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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Florence County
Honorable George M. McFaddin, Jr., Circuit Court Judge

Justin Simms,

Petitioner,

vs.

State of South Carolina,

Respondent.

Appellate Case No. 2020-001432

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Counsel was not ineffective for failing to inspect the vehicle in which the victim was shot. Petitioner failed to offer any evidence of what benefit would accrue if the defense inspected the vehicle and therefore, failed to offer any evidence of prejudice. Further, probative evidence supports a finding that counsel's performance was not deficient.

STATEMENT OF THE CASE

A jury convicted Petitioner of murder, attempted armed robbery, and possession of a weapon during a violent crime at the conclusion of trial on December 9-13, 2013. The Honorable R. Knox McMahon imposed concurrent sentences of forty years' imprisonment for murder, twenty years' imprisonment for attempted robbery, and five years' imprisonment for possession of a weapon during the commission of a violent crime. Petitioner appealed the convictions and sentences. However, the appeal was dismissed pursuant to Anders v. California, 386 U.S. 738 (1967).

Petitioner filed an application for post-conviction relief on September 19, 2016. A hearing was held on April 6, 2018, before the Honorable George M. McFaddin, Jr. A second, supplemental hearing was held before Judge McFaddin on August 23, 2018. Following the submission of proposed orders, Judge McFaddin issued an order denying post-conviction relief on October 7, 2020.

STATEMENT OF FACTS

Petitioner and his two co-defendants, Curtis Joe and Joshua Carraway, all from Darlington, arranged for a drug transaction with three young men from Lake City, including Victim. Curtis Joe explained he set up a transaction to sell a pound of marijuana to Victim at the Days Inn in Florence. App. p. 339. However, there never was going to be a drug transaction. Joe explained he was taking Carraway over to the hotel to rob the car from Lake City. Joe explained Petitioner was with Carraway, "I didn't even know he was coming, but he was just with him. He just came with [Carraway]." App. p. 342, lines 9-17. Joe testified he remained in the car while Carraway and Petitioner went through the breezeway to the other side of the hotel where the vehicle of the would-be purchasers was parked. App. pp. 342-43. That is when Joe heard gunshots. Joe was about to pull away when Petitioner ran back to the car. Joe and Petitioner fled back to Darlington. App. pp. 343-45. Petitioner told Joe that "the boy started shooting and [Carraway] was still in the car." App. p. 345, lines 6-13. According to Joe, "He was just saying the dude started shooting them. He didn't never say he shot him." App. p. 346, lines 13-18.

Ironically, Joe became concerned that his customers were going to rob them based on the way they were acting. App. pp. 351-52. Additionally, Joe testified that he did not know if Petitioner was aware Joe and Carraway planned a robbery. App. p. 353; p. 357.

Shane Graham, Victim's brother, drove Victim and Squan Davis from Lake City to the Florence Days Inn. He testified he was unaware there was supposed to be a drug deal, he thought they were meeting some girls at the Days Inn. When they parked at the Days Inn, he saw someone creeping around the car. Victim's door flew open and someone said "give it up." He saw a .380 – it was determined at trial that Victim was shot with a .380. App. pp. 363-67. Graham claimed he did

not know Victim had a gun on him. When Victim jumped towards the gunmen, Graham put his head down and heard shots fired. When the shooting stopped, Graham looked and saw the car door open and Victim laying on the ground. Davis was gone. Graham pulled Victim in the car and drove to the hospital. App. 368-70. Graham testified that law enforcement took his car and returned it maybe a month later. App. p. 374. Graham testified he did not know any of the defendants. App. pp. 381-82.

Josh Carraway testified Joe called and told him some people from Lake City called to buy marijuana. They were going to rob them. Carraway testified Joe also called Petitioner about this planned robbery. Tr. pp. 387-89. Carraway testified he put a coat inside a grocery bag to look like the marijuana. Petitioner and Carraway got out of the car. Carraway claimed he was never armed. He claimed Petitioner carried a .380 High-point. Carraway claimed he asked to use the gun, but Petitioner wanted to carry the gun. Carraway testified he got in the car behind Victim and shut the door. Victim wanted to see the marijuana, Carraway said he wanted to see the money to make sure it was not counterfeit. App. pp. 392-96.

Petitioner opened Victim's door and put his gun in the car. Meanwhile, Carraway hit Squan Davis, who sitting next to him, with his cell phone. Then gunfire started and Carraway jumped out of the car and ran. Carraway thought Victim fired first. Carraway was shot in the foot and leg while he ran. He laid down at first, but when Graham pulled the car away, Carraway ran into the hotel. App. pp. 396-98.

Carraway wanted to call a friend to pick him up, but instead the hotel clerk called an ambulance. Law enforcement allowed Carraway to go home originally believing he was a victim rather than a participant in a crime. Carraway admitted giving multiple statements to police which contained things that were not true. App. pp. 408-411; pp. 420-22. He admitted in prior statements,

he said Joe got out of the car and was the one who fired the .380. App. pp. 421-22.

Squan Davis testified Davis and Victim arranged to purchase marijuana from Curtis Joe. Davis testified that at the Days Inn, "the suspect" opened the door, patted him down, hit him in the face and said "give it up." The assailant hit Victim with a gun and then shots went off. Davis ran. He testified he only saw one person during the robbery. App. pp. 278-83. He testified he saw Victim shooting as he fell out the car and was firing in Davis' direction, although Davis did not think Victim was trying to shoot at him. App. pp. 301-04. Davis claimed he brought $800 for the marijuana transaction that never occurred. App. pp. 313-14.

Deputy Chris Owens responded to the scene of the crime. He spoke to Carraway, who was in the hotel lobby. Carraway was shot in the foot. Deputy Owens learned there was another shooting victim at the hospital. Deputy Owens discovered a black Ford Fusion, Graham's vehicle, at the hospital and secured the vehicle. He observed shell casings on the floor of the vehicle. App. pp. 100-08. Deputy Owens agreed Carraway and Graham gave vastly different stories when he interviewed them that day. App. p. 116.

Investigator Adam Moore testified he recovered various items from the crime scene, including shell casings and gun fragments. He testified GSR was found on Victim's right hand. App. p. 120; p. 130; pp. 151-52. He collected a .45 caliber pistol. App. p. 153. There were several .45 casings found and a single .380 casing collected in the parking lot. App. pp. 165-66.

Pathologist Dr. Presnell testified Victim's cause of death was a bullet to the back that went through the aorta and the left lung before exiting the chest. App. pp. 193-94. Paul Bird, a Florence County crime scene investigator, determined the door to the vehicle must have been open when Victim was shot. The other shots appeared to originate from within the vehicle. App. pp. 214-22.

Investigator McFadden testified about his interviews with Carraway. Investigator McFadden confirmed Carraway originally claimed he stayed in the vehicle and Joe and an individual named Jermaine Jones robbed the other car. App. p. 455. Additionally, Squan Davis thought Carraway was the shooter. App. p. 470.

During closing argument, trial counsel emphasized Joe's testimony that he did not know Petitioner would be there and never saw Petitioner with a gun. App. p. 495, lines 13-17. Counsel emphasized inconsistencies in Carraway's statements and noted portions of trial testimony that did not appear in Carraway's statements. App. pp. 495-97. Noting Davis picked Carraway out of the lineup, trial counsel asked, "Why is [Carraway] not on trial? Why is he not the one in [Petitioner's] seat?" App. p. 498, lines 16-21. Trial counsel noted that the trial court would instruct the jury on hand of one, hand of all, but argued, "And at the very outset, Justin knew nothing about what Joshua Carraway was going to do, absolutely nothing. And you know that because the codefendant, Curtis Joe, told you." App. p. 499, lines 1-8. Trial counsel argued the only person responsible for Victim's death was Carraway. App. p. 499, lines 12-24.

The prosecution, during its closing argument discussed hand of one hand of all. However, the prosecution also explained the charge of possession of a weapon during the commission of a violent crime and explained, "if you think there was a violent crime being committed and [Petitioner] had a weapon, then he's guilty of that charge." App. p. 508, line19 – p. 509, line 2. Later, the prosecution explained to the jury that if it thought Petitioner was the triggerman, it would find Petitioner guilty of possession of a weapon during the commission of a violent crime. App. p. 533, lines 16-20. In fact, the jury found Petitioner guilty of possession of a weapon during a violent crime. App. p. 601. During the remainder of the closing argument, the prosecution concentrated on

its theory of the case that Petitioner was the triggerman, although it made short reference to accomplice liability. App. pp. 509-34 (references to accomplice liability: App. p. 529, lines 12-20; p. 533, lines 4-7).

STANDARD OF REVIEW

Appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018); Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40.

Burden is on the PCR applicant

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Strickland's two-prong test

When an applicant alleges ineffective assistance of counsel, the 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard

v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. The attorney's performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

If it is easier to dispose of an ineffectiveness claim due to a lack of evidence to prove sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 670. This becomes relevant on review in the instant case because in the first issue, Petitioner failed to present **any** evidence that but for counsel's alleged deficient performance, Petitioner would have pled guilty to any plea offer the prosecution might have presented. Likewise, in the second issue, Petitioner failed to present any evidence that Petitioner was prejudiced by counsel's failure to inspect the vehicle where the shooting occurred because Petitioner failed to offer anything but speculation that useful evidence could be found if the defense inspected the vehicle.

ARGUMENT

I.

Petitioner did not raise this issue during the PCR hearing, and the PCR court did not err in denying relief because Petitioner never established Petitioner would have pled guilty but for the alleged deficiency of counsel. Counsel's performance did not fall below professional norms.

Petitioner contends in his petition to this Court that counsel's ineffectiveness caused him to decline an alleged plea offer. Evidence of the supposed plea offer was underwhelming, and Petitioner never testified he would have accepted the alleged offer. Further, Petitioner never actually raised the issue below. Instead, his petition collects a collage of testimony in an attempt to advance a theory of ineffectiveness he did not advance below. Finally, counsel's performance was not ineffective for failing to explain accomplice liability to Petitioner prior to trial because Petitioner claimed to be merely present and not a participant in the robbery that led to Victim's death and the State's theory of the case was that Petitioner was the shooter.

How the issue was not raised, nor intended to be raised, below.

At the beginning of the hearing, Respondent requested Petitioner to state the allegations for the record. PCR counsel announced the allegation that counsel was ineffective for lack of preparation, "particularly in not anticipating the State's theory of the case." App. p. 722, lines 9-13. PCR counsel also alleged trial counsel was ineffective for failing to object to what he described as an incomplete copy of the jury charge being provided to the jury and the second issue raised in the petition to this Court – counsel was ineffective for a belated motion to inspect the vehicle involved in the crime. App. p. 722, lines 14-20. PCR counsel explained, "[T]hose are the specific allegations. There are some general preparation-type allegations as well." App. p. 722, lines 21-22.

Petitioner testified on his own behalf as the first witness and testified that when they first met, trial counsel talked to him about pleading guilty, but Petitioner did not want to plead because he was not guilty of murder. App. p. 729, lines 6-13.

Petitioner admitted counsel advised him he should consider pleading guilty because "it was going to be hard to win because my co-defendants were going to testify against me, and he was just trying to persuade me to plead and I just wasn't – I didn't want to plea. I wanted to go to trial. I didn't want to forfeit my rights." App. p. 732, line 25 – p. 733, line 4. On cross-examination, Petitioner agreed this conversation took place fairly early in representation, between January 2010 and April 2011. Tr. p. 738, line 10 – p. 739, line 8.

Petitioner claimed trial counsel never spoke to him about mere presence or accomplice liability. App. p. 734, line 23 – p. 735, line 3; p. 735, line 24 – p. 736, line 10. However, Petitioner never claimed during the PCR hearing he would have considered pleading guilty. Petitioner never testified that any plea offers were made by the State. Petitioner did not allege that counsel failed to communicate any plea offers. Critically, **Petitioner never claimed he would have pled guilty to the charges but for counsel's alleged failure to discuss accomplice liability**. When asked by PCR counsel if there was anything else the PCR court needed to be aware of concerning trial counsels' representation, Petitioner complained about purported sleeping jurors. App. p. 737, lines 6-14.

Trial counsel testified as follows:

> I wanted to plead this case out based on all of the evidence that I got. I expressed that to my client. My client – my client was adamant that he wanted to go to trial and at that particular point, my client, myself, and his father – we had a long conversation several weeks leading up to this trial and once he made the decision to go to trial, it was his decision and we put all of the efforts in order to try this case so that justice was served.

App. p. 759, lines 4-15. Counsel confirmed he went through discovery with Petitioner including the statements to codefendants and witnesses. App. p. 759, lines 12-24.

PCR counsel did not subpoena Petitioner's father, Robert Stucks, for the original hearing. However, the PCR court agreed to hold the record open and allow PCR counsel to call Stucks at a supplemental hearing. App. p. 767. Stucks was an attorney and he was heavily involved in his son's case, so he was co-counsel, although most discussions were between trial counsel and Petitioner, and Stucks described himself as a go-between the two sometimes. Tr. pp. 776-77. There was no discussion of plea offers during direct examination.

On cross-examination, for the first time, Stucks claimed to recall a plea offer right before trial for voluntary manslaughter, which Petitioner turned down. Tr. p. 783, line 24 – p. 784, line 9. On redirect, when asked, Stucks equivocated, answering, "Wait. I don't know – I think it was a voluntary manslaughter charge. It had to be." App. p. 784, lines 18-23. There was no further testimony or evidence regarding the alleged plea offer and Petitioner did not testify at the supplemental hearing.

The PCR court asked for proposed orders at the close of evidence. App. p. 786. The PCR court issued an order specifically addressing four issues raised, including the claim trial counsel failed "to properly prepare for trial and anticipate the State's theory of the crime." App. p. 799. The PCR court did not specifically address the claim now raised that counsel was ineffective for not advising Petitioner about accomplice liability when Petitioner decided to not plead guilty and proceed to trial. The PCR court's order noted testimony that a plea offer for voluntary manslaughter was made immediately prior to trial (App. p. 798); and in finding Petitioner was not prejudiced by

the alleged deficiency, the PCR court observed trial counsel explained accomplice liability during trial and Petitioner never testified he would have changed his mind and plead guilty but for trial counsel's alleged deficiency of performance. App. p. 800.

Petitioner never presented the issue to the PCR court

Certiorari should be denied because this claim was not raised below. Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) ("On certiorari to this Court, Plyler raises the issue of whether trial counsel was ineffective for failing to object to an erroneous malice charge. Since this issue was neither raised at the PCR hearing nor ruled upon by the PCR court, it is procedurally barred."); Hyman v. State, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) ("The appellant asserts representation was ineffective because her trial counsel did not object that the sentences constituted cruel and unusual punishment. This point was not raised in her application or at the hearing and is not properly before us."). To be clear, this is not a case where an issue was raised during the PCR hearing and the PCR court's order neglected to address the issue. See Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019) (issue raised at hearing but not addressed in PCR order, case remanded to address the issue despite lack of a Rule 59(e) motion).

PCR counsel never raised a claim that trial counsel was ineffective in his advice to Petitioner as to whether he should plead guilty or accept any offers that might have been made by the prosecution. Instead, PCR counsel specifically stated that counsel was ineffective for failing to anticipate the State's theory of the case. Further, during his testimony, Petitioner did not testify as to any plea offers and did not allege the lack of advice on accomplice liability affected his decision on whether or not to plead guilty. Finally, the PCR court's order did not address counsel's performance regarding his advice as to whether or not Petitioner should accept any plea offers. But see Mize v.

Blue Ridge Ry. Co., 219 S.C. 119, 129-30, 64 S.E.2d 253, 258 (1951) (A matter is not preserved for appeal even if the trial court raises it sua sponte). Accordingly, certiorari should be denied on this issue.

Petitioner never demonstrated a reasonable probability Petitioner would accept any plea offer that might have been presented by prosecution.

Petitioner attempts to connect disparate pieces of testimony to weave an argument that the PCR court erred in not granting relief. However, inevitable failures in proof defeat Petitioner's claims on appeal. Two United States Supreme Court cases decided the same day provide the test to determine if counsel is ineffective in the plea negotiation process. In Missouri v. Frye, 566 U.S. 134 (2012), the defendant argued – and the United States Supreme Court agreed – that his attorney was ineffective in not relaying plea offers. The defendant stated he would have accepted one of these offers if he had known about it. The Frye Court held:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or **been rejected** because of counsel's deficient performance, **defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel.** Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.

Id. at 147-48 (emphasis added). In the other case, the United States Supreme Court confirmed the necessity of showing a defendant would have accepted a plea offer but for counsel's deficient performance in advising the defendant to reject a plea offer. Lafler v. Cooper, 566 U.S. 156, 164 (2012) (in order to establish prejudice from a claim that counsel misadvised his client regarding a

plea offer there must be a showing that the defendant would have accepted the plea but for counsel's deficient performance).

In Collins v. State, 422 S.C. 50, 810 S.E.2d 871 (2018), the South Carolina Supreme Court found the PCR court erred in granting post-conviction relief because Collins only testified he would have wanted more information about an expired offer, "the record is void of any testimony that Collins expressed a desire to accept the expired offer." Collins, 422 S.C. at 262-63; 810 S.E.2d at 877-78. There also was no testimony establishing the State would have revived the expired offer or any new offer was available before trial that Collins would have accepted. Id.

In the instant case, Petitioner never testified he would have been willing to plead guilty had he understood accomplice liability. As in Collins, Petitioner failed to establish prejudice. Notably, Petitioner never referenced any particular offers the prosecution might have made during his own testimony.

Petitioner claimed mere presence, denied he was an accomplice.

Further, Petitioner failed to establish counsel's performance was deficient in this regard. Petitioner testified he did not know of the plan to rob Victim and his companions. Instead, Petitioner insisted he thought he was accompanying Curtis Joe and Josh Carraway for a drug deal. Petitioner testified he remained in the car and therefore, was not a participant in the attempted robbery or murder. App. p. 725; pp. 735-36. Trial counsel testified the defense's theory of the case was that Petitioner did not fire the fatal shot and was not part of the robbery. App. pp. 747-49; p. 775, lines 6-20. Therefore, Petitioner contended he did not participate in the robbery and was merely present; Petitioner did not contend he was a participant in the robbery, but not the triggerman.

Counsel noted the uncertainty in terms of the testimony expected from the codefendants, due

to several inconsistent statements. App. p. 749. However, once trial started, Counsel explained accomplice liability to Petitioner. App. p. 749. In Whetsell v. State, 276 S.C. 295, 298, 277 S.E.2d 891, 892-93 (1981), this Court observed the following:

> [T]he decision to plead guilty before the evidence is in frequently involves making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. . .

(quotation marks and citations omitted). In the present case, the prosecution primarily advanced the theory of the case that Petitioner was the triggerman. Further, Counsel testified he went through all the witness and codefendant statements with Petitioner to prepare for trial. The record fails to reflect that the concept of accomplice liability was central to the prosecution's case or its existence was important to Petitioner's decision to invoke his right to trial by jury. See United States v. Ruiz, 536 U.S. 622, 630 (2002) ("[T]his Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require **complete** knowledge of the relevant circumstances . . . .") (emphasis added).

Moreover, as the PCR court noted, evidence established Petitioner as the one who fired the weapon and this was the prosecution's primary theory of the case during closing argument. App. pp. 511-14; p. 800.

Evidence is equivocal as to any plea offers presented.

The exact plea offer made by the prosecution, predicate proof for this claim, is hazy at best. The only evidence of a supposed plea offer came during cross-examination of the last witness, and only somewhat inadvertently – counsel for the State was asking about any conversations between

trial counsel and Petitioner about the jury instruction for accomplice liability, and Stucks mentioned the plea offer for voluntary manslaughter that occurred right before trial started. App. pp. 783-84. It is clear Petitioner never intended to raise a claim about his decision to reject a plea offer. The testimony from Stucks was equivocal and Stucks expressed some wavering on whether or not the offer was for a plea to voluntary manslaughter. Stucks did not provide any detail if the offer was for a term of years, or a straight up plea to voluntary manslaughter.

Testimony incidental to the claim that actually was raised at the hearing is insufficient to repurpose and support relief for the claim now made on appeal. Therefore, certiorari should be denied for this issue.

For a claim of ineffective assistance of counsel causing rejection of a plea offer, a new trial is not the proper relief.

Respondent would also point out that Petitioner, in his prayer for relief from this Court, requested a new trial. However, for the claim that ineffective assistance of counsel led an applicant to reject a favorable plea offer, that is not the proper relief. In Lafler, the Court specified the proper relief is to require the prosecution to reoffer the prior plea offer. If an applicant accepts this offer, the sentencing court then can exercise its discretion as whether to vacate some convictions and resentence the applicant accordingly, or leave the convictions and sentence from trial undisturbed. Lafler, at 174.

Conclusion

To conclude, the PCR hearing transcript reflects no intention of Petitioner to raise this issue, Petitioner failed to present any evidence of prejudice, and counsel's performance was not deficient, nor was advice prior to trial on accomplice liability critical to the determination of the case.

Therefore the petition should be denied on this issue.

II.

Counsel was not ineffective for failing to inspect the vehicle in which the victim was shot. Petitioner failed to offer any evidence of what benefit would accrue if the defense inspected the vehicle and therefore, failed to offer any evidence of prejudice. Further, probative evidence supports a finding that counsel's performance was not deficient.

Petitioner claims the PCR court erred in denying his allegation that counsel was ineffective for failing to inspect the car where the homicide occurred. However, although Applicant speculated there was additional helpful evidence to be found in the car, Applicant did not produce any such evidence or the testimony of any expert witnesses at the evidentiary hearing. See, e.g., Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1999) (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); 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. . . ."); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional

preparation would have had any possible effect on the result at trial). This is fatal to a claim of ineffective assistance of counsel as Petitioner failed to offer any evidence of prejudice to support his claim of ineffective assistance of counsel.

Further, Petitioner failed to prove counsel's performance was deficient. At best, evidence was equivocal as to whether the vehicle was ever available to trial counsel and further, the record indicates that the vehicle was unexpectedly returned to the victim's brother before the preliminary hearing. App. p. 731; pp. 736-37. Petitioner testified, "I mean he couldn't – he couldn't – if – if the State releases the car before February, the crime – if this happens in January and the State releases the car before February, then he can ask for it all he want[s] to. He can't – he can't get it." App. p. 732, lines 2-6. Counsel confirmed the car was released back to the owner around the time of the preliminary hearing. App. pp. 750-51.

Petitioner fails to offer any evidence that counsel should have anticipated the vehicle being returned so quickly, or that he had sufficient opportunity to inspect the vehicle that was returned possibly only days after he began representing Petitioner. See Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) (finding plea counsel was not ineffective for failing to interview the burglary victim because plea counsel would need to be clairvoyant to expect any benefit would accrue to his client).

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition, Respondent would respect permission to more fully brief the issues herein.

Respectfully submitted,

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