.

Failure to Call Plowden and Michael Spann to Testify

Clayton Antonio Plowden

Plowden did not testify at trial. At the reconvened PCR hearing, Plowden testified that before trial, he met with the investigator retained by trial counsel. He gave a statement to the investigator on March 29, 2010. At the time of trial, he was incarcerated at Broad River Correctional Institution. He testified that before and during the murder occurred in Bishopville, he and the Applicant were smoking marijuana and drinking gin together in Sumter on Bowman

[1] The court notes that sometimes appellate courts seem to search for possibly valid strategic reasons for counsel's actions. For example, in *Smith v. State, supra*, the Supreme Court observed, "[m]oreover, we can discern no defensible basis for trial counsel's failure to challenge the forensic interviewer's objectionable testimony." 386 S.C. at 568. However, the rule seems to be that trial must articulate a strategy before the strategy can be reviewed by the PCR court.

Drive thirty minutes away from the murder scene. He said they were together from approximately 10:00 p.m. and 1:00 a.m. He testified he never talked to trial counsel about this case. He testified that trial counsel had represented him in a criminal matter before the applicant's trial.

The trial transcript reveals that Plowden was incarcerated at Kirkland R & E at the time of trial and that trial counsel knew this. Kirkland was under quarantine at the time trial because of an illness spreading around that facility. When the assistant solicitor noted that fact to the trial judge, trial counsel stated that she did not anticipate calling Plowden as a witness anyway. During the PCR hearing, trial counsel gave no concrete reason for not asking for a continuance or for special dispensation to have him transported in spite of the quarantine. Trial counsel testified that she could not recall why she did not ask for a continuance but further testified that if she had felt like he was a good alibi witness, she would have moved for a continuance. She testified she could not "verify" the alibi witnesses, and that even though she had notified the solicitor of the purported alibi witnesses, that did not mean she would definitely have them testify. She testified that "[w]hat I do recall is that I don't have a good alibi witness that could testify where he was at the time of the incident." She further attempted to explain that even though she may have subpoenaed the witnesses for trial, that doesn't mean she was absolutely intending to call them to the witness stand. This was certainly a reasonable approach but does not end the inquiry.

Plowden testified at the reconvened PCR hearing. I find his credibility at the PCR hearing was suspect. He was incarcerated at the time of trial following a forgery conviction. Forgery is a crime of dishonesty. His incarceration and conviction would have certainly been made known to the jury. Also, the substance of his testimony, i.e., that he and the Applicant were smoking marijuana and drinking gin from 10:00 p.m. through 1:00 a.m., would certainly not have put the Applicant in a good light. Plowden's credibility could have easily been called into question on the

issue of his sobriety and whether he could accurately recall his time with the Applicant. Trial counsel's explanation for not calling him to testify at trial, while not specifically articulated, was that she simply did not feel he was a good alibi witness. All in all, trial counsel's decision not to call him to testify at trial was a valid strategy and the strategy was sufficiently articulated by trial counsel.

Michael Spann

Though he has been categorized by the parties as an alibi witness, he was not an alibi witness. The sole purpose of his testimony would have been to complete the impeachment of Mary Ann Lovely with a prior inconsistent statement. Before addressing his PCR testimony, the court will review the eyewitness evidence presented by the State at trial.

Tameka Wilson (Tameka) was a trial witness. She was the immediate former girlfriend of the Applicant and was spending the night with the victim in his bedroom when the killer broke through the front door, entered the dwelling, and shot the victim. Soon after the murder, Tameka gave a statement to law enforcement and stated that when the assailant entered the home, she thought she heard the applicant ask "[W]here they at?" This could imply that whoever entered the home was looking for the victim and Tameka.

Mary Ann Lovely, the victim's mother, called 911 after the shooting. At some point, Tameka spoke to the operator and the operator asked her who shot the victim. Tameka stated the name "James Keion Spann" four times. However, at trial, Tameka testified that she actually told the operator that she only said "I believe" it was James Keion Spann who shot the victim.

Tameka testified that she could not identify "by sight" who shot the victim. She testified that Mary Ann Lovely came to the bedroom door and said that she heard a gun being cocked at the front door. Tameka testified she and the victim began to get dressed and ran down the hallway

toward the front door. She testified at trial that someone kicked the door in and said "Where they at?", but she testified she did not know if the applicant was the one who said that and that she never saw anybody. She testified that she told law enforcement that "I believe it could be [the Applicant]" because she and the applicant had just broken up and "went through some problems" and that "I don't think anybody else was after me ... So, of course, I'm going to say the person that I just got into an altercation with" (Tr., pp. 94-95). She testified that the police told her what to say in her statement. The only testimony she gave that was helpful to the State was that she "believed" she heard the applicant make the statement "Where they at?" She testified that she was told by law enforcement what to say in her statement. The totality of Tameka's trial testimony was a recantation of what was in her statement to law enforcement and a denial of knowledge as to who shot the victim.

The foregoing left Mary Ann Lovely as the sole eyewitness against the Applicant. Because Tameka Wilson recanted, Ms. Lovely's credibility was obviously an important issue. Ms. Lovely is the victim's mother. She testified at trial that she heard noise at the front door, looked through the peephole, saw the Applicant, and heard a gun being cocked. She testified she ran to the victim's bedroom door and told him "that boy" was at the door with a gun. She testified she ran to her other son's room and lay down on top of him so he would not get hurt. She did not see the shooting itself. She placed the 911 call to ask for an ambulance. The 911 operator asked her if she knew who shot the victim, and she replied "I don't know." At trial, she explained that she did not know the Applicant's real name, just his nickname, "Duc" (presumably pronounced "duck") and that is why she told the 911 operator she didn't know who shot her son. Trial counsel cross-examined her extensively on her saying to the 911 operator that she did not know who shot her son.

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On cross-examination at trial, trial counsel asked Ms. Lovely if she knew Michael Spann. The trial transcript reflects that she replied she did not know anyone by that name, but did eventually acknowledge she knew someone identified as "Lenny". The trial transcript reflects that name, but it must be noted that Michael Spann testified at the reconvened PCR hearing that his street name was "Blity" (pronounced "blitty"). The court concludes that the similar sounding enunciations of "Lenny" and "Blity" are indicative of the same person, i.e., Michael Spann. Counsel asked Ms. Lovely if she had ever told "Lenny" that she heard noise at the front door and then heard gunshots but was too scared to come out of her bedroom and that she never saw anything other than a car pulling away from the house after the shooting. Ms. Lovely replied that she has never talked to anyone about the shooting and that she told "Lenny" no such thing.

The foregoing exchange was a partial use of Rule 613, SCRE, which addresses the admissibility of extrinsic evidence of a prior inconsistent statement of a witness. Rule 613 provides that extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is advised of the substance of the alleged statement, the time and place it was allegedly made, and the person to whom the statement was allegedly made. Also, the witness must be given the opportunity to explain or deny the statement; if the witness does not admit making the statement, extrinsic evidence of the statement is admissible. In the instant case, trial counsel's cross-examination laid a foundation for the admission of a prior inconsistent statement. The witness to be called to complete the impeachment was Michael Spann, aka "Lenny" or "Blity".

Again, Michael Spann did not testify at trial. He testified at the reconvened PCR hearing that he is a distant cousin of the applicant and that he knew the victim, Lindsey Lovely. Spann testified that he also knew Mary Ann Lovely and that Ms. Lovely told him (before trial) that she heard loud banging at the front door, that she was too scared to go to the door, heard gunshots in

the house, came out of her room, saw the victim on the floor in the hall, went to a window, and saw a car pulling away. Michael Spann's testimony, if deemed credible by the jury, could have placed Ms. Lovely's credibility in doubt.

Mr. Spann testified that he told trial counsel and her investigator all of the foregoing and that trial counsel told him she would contact him when it was time for trial. Trial counsel could have called Michael Spann as a witness to complete the impeachment as permitted by Rule 613, but trial counsel did not do so. Trial counsel articulated no reason whatsoever for not calling him to testify. She incorrectly lumped him into the category of "alibi witnesses" and explained that she did not think any of the alibi witnesses would be helpful.

The Attorney General contends trial counsel's decision not to call Spann to testify was a valid trial strategy. However, as noted above, trial counsel must articulate what her strategy was before the strategy can be argued as valid. As noted in *Smith*, *supra*, the presumption of adequate representation disappears when trial counsel articulates no strategy, and under *Bruno* and *Gilchrist*, this court cannot base a finding of the exercise of valid strategy on evidence that is not in the record. To do so would be to engage in "a post-hoc rationalization of trial counsel's conduct rather than an accurate description of [counsel's] deliberations..." *Weik v State, supra.*

The court must therefore conclude that the Applicant has satisfied the first *Strickland* prong that trial counsel's decision not to call Michael Spann to complete the impeachment of Ms. Lovely fell below accepted professional norms. The court so concludes even though many valid reasons might have existed for not calling Michael Spann to testify. Such valid reasons, if they had been articulated, could have been (1) Michael Spann was formerly a member of the Blood gang and the jury may have found him not credible for that reason, (2) Michael Spann was in prison at the time of trial and this would have been made known to the jury; his record (though unspecified) could

have been introduced to adversely impact his credibility, (3) one eyewitness (Tameka) had recanted, and that left only one remaining eyewitness, Ms. Lovely, who sounded hysterical and somewhat confused in the 911 recording as to who shot her son--- one could reasonably conclude that the State's case was already weak and that there was enough reasonable doubt for the jury, and there was no need to risk calling a convict to attempt to impeach the victim's mother with a prior inconsistent statement.

Again, however, the court cannot consider these or any other unarticulated strategic reasons for not calling Michael Spann to testify. Therefore, the court must conclude that the Applicant has satisfied the first *Strickland* prong.

Prejudice

Since the Applicant has satisfied the first *Strickland* prong as to trial counsel's failure to call Michael Spann to testify, the court will consider the prejudice prong, i.e., whether there is a reasonable probability that but for trial counsel's failure to call Michael Spann to testify, the result of the trial would have been different. Simply put, if Michael Spann had been called to testify, is there a reasonable probability that the jury would have concluded there was a reasonable doubt as to Ms. Lovely's identification of the Applicant as the person who shot the victim, and therefore would have concluded there was a reasonable doubt as to the Applicant's guilt?

The question of prejudice in this case is close. However, after exhaustive reading of the trial transcript and after careful review of the PCR testimony, the court concludes that there is not a reasonable probability that the outcome of the trial would have been different if Michael Spann had been called to testify. His credibility would have been too suspect; he was an admitted former gang member, had a criminal record, was incarcerated at the time of trial, and is also related in some way to the Applicant, and while he also claimed to have known the victim for many years,

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Michael Spann had also known the Applicant for many years. The court concludes that Michael Spann's testimony would have been too tainted for a jury to have found him credible and there is therefore not a reasonable probability that the jury would have found the Applicant not guilty.

Insufficient *Voir Dire*

The Applicant submits in his amended application that trial counsel should have requested more detailed *voir dire* from the trial judge as to any prospective juror's relationship with the victim or anyone in the victim's family. The trial judge asked the jury panel whether anyone was "connected by blood or marriage, close personal friends, or social relations" with the victim. The trial judge asked whether any juror was "connected by blood or marriage, close personal friends, or family relations" to any prospective witnesses.

The Applicant claims that with regard to jurors Christopher Hickman and Felicia Williams, a more detailed question would have caused them to disclose certain things they did not disclose. Neither juror stood in response to these questions. Their "failure" to respond was addressed in a hearing convened after the Applicant moved for a new trial on the ground of juror misconduct. Both jurors testified at the hearing. Mr. Hickman testified he knew Lindsey Lovely but that they were not close friends. He also testified that he knew the Applicant but that he had "never been around him." He testified that he had no social relations with either the Applicant or the victim and that he would "[j]ust see them on the street and go about my business." A witness at the new trial hearing testified that she had seen Hickman and the victim riding around in an automobile together, but Hickman testified he had never ridden in an automobile with the victim. Juror Hickman cited their age differences (Hickman was 35) and stated "I don't mess with a young boy like that." He denied ever attending parties with the victim and said he did not know where he lived. He testified he did not attend the victim's funeral.

Concerning Ms. Lovely, juror Hickman testified that he thought "she lived in the trailer park" but had never been in her home, although he may have walked by her home.

Juror Felicia Williams testified that she did not know the Applicant. She testified she did not know the victim but she had seen him before. She said she was not a close friend and had never been in a social setting with him. She did not know where the victim or Ms. Lovely lived. She stated she had never interacted with them at all and did not go to the victim's funeral.

The court concludes that even if a more specific *voir dire* question had been asked of the jury panel, neither juror Hickman nor juror Williams would have been compelled to respond. The gist of Hickman's testimony was that he knew who the victim was but had no relationship at all with him. Ms. Williams' testimony was that she had seen the victim before but did not know him and that she had never interacted with Ms. Lovely. The Applicant has not met his burden of proving either *Strickland* prong on this issue.

Ineffective Assistance of Appellate Counsel

On the juror *voir dire* issue, the Applicant alternatively claims appellate counsel was ineffective for failing to argue on appeal the denial of his new trial motion. The Applicant's new trial motion was based on the ground that jurors Hickman and Williams failed to disclose they were acquainted with the victim or the victim's mother, or both. The court has reviewed the transcript of the new trial motion hearing and the transcript of jury selection. The court concludes that the trial judge's conclusion that there was no intentional concealment by either juror would not have been disturbed on appeal.

As noted above, the *voir dire* question relating to potential witnesses (the relevant one being Mary Ann Lovely) that was asked by the trial judge was whether any jurors were "connected by blood or marriage, close personal friends, or family relations to any of those potential

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witnesses." With regard to the victim, the trial judge asked if any juror was "connected by blood or marriage, close personal friends, or social relations with Lindsey Lovely". Neither juror Hickman nor juror Williams stood in response to these questions.

In his new trial motion, the Applicant contended there was evidence that juror Hickman and the victim were good friends and that they had been seen riding around with each other and that Hickman frequently visited the victim's home. Evidence was presented at the new trial motion hearing that these two jurors, especially juror Hickman, knew the victim and Ms. Lovely. However, the trial judge obviously considered all the evidence that was presented and ruled that neither juror concealed any information or failed to respond truthfully to *voir dire* questions. Again, the specific question was whether any juror was related by blood or marriage, was a close personal friend or social relation with the victim or any witness. The record certainly supports the trial judge's ruling that there was no "intentional failure to respond appropriately to my questions."

Appellate counsel was not ineffective for not raising the issue of intentional concealment on appeal because there was no chance an appellate court would have reversed the conviction on this issue. In *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), the Supreme Court discussed the issue of intentional and unintentional concealment of *voir dire* information by a juror and stated:

> When a juror conceals information inquired into during *voir dire,* a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. *Thompson v. O'Rourke,* 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn. *State v. Savage,* 306 S.C. 5, 409 S.E.2d 809 (Ct.App.1991).
> 345 S.C. at 587-88.

In the instant case, the record supports the trial judge's ruling that there was no concealment by either juror. Appellate counsel had no reason to raise this issue on appeal because the issue had no merit. Even if appellate counsel had raised the issue, there is not a reasonable probability that the conviction would have been reversed and a new trial ordered.

Conclusion

For the foregoing reasons, the application for post-conviction relief is denied. The Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

It is therefore

ORDERED the application for post-conviction relief is denied and dismissed with prejudice. It is further

ORDERED that the Applicant shall remain in the custody of the South Carolina Department of Corrections.

September 29, 2016

George C. James, Jr.
Circuit Judge