

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUL 27 2020

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

J. Derham Cole, Circuit Court Judge

Case No. 2016-CP-32-02577

Demetriss a/k/a Demetrius Glenn #275644.....Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

NOTICE OF APPEAL

This is a post-conviction relief case. Appellant appeals from the Order of Dismissal entered in this case on September 13, 2018 and from the Order entered on May 20, 2020 that denies Appellant's timely filed Rule 59(e) SCRPC Motion to Alter or Amend. Appellant received written notice of the entry of the Order entered on May 20, 2020 by email from the South Carolina Attorney General's Office on June 24, 2020. Copies of the Orders appealed from are attached.

July 24, 2020



Arthur K. Aiken
Aiken & Hightower, PA
PO Box 90707
Columbia, SC 29290
Telephone: 803-799-5205
Fax: 803-799-5206
Email: art@aikenandhightower.com
ATTORNEYS FOR APPELLANT

OTHER COUNSEL OF RECORD:

South Carolina Attorney General's Office
Assistant Attorney General Lillian L. Meadows
PO Box 11549
Columbia, SC 29211-1549

ATTORNEYS FOR RESPONDENT

FILED

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

2018 SEP 13 AM 10:29

Demetriss¹ Glenn, #275644,

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

C/A No. 2016-CP-32-02577

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 (PCR) filed by Demetriss Glenn (Applicant) on July 22, 2016. The Court convened for an evidentiary hearing into the matter on Tuesday, February 20, 2018. Applicant was present at the hearing and represented by appointed counsel Arthur K. Aiken, Esquire. Assistant Attorney General Caroline Scrantom appeared on behalf of Respondent.

PROCEDURAL HISTORY

Applicant is presently in the custody of the South Carolina Department of Corrections at McCormick Correctional Institution. He is serving concurrent life sentences without the possibility of parole.

A. The Underlying Prosecution

Applicant was indicted for the murder, first degree burglary, and armed robbery of Timothy Tice. Casey Cornwell and Andrew Sims Radeker, Esquires, represented Applicant at his jury trial, which took place November 4-7, 2013, in Lexington County. The Honorable Thomas Russo presided. On behalf of the State, now-Eleventh Circuit Solicitor Rick Hubbard

¹ SCDC Records list Applicant's first name Demetrius. Throughout his criminal proceedings, Applicant was consistently identified as Demetriss, as reflected in Applicant's indictments, trial transcript, and appellate records.

prosecuted the case along with Deputy Solicitor Shawn Graham. The jury found Applicant guilty as indicted. Judge Russo sentenced Applicant to 30 years for armed robbery and to life without parole for both murder and burglary, first degree. He issued the sentences to run concurrently.

Applicant filed a timely notice of appeal which David Proffit and Robert Dudek, Esquires, perfected. The appeal raised the following two issues:

- I. Did the trial judge err in refusing to instruct the jury on involuntary manslaughter where the evidence showed that Appellant did not intend to participate in a robbery planned by others, was suddenly awakened while sleeping or passed out drunk in a car during a robbery by others, and was called inside a house to defend a friend who was being attacked?
- II. Did the trial court err in refusing to instruct the jury on defense of others and the right to act on appearances where the evidence showed that Appellant did not intend to participate in a robbery planned by others, was suddenly awakened while sleeping or passed out drunk in a car during a robbery by others, and was called inside a house to defend a friend who was being attacked?

By and through the Attorney General's Office, the State made its brief in response. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences on the basis that the jury instruction was a correct and current reflection of South Carolina law in light of the facts presented at trial. *State v. Glenn*, Op. No. 2016-UP-048 (S.C. Ct. App. filed Jan. 27, 2016) (unpublished). The Remittitur was returned on April 6, 2016.

B. The Instant PCR Action

Applicant presented the following initial claims for PCR, supporting each claim with additional facts alleged in the *pro se* application:

1. "Ineffective Assistance of Counsel"

Trial counsel was ineffective for failing to conduct any pretrial discovery or file timely suppression motions. Trial counsel knew Applicant was never given an arrest warrant, was never arraigned or presented with an indictment for armed robbery. Counsel did not even know the elements of murder. And did not present a defense, call witness or effectively cross-examine state witnesses. Furthermore Trial Counsel showed prejudice when he refuse[d] to talk to Applicant co-defendants when they maded (sic) statement saying

Applicant was innocent. And trial counsel failure to object and motion for reason why Juror was struck doing Jury Selection by the State and she was one of two Black Jurors. Trial Counsel was ineffective and prejudice by letting Applicant be prosecuted for these charges when someone else confessed to them . . .

2. "Fourth Amendment Violation"

. . . . The only evidence of any involvement Applicant had with this case presented by the State was heresay(sic) testimony which Applicant had supposedly told someone he committed crimes after He was arrested. Applicant fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. . . . Therefore trial counsel was ineffective for failure to raise and challenge fourth Amendment violation.

3. "Due Process Violation"

. . . the Solicitor failure to move to dispose of this case within 180 days from the date of Defendant's arrest indicates a voluntary and intentional relinquishment of the right to do so, and upholding such waiver, this case should have been dismissed with prejudice. Moreover, such is evidence of procedural Ineffective assistance of Trial counsel and has Trial counsel done an effective Job the outcome of Trial would have been different.

Applicant was appointed Arthur K. Aiken, Esquire, as counsel (PCR counsel).

Respondent filed its Return on or about September 29, 2017, requesting an evidentiary hearing.

In accord with Rule 71.1, SCRPC, PCR counsel submitted to Respondent an amended application on February 11, 2018. That application included the following claims which were pursued at the evidentiary hearing before the undersigned:

(a) Ineffective assistance of trial counsel

- i. In his preliminary jury instructions (Tr. pp. 105, 106) and in his final jury instructions (Tr. p. 529), the trial judge emphasized the truth-seeking function of the jury. This was error. *See State v Alesky*. 343 S.C. 20, 538 S.E.2d 248 (2000). Trial counsel failed to object to these instructions, and the error in giving these instructions was not preserved for appellate review. Trial counsel gave Glenn ineffective assistance of counsel because trial counsel failed to object to the trial court's instructions emphasizing the truth-seeking function of the jury.
- ii. Trial counsel himself argued the truth-seeking function of the jury in his opening statement and failed to argue reasonable doubt in the opening. Trial

counsel was ineffective because he made the prejudicially erroneous statement in his opening statement that the jurors' role was to seek the truth and because he failed to make any statements concerning reasonable doubt.

- iii. Trial counsel stated in his opening statement that Glenn struck the victim with a stool and took his life. Trial counsel was ineffective because he substantially admitted Glenn's guilt in his opening statement.
- iv. The principal witnesses for the State were a jailhouse informant, Charlie Plumley, and Tyrone Williams. Trial counsel did not effectively cross-examine Plumley and Williams. Trial counsel asked Plumley only twelve questions on cross-examination and asked Williams only twenty-one questions on cross-examination. Trial counsel was ineffective because he did not effectively cross-examine the State's principal witnesses, Plumley and Williams.
- v. On cross-examination of Detective Cathy Etheridge, trial counsel elicited a hearsay statement of Glenn's co-defendant, Kenneth Walters, that Walters "didn't kill anybody." Trial counsel was ineffective because he introduced an inadmissible hearsay statement that exculpated Glenn's co-defendant and thereby implicated Glenn.
- vi. During the testimony of Detective Joe Chappell, the prosecution asked Chappell several questions about what Glenn did not say after he had been read his *Miranda* warnings. This was inadmissible comment on Glenn's invocation of his rights, and trial counsel failed to object to those comments. The prosecution also argued these comments in their closing argument. Trial counsel was ineffective because he failed to object to Chappell's inadmissible comments on Glenn's invocation of his rights.
- vii. Glenn was arrested in July of 2011, but he was not tried until November of 2013. Between Glenn's arrest and his trial date two Circuit Judges had ordered Glenn tried by specific dates, but neither of those trial dates were met. After these scheduled trial dates and before the November 2013 trial a critical alibi witness for Glenn, Tammy 1/n/u died. Trial counsel did not file a motion to dismiss on speedy trial grounds. Trial counsel was ineffective because he did not file a motion to dismiss on speedy trial grounds.
- viii. Trial counsel was ineffective because he failed to conduct a thorough pretrial investigation.
- ix. Trial counsel erroneously advised Glenn that a prior juvenile conviction could be admitted in evidence if he testified in his case. Trial counsel also gave Glenn defective advice that he should not testify. Trial counsel was ineffective because he gave Glenn erroneous advice about his prior conviction and because he advised Glenn that he should not testify.

(b) Prosecutorial Misconduct

- i. The prosecution made Glenn's case public at the jail and offered deals to anyone testifying against Glenn. Plumley was at Glenn's bond hearing and at Glenn's co-defendant's bond hearings. Moreover the same Assistant Solicitor was responsible for Glenn's case and Plumley's case.
- ii. After Glenn was excluded as a contributor on all DNA samples from the scene, false witnesses and fraudulent testimony was presented at Glenn's trial so that he would be found guilty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the evidentiary hearing, this Court had before it the amended PCR application and the State's Return, which included as attachments the Lexington County Clerk of Court records pertaining to Applicant's indictments and sentencing, Applicant's South Carolina Department of Corrections records, Applicant's *pro se* PCR application, the transcript of Applicant's trial and sentencing, and Applicant's appellate filings, including the Order dismissing his direct appeal.

A. Standard of Review

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing *Strickland v. Washington*, 466 U.S. 688, 687, 104 S.Ct. 2052 (1984) (seminal case developing the ineffective assistance of counsel standard)). In regards to the first prong, "[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. at 2065. 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." *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

At all times during the proceeding, the Applicant maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Moreover, the proceeding is coupled with "a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011).

Therefore, Applicant must demonstrate that "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." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 441(1985) (quoting *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064). A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

B. Initial Findings

This Court finds at the outset all claims from the *pro se* petition not duplicated in the amended application waived and abandoned as they were not addressed at the evidentiary

hearing. S.C. Code Ann. § 17-27-90. When the evidentiary hearing convened, Applicant's PCR counsel clarified that the claims going forward at the hearing would be those pursued within the amended PCR application. No motions were made to amend that pleading to conform with the testimony and evidence presented, nor did the testimony presented establish a basis for additional allegations not raised in the amended application.

As a matter of general impression, this Court finds credible and persuasive the testimonies of trial counsel Andrew Radeker, Solicitor Rick Hubbard, and Deputy Solicitor Shawn Graham, each of whom Respondent called as witnesses at the hearing, and each of whom presented well-recalled testimony of relevant events leading up to and during trial.

Conversely, this Court finds Applicant's testimony and assertions not credible. Applicant testified on his own behalf at the hearing. At the outset he testified that he was assisted by six or seven appointed lawyers prior to trial. At times, Applicant's PCR testimony contradicted the allegations raised in his application. This Court finds impressionable the fact that Applicant wrote the Solicitor's Office on January 2, 2018, just over a month prior to his PCR hearing, requesting to enter into a plea deal with the State for a 20-year sentence for manslaughter in lieu of the life sentence received following the trial in this case. (Respondent's Exhibit 1 at PCR). Applicant testified that he did indeed send the letter to the Solicitor's office just weeks before his PCR hearing. Our courts have previously held that "review of trial error is unnecessary" where a defendant who pled guilty reiterates his guilt during post-conviction proceedings and states he "would plead guilty again if granted a new trial." *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (citing *State v. Sroka*, 267 S.C. 664, 230 S.E.2d 816 (1976)). This rule applies "only where the applicant is not prejudiced by any allegations of the PCR application." *Craddock v. State*, 327 S.C. 303, 304-05, 419 S.E.2d 251, 251 (1997); *Johnson v. Catoe*, 336

S.C. 354, 359, 520 S.E.2d 617, 619 (1999) (“*Whetsell* does not bar a capital defendant who admits his guilt at sentence from challenging guilt phase errors on collateral attack”).

However, this Court finds applicable the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment in his representation of Applicant at all stages of Applicant’s trial. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland, supra*). “[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel’s strategy is viewed under an ‘objective standard of reasonableness.’” *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis in original). The United States Supreme Court has cautioned that “every effort be made to eliminate the distorting effects of hindsight” and evaluate counsel’s decisions at the time they were made. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Any post-conviction relief court must be wary of second-guessing trial counsel’s tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). “[W]hen 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)).

C. Individual Claims on the Merits

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State’s Return, this Court proceeds to the claims raised in the amended application and finds each without merit. Pursuant

to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

- i. Counsel's alleged failure to object to jury instructions that "emphasized the truth-seeking function of the jury"

Applicant first alleges that trial counsel did not object to jury instructions Applicant characterizes as emphasizing the truth-seeking function of the jury, prejudicing Applicant because they were not preserved for appellate review. Applicant cites to the trial court's preliminary jury instructions, (Trial Tr. pp. 105, 106), and final jury instructions, (Trial Tr. p. 529), and claims the error is controlled by *State v Aleksey*. 343 S.C. 20, 538 S.E.2d 248 (2000). At the evidentiary hearing, this claim was primarily addressed through the legal arguments of counsel. This Court finds this allegation without merit.

On this issue, our State Supreme Court has cautioned that "[j]ury instructions on **reasonable doubt** which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to the defendant.'" *State v. Aleksey*, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (emphasis added). However, the *Aleksey* court went on to hold that because the "truth-seeking" instruction in that case was "given in the context of the jury's role in determining the credibility of witnesses" there was "not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt." *Id.* at 28-29, 538 S.E.2d at 252. That court cautioned the circuit courts to abandon the truth-seeking language in future charges, but held that the instruction as a whole in that case was a correct statement of law and found no basis for reversal on that ground. *Id.*; see also *State v. Beaty*, Op. No. 27693, 2016 WL 7474479 (S.C. Sup. Ct. filed Dec. 29, 2016) (holding a nearly identical instruction was delivered in error but caused no prejudice warranting reversal) (awaiting opinion after rehearing).

This Court finds that the jury instructions cited by Applicant did not warrant an objection by trial counsel because the trial court's issuance of any language pertaining to the jury's role at trial did not address the burden of proof the jury was to apply to its deliberations. The cited instructions were issued by the trial court in introduction and explanation of courtroom procedure, not as a means of explaining the burden of proof by which they must decide the case. (Trial Tr. pp. 105-06). In the closing charge, the trial court made mention of "truth" only in its instruction regarding the jury's role in evaluating the credibility of the witnesses. (Trial Tr. p. 529). Accordingly, pursuant to *Aleksey*, the instructions cited by Applicant did not warrant an objection. 343 S.C. at 28-29, 538 S.E.2d at 252. Even had counsel objected and preserved the issue for appellate review, there is no reasonable likelihood of success at that stage given the previous finding of the South Carolina Supreme Court in regards to a nearly identical instruction. *Id.*

Applicant's first ineffective assistance allegation is **DENIED** as he has failed to meet his burden of proving *Strickland* error and prejudice.

ii. Counsel's alleged ineffectiveness stemming from his opening statement

This Court addresses claims "ii." and "iii." in tandem as they pertain to trial counsel's strategic decisions made in relation to the opening statement delivered in Applicant's case. Applicant alleges that trial counsel was ineffective by erroneously and prejudicially including in his opening a statement that the jury's function was to seek the truth. (Trial Tr. pp. 122-23). Applicant further claims trial counsel's opening statement was ineffective because it did not mention the burden of proof. Finally, Applicant alleges his trial counsel substantially admitted Applicant's guilt in his opening statement when he stated to the jury that Applicant struck the victim with a stool and took his life. (Trial Tr. p. 121).

The trial record demonstrates that first-chair counsel Casey Cornwell delivered an opening statement which asked the jury to consider the credibility of the State's witnesses, namely the co-defendants in Applicant's case. (Trial Tr. pp. 119, 121-23). In this context, trial counsel, similar to the trial court, asked the jury to consider to weigh the credibility of the witnesses as the factfinder and to "separate the truth from what is fiction." (Trial Tr. pp. 122-23). Counsel's opening statement further established an alternative version of the facts of the case from that posed by the Solicitor's opening. Applicant's counsel pointed at the co-defendants as the instigators of the crimes and stated: "You'll hear the story about how his co-defendants, Ms. Marie Driggers and Kenneth Walters, were together on this without the knowledge of Mr. Glenn." (Trial Tr. p. 120, lines 1-4). Counsel later added: "You'll hear he rushes in to save his friend. . . . You'll hear that the only reason he struck him was to get him off the person whom he believed was being attacked." (Trial Tr. p. 121, lines 8-18).

As trial counsel Radeker testified to at PCR, Applicant's defense was that of the defense of others. Applicant's counsel prepared for trial in anticipation that the two co-defendants would testify. Radeker himself prepared to cross-examine them. As highlighted above, counsel's opening statement establishes the defense of others by exposing the jury to the possibility that Applicant was unaware of the reason for being at the victim's residence and believed his purpose in being called to enter the scene was to rescue his comrades. Accordingly, trial counsel Cornwell delivered an opening statement which asked the jury to question the credibility of the co-defendants, whom he believed would be the State's star witnesses, and to develop a defensible reason for his client's involvement in the crimes charged. However, as explained by Solicitor Hubbard at PCR, the State later (and permissibly) elected not to call the co-defendants to testify at trial.

The United States Supreme Court has cautioned that “every effort be made to eliminate the distorting effects of hindsight” and evaluate counsel’s decisions at the time they were made. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. “[W]hen 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)). Any post-conviction relief court must be “wary of second-guessing trial counsel’s tactics.” *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 64 (2011); *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). The validity of counsel’s strategy is viewed under an ‘objective standard of reasonableness.’” *Lounds v. State*, 380 S.C. at 462, 670 S.E.2d at 650.

This Court finds that Applicant’s trial counsel did not render deficient performance in the opening statement delivered in this case, including the admission that Applicant struck the victim. Based upon credible PCR testimony delivered by trial counsel for both Applicant and the prosecution, this Court finds that trial counsel’s opening statement was strategically formulated to introduce the jury to the theory of defense which he planned to utilize throughout the trial. Counsel formulated his defense, at least in part, upon the likelihood that his client’s co-defendants would testify at trial and would point to Applicant as the perpetrator. Counsel chose in his opening to address the version of the facts that would be presented by the State and introduce an opposing perspective. The State’s own strategic exercise in electing not to call the co-defendants to testify does not discredit the preparation of Applicant’s counsel for objectively foreseeable trial testimony. This Court further finds that trial counsel’s failure to address the State’s burden of proving guilt beyond a reasonable doubt is of no consequence, as the court’s

role was to instruct the jury on the law to be applied. (Trial Tr. pp. 107, 522-25). Accordingly, this Court finds no *Strickland* error in trial counsel's opening statement.

This Court additionally finds Applicant has failed to meet his burden of demonstrating prejudice flowing from the opening statement delivered on his behalf. Applicant was not prejudiced by counsel's representation because there is no reasonable likelihood of a different result had counsel not acted in the manner complained of. As for reasonable doubt, trial counsel addressed the burden of proof in his closing argument. (Trial Tr. pp. 508-22).² Applicant cannot prove on this record "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. at 117-18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). The opening statement related not only to the evidence that would be presented, but established the theory of his defense which would be pursued throughout trial. Ultimately, that theory would fail; however, that fact alone does not amount to error or prejudice under *Strickland* and its progeny. *Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel).

Applicant's second and third ineffective assistance allegations are **DENIED** as he has failed to meet his burden of proving *Strickland* error and prejudice.

iii. Counsel's alleged ineffectiveness in cross-examining the Charlie Plumley, Tyrone Williams, and Detective Cathy Etheredge

This Court addresses claims "iv." and "v." in tandem as they each pertain to trial counsel's cross-examinations. Applicant's fourth ineffective assistance allegation concerns the cross-examinations of the jailhouse informant who testified for the State, Charlie Plumley, and

² Beginning on page 508 of the trial transcript, trial counsel questions the believability of each witness and asks the jury to assign reasonable doubt to the efficacy of their testimonies and to assign doubt to the lack of testimony by the co-defendants.

another State's witness Tyrone Williams, who was a father figure to Applicant. Plumley and Williams each testified that Applicant admitted his involvement in the victim's murder to them. Applicant claims that trial counsel's cross-examinations of these witnesses was deficient because trial counsel asked less than twenty questions of each witness. (Trial Tr. pp. 385-87, 420-23). Applicant's fifth ineffective assistance claim alleges error and prejudice stemming from trial counsel's cross-examination of a Detective who told him on cross-examination that co-defendant Walters told her that he "didn't kill anybody." (Trial Tr. pp. 289-90).

This Court finds applicable the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in his representation of Applicant during the cross examinations of Plumley, Williams, and Etheridge. *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 596 (citing *Strickland, supra*); *Edwards v. State*, 392 S.C. at 457, 710 S.E.2d at 64 (court must be "wary of second-guessing trial counsel's tactics"). "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." *Willis v. United States*, 87 F.3d 1004, 1006 (8th Cir. 1996). Hindsight, however, does not govern the merits of collateral relief. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry upon its opportunity to examine a witness; "the proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases." *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (addressing claim of deficient performance during cross-examination and affirming grant of PCR).

This Court finds Applicant has not met his burden of demonstrating deficient performance. The extent of counsel's cross-examinations of Plumley and Williams proves reasonable when reviewed in the context of the chosen defense. The trial record evidences that counsel's cross-examinations of both Plumley and Williams were in keeping with the theme established in his opening statement and argued at closing: Applicant was unaware that a robbery was occurring and went inside the victim's residence because he was asked to defend his comrades in an ensuing altercation. Counsel highlighted through Plumley's cross-examination that Applicant was asleep in the backseat of the co-defendant's car before and during the crimes, and was awoken by co-defendant Margaret Driggers and asked to come inside to help defend the other co-defendant. Plumley testified Applicant "was just along for the ride." (Trial Tr. p. 387, lines 7-8). Through Plumley, counsel essentially asked the jury to draw the inference that Applicant learned what had occurred in the aftermath. (Trial Tr. pp. 385-87). With Tyrone Williams, trial counsel corroborated the testimony drawn from Plumley's cross-examination and additionally established that Williams had a felony record. (Trial Tr. pp. 420-23).

Applicant also cannot establish prejudice from the lack of additional cross-examination. This Court notes that Applicant did not offer additional testimony from Plumley or Williams at PCR. Nor did Applicant present any testimony at the PCR hearing which tended to establish what additional impeachment evidence could have been pursued against Plumley and Williams at trial. An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness's failure to testify at trial. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992). An applicant's mere speculation as to what a witness's testimony would have been had additional examination

been conducted cannot, by itself, satisfy his burden of showing prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995).

The content of the direct examinations by the State upon both Plumley and Williams is of additional note on the point of prejudice. The State frontloaded impeachment testimony such that an expanded cross-examination in this area would be cumulative to testimony already taken. And as credibly established by the Solicitor at the PCR hearing, Plumley and Williams provided convincing testimony in their own respects.

By the prosecution's assessment, Plumley provided credible testimony because he did not say that Applicant gave him a full confession, but rather testified to a series of half-truths divulged to him by Applicant over time. Moreover, Plumley testified that he was afraid for his life but still chose to testify.³ (Trial Tr. pp. 374-75). The State also established from the inception of Plumley's testimony that he was facing charges for murder, armed robbery and burglary first in another case. Plumley in fact admitted his guilt in regards to those charges at the outset of his testimony and testified that he at no time testified in exchange for a deal from the State. (Trial Tr. pp. 371-73).

In the case of Tyrone Williams, the State once again pinpointed the extent of his criminal record stemming back to 2005. (Trial Tr. pp. 396-97). The State also established, as recollected by the Solicitor at PCR, that Williams willingly took a bus from New York to South Carolina to testify at Applicant's trial knowing that he would be taken into custody in South Carolina for failure to pay child support. (Trial Tr. pp. 397-99). The Solicitor testified at PCR that Williams' voluntarily turning himself in enhanced the credibility of his testimony. Moreover, Williams'

³ The Solicitor testified at PCR, and the trial record reflects, that Plumley received threats on the eve of his testimony, and that, given the choice to withdraw his willingness to testify, he still chose to take the stand. (Trial Tr. pp. 313-15).

testimony substantively established that Applicant called Williams to come talk with him after the murder. (Trial Tr. pp. 403-05). During this visit Applicant told him what happened with the victim—that he repeatedly hit him with a stool—and showed him the items stolen from the victim's residence. Applicant even brought Williams the rifle stolen from the scene. (Trial Tr. pp. 406-12).

Williams' and Plumley's testimonies corroborated those of the forensic pathologist, who testified that the victim incurred a number of linear and right-angled blunt force traumas that were not consistent with a bottle⁴ but could be consistent with the edge of a stool. (Trial Tr. pp. 435-38). And before Plumley and Williams testified, law enforcement had testified that Williams provided them with information about items relinquished to him by Applicant—a rifle and a Crown Royal bag containing ammunition—which law enforcement in turn collected from Williams' home. (Trial Tr. pp. 219-22). The victim's brother corroborated that the rifle retrieved from Williams was that which belonged to the victim. (Trial Tr. p. 245-47).

Considering the totality of the testimony taken from Plumley and Williams at trial, this Court finds no likelihood of a different result had trial counsel extended his cross-examination of these witnesses. Given that Applicant's counsel drew out on Plumley and Williams' cross-examinations that facts which supported his theory of defense, and considering the totality of the testimony taken from these two witnesses as well as its corroboration of other evidence against Applicant presented at trial, this Court declines to find *Strickland* error and prejudice.

Turning to the cross-examination of Detective Cathy Etheridge, this Court initially notes the statement cited in the amended application was not offered for the truth of the matter asserted. (Trial Tr. pp. 289-90 (when approached by Detective Etheridge, co-defendant Walters

⁴ A broken wine bottle was recovered from the scene. (Trial Tr. p. 200).

said he “didn’t kill anybody”). Accordingly, there can be no ineffective assistance for failing to object because no hearsay objection was warranted.⁵ *Rhodes v. State*, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002). But this Court further finds in regards to this claim that, even assuming the statement was hearsay and the failure to object erroneous, that Applicant has failed to demonstrate prejudice. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069 (allowing disposal of ineffective assistance claim on prejudice prong alone). Detective Etheridge testified during cross-examination that co-defendant Kenny Walters made a spontaneous statement prior to Etheridge taking him in for questioning. That statement reportedly was that he “didn’t kill anybody.” (Trial Tr. pp. 289-90). Etheridge’s cross-examination testimony in and of itself did not establish Applicant’s involvement in the crimes: there was a third co-defendant, Margaret Driggers, to whom Walters’ spontaneous statement may have applied. The remainder of the evidence at trial demonstrated that Walters was present at the scene and in fact orchestrated the burglary and armed robbery of the victim along with Margaret Driggers. Walters’ statement therefore could have been referring to Driggers. In fact, under Applicant’s theory of the case, Walters’ statement would have referred to Driggers.

As an additional consideration on the prejudice prong, Applicant was implicated as a knowing participant by other, more straightforward, testimony than that received through trial counsel’s cross-examination of Etheridge. Both Plumley and Walters gave their accounts of Applicant’s admitted involvement. (Trial Tr. pp. 378-79, 406-07).

⁵ Further, had the statement been hearsay, the fact that it was volunteered by a co-defendant to an investigator prior to being taken into custody makes it likely evidence of consciousness of guilt not necessitating an objection by defense counsel. “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011).

Therefore, even going so far as to assume error, this Court finds there is no reasonable probability of a different result at trial. *Cherry v. State*, 300 S.C. at 117-18, 386 S.E.2d at 625. Even if it was hearsay, the statement elicited through Etheridge's cross-examination did not expressly implicate Petitioner in any criminal act, yet proper testimony from other witnesses did.

For the reasons stated, the allegations regarding trial counsel's cross-examinations of Plumley, Williams, and Etheridge are **DENIED**.

iv. Counsel's alleged failure to object to testimony by Detective Joe Chappell

Applicant's sixth ineffective assistance allegation claims that counsel failed to object to testimony by Detective Joe Chappell and failed to object to mentions of that testimony in the State's closing argument. Applicant alleges that Detective Chappell testified about things Applicant did not say after he had been read his *Miranda* rights and that this testimony was an impermissible comment on Applicant's invocation of those rights. Applicant did not present any direct testimony on this allegation at PCR. Nor did Applicant cite to portions of the record giving rise to this ineffective assistance allegation. Thus, this Court is best left to conclude that Applicant refers to the portion of the State's direct examination which asked Chappell if Applicant ever indicated to him: (1) that he had ever been to the location where the murder occurred; (2) the name of the male co-defendant, Walters; (3) that an altercation happened wherein he needed to help a friend; (4) that somebody brought him property belonging to another; and (5) that he was injured. (Trial Tr. pp. 355-56). On re-direct, the State asked three questions clarifying that Applicant, during Chappell's interrogation, did not state that he went to aid or defend anyone. (Trial Tr. p. 365). Notably, these questions directly relate to Applicant's theory of defense: the defense of others.

This Court finds the record contains no meritorious basis for a broad objection to Chappell's direct examination and, thus, no ineffective assistance for counsel's lack of objection. *see, e.g., Almon v. United States*, 302 F.Supp.2d 575, 586 (D.S.C.2004) ("There can be no ineffective assistance of counsel for failing to raise a claim which is not legally viable."). Applicant made a statement to law enforcement which was ruled admissible after a pre-trial hearing pursuant to *Jackson v. Denno*, 371 U.S. 967, 83 S.Ct. 553 (1963). (Trial Tr. pp. 53-78). Accordingly, the State permissibly introduced Applicant's post-arrest statement at trial and permissibly questioned the interrogator about the contents of that statement in the context of the facts presented at trial. Applicant did not invoke his Fifth Amendment right during the interrogation and, to the extent Applicant did invoke that or any *Miranda* right, it was appropriately not made part of the trial record. And the trial record further reflects that counsel did lodge a specific objection.

At trial, Detective Chappell testified that he Mirandized and questioned Applicant as part of the investigation in this case. Applicant invoked his right to counsel during the interrogation; however, this was appropriately not part of Chappell's testimony before the jury. (Trial Tr. pp. 337-42). Applicant's counsel objected to Chappell's testimony when it became apparent to counsel that Chappell may in some way mention why he ceased the interview with Applicant. Trial counsel argued *in limine* that it would be prejudicial for the jury to hear that Applicant invoked his right to remain silent. (Trial Tr. p. 342). The State responded that Chappell's testimony would not go so far as to discuss Applicant's invocation of his Fifth Amendment rights, but would simply address that the conversation ceased. The trial court sustained the objection. (Trial Tr. pp. 343-48). When the Detective's testimony resumed, he made no mention of Applicant's invocation of any *Miranda* right. (Trial Tr. pp. 349-57).

The trial record reflects that Applicant's counsel imposed an objection to Chappell's testimony and prevailed in his argument to the trial court. "[T]he proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases." *Rutland v. State*, 415 S.C. at 577, 785 S.E.2d at 353. Given trial counsel's objection, this Court finds Applicant has failed to demonstrate how trial counsel's performance in this matter was deficient. *Id.*; *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. at 2065.

Moreover, Applicant has failed to demonstrate prejudice. *Strickland, supra*. Even to the extent Applicant alleges Detective Chappell's testimony warranted objection where the State asked Chappell a series of questions about whether Applicant mentioned particular facts during their conversation, (Trial Tr. pp. 355-56, 366), this Court notes that the Detective's testimony was not objectionable as alleged. Ineffective assistance claims based on failure to object are tied to the admissibility of the underlying evidence. *Hough v. Anderson*, 272 F.3d 878 (7th Cir. 2001); *see, e.g., Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"). Here, the trial record fails to exemplify any improper comment on Applicant's invocation of any right, and Applicant did not present any testimony in furtherance of this allegation at PCR.⁶ Therefore there can be no prejudice from its inclusion.

⁶ This Court notes that the cross-examination of Chappell is not subject to any allegation of ineffective assistance of counsel before it. But this Court additionally finds that, to the extent this cross-examination may relate to the actual claim of ineffective assistance for failure to object to testimony on re-direct, that counsel was not deficient in eliciting the testimony from Chappell on cross-examination. It comports with counsel's theory of the defense continually pursued at trial. *E.g., Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 64 (2011) (PCR court "must be wary of second-guessing trial counsel's tactics").

And as for the State's questions on re-direct, defense counsel opened the door to such testimony during cross-examination and Applicant cannot thereafter claim prejudice from the State's reply inquiry. *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991) (if the complaining party "opened the door to this evidence, he cannot complain of prejudice from its admission"). "When evaluating the reasonableness of counsel's conduct, '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.'" *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 597 (quoting *Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. 2052). "It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." *State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008) (citing *State v. Young*, 364 S.C. 476, 485, 613 S.E.2d 386, 391 (Ct. App. 2005).

Trial counsel's cross-examination of Chappell established the following: Applicant told Chappell "he was basically drunk and high and doesn't remember much about that night"; Applicant "never expressed that he had knowledge of any murder" when Chappell questioned him; Applicant "expressed that him and Marie [the female co-defendant] separated at some time during the night"; and Applicant "gave [Chappell] no indication whatsoever that he had knowledge of participation in that crime." (Trial Tr. pp. 364-65).

Therefore, even had counsel objected to the State's questioning on re-direct, there is no reasonable likelihood that he would have again succeeded in eliminating the complained-of testimony. Applicant opened the door to that line of questioning during his own examination of when he asked the witness about what Applicant did not say. That is not to say the testimony was otherwise inadmissible. *See United States v. Bosch*, 914 F.2d 1239, 1247 (9th Cir. 1990) (in federal habeas actions, counsel's failure to object to otherwise admissible testimony will not be

deemed unreasonable or prejudicial). Detective Chappell's re-direct testimony even tends to bolster the theory of the defense established during cross-examination: that Applicant was not part of the criminal acts.

For the stated reasons, this Court finds Applicant has failed to demonstrate error on the part of counsel because the Chappell's testimony was admissible. This Court find Applicant has also failed to demonstrate how he was prejudiced from the State's examination of Detective Chappell. Applicant's ineffective assistance allegation pertaining to the examination of Detective Chappell is **DENIED**.

v. Counsel's alleged failure to litigate a speedy trial motion

Applicant next alleges trial counsel should have filed a motion to dismiss on speedy trial grounds and was ineffective for not so moving. At PCR, Applicant testified that he filed a *pro se* speedy trial motion in conjunction with a *pro se* motion to relieve the counsel who represented him prior to trial counsel Cornwell and Radeker. He testified that trial was set for January 2013, April 2013, and then August 2013, but he was actually tried in November 2013. At one point, Applicant also testified that he asked his trial counsel to get a continuance to have more time to prepare for trial.

The murder occurred on June 26, 2011. Applicant was initially indicted in November 2011. Applicant further alleges that between his 2011 arrest and November 2013 trial, a critical alibi witness named Tammy (last name unclear from Applicant's testimony) died. On this point, Applicant testified that he was aware that his trial counsel hired a private investigator that tried to locate Tammy, but discovered that she had passed away in 2013. As to the extent of the alibi she may have offered, Applicant's testimony was simply that because she lived with him at the time of the murder, he was with her a lot. Applicant could confirm no specifics concerning his

alternative whereabouts during the incident. Accordingly, this Court finds not persuasive the assertion that the delay in trial prejudiced Applicant by virtue of the death of a potential alibi witness.

This Court also finds Applicant was not prejudiced by any lack of motion to dismiss for speedy trial violation. As an initial consideration, Applicant testified that the speedy trial motions were filed *pro se* while represented by counsel. Any direct communication between Applicant and the court in this regard is essentially a nullity because “substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.” *Miller v. State*, 388 S.C. 347, 347, 697 S.E.2d 527, 527 (2010) (citing *State v. Stuckey*, 333 S.C. 56, 508 S.E.2d 564 (1998); *Foster v. State*, 298 S.C. 306, 379 S.E.2d 907 (1989)). But not only was Applicant’s *pro se* assertion of his right to a speedy trial not properly before the Court, trial counsel cannot be found ineffective for the failure to argue such motion on Applicant’s behalf because PCR testimony by counsel for both the defense and the prosecution credibly indicated that counsel for both sides were working towards trial without undue delay.

Deprivation of the right to speedy trial does not *per se* prejudice the accused’s ability to defend himself. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972). Before passing on the merits of any such motion, the reviewing court should consider four factors used to determine whether a defendant has been deprived of his or her right to a speedy trial: 1) length of the delay; 2) reason for the delay; 3) defendant’s assertion of the right; and 4) prejudice to the defendant. *State v. Evans*, 386 S.C. 418, 423, 688 S.E.2d 583, 586 (Ct. App. 2009). “Accordingly, the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case,

balancing the conduct of the prosecution and the defense.” *State v. Pittman*, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007).

As established by the Deputy Solicitor’s discussion of the indictment issued in this case, Applicant was first indicted in 2011, with two years passing prior to trial. The Solicitor testified that Applicant’s case was twice set for trial in 2013 and was twice continued with judicial oversight and by order of the Chief Administrative Judge, as the Solicitor was not responsible for unilaterally continuing or calling cases during the period in 2013 when this case was continued. *See State v. Langford*, 400 S.C. 421, 441, 735 S.E.2d 471, 481-82 (2012) (ruling S.C. Code Ann. § 1-7-330(2005) violative separation of powers and subsequently causing the Chief Administrative Judges of the Circuit Courts to oversee the disposition and reconciliation of pending General Sessions cases); *see also Re: Reconciliation and Disposition of General Sessions Cases Statewide and Appointment of Committee Members*, 2013-002484, S.C. Sup. Ct. Order dated Jan. 7, 2014) (issued after Applicant’s trial).

While two years passed between indictment and trial in this case, the constitutional guarantee of a speedy trial affords protection only against unnecessary or unreasonable delay. *State v. Chapman*, 289 S.C. 42, 45, 344 S.E.2d 611, 613 (1986) (citing *State v. Waites*, 270 S.C. 104, 240 S.E.2d 651 (1978); *Wheeler v. State*, 247 S.C. 393, 147 S.E.2d 627 (1966)). “[A] speedy trial does not mean an immediate one; it does not imply undue haste, for the [S]tate, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay.” *State v. Langford*, 400 S.C. 421, 441, 735 S.E.2d 471, 481-82 (2012), *reh’g denied* (Dec. 20, 2012) (citing *Wheeler*). Given that testimony from the PCR hearing demonstrates that Applicant’s trial was on defense counsel’s radar for the majority of 2013 and was twice continued by the Chief Administrative Judge, this Court finds no record

of unnecessary or unreasonable delay which caused Applicant prejudice. Applicant himself demonstrated a proclivity for seeking relief from previous appointments of counsel, which in and of itself is reason for some delay. Each time Applicant requested and was ordered appointment of new counsel, that counsel necessarily needed time to get up to speed. Additionally, testimony from the State at PCR established that there were no unwarranted delays or violations concerning the discovery which may have prejudiced Applicant's preparation for trial.

This Court finds Applicant has failed to meet his burden of demonstrating *Strickland* error and prejudice from any failure to move to dismiss the indictments for a speedy trial violation. Applicant has failed to demonstrate a meritorious basis for a court to find a speedy trial violation warranting the dismissal of his charges. *See State v. Evans, supra*. Thus, Applicant has not demonstrated the reasonable probability of a different outcome at trial had counsel acted in the manner complained of. This allegation is **DENIED**.

vi. Counsel's alleged deficient investigation

Applicant next makes a general allegation that trial counsel did not conduct a thorough pre-trial investigation. The PCR record refutes this claim. "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*,

466 U.S. at 691, 104 S. Ct. at 2066. Our courts have additionally cautioned not to lose sight “of the reasonableness standard regarding counsel’s duty to investigate. *Id.*; *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 597 (“this duty is limited to a reasonable investigation”). “When counsel makes such a reasonable decision, he will have fulfilled the duty he owes to his client.” *Id.* at 457, 710 S.E.2d at 64-65.

Applicant’s second-chair trial counsel Radeker credibly testified that he worked on this case along with first-chair counsel Cornwell for a significant period of time prior to trial, meeting with Applicant several times in preparation of a defense. Counsel notified Applicant of his trial date. Radeker recalled sharing the paper discovery in this case with Applicant, passing copies to him in their meeting space at the detention center. Radeker testified Applicant decided to go to trial in lieu of accepting any plea offer. Radeker testified Applicant hardly, if at all, indicated that he was unhappy with Radeker and Cornwell’s representation.

Radeker testified that they hired a private investigator to look into a potential alibi. Radeker testified that their defense was premised upon the defense of others: Applicant entered the scene in the belief he was to assist a friend who was embroiled in a fight. He prepared to cross-examine the co-defendants at trial; counsel anticipated they would testify, pointing the finger at Applicant instead of taking responsibility for their own actions. Expounding upon the defense offered at trial, Radeker testified that they prepared to present the defense of others. Counsel stated and the record otherwise reflects— a point expounded upon by his counsel at trial. (Trial Tr. pp. 263-64, 272, 505). Conversely, DNA evidence was recovered for each of the two co-defendants. (Trial Tr. p. 261-62, 267-72).

Counsel’s PCR testimony also established the strategy counsel planned to employ at trial in light of the evidence against Applicant. As testified to by the Solicitor at PCR, first-chair trial

counsel Cornwell was no stranger to criminal defense and had previously tried cases in Lexington County. Radeker's testimony established that while he and Cornwell recognized that the incident implicated Applicant in a hand-of-one-hand-of-all scenario, counsel hoped to prevail upon a request for a jury instruction on the defense of others. Their basis for the request was that from the evidence presented, it could be inferred from the record that Applicant was unaware of any ongoing criminal act when he was summoned to enter the victim's residence by his co-defendant; or that he was merely present at the scene and not culpable. Counsel was successful in garnering a mere presence instruction. (Trial Tr. p. 539). The defense of others instruction was rejected and the issue pursued on appeal, but Applicant did not prevail. *State v. Glenn*, Op. No. 2016-UP-048 (S.C. Ct. App. filed Jan. 27, 2016) (unpublished).

Aside from testifying that he was generally displeased with trial counsel's efforts, Applicant acknowledged on cross-examination that trial counsel argued a number of pre-trial motions on his behalf which were at least in part successful in excluding some of the evidence against him. The trial record reflects a series of pre-trial motions wherein counsel challenged the admissibility of anticipated evidence from co-defendant Driggers regarding her making Applicant "touch things" in the home, as well as her potential testimony regarding Applicant's ability to "pump people up." (Trial Tr. pp. 81-89). Trial counsel was also successful in limiting references to evidence argued prejudicial, such as any mention of Applicant by his nickname "West Hell," or of the admission of any evidence about prior drug activity. (Trial Tr. pp. 87-97). Trial counsel challenged the admissibility of Applicant's statement in a pre-trial hearing pursuant to *Jackson v. Denno*, 371 U.S. 967, 83, S.Ct. 553 (1963), (Trial Tr. pp. 53-78), and moved to strike portions of the police interview once it was deemed admissible. (Trial Tr. pp. 85-87).

This Court finds Applicant has failed to meet his burden as to proving error in the extent of trial counsels' pre-trial investigation. *Strickland v. Washington*, 466 U.S. at 690, 104 S. Ct. at 2066 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"). Testimony taken at PCR by trial counsel credibly established that counsel took time and care to prepare for trial, anticipating the evidence the State would put forth, limiting that evidence, and planning and presenting a defense premised upon inferences which could be derived from the record and which trial counsel was hopeful would cast reasonable doubt upon his client's involvement in the crimes. The Court finds counsel conducted a reasonable investigation into the facts and circumstances of Applicant's involvement in the incident and that counsel's performance in this regard was not deficient. In addition to the testimony of second-chair counsel Radeker deemed credible by the Court, this Court finds the effort put towards counsel's pre-trial motions a result of reasonable investigation and preparation by defense counsel. As a whole, the record reflects that Applicant received a trial with the competent assistance of counsel. *Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. 2052 ("counsel's function . . . is to make the adversarial testing process work in the particular case").

Applicant has further failed to produce any additional exculpatory evidence during the PCR proceeding. Where a PCR applicant fails to proffer any evidence at PCR in support of the alleged deficiency by counsel, that applicant wholly fails to meet his burden of showing that he was prejudiced by trial counsel's alleged omission. *Edwards, supra*, 392 S.C. at 459, 710 S.E.2d at 66; *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995); *Cherry v. State*, 300 S.C. 115, 118-19, 386 S.E.2d 624, 625-26 (1989).

This Court also finds Applicant has failed to demonstrate prejudice derived from counsel's representation due to the weight of the evidence presented at trial. It is not apparent that, had counsel conducted a more thorough investigation or presented a hypothetical alternative defense, that there exists any reasonable probability of a different outcome at trial. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. at 694, 104 S. Ct. at 2068. In support of this finding, this Court outlines the facts established at trial, presented by the State in its Return to the *pro se* PCR application, and credibly recollected before this Court by and through PCR testimony by the Solicitor:

The victim was found face down in a pool of blood in his kitchen on June 26, 2011. (Trial Tr. p. 126, line 24 - p. 131, line 5). Having been beaten, he died as a result of blunt force injuries to his head. (Trial Tr. p. 441, lines 3-6). The State presented evidence that three people were present at the time the victim was killed—Kenneth Walters, Margaret Driggers (also identified as Roxie), and Applicant (also identified as Shawn). None of those individuals testified at Applicant's trial. Instead, Charles Plumley, who had been Applicant's roommate at the county detention center, testified that Applicant told him multiple stories about what happened the night of the murder. (Trial Tr. p. 370, line 10 - p. 388, line 3). Applicant first told Plumley "that he was involved—he was with some people that went on a robbery, and his co-defendant killed somebody." (Trial Tr. p. 375, line 19—p. 376, line 2). According to Plumley, Applicant identified Kenneth Walters and Margaret Driggers as the two people he was with. (Trial Tr. p. 376, lines 3—p. 377, line 7). Over time, Applicant told Plumley more about that night, and Plumley testified to the following as being the Applicant's final story:

That him, Margaret Driggers, Kenneth Walters was at a bar called Shaggy's in West Columbia. They was drinking and partying, and Marie got a call from the victim, Timothy Tice. She knew the victim because she used to work Backpage and she's a prostitute.

And Marie and Kenneth planned the robbery, that the plan was that she was go [sic] inside. Soon as the man feel [sic] asleep, she was going to text Walters to come inside and rob the man. But the man wasn't asleep, that she thought he was asleep when she texted him. The man seen Walters in the house, jumped on him and started beating him real bad.

And Shawn was out in the car, and she ran out there screaming for him to come help—for him to come help his friend because the victim was killing him. And he went inside and tried to pull the man off of him. The man wouldn't get off of him.

And he hit the man, and then he left. He didn't know what happened. After he left, Marie came out of the house—Marie and Walters came out of the house with something wrapped in a sheet, and it was two rifles.

(Trial Tr. p. 378, line 22–p. 379, line 20). Plumley learned from Applicant that those rifles “went to somebody named Ty.” (Trial Tr. p. 379, lines 21–23).

“Ty” proved to be Tyrone Williams who also testified for the State. (Trial Tr. p. 396, line 2–p. 423, line 19). Williams was best friends with Applicant's cousin, and Applicant called Williams “uncle.” (Trial Tr. p. 399, line 13–p. 400, line 10). Williams testified that Applicant called him one day to meet at a motel and told him “he had to bust somebody in the head” the night before. (Trial Tr. p. 403, line 21–p. 406, line 1). Applicant later told Williams more details, explaining what happened the night he killed Victim:

[T]his particular guy called repeatedly while he was at the club, him and the girl Roxie, and another guy who I don't know. And I think maybe the third or fourth time they finally went. And he was asleep in the car. That's what he tells me, now. And Roxie supposedly went in and left the door open or unlocked or whatever. . . .

The little dude went in and said he was asleep, and Roxie was already in and left the door open. The little dude went in. And I don't know how much time it was, but Roxie ended up coming outside banging on the window to get him, yelling she'd been calling him or something or texting him or whatever. And when he got out, she said he was beating the little dude down. . . .

He got out and went in to confront him, and they got into a tussle. . . . When he jumped on him, he said he was a tough cracker. He said the more he hit him, the

more he kept coming. And he grabbed either a wine bottle or a liquor bottle and hit him in the head. It dazed him a little bit, but he kept coming.

He said he grabbed a stool or either a chair. He said he repeatedly hit him, and he finally fell. He said he blacked out and he couldn't stop.

(Trial Tr. p. 406, line 9–p. 407, line 24).

A day or two after that conversation, Applicant came over to Williams's home and put a rifle and a Crown Royal bag, which Williams believed had silver in it, in a back room of Williams' house. (Trial Tr. p. 408, line 6–p. 409, line 24). Applicant had wrapped the gun in a sheet, so Williams could not see it, but he knew what it was. (Trial Tr. p. 408, lines 6–23). Applicant told Williams, "If you find somebody that wants to get it, give me a call." (Trial Tr. p. 408, line 25–p. 409, line 1). One day later, Williams was in a car with Applicant and Driggers and heard an argument between them wherein Driggers asked Applicant why he had sent that "little boy" in when Applicant was supposed to have come in with him. Applicant responded, "Shut the f--- up. I handled it, didn't I?" (Trial Tr. p. 412, line 5–p. 416, line 14). Applicant also told Williams that his DNA would not be in Victim's house because "he cleaned up everything." (Trial Tr. p. 416, line 21–p. 417, line 15).

Other evidence corroborated the testimony of both Plumley and Williams. The victim's brother identified the rifle that police retrieved from Williams' home as one that belonged to his brother. (Trial Tr. p. 245, line 3–p. 247, line 9; Tr. p. 297, line 7–p. 301, line 10). The forensic pathologist testified that the victim had multiple bruises and abrasions to his face, and he had blunt force injuries—including abrasions and lacerations—to other parts of his head. (Trial Tr. p. 433, lines 3–p. 435, line 25). The forensic pathologist testified that some of the victim's injuries were consistent with having been hit by either a stool or a wine bottle. (Trial Tr. p. 436, line 6–p. 437, line 6). Police recovered a broken wine bottle and a stool from the crime scene—both items

tested positive for the victim's blood. (Trial Tr. p. 254, line 8–p. 256, line 9; Tr. p. 270, lines 2–21).

vii. Counsel's alleged deficient advice to Applicant not to testify

Applicant alleges that trial counsel erroneously advised him that a prior juvenile conviction could be admitted in evidence if he testified at trial. No additional testimony was presented on this topic at the PCR hearing. *See Bannister, supra* (applicant must offer testimony at PCR in accord with rules of evidence in order to demonstrate prejudice from counsel's omission); *see also Clark v. State, supra* (pure conjecture as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different). Radeker testified at PCR that Applicant's version of events differed over the course of their preparation for trial and that counsel developed ethical concerns about advising their client to testify. *See* Rules 1.2(d) and 4.1(b), RPC, Rule 407, SCACR. The remainder of the PCR record fails to credibly demonstrate that, had Applicant testified, that he would have delivered reliable or exculpatory testimony. As for potential impeachment, the trial record demonstrates that Applicant had a prior burglary conviction which Applicant's counsel moved to exclude and which the trial court preliminarily ruled would be admissible only in vague terms of a prior felony conviction. (Trial Tr. pp. 78-80; *see id.* pp. 450-55 (discussion client's right to testify and election not to)).

This Court finds counsel's advice to his client not to testify a reasonable tactical decision made in light of all relevant circumstances. "Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). Again, the validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" *Lounds v.*

State, 380 S.C. at 462, 670 S.E.2d at 650. In this case, counsel was reasonably unsure whether his client's testimony would dovetail with the chosen defense because his client's story shifted over time. Based in reason, counsel's advice in this regard does not amount to deficient performance. The trial record also reflects that counsel was aware of Applicant's prior burglary conviction and moved to exclude it in the event his client did ultimately testify. Counsel was preliminarily successful in this regard. *See Jackson v. State*, 329 S.C. 345, 352-53, 495 S.E.2d 768, 772 (1998) (advising applicant not to testify valid strategic decision not prejudicing applicant where applicant had prior convictions for crimes of moral turpitude).

Based upon the recitation of facts already discussed within this Court's Order, the undersigned additionally finds no reasonable probability of a different result at trial had Applicant testified and, thus, no prejudice from counsel's advice in this regard. *See Strickland, supra*. Had Applicant been advised to testify and chosen to do so, the veracity of his defense would be questioned by the State and, as exemplified by the facts of the case recited above, the weight of evidence placed Applicant at the scene in a manner making him complicit in the crimes alleged. Without Applicant's testimony, there was no vehicle to question the veracity of the statement Applicant made to Detective Chappell: he was at a bar with the co-defendants, rode around with them afterwards while intoxicated, and could not recall anything more. (Trial Tr. pp. 352-53). Otherwise, counsel employed a defense which utilized cross-examinations of the State's witnesses to corroborate the statement Applicant made to Chappell and otherwise attempt to credibly establish that Applicant was either merely present at the scene or was not aware of any criminal intent on the part of his co-defendants. (Trial Tr. pp. 306, 385-87, 420-23).

viii. Alleged prosecutorial misconduct unsupported by record

Applicant's final PCR allegations insinuate that the State extended an impermissible plea offer to Charlie Plumley in exchange for his trial testimony against Applicant. Without further support, Applicant also alleges in the amended application for PCR that the State presented false witnesses and fraudulent testimony at trial.

This Court finds Applicant has not presented any evidence tending to establish bad faith on the part of the State in regards to this case. This Court finds credible the Solicitor and Deputy Solicitor's PCR testimonies which established that Applicant and counsel were made aware and informed of the nature of the charges in advance of the trial, were provided with discovery in the ordinary course and in line with Rule 5, SCRCrimP and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), and that no deals or offers were extended to either Plumley or Williams in exchange for their trial testimonies.

Applicant has not met his burden as to any allegation of prosecutorial misconduct contained in the amended PCR application. *See Earley v. State*, 418 S.C. 255, 792 S.E.2d 266 (2016). Applicant wholly failed to put forth any evidence to the contrary and wholly failed to demonstrate any bad act or intent on the part of the prosecution. This Court accordingly **DENIES** these allegations.

CONCLUSION

Upon consideration of the testimony presented at the evidentiary hearing, a review of the pertinent portions of the file made part of this record by way of attachment to the State's Return, and the applicable case law, the undersigned finds that Applicant has failed to meet his burden of establishing error and prejudice as to any ineffective assistance of counsel claim raised in the amended application. Even if Applicant had put forth sufficient evidence that plea counsel's performance was unreasonable under prevailing professional norms, which this Court finds he


did not, Applicant has failed to present any evidence that would tend to establish that he was prejudiced by some act or omission of counsel. This Court further finds Applicant wholly failed to establish a factual basis for any claim of prosecutorial misconduct raised in the amended application.

IT IS THEREFORE ORDERED THAT:

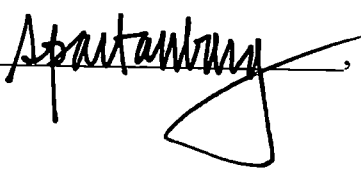
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

This Court additionally notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. 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, PCR counsel must serve and file a notice of appeal on Applicant's behalf.

AND IT IS SO ORDERED this 6 day of September, 2018.



J. DERHAM COLE
Presiding Judge


_____, South Carolina

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016-CP-32-02577

Demetrius a/k/a Demetriss GLENN,
SCDCID #245428

FILED

The STATE of South Carolina,

Respondent,

2020 MAY 20 PM 2: 18

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

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.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other

IT IS ORDERED AND ADJUDGED: See formal order to follow; Statement of Judgment by the Court:

This matter originally came before this court for hearing on an application for post-conviction relief filed pursuant to *South Carolina Code Annotated Section 17-27-20*. The matter was heard and an order issued denying the request for post-conviction relief. The applicant filed a motion pursuant to Rule 59(e), SCRPC, to "alter or amend and for reconsideration" of the judgment entered by the Court.

Applicant contends in his motion that (1) the Court failed to "explicitly rule on" his argument that trial counsel was deficient by "admitting in his opening statement that Glenn had killed Tice by striking him over the head with a stool" and (2) the Court erred in failing to find that trial was deficient in his performance and the applicant was prejudiced thereby.

In the Court's discussion of Applicant's allegation that trial counsel performed deficiently in his opening statement and that Applicant was prejudiced thereby, this Court concluded and the Order "explicitly" states that, "This Court finds that Applicant's trial counsel did not render deficient performance in the opening statement delivered in this case, including the admission that Applicant struck the victim."

Having considered the matter carefully, this Court finds that its Order complies with S. C. Code Ann. Section 17-27-80 and Rule 52(a), SCRPC, and finds there is no reason to alter or amend its previous ruling in this matter.

The applicant's **MOTION** should be and **IS** therefore **DENIED**.

Dated at Spartanburg, South Carolina, this 21st day of April, 2020.

J. Derham Cole, Presiding Judge

This judgment was entered on the 20 day of May, 2020, and a copy mailed first class this 20 day of May, 2020 to attorneys of record or to parties (when appearing pro se) as follows:

ARTHUR K. AIKEN, Esq.
221 Devine Street, Suite 201
Columbia, S. C. 29205

ATTORNEY(S) FOR THE APPLICANT

CAROLINA M. SCRANTOM, Esq.
Post Office Box 11549
Columbia, South Carolina 29211-1549

ATTORNEY(S) FOR THE RESPONDENT

LISA M. COMER, CLERK OF COURT

2020 MAY 19 2020