R. MILLS ARIAIL, JR.
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October 8, 2018

Via US Mail
Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Notice of Intent to Appeal from James Randolph Frady vs. State of South Carolina C.A. No.: 2009-CP-37-0451

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Jocelyn Newman's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Oconee County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law

R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2009-CP-37-0451

James Randolph Frady,..... Appellant,

v.

State of South Carolina ..... Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Jocelyn Newman's Order of Dismissal dismissing Appellant's application for post-conviction relief. On September 5, 2018, the Honorable Jocelyn Newman signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on September 25, 2018. A copy of the Honorable Jocelyn Newman's Order of Dismissal is attached.

R. Mills Ariail, Jr.
Attorney at Law
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Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for James Randolph Frady

Greenville, South Carolina
October 8, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM OCONEE COUNTY
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James Randolph Frady,..... Appellant,

v.

State of South Carolina ..... Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this October 8, 2018, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, in an envelope addressed as set forth herein below:

Lindsey A. McCallister, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

Oconee County Clerk's Office
Oconee County Courthouse
205 West Main Street
Walhalla, SC 29691

James Randolph Frady SCDC# 317328
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

October 8, 2018

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-37-00451

JAMES R. FRADY (SCDC #317328)
PLAINTIFF(S)

STATE OF SOUTH CAROLINA
DEFENDANT(S)

FILED IN THE OFFICE OF THE CLERK OF COURT OCONEE COUNTY, SC
2018 SEP 10 A 11:37

Submitted by: NEWMAN, J.

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

CERTIFIED TRUE COPY
SEP 10 2018
CLERK OF COURT
OCONEE COUNTY, SC

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Jocelyn Newman
Circuit Court Judge

2757
Judge Code

Sept. 5, 2018
Date

Copies to:
Atty ___(P) Ariail ___(D) McCallister
DSS ___ other ___
Mailed ✓ Boxed ___ handed

ENTERED
AW
COMPUTER

SCRCP Form 4C (12/2016)

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

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

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

STATE OF SOUTH CAROLINA COUNTY OF OCONEE James R. Frady (SCDC #317328), Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT Civil Action No. 2009-CP-37-00451 **ORDER OF DISMISSAL**

This matter comes before the Court upon Application for Post-Conviction Relief (PCR) filed by James R. Frady ("Applicant") on April 13, 2009. The State of South Carolina (Respondent) filed a Return on October 19, 2009. On June 26, 2017, an evidentiary hearing was conducted at the Oconee County Courthouse. Applicant was represented by his counsel, R. Mills Ariail, Esquire. Assistant Attorney General Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented the State of South Carolina.

For the reasons set forth below, the Applicant for Post-Conviction Relief is DENIED, and this matter is DISMISSED WITH PREJUDICE.

FACTUAL AND PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to the Oconee County Clerk of Court's orders of commitment. During the December 2004 term, the Oconee County Grand Jury indicated Applicant for Second-Degree Arson (2004-GS-37-2070), Grand Larceny (2004-GS-37-2071), First-Degree Burglary (2004-GS-37-2078), Possession of a Weapon During the Commission of a Violent Crime (2004-GS-37-2074), and two counts of Murder (2004-GS-37-2072 and -2073).

Applicant was represented by Donald Allen, Esquire ("trial counsel"), and Elizabeth Waldrep, Esquire. On August 29-31, 2006, Applicant proceeded to a jury trial before the Honorable Perry M. Buckner. He was found guilty as indicted. On August 31, 2006, Judge Buckner sentenced Applicant to terms of imprisonment of five years each for Possession of a Weapon During a the Commission of a Violent Crime and Grand Larceny, twenty-five years for Second-Degree Arson, thirty years for First-Degree Burglary, and life without parole for each count of Murder, all to be served concurrently.

Applicant filed a timely notice of appeal. An appeal was perfected by Joseph Savitz, Esquire, of the South Carolina Office of Indigent Defense – Division of Appellate Defense, pursuant to the procedure set forth in Anders v. Calfornia, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction on November 12, 2008. State v. Frady, Op. No. 2008-UP-634 (S.C. Ct. App. filed November 12, 2008). The Remittitur was returned on December 3, 2008.

Applicant then timely filed this application for post-conviction relief on April 13, 2009. An evidentiary hearing was convened on October 3, 2011, before the Honorable J. Cordell Maddox, Jr. Applicant was present at that hearing and represented by Rodney Richey, Esquire. Respondent was represented by Kaelon May, Esquire. Following the hearing, Judge Maddox issued an Order, filed January 19, 2012, denying and dismissing the application with prejudice. Applicant filed a notice of appeal. While preparing the petition for writ of certiorari, the parties discovered that due to a malfunction with the court reporter's equipment, only the last eleven minutes of the evidentiary hearing had been recorded and were available to be transcribed.

Applicant then filed a motion to reconstruct the record, which was granted; however, after a hearing, Judge Maddox sent a letter to the South Carolina Supreme Court stating the record could

not be sufficiently reconstructed. Applicant then filed a petition for writ of certiorari requesting a new trial. By Order filed December 9, 2015, the Supreme Court affirmed the PCR court's denial of relief in part, but vacated the court's findings as to six of Applicant's allegations, finding there was not enough evidence in the record to meaningfully review the court's findings. Frady v. State, Op. No. 2015-MO-073 (S.C. Sup. Ct. filed December 9, 2015). The Supreme Court then remanded Applicant's PCR for a new hearing, limited solely to those six grounds. Id.

SUMMARY OF FACTS ADDUCED AT TRIAL

At trial, Officer Timothy Hunnicutt testified he was dispatched to respond to an incident on the night of September 22, 2004, which involved a report of a stolen van. After a brief investigation, Officer Hunnicutt and the van's owner located the van, and Officer Hunnicut went to Applicant's residence to question him. Applicant relayed that he had just returned home from a funeral.[1] Officer Hunnicutt noticed Applicant's muddy boots and asked Applicant if he could photograph them. Applicant initially consented before changing his mind. He was not under arrest at that time. Since officers had located the van, they released it back to the owner that night, and no forensic processing or evidence collection was done. Officer Hunnicutt testified that officers were unaware of the connection to the murder at that time.

On September 23, 2004, Patrol Officer Phillip Bryant, of the Oconee County Sheriff's Office, responded to a 911 call at a residence on Westminster Highway in Walhalla. Upon arrival, Officer Bryant looked into the home through the open front door and observed a man slumped over in a chair. He also noticed a burnt smell in the air. Additional officers arrived and conducted a protective sweep of the home, at which time the officers discovered the two victims, Jim and

[1] The friend who drove Applicant to the funeral home that night testified for the State; and, according to him, he and Applicant stayed only approximately 45 minutes and returned to Applicant's house well before dark.

Barry Frady, dead from apparent gunshot wounds. A neighbor reported hearing two gunshots around 11:30 p.m. the night before.

Applicant was deemed a suspect when officer learned he had two outstanding arrest warrants for assault on each victim.[2] As a result, Officers Jenkins, Reed, and Bryant were instructed to locate and serve the arrest warrants on Applicant. Officer Jenkins testified he made contact with Applicant in the backyard of Applicant's residence. He was immediately detained and asked if there were any undisclosed persons or weapons on the property. Applicant told Officer Jenkins that he had a shotgun in his home. Applicant then made the following voluntary, post-Miranda statement to Officer Jenkins:

> *[Applicant] was asked about the shotgun in the residence. And he stated he had bought it from a friend previously. And he was asked when was the last time he had seen his family. And his response was that he hadn't seen his folks in two to three months.*

Later that day, officers searched the area where the van had been found the night before and discovered two twelve-gauge shotgun shells. The shells were collected by the South Carolina Law Enforcement Division ("SLED") and processed for DNA. SLED also processed the van for fingerprints and located prints on the exterior hood of the van and the interior passenger window. None of the prints could be matched to Applicant.

ALLEGATIONS RAISED

Pursuant to the South Carolina Supreme Court's order remanding for an evidentiary hearing, Applicant's allegations are limited to the following six grounds:

1. "Defense counsel failed to conscientiously discharge his professional responsibilities while handling [Applicant's] case;

[2] Officer Kevin Davis testified he issued the arrest warrants after a June 11, 2004, incident during which Applicant threatened to harm both victims.

2. Defense counsel failed to effectively challenge the arrest and seizure of [Applicant];

3. Defense counsel failed to pursue plea negotiations that may have proven advantageous to [Applicant];

4. Defense counsel failed to put forward any argument for a minimum sentence at [Applicant's] sentencing;

5. Defense counsel failed to object to the admission of evidence at trial on the basis that the chain of custody had been broken, and that he had not been given an opportunity to examine the evidence;

6. Defense counsel withdrew a potentially meritorious motion to suppress."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court had before it the records of the Oconee County Clerk of Court regarding Applicant's conviction, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the application, Respondent's Return, and the trial transcript. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has reviewed the trial court record and has heard the testimony of both Applicant and trial counsel. This Court has therefore 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).

In a post-conviction relief action, 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, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether

the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. A PCR applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced 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 117-18, 386 S.E.2d at 625.

I. FAILURE TO DISCHARGE PROFESSIONAL RESPONSIBILITIES

Applicant's first allegation was that trial counsel failed to conscientiously discharge his professional duties. Applicant contends palm print evidence and evidence from the getaway van was withheld from him. Further, Applicant claims trial counsel failed to appropriately investigate the timeline regarding the theft of the van and the murders, failed to properly argue the motion for a change of venue, failed to impeach the witness Kevin Cromer, and failed to object to the judge's improper jury instruction regarding malice.

Respondent objected to any testimony regarding the change of venue motion and evidence of the van and palm print being withheld as those allegations were specifically raised in Applicant's original application and have already been ruled upon. However, this Court allowed Applicant to raise the issues over Respondent's objections.

A. PALM PRINT EVIDENCE AND EVIDENCE FROM GETAWAY VAN WITHHELD

Applicant testified he did not recall discussing the van or evidence obtained from it (the palm print) with his attorneys and did not know the State would use it at trial. Applicant testified he believed the State improperly withheld that evidence because the van was not listed in the State's response to trial counsel's Rule 5 discovery motion. Applicant further testified trial counsel did not investigate the van in any way or object to testimony regarding the van coming in at trial. Applicant testified he felt the van should have been kept out because it was turned back over to the owner and not kept in police custody, thereby creating a chain-of-custody issue.

Trial counsel testified he was aware that evidence of the van itself and evidence of prints collected from it would be introduced at trial. Trial counsel testified he felt he had two ways to approach the van evidence; first, by arguing it was unreliable because it was not preserved, and second, that it was evidence of third-party guilt. However, trial counsel testified he had no way to keep the van evidence out completely. He also testified he raised the chain-of-custody issue in cross examination because the police returned the van to the owner before realizing it was connected to the murders. Trial counsel further testified he proffered the testimony of the van owner at trial, although the trial court did not allow him to present that testimony to the jury. He also testified he used evidence of the palm and fingerprints in the van as part of his theory of third-party guilt.

B. INVESTIGATION OF TIMELINE

Applicant testified he told his attorneys the timeline for the theft of the van, running out of gas, perpetrating the murders, and returning to his home did not add up. Applicant stated he asked them to investigate the issue, but the defense investigator did nothing except obtain phone records.

Trial counsel testified the location where the van was found, Applicant's home, and the crime scene were all within two to three miles of each other. Trial counsel agreed Applicant raised the issue of the van and the timeline with him, and he stated most of his knowledge regarding that issue came from Applicant himself. However, trial counsel testified he hired an investigator to test Applicant's contention regarding the timeline, and the investigator concluded it was possible within the timeframe. Further, trial counsel testified he did not contest the timeline because it was not exculpatory or helpful to Applicant.

Therefore, this Court finds trial counsel was not deficient in his handling of evidence regarding the getaway van and items of evidence found inside of it. Further, this Court finds trial counsel conducted an appropriate investigation of the timeline dispute as he hired an investigator to attempt to discredit the timing, but the effort was unsuccessful. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (citation omitted). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

Finally, trial counsel testified he was aware of all the evidence the State introduced prior to trial, and he did not see any way to exclude such evidence. Therefore, this Court finds there was no violation of Rule 5, and trial counsel was not deficient in his professional responsibilities because he had no meritorious objection to make to the introduction of such evidence. Additionally, Applicant offered no evidence, except his speculation to support his contention that

trial counsel failed to investigate or that the State's timeline was demonstrably infeasible. Thus, Applicant's PCR application is denied as to these allegations.

C. CHANGE OF VENUE MOTION

Applicant testified the change of venue motion was made due to concerns about the notoriety of the case and exposure of jurors to pre-trial publicity. Applicant testified every juror indicated during *voir dire* they had heard something about the case, and half of the jurors had heard something on the radio that morning. Applicant stated his attorneys told him the motion was being withdrawn because the charges "could be beat in Oconee County" just as easily as anywhere else. Applicant further testified he told his attorneys he did not want the motion withdrawn.

Trial counsel testified he never made a statement that the charges "could be beat," and the motion was never formally withdrawn. Trial counsel testified some jurors did stand up when asked if they had any prior knowledge of the case, but the judge engaged in extensive *voir dire* with each one, and all unequivocally stated they could put their previous knowledge aside and decide the case only on the evidence presented. Trial counsel stated he felt the issues raised in the motion were addressed by the judge's colloquy with the jurors, and he felt it was fruitless to press it further since case law gives great deference to the trial judge's decision on that issue.

Thus, having weighed the credibility of the testifying witnesses and having considered the admissions and explanations offered, this Court finds trial counsel rendered effective assistance of counsel and Applicant was not prejudiced by trial counsel's decision to forego the motion at the conclusion of jury selection. In addition, this Court determines trial counsel credibly testified he felt the trial judge addressed all of the issues raised in the motion through *voir dire*, and the jurors unequivocally testified to their own impartiality. This Court also notes any motion to change venue would have been premature until the trial court failed to qualify a jury, which never became

an issue in Applicant's case. See State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997) (noting the best practice "is to attempt to seat a jury prior to ruling on a motion to change venue based on pretrial publicity"). Further, it is clear trial counsel made a reasonable decision not to pursue the motion, and that the decision was made based on strategy rather than neglect. See Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective.").

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Here, Applicant did not present any evidence that he was prejudiced by trial counsel's performance at trial. Moreover, Applicant did not call any jurors as witnesses or present any evidence that the jury was impartial due to the trial venue and/or the pre-trial publicity. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . ."). Therefore, Applicant's PCR application is denied as to these allegations.

D. IMPEACHMENT OF KEVIN COMER

Applicant testified trial counsel failed to impeach the witness Kevin Comer's testimony regarding Applicant's questions about using LSD to kill someone. Applicant stated Comer had a criminal record, and Applicant was not aware Comer would be allowed to testify against him.

Applicant further testified Comer's testimony was untrue, and there were other inmates who witnessed the conversation in question between Comer and Applicant. However, Applicant stated he never gave his attorneys the names of such inmates, although he did tell them Comer's version was false.

Trial counsel testified it was his practice to pull criminal records of all witnesses, and he would have impeached the witness if he had any qualifying convictions. Further, the transcript reflects trial counsel did question the witness on cross-examination regarding both his criminal history and the conversation about LSD.

Therefore, this Court finds trial counsel was not deficient in his handling of the cross-examination of Kevin Comer. This Court notes Applicant's testimony is flatly contradicted by the record, and trial counsel did indeed cross-examine Comer as to his criminal record and the alleged conversation about LSD. Consequently, Applicant's PCR application is denied as to these allegations.

E. JURY INSTRUCTION ON MALICE

Applicant objects to the Court's charge that implied malice is inferred from the use of a deadly weapon. This Court has reviewed the jury charge and finds no issue with the Court's charge. The trial judge charged the jury as follows:

> *"Malice aforethought **may** be expressed **or** implied. These terms expressed and implied do not mean different kinds of malice, but merely the manner in which malice **may** be shown to exist. That is either by direct evidence **or** by an inference from the facts and circumstances which are proved based on evidence introduced during the trial of the case. . . ."*
>
> *"[Implied] malice **may** 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."*

(emphasis added). Although the trial court did not specifically instruct the jury it could reject an inference of implied malice, the Court's language clearly conveyed the permissive nature of the inference. Further, the trial court's charge also instructed the jurors as to their "duty to determine the effect, the value, the weight, and the truth of any evidence offered during the trial of this case. . ." and that they were "to weigh the evidence, to consider the evidence, and render a verdict based solely upon the evidence" introduced during trial.

This Court has reviewed the jury instruction on implied malice and finds the instruction was legally correct and unobjectionable. "A charge is sufficient if, when considered as a whole, it covers the law applicable to the case." State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996). "The substance of the law is what must be charged to the jury, not any particular verbiage." State v. Adkins, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct. App. 2003). "Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error." State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

This Court does not find trial counsel failed to identify an error during jury instruction. Therefore, the PCR application is denied as to these allegations as well.

II. FAILURE TO EFFECTIVELY CHALLENGE APPLICANT'S ARREST AND SEIZURE/ WITHDRAWAL OF MOTION TO SUPPRESS

Applicant testified trial counsel filed a motion to suppress, but then withdrew the motion without consulting Applicant. Applicant testified he did not want the motion withdrawn. Applicant further testified he believed the shotgun, shells, and clothing were taken from his residence improperly without a warrant.

Trial counsel testified the basis of Applicant's arrest was two prior arrest warrants that had been issued against Applicant for threatening to assault his father and brother. Counsel testified he saw no reason to challenge the arrest, although he did argue to exclude any mention of the threats or assault at trial. Trial counsel further testified he filed a motion to suppress the shotgun, shells, and clothing, but after hearing the testimony of the officers during the pretrial hearing and reviewing the search warrant, he felt the State could establish compliance with the statute, and he no longer had a meritorious argument for suppression. Trial counsel testified, in his opinion, the search warrant used to collect the shotgun, shells, and clothing was a valid warrant based on statements made by Applicant during his arrest. Trial counsel noted he challenged the statements on Fifth Amendment grounds, but was overruled.

Decisions primarily involving trial strategy and tactics may be made by trial counsel. Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014). Examples of such decisions include "which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, *whether to object to the admission of evidence*, [and] whether and how a witness should be cross-examined." Id. (emphasis added). Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). In this instance, trial counsel made a conscious, strategic choice not to pursue the suppression motion after hearing the pre-trial testimony and determining the State would be able to meet its burden as to the validity of the warrants. Therefore, Applicant's PCR application is denied as to this allegation.

III. FAILURE TO PURSUE PLEA NEGOTIATIONS

Applicant testified he rejected a thirty-year plea offer because his attorneys told him he would "beat [the charges] because there was no evidence." According to Applicant, he told his attorneys he would not accept an offer at that time. Applicant stated he was never told he could get consecutive sentences on top of a maximum sentence or that a life sentence without parole would be mandatory if he was convicted. Applicant testified he would have "almost assuredly" accepted the plea offer if he had been properly informed.

Trial counsel testified unequivocally there was never a plea offer extended from the State. Trial counsel stated his usual practice with plea offers was to put the plea offer in writing and personally take the written offer to his client; however, trial counsel stated he did not do that in this case because no plea offer was ever made. Additionally, trial counsel testified his impression was that Applicant would not plead guilty, regardless, and Applicant never gave him a specific number of years or range that he would agree to plea to. Trial counsel further testified the only discussions he had with Applicant regarding a plea were hypothetical. Trial counsel testified these were brutal killings, and Applicant was fortunate the State agreed not to pursue the death penalty against him.

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). However, a defendant has no constitutional right to a plea bargain. Id. at 685, 511 S.E.2d at 401. The decision whether to offer a plea bargain is within the solicitor's discretion. State v. Whipple, 324 S.C. 43, 49, 476 S.E.2d 683, 686 (1996) (citing State v. Chisolm, 312 S.C. 235, 439 S.E.2d 850 (1996)). Further, in Davie v. State, the South Carolina Supreme Court held the standard to be successful on a claim that counsel failed to convey a

favorable plea offer requires Applicant to prove that: (1) Counsel's failure to communicate the State's initial plea offer constituted deficient performance, and (2) Applicant was prejudiced by the deficient performance, or there was a reasonable probability that but for this deficient performance, he would have accepted he original plea offer. 381 S.C. 601, 608, 675 S.E. 416, 420 (2009).[3]

Having considered the admissions and explanations offered, this Court finds trial counsel's testimony on this issue to be credible, while also specifically finding Applicant's testimony not credible. This Court finds no plea offer ever existed, and Applicant never indicated any interest in pleading guilty; therefore, trial counsel was not deficient in any manner. In any event, Applicant's testimony at the evidentiary hearing that he would have "almost assuredly" accepted the alleged thirty-year offer if he had known the consequences of proceeding to trial is insufficient to meet his burden under Davie. This allegation is therefore denied under the PCR application.

IV. Failure to Put Forth Argument for Minimum Sentence

Applicant testified trial counsel made no argument in mitigation during his sentencing, and Applicant believed he should have. However, Applicant offered no such evidence or testimony himself, and Applicant has not challenged or raised any allegations regarding the State's notice of its intention to seek life without parole upon conviction. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . .). Therefore, Applicant cannot establish prejudice, even if trial counsel's performance was somehow deficient.

[3] Although Davie was decided in 2009, after Applicant's trial, the decision relied on precedent stretching back to the 1980s.

Trial counsel testified he felt the State could establish aggravating factors qualifying Applicant for the death penalty, and Applicant was fortunate the State agreed not to pursue death. Trial counsel further testified he did speak to Applicant's family members, particularly Applicant's grandfather, but their only interest and involvement in the case was to help get the death penalty off the table. Once that was accomplished, according to trial counsel, the family members were no longer interested in assisting further with mitigation. Given the nature of the crimes and the State's notice of life without parole, which was not challenged at trial or in this action, this Court finds trial counsel rendered effective assistance in mitigating Applicant's sentence in that he was able to keep the State from seeking death. Once Applicant was convicted at trial, the trial court had no discretion in sentencing Applicant to life imprisonment, and any mitigation witnesses or evidence from Applicant would have been fruitless in any event. Therefore, Applicant has failed to prove either deficiency or prejudice, and this allegation is denied under the PCR application.

V. FAILURE TO OBJECT TO ADMISSION OF EVIDENCE ON THE BASIS OF CHAIN-OF-CUSTODY ISSUES AND COUNSEL'S INABILITY TO VIEW EVIDENCE PRIOR TO TRIAL

Finally, Applicant testified all evidence regarding the van should have been excluded because the van was released back to the owner before law enforcement realized it was involved in the murders. According to Applicant, this broke the chain of custody and tainted evidence. Applicant also alleges trial counsel should have objected because he was not able to review the van evidence prior to trial.

Trial counsel opined that this was a triable case, primarily because the evidence was all circumstantial, and the State could not fill in every hole in the timeline. Trial counsel testified he was well aware prior to trial of the van, the State's contentions regarding the timeline of the murders, and the evidence of fingerprints in the van. Trial counsel testified he felt the van was a significant piece of evidence, and there was no way to keep it out completely. However, he

testified he was able to cross-examine the officers and argue to the jury the van was unreliable evidence because of the chain-of-custody issues and that, if anything, the van supported Applicant's third-party guilt defense because the fingerprints and palm print found in the van were not Applicant's. Trial counsel also testified he proffered the testimony of the van's owner, Michael Harper, at trial in support of counsel's contention of ill will between Harper and the victims that went towards the third-party guilt theory, although ultimately the trial court declined to allow the testimony to go in front of the jury.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that trial counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). No particular set of detailed rules for trial counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of trial counsel's performance must be highly deferential. Id. at 689.

"Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed

ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

Trial counsel testified he was aware of the contested evidence prior to trial, and a review of the transcript shows he prepared and employed a variety of strategies to cast doubt on the evidence and use it to Applicant's advantage. Applicant has presented no evidence or argument, other than his conclusory assertions, to show this Court that there was a valid objection trial counsel could have made. Trial counsel articulated a reasonable strategy for dealing with this evidence, which included cross-examination of the State's witnesses on the chain-of-custody issues. Thus, Applicant has failed to prove either deficiency or prejudice, and this allegation is denied under the PCR application.

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Trial counsel was not deficient, nor was Applicant prejudiced by trial counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a

right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, Applicant must serve and file a notice of appeal on his own behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED that the Application for Post-Conviction relief is DENIED and DISMISSED with prejudice.

IT IS FURTHER ORDERED that Applicant James R. Frady be REMANDED to the custody of the State of South Carolina.

AND IT IS SO ORDERED.

Jocelyn Newman
Presiding Judge

September 5, 2018
Columbia, South Carolina.

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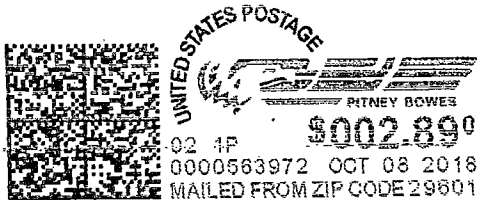

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