

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Brian M. Gibbons, Circuit Court Judge

2018-CP-40-04637

RECEIVED
AUG 10 2021
S.C. SUPREME COURT

Holly Jo Thompson, # 299956,

Appellant,

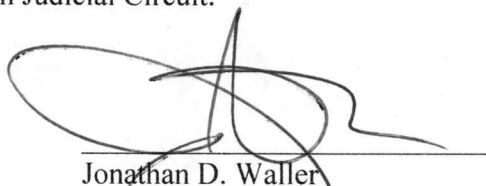
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Holly Thompson, # 299956, appeals the Order of Dismissal denying her
Application for Post-Conviction Relief filed July 28, 2021, issued by the Honorable Brian
M. Gibbons, Presiding Judge, Fifth Judicial Circuit.



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August 5, 2021

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IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2018-CP-40-4637

ORDER OF DISMISSAL

V.

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RICHLAND COUNTY
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S.C. SUPREME COURT

Respondent.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to meet his requisite burden of proof, denies relief, and dismisses this application with prejudice.

Applicant is presently confined in the South Carolina Department of Corrections. In April 2014, the Richland County Grand Jury indicted Applicant for murder (2014-GS-40-2072). Alicia Goode, Robert Bank, and J. Rhodes Bailey, Esquires, represented Applicant. Assistant Solicitors Luck Campbell, Meghan Walker, and Laura Gregg of the Fifth Circuit Solicitor's Office prosecuted the case. On February 16-19, 2016, Applicant proceeded to trial before the

Honorable Robert E. Hood and a jury. The jury found Applicant guilty as indicted. Judge Hood sentenced Applicant to imprisonment for forty-five years.

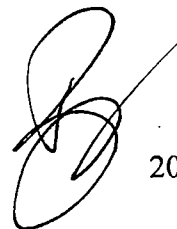
Applicant filed a timely notice of appeal. Appellate Defender Katherine H. Hudgins of the South Carolina Office of Indigent Defense perfected the appeal. Appellate Counsel raised three issues: (1) whether the trial court erred in refusing to instruction the jury on voluntary manslaughter; (2) whether the State was required to provide Applicant with juror rap sheets; and (3) whether the trial court should have allowed re-cross examination of a State's witness. The South Carolina Court of Appeals affirmed Applicant's conviction on June 13, 2018. *State v. Thompson*, Op. No. 2018-UP-258 (S.C. Ct. App. filed June 13, 2018). The remittitur was returned to the circuit court on June 29, 2018. Applicant thereafter commenced this PCR action on August 26, 2016.

FACTS

On January 27, 2014,¹ Odell Middleton (Middleton) found the body of James Solomon ("victim") inside the victim's mobile home in Hopkins. At trial, Middleton testified he was worried about his friend when he walked into the unexpected and bloody scene. (R. at 48; 52; 55). Middleton described seeing the victim on the floor, blood around his head, and broken glass near the body. (R. at 54-56). Middleton additionally testified he noticed signs of a possible struggle, including two rugs in the hallway, which were "tangled up and kicked up." (R. at 55). Middleton ran out of his friend's home and called 911. (R. at 55).

Evidence collected from the victim's home helped investigators narrow down their list of suspects. Crime scene technicians swabbed the bloodstains from the knife blade found in the bedroom, the blood from the bedroom, hallway, and living room, and collected the sheets from

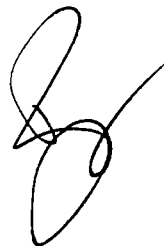
¹ The victim was found three days after his death. (R. at 728-27).



the bedroom. (R. at 139; 215-16; 220). The DNA from the blood collected from these locations matched the victim. (R. at 321; 332-37; 347). Additionally, a technician collecting broken glass at the scene and noticed a possible palm print in the dried blood. (R. at 123-24). The print ultimately matched Applicant. (R. at 309-11).

Applicant never denied she was at the victim's home on the night of his death, but told the deputy who arrested her that she did not kill him. (R. at 579). However, Applicant changed her story after learning the evidence investigators had against her, including the palm print, and subsequently told investigators she killed the victim in self-defense. (R. at 580; 588-89).

At trial, Applicant testified she was a prostitute and the victim was one of her clients who paid for sex with money or drugs. (R. at 472-74). Applicant stated she and the victim smoked crack cocaine together on the night of his death and tried to have sex in the living room, but when the victim could not perform, he got angry. (R. at 477-80). Applicant testified they tried to have sex again later in the bedroom; however, the victim still could not perform so Applicant went to the living room to get dressed and the victim followed her. (R. at 480-81). Applicant testified the victim had a small knife that he swung at her, cutting her right hand. Applicant claims she grabbed a glass vase to defend herself. (R. at 481). Applicant stated the victim swung the knife at her again as she tried to grab her crack pipe and clothes to leave, so she hit him with the vase. (R. at 482; 486). Applicant testified she and the victim fell to the floor, the vase broke, and she thought she hit him five or six times. (R. at 486-87). Applicant then claimed she got up and the victim remained on the floor, threatening her, as she ran out the front door. (R. at 487). Applicant admitted she did not call 911 or otherwise call for help, not even when she later learned the victim had died. (R. at 490; 493).

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ISSUES RAISED

In her application for post-conviction relief, Applicant alleges she is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel;
 - a. Attorney refused to call character witnesses;
 - b. Attorney did not honor Applicant's request for a mental health evaluation.

At the evidentiary hearing, PCR counsel for Applicant proceeded on the allegations raised in the original application. Additionally, at the closing of the hearing, PCR counsel moved to amend the pleadings to conform to the evidence to include an allegation of ineffective assistance of counsel for failure to seek immunity. The Court granted PCR Counsels motion. (PCR Tr. 46).

SUMMARY OF RELEVANT TESTIMONY

Applicant's testimony

At the evidentiary hearing, Applicant testified she was originally appointed an attorney who represented her for a brief period before trial counsel Robert Bank ("Bank") took over her case. (PCR Tr. 7). Applicant testified that during their first meeting she and Bank discussed what happened the night of the incident and different aspects of the case. (PCR Tr. 8). Applicant stated that she did not have the DNA testing, handprint analysis and jail phone calls as part of discovery towards the beginning of the case. (PCR Tr. 8). Applicant indicated she gave Bank her side of the story and that the theory of the case was that the victim had attacked Applicant and she was defending herself when she struck the victim in the head with a vase, ultimately killing him. (PCR Tr. 9). Applicant testified that her story has never changed. (PCR Tr. 9). Applicant testified Alicia Goode ("Goode") and Rhodes Bailey ("Bailey") were brought on to assist with her case closer to trial. (PCR Tr. 9-10). Applicant stated she told Bank about two potential witnesses



including her boyfriend and the man she lived with at the time for possible testimony. Applicant stated that both the men instead testified for the State. (PCR Tr. 10).

Applicant testified she told Bank about the back door of the victim's home being found open, and stated she did not leave the home that way. (PCR Tr. 12). She testified she and Bank discussed how they would prepare the theory of self-defense for trial, including showing photos of where she had been cut or scratched by the victim's knife. (PCR Tr. 12). Applicant testified that she discussed every aspect of the whole case with Bank, Goode, and Bailey in preparation for trial, giving her attorneys her side of the story. (PCR Tr. 12-13). Applicant testified she reviewed the State's evidence of the blood throughout the house with her attorneys, and as a group, they discussed various pieces of the evidence and their location in the home. (PCR Tr. 13). Applicant testified she provided statements to law enforcement, and she and her attorneys discussed the statements and how they were given. (PCR Tr. 14). Applicant indicated her attorneys explained the procedures of trial, what the State would have to prove for her to be found guilty, Applicant's constitutional rights, and her right to testify. (PCR Tr. 15). Applicant stated she wanted to testify at trial because she didn't want to be looked at as a murderer. (PCR Tr. 16). Applicant testified she asked for her attorneys to call Dorothy Williams as a character witness on her behalf, who she had known for twenty-eight years. (PCR Tr. 16). Applicant acknowledged that Ms. Williams did not have any direct knowledge of the incident. (PCR Tr. 16).

Applicant testified she believed a mental health evaluation would have helped her as she was diagnosed with "several mental illnesses" and she was not on medication at the time the incident occurred, so she self-medicated with street drugs, which she stated was a factor in the

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incident. (PCR Tr. 17). Applicant did not remember having a discussion with her attorneys about seeking immunity from the charges. (PCR Tr. 17).

On cross-examination, Applicant admitted she did not specifically ask her attorneys to look into Dorothy Williams as a character witness, and testified she could not remember if she gave her attorneys Ms. Williams' name. (PCR Tr. 18). Applicant acknowledged that Ms. Williams had nothing to do with the case. Applicant stated she asked her attorneys for a mental health evaluation and they discussed it, but she did not remember discussing it further. (PCR Tr. 19). Applicant testified she told her attorneys her version of events, and testified to her version of the events at trial. (PCR Tr. 19). Applicant acknowledged she and her attorneys reviewed the DNA testing and fingerprint evidence before trial, and that her attorneys had the opportunity to cross-examine her boyfriend, roommate, and witness Amy Norris at trial. (PCR Tr. 20). Applicant testified she did not have an argument against the evidence that the victim had been stabbed other than someone else must have been in the home after she left. (PCR Tr. 21). Applicant stated she did not stab the victim and she testified as such at trial. (PCR Tr. 21).

On re-direct, Applicant acknowledged she never denied hitting the victim with a vase. Applicant alleged she just did not know she had killed the victim because when she left the home he was still alive. (PCR Tr. 21). Applicant testified she did not understand how the victim could have died due to blunt force trauma to the head and simultaneously have cuts on his feet from glass. (PCR Tr. 22).

Counsel Bank's testimony

Counsel Bank testified he represented Applicant for approximately eleven months until her trial. (PCR Tr. 23). Bank testified his perspective of the allegations was that Applicant lived down the street from the victim and the two were acquainted, occasionally engaging in drug use,

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prostitution, and drinking. (PCR Tr. 23). Bank testified Applicant and the victim were at the victim's home the evening of the incident when the victim became agitated with Applicant and accused her of stealing his crack cocaine before attacking her. Applicant defended herself by grabbing a vase and hitting the victim multiple times. (PCR Tr. 23). Bank confirmed that Applicant told him the victim was still alive when she ran out of the residence, and testified the autopsy pathologies agreed the victim would have been alive for some period of time after the incident. (PCR Tr. 23). Bank testified they believed the victim was able to walk, explaining the cuts on the bottom of his feet. (PCR Tr. 23). Bank indicated Applicant was located and interviewed by law enforcement several days later and gave a statement detailing the same scenario. (PCR Tr. 24). Bank confirmed their defense was a theory of self-defense and testified the toxicology report confirmed the victim was a large and strong man for his age. (PCR Tr. 24). Bank confirmed Applicant's testimony that he and his co-counsels prepared Applicant for the self-defense theory and stated he felt Applicant had been honest in answering their questions during preparation. (PCR Tr. 25). Bank testified that Goode and Bailey came in two months prior to trial and assisted with reviewing the State's evidence and preparing Applicant for direct and cross-examination. (PCR Tr. 25).

Bank indicated Goode and Bailey assisted with obtaining last-minute discovery, ensuring witnesses they wanted to speak to were contacted, and preparing various motions or cross-examinations that may arise. (PCR Tr. 26). Bank testified he did not recall having a discussion with Applicant about seeking immunity under the Protections of Persons and Property Act. (PCR Tr. 26). Further, Bank did not recall doing research into whether that would have been appropriate in this case and testified it would have not precluded Applicant from raising self-defense at trial. (PCR Tr. 26). Bank testified they became aware the State was introducing a

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blood splatter expert in the week leading up to trial and requested the report from the Solicitor, who told the defense team there was no report. (PCR Tr. 27). Bank stated he believed the State tried to use the expert to combat the self-defense argument by establishing that Applicant hit the victim from behind and show inconsistencies with the physical evidence. (PCR Tr. 28). Bank testified when the issue first came to their attention, he discussed asking for a continuance with Goode and Bailey but the team concluded they would be prepared to deal with expert. (PCR Tr. 28). Bank admitted the defense team discussed, in hindsight, how it may have been more effective to ask for a continuance or obtain their own expert. (PCR Tr. 29). Bank indicated he did not remember having issues reviewing the jail phone calls prior to trial, and acknowledged the blood splatter was something he did not have extra time to absolutely review. (PCR Tr. 29-30).

On cross-examination, Bank testified he met with Applicant at least ten to fifteen times prior to trial and felt he met with her enough to prepare the case for trial. (PCR Tr. 31). Bank indicated he did not handle the blood splatter expert, but used some of the expert testimony to the benefit of Applicant during closing arguments. (PCR Tr. 31). Bank indicated he was also able to argue the victim's cuts were from the glass vase during closing arguments and that the victim was alive when Applicant left. (PCR Tr. 32). Bank testified he spoke to Dorothy Williams who was a family friend multiple times to update the family on the status of the case, but never planned to call her as a witness at trial. (PCR Tr. 32). Bank stated that Ms. Williams had no relevant information regarding the facts, and would not have fed into the good character evidence rules. (PCR Tr. 32). Bank additionally testified there were issues in Applicant's past the defense was trying to make sure they did not open the door to by introducing Ms. William's testimony. (PCR Tr. 32). Bank testified Applicant might have requested a mental evaluation, and

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if so, the team would have discussed it. However, after explaining the choices of evaluations they decided against it. (PCR Tr. 33). Bank stated he had no reason to believe Applicant was not competent to stand trial. (PCR Tr. 33).

Bank testified he was aware of the Protections of Persons and Property Act at the time but chose not to pursue it, though he could not specifically recall why. (PCR Tr. 33). Bank testified they requested the lesser-included offense of involuntary manslaughter and did not receive it. (PCR Tr. 34). Bank confirmed he prepared Applicant multiple times for her testimony at trial, and he believed Applicant's trial testimony was consistent with the statements she gave to police. (PCR Tr. 35). Bank additionally testified the coroner's report indicated the victim was struck in the face and back of the head. Bank indicated the defense pointed this out while cross-examining the State's witnesses and in closing arguments. (PCR Tr.35-36).

Counsel Goode's testimony

Counsel Goode testified she was brought on to Applicant's case a few months before trial, and acted as second chair, giving the opening statement to the jury and examining crime scene witnesses. (PCR Tr. 37-38). Goode testified the blood splatter expert reviewed photos taken by the crime scene department and gave recommendations based on the images. (PCR Tr. 38-39). Goode testified she did not recall listening to the jail phone calls. (PCR Tr. 39). Goode testified she worked with Applicant in telling her story and presenting self-defense in the opening statements by highlighting Applicant's state of mind, the victim's state of mind, and the victim's physical stature. (PCR Tr. 39-40). Goode confirmed that Applicant's testimony was the biggest part of the defense. (PCR Tr. 40).

On cross-examination, Goode testified the photos the blood splatter expert testified about were included in discovery, and she reviewed the photos prior to trial. (PCR Tr. 41-42). Goode



acknowledged she highlighted the victim as a larger, strong man during opening statements. (PCR Tr. 41). Goode did not recall anything specific in the expert's testimony that was helpful for the defense during his cross-examination. (PCR Tr. 42). Goode confirmed their theory was the victim was alive when Applicant left and he was able to walk around. (PCR Tr. 43).

Counsel Bailey's testimony

Counsel Bailey testified he was the third seat and supervisor for the trial who primarily assisted the others with preparation. (PCR Tr. 44). Bailey testified he handled the cross-examination of Dr. Durso to parse out determining whether the injuries were the product of self-defense, as well as a few other witnesses (PCR Tr. 45). Bailey indicated he did not conduct any independent research or investigation outside his preparation for the pathologist's testimony. (PCR Tr. 45).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court also had before it the records of the Richland County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application, Respondent's return, the trial transcript, and the transcript from the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court finds the combined record of the trial transcript and the testimony and evidence presented at the evidentiary hearing establishes Applicant received effective assistance of counsel, and this application should be denied. Set forth below are the relevant findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code.

INEFFECTIVE ASSISTANCE OF COUNSEL

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Applicant raises allegations that her trial counselors were ineffective in their representation. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCF; *Butler v. State*, 286 S.C. 441, 344 S.E.2d 813 (1985). Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his PCR action, and when alleging counsel was constitutionally ineffective, she must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” *Strickland*, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*, 466 U.S. 668.

First, Applicant must prove counsel’s performance was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler v. State*, 286 S.C. 441, 442, 344 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* (citing *Strickland*, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* The standards do not establish mechanical rules; the



ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. 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. 668.

Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from a rigid rule of representation. Rather, *Strickland* requires the applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 697. The function of the PCR court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." *Id.* at 690. Although courts may not indulge "post hoc rationalization" for counsel's decision-making that contradicts the available evidence of counsel's actions, *Wiggins v. Smith*, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for actions. There is a "strong presumption" counsel's attention to certain issues to the exclusion of others reflects tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U. S. 1, 8 (2003).

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. *Harrington*, 562 U.S. 86.

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“Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversarial process the right to counsel is meant to serve. *Strickland*, 466 U.S. at 689–690. Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, opposing counsel, and the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” *Id.* at 689; *see also Bell v. Cone*, 535 U. S. 685, 702 (2002); *Lockhart v. Fretwell*, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S at 690.

In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. *Wong v. Belmontes*, 558 U.S. 15 (2009); *Strickland*, 466 U.S. at 693. Instead, *Strickland* asks whether it is “reasonably likely” the result would have been different. *Id.* at 696. This does not require a showing that counsel’s actions “more likely than not altered the outcome,” but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters “only in the rarest case.” *Id.* at 693, 697. The likelihood of a different result must be substantial, not just conceivable. *Id.* at 693; *Harrington*, 562 U.S. 86. “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.”

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Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96 (explaining the court must analyze how individual errors of counsel affect the important factual findings in a particular case))).

Counsel failed to call character witness

Applicant alleges her trial counselors were ineffective for refusing to call any character witnesses. This Court finds this allegation is meritless. 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 from the witness' failure to testify at trial. *Bannister*, 333 S.C. at 303, 509 S.E.2d at 809. Applicant failed to produce the testimony of her character witness during her PCR hearing. Applicant's allegation that Ms. Williams could have testified positively about her due to their relationship, and any potential result the testimony would have had on the proceeding, is purely speculative. Further, the decision not to call Ms. Williams as a witness was trial strategy.

The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). Here, Applicant alleges she requested her attorneys call Dorothy Williams as a character witness because Ms. Williams knew her for a period of almost twenty-eight years. However, during cross-examination, Applicant acknowledged that Ms. Williams had nothing to do with the case. (PCR Tr. 19). Applicant further testified she could not recall if she asked her attorneys to look into Ms. Williams as a character witness, and additionally that she was not sure whether she gave the name of Ms. Williams to her attorneys. (PCR Tr. 18).



As such, this Court finds Applicants testimony to lack credibility. This Court finds counsel Bank's testimony that he spoke to Dorothy Williams, who was a family friend, multiple times to update the family on the status of the case credible. The Court additionally finds credible counsel Bank's testimony that he never planned to call Ms. Williams as a witness at trial as she had no relevant information regarding the facts. (PCR Tr. 32). Further, this Court finds credible counsel Bank's testimony of his decision not to use Ms. William's as a "good" character witness in light of the risk her testimony would open the door to examination of damaging facts in Applicant's past that the defense thought it best to exclude. (PCR Tr. 32). This is a valid reason for deciding not to call Ms. Williams since she had no actual knowledge of which to testify, and Applicant's character would have been at issue if she testified. Thus, counsel was not ineffective for employing this strategy. *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992) (where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel), *see also Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998). Accordingly, this allegation is denied and dismissed with prejudice.

Counsel failed to request mental health evaluation

Applicant additionally alleges her counselors rendered ineffective assistance for failing to obtain a mental health evaluation. "Due process of law prohibits the conviction of a person who is mentally incompetent." *Jeter v. State*, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992). An accused is competent to stand trial if he or she has sufficient capability to consult with his or her lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings. *Id.*, 308 S.C. at 232, 417 S.E.2d at 596. "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he [or she] has

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the *ability* to understand the proceedings.” *Garren v. State*, 423 S.C. 1, 14, 813 S.E.2d 704, 711 (2018) (quoting *Godinez v. Moran*, 509 U.S. 389 (1993)).

As to the deficiency prong under *Strickland*, an attorney may reasonably rely upon his or her own perceptions of a defendant in determining whether or not their client should be mentally evaluated. *Jeter*, 308 S.C. at 233, 417 S.E.2d at 596. When establishing *Strickland* prejudice in the context of counsel’s failure to request a mental competency evaluation, the applicant need only show a reasonable probability that they were incompetent at the time of the original proceeding. *Garren*, 423 S.C. at 12, 813 S.E.2d at 710 (citing *Ramirez v. State*, 419 S.C. 14, 21, 795 S.E.2d 841, 845 (2017)). As is the case with any other allegation that a defense attorney failed to adequately investigate some matter, an applicant must present some proof of identifiable mental health issues that undermine his or her competency; mere speculation and conjecture by the applicant is insufficient to establish prejudice. *Id.*, 423 S.C. at 13-14, 813 S.E.2d at 711.

Bank testified that Applicant may have requested a mental evaluation, but after discussion of the evaluation choices, they decided against it. (PCR Tr. 33). Bank additionally stated he had no reason to believe Applicant was not competent to stand trial. (PCR Tr. 33). The record demonstrates that Applicant understood the nature and object of the proceedings against her, such that she assisted in her defense by testifying at trial. Applicant testified she had a history of mental illnesses, and was self-medicating with street drugs, which she testified was a factor in the murder. (PCR Tr. 17).

Notably, Applicant never argued lack of capacity or incompetence as a basis for requesting the evaluation. Applicant additionally never claimed her mental illnesses rendered her incompetent at the time of the proceeding. Instead, the record establishes that Applicant intelligently and competently assisted in her defense. As such, this Court finds Applicant’s

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testimony that she needed a mental health evaluation to be not credible. This Court finds Counsel Bank's testimony that he did not request an evaluation because he had no reason to believe Applicant was not competent to be credible. Counsel Bank's assessment that Applicant was competent was reasonable in light of the record of Applicant's communication and assistance to her trial attorneys in developing the theory of self-defense, contribution of names for possible witnesses, consistently testimony of her version of the incident, and testimony in her own defense at trial.

This Court therefore finds Applicant failed in her burden to establish that she was incompetent at the time of her trial, and likewise failed to establish any alleged deficiency on behalf of her trial counselors for failing to request an evaluation, and any resulting prejudice therefrom. Accordingly, this allegation is denied and dismissed with prejudice.

Counsel failed to seek immunity

Applicant asserts her trial counsel were ineffective for failing to seek immunity pursuant to the Protections of Persons and Property Act² (the Act) pretrial, when trial counsel sought a jury instruction on immunity under the Act during the charge conference. The Court disagrees.

Subsection 16-11-440(C) of the South Carolina Code provides in pertinent part:

A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard" *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). After an adverse verdict at trial even the most experienced counsel may find it

² S.C. Code Ann. §§ 16-11-410 to -450.

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difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. *Strickland*, 466 U.S., at 688, 104 S.Ct. 2052. *Harrington v. Richter*, 131 S. Ct. 770, 790, 178 L. Ed. 2d 624 (2011).

"Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992).

This Court finds Applicant's trial counsel were not deficient for failing to seek immunity pursuant to the Act because counsel articulated a valid strategy of focusing the defense efforts on pursuing a theory of self-defense. Counsel Bank's testified he was aware of the Protections of Persons and Property Act while preparing for Applicant's trial, but chose not to pursue it through a pro/con process performed in any case. (PCR Tr. 26; 33). Bank testified that he considered whether Applicant was in a space she had a right to be in to qualify under the Act, among other factors. (PCR Tr. 26). Bank additionally testified that while seeking immunity would have not precluded Applicant from raising self-defense at trial; the trial strategy had always been to focus on pursuing and preparing the theory of self-defense. (PCR Tr. 26; 33). Moreover, a self-defense

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charge was given to the jury in Applicant's case. (PCR Tr. 34). This Court finds credible Counsel's testimony that Applicant's version of the events best supported a self-defense theory, and her attorneys worked with her in developing her testimony and the case to best support those facts. Accordingly, trial counsel was not allegedly deficient for failing to seek immunity under the Act pretrial. As such, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. The Court finds that trial counsel Bank, Goode, and Bailey's representation was neither deficient nor prejudicial. The Court finds Applicant failed to establish she lacked capacity at the time of the initial proceeding. The Court further finds Applicant competently and intelligently assisted in her defense, which is evinced by the trial transcript and testimony given at the PCR hearing.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

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IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this ____ day of 7/12, 2021.



BRIAN M. GIBBONS
Presiding Judge
Fifth Judicial Circuit