STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Dadrin J. Johnson #316909, Applicant,	)	Case No.: 2014-CP-42-204
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before this Court by way of Applicant's post-conviction relief application filed January 16, 2014. Respondent made its Return on August 21, 2014, requesting an evidentiary hearing be convened. An evidentiary hearing was held on September 19, 2016, at Spartanburg County Courthouse. J. Brandt Rucker, Esquire, represented Applicant. Assistant Attorney General Patrick L. Schmeckpeper represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Tanya Jones also testified through telephone. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In February 2010, the Spartanburg County Grand Jury indicted Applicant for Murder (2010-GS-42-1052). Tanya Jones, Esquire represented Applicant. Solicitor Barry J. Barnette and Amanda Morris Gallivan, Esquires, prosecuted the case. On December 13-14, 2010, Applicant proceeded to trial before the Honorable J. Derham Cole, circuit court judge, and a jury. Applicant was found guilty of murder

and Judge Cole sentenced Applicant to life imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf, dated December 16, 2010. On appeal, the following issue was addressed:

> Whether the court erred by ruling the solicitor's reason for striking juror #49 was not racially pre-textual where the solicitor said this African-American woman juror had red streaks in her hair – "red hair" – that he thought was indicative of an "attitude". Since his peremptory challenge of this juror was impermissibly racially stereotypically based?

Applicant was represented by Robert M. Dudek, Esquire. The South Carolina Court of Appeals affirmed the conviction and sentence. *State v. Johnson*, Op. No. 2012-UP-528 (S.C. Ct. App. filed Sept. 19, 2012). Applicant filed a Petition for Rehearing, which was denied on October 18, 2012. Applicant then filed a Petition for Writ of Certiorari with the South Carolina Supreme Court. The Supreme Court of South Carolina dismissed the Petition, by written order, on December 19, 2013. The Remittitur was returned on December 27, 2013.

Summary of Relevant Facts

On October 9, 2009, Applicant was at a party when the party host, Amber Rice, stated they needed to go to the gas station. (Trial Tr. 74-75). Applicant asked the driver, Crystal Miller, if he could go as well. (Trial Tr. 75). While the driver and Applicant were waiting in the parking lot, the other defendant, Brandon Robbs, pulled up on his moped, and went over to the car. (Trial Tr. 77). At this time, Applicant exited the car and asked if he could borrow Brandon's coat and moped, which Brandon consented to. (Trial Tr. 77). Thereafter, Adrian Edwards, the victim, walked over by his car. (Trial Tr. 77-78). Edwards walked over to Applicant, extended his hand, and then Applicant began shooting at Edwards. (Trial Tr. 78). Thereafter, the witnesses fled the scene. (Trial Tr. 78). Two eyewitnesses observed the shooting, which was also captured on video footage. (Trial Tr. 79, 81-82, 102). Applicant was easily identifiable as the perpetrator upon

review of the video footage. (Trial Tr. 83-84).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that Counsel failed to "properly research and investigate the facts and laws surrounding . . . [Applicant's] whole case."

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Counsel was ineffective for:
    a. Failure to regularly meet and communicate with Applicant about the case.
    b. Failure to investigate the case.
        i. Failure to investigate whether the video footage was tampered with.
    c. Failure to pursue and present an alibi witness defense.
    d. Failure to share evidence and discovery related to the case with Applicant.
    e. Failure to secure a plea deal.
    f. Failure to allow Applicant to choose his own jury.
    g. Failure to allow Applicant to testify at trial.
    h. Failure to request voluntary manslaughter instruction.

All other allegations raised in his initial application and amendments are deemed abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Dadrin Johnson Testimony

Applicant was sentenced to life imprisonment. (PCR Tr. 5). He was represented by Tanya Jones at trial. (PCR Tr. 5).

Applicant stated Counsel only visited him two or three times. (PCR Tr. 9). Applicant stated the meetings only lasted for about fifteen minutes, if that. (PCR Tr. 9). Applicant stated that when Counsel finally met with him, Counsel seemed like she was not listening to him. (PCR Tr. 6-7). Applicant stated he was upset that he was charged with murdering someone he cares about and that he did not kill them, but Counsel did not listen to him. (PCR Tr. 7).

Applicant stated he requested Counsel obtain the discovery and evidence against him and

she did not. (PCR Tr. 5). Applicant stated he received a copy of the discovery, which was incomplete, on the second day of trial. (PCR Tr. 5-6). Applicant testified he did not know anything about the crime he was charged with. (PCR Tr. 6).

Applicant alleged Counsel failed to properly research and investigate the facts of the case. (PCR Tr. 5). Applicant had a difficult time specifically stating what Counsel failed to do or investigate, even when pressed. (PCR Tr. 8, 10-11). When pressed further on what Counsel failed to investigate, Applicant just stated he "requested so much stuff, man." (PCR Tr. 8). Applicant stated he did not feel that Counsel defended him at all. (PCR Tr. 11). Eventually, Applicant stated that if Counsel had investigated further, he would have discovered it was not him on the video footage and that the video was tampered with. (PCR Tr. 11-12). He stated he thought it had "different settings" and did not show the murder. (PCR Tr. 16). Applicant stated he wished Counsel investigated the video evidence and asked for a private investigator and specialist on the film. (PCR Tr. 12).

Applicant also stated that if she investigated further, Counsel would have discovered his whereabouts at the time of the murder. (PCR Tr. 8). Specifically, Applicant stated he discussed an alibi witness, his now deceased Aunt Penny, with Counsel who could verify "the situation" but Counsel did not pursue this defense. (PCR Tr. 7). Applicant stated he gave Counsel his aunt's contact information, but did not give Counsel her real name because he did not know her name. (PCR Tr. 16-17). Applicant stated she was not called to testify. (PCR Tr. 7-8). Besides his Aunt's alleged testimony, Applicant stated no other evidence existed indicating he was somewhere else at the time of the incident. (PCR Tr. 8).

Applicant stated he was never presented a plea offer and, to the best of his knowledge, Counsel never tried to get a plea offer for him. (PCR Tr. 6). Additionally, Applicant stated he

never went to court for a plea hearing before trial week. (PCR Tr. 6).

Applicant stated Counsel told him he could pick his own jury, but ultimately was unable to. (PCR Tr. 10). Applicant also stated that during voir dire the State was striking jurors from the culture or area of town he lived in, which prejudiced him. (PCR Tr. 14). Applicant conceded Counsel challenged this, but believed she should have challenged it more. (PCR Tr. 14-15).

Applicant stated he did not testify at trial and did not have a chance to defend himself. (PCR Tr. 10). Applicant stated that Counsel wanted to have the last word before the jury and, thus, did not want Applicant to testify. (PCR Tr. 10).

Applicant stated he thought the jury instruction given was incorrect and Counsel was ineffective for failing to object to them. (PCR Tr. 13-14). Applicant stated he thought he could have been charged with the lesser included offense. (PCR Tr. 14).

Counsel Tanya Jones Testimony

At the PCR hearing, Counsel appeared by telephone while in Oklahoma. (PCR Tr. 23).Counsel stated that, in preparation for the PCR hearing, she was provided with a copy of the discovery prior to the PCR hearing by the office she practiced at when representing Applicant, but they did not locate notes she took while speaking with Applicant at prison. (PCR Tr. 23).

Counsel stated she became a licensed attorney in 2000 and began her public defender work in Georgia starting in 2007. (PCR Tr. 18). By the time of the PCR hearing, she stated she had been doing defense work for eight years. (PCR Tr. 18). Counsel stated that Applicant was not a difficult client, but was quiet and consistently stated he was not guilty. (PCR Tr. 19). Counsel stated he did not remember them ever having a contentious relationship. (PCR Tr. 20).

Counsel stated that typically when people are arrested they are interviewed regarding whether or not they will need an attorney appointed and if they qualify the public defender would

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get a file. (PCR Tr. 18). Counsel stated that she got the file shortly after the arrest; probably in or around October 2009. (PCR Tr. 18-19).

Counsel stated that Applicant never told her that he felt they did not meet enough. (PCR Tr. 19-20). Counsel also stated Applicant never told Counsel he thought she was not showing him enough of the evidence on the case. (PCR Tr. 20).

Counsel stated she did not remember how many times she met with Applicant, but it was a number of times, probably at least four or five times. (PCR Tr. 19, 23-24). Counsel stated that, at the meetings, they went over all the discovery, including autopsy photographs, video footage, photographs, and all evidence. (PCR Tr. 19). Counsel stated there was a lot of discovery in the case and she could not recall anything specific that was missing. (PCR Tr. 19).

Counsel stated she reviewed the video of the murder with Applicant several times. (PCR Tr. 21). Counsel stated she did not remember thinking the video seemed like it was tampered with. (PCR Tr. 21). Counsel testified it was undisputed that the victim was shot at a gas station. (PCR Tr. 21). Counsel stated that the video was not high definition and was filmed at nighttime, but the convenience store was well lit and you could clearly see someone walking in a unique walk that matched with how her client walked. Counsel stated the video showed someone stick their head in the door of the convenience store and that the camera was directed at the door he walked through. (PCR Tr. 25). Counsel stated the video clearly identified Applicant as the perpetrator, who walk away, got on a moped waiting for the victim, and then when the victim exited the store, fired several shots. (PCR Tr. 26). Counsel testified that, thereafter, the footage shows someone hitting the ground and trying to crawl away and then more shots were fired, which was shown as a burst of color on video. (PCR Tr. 26).

Counsel also stated that there were two eye witnesses who were both close friends of

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Applicant. (PCR Tr. 22). When asked if she thought an eyewitness's testimony was the big issue in the case, Counsel stated she thought the video was the biggest obstacle. (PCR Tr. 26). Counsel stated she does not remember whether or not she spoke with the eyewitnesses about the case. (PCR Tr. 27). Additionally, one officer recognized Applicant from the video. (PCR Tr. 22). Counsel stated that, at the time, Applicant went by the nickname Worm, which was used to track down Applicant. (PCR Tr. 22).

Counsel stated she did not remember the Solicitor offering a plea offer in the case, but remembered talking with Applicant about potentially contacting the Solicitor and asking how he felt about an offer of thirty years imprisonment. (PCR Tr. 24). Counsel stated that she thought the case was weak and would lose at trial. (PCR Tr. 21). Counsel also stated that she was also worried about the case because Solicitor Barnette was prosecuting the case and the victim's mother was very involved. (PCR Tr. 24). However, Counsel stated that she could not get Applicant to authorize any type of plea, whether it be a number, term or number, or a straight up without recommendation. (PCR Tr. 24).

Counsel testified that the trial strategy was for Applicant to say he did not do it and then leave it in the hands of the jury. (PCR Tr. 25). Counsel stated she did not remember Applicant mentioning an alibi witness. (PCR Tr. 20). Counsel stated that, typically, if she is told about an alibi witness she will investigate it. (PCR Tr. 20). However, Counsel then testified that, typically, when a client tells her about a potential alibi witness they do not know their first name or an exact address. (PCR Tr. 20). Thus, Counsel stated that potential alibi witnesses usually use up a lot of time and resources for little gain, because she rarely has luck with locating them. (PCR Tr. 20). However, Counsel stated that if Applicant told her about an alibi witness she would have investigated it. (PCR Tr. 20).

Counsel stated that it is not generally her practice to let her clients pick their juries, but stated she does consult with them in case there is a juror they do not like or who is sending them a bad look. (PCR Tr. 20-21). Counsel stated she did not specifically remember discussing a possible voluntary manslaughter jury instruction because she did not remember the evidence being so specific. (PCR Tr. 28). Counsel stated she was unsure whether the instruction fit the charge, since the video showed premeditation. (PCR Tr. 28).

Counsel stated that the State never alleged a motive. (PCR Tr. 28). Counsel stated Applicant stated he had a motive, but it never came out at trial. (PCR Tr. 28). Counsel stated Applicant told Counsel that he killed the victim because the victim was supposed to go to Atlanta for drugs, but the drugs were bad in that they were not real and Applicant was thus out of money in the range of $1,500-$4,500. (PCR Tr. 29). Once this was revealed to Counsel, she stated that she did not think the case should proceed to trial. (PCR Tr. 29-30).

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. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the

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application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "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 v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington.*

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland,* 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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. *Strickland*, 466 U.S. at 696. 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. *Id.* at 696-97.

Failure to Communicate

Applicant alleges that Counsel was ineffective for meet enough times and consistently communicate with Applicant. "[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating "how additional preparation or communication would have resulted in a different outcome." *Id. See Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); *Skeen v. State*, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to

show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

This Court finds Counsel's PCR hearing testimony credible. Counsel credibly stated that she met with Applicant several times and Applicant never told her he felt they did not meet enough. (PCR Tr. 19-20, 23-24). Additionally, though Applicant complained about not meeting with Counsel enough and that Counsel did not seem to be listening enough, he never stated what impact, if any, further communication or additional meetings would have had on the trial's outcome. (PCR Tr. 6-7, 9). Thus, because there is no evidence beyond Applicant's own assertion that Counsel did not sufficiently communicate with Applicant and there was no showing of prejudice consequent to the alleged failure, this Court finds this allegation is without merit.

Failure to Investigate

Applicant's allegation that Counsel was ineffective failure to investigate is without merit. *Strickland* makes clear that counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. When highlighting failure to investigate as a ground for a larger ineffective assistance of counsel claim, judicial determination of this claim's validity is evaluated for "reasonableness [under] all the circumstances" with "a heavy measure of deference to counsel's judgments" applied. *Id.* Counsel is required to, at minimum, "interview potential witnesses and make an independent investigation of the facts and circumstances of the case", *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quoting *Troedel v. Wainwright,* 667 F.Supp. 1456, 1461 (S.D.Fla.1986), *aff'd,* 828 F.2d 670 (11th Cir.1987)), including aggressively re-examining all the government's forensic evidence and conducting analyses of all other available forensic evidence." *Id.* (quoting *American Bar Association Guidelines For The Appointment And*

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Performance Of Defense Counsel In Death Penalty Cases, reprinted in 31 Hofstra L.Rev. 913, 1015 (2003) (emphasis added)).

Counsel is not obligated to "investigate lines of defense that he has chosen not to employ at trial." *Strickland*, 466 U.S. at 682 (quoting *Washington v. Strickland*, 693. F.2d 1243, 1255 (5th Cir. 1982)). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Applicant alleges Counsel failed to properly research and investigate the facts of the case. (PCR Tr. 5). When pressed, Applicant stated he thought Counsel was ineffective for failing to investigate the video footage, which he thought was tampered with. (PCR Tr. 11-12). Applicant alleged that if Counsel investigate the evidence further she would have discovered it was not him on the video. (PCR Tr. 11-12). Conversely, Counsel stated she did not remember thinking the video seemed like it was tampered with or altered and that the video clearly identified Applicant as the shooter. (PCR Tr. 21, 25).

This Court finds Counsel's testimony is more credible than Applicant's. Counsel, after viewing the video several times, did not find any indication the video was tampered with. (PCR Tr. 21). Additionally, two eyewitnesses who were both close friends of Applicant's identified Applicant as the shooter, substantiating the video's veracity. (Trial Tr. 79, 81-82, 102). Counsel did not act unreasonably in failing to further investigate the video when there was no evidence of tampering, eyewitness testimony from two witnesses substantiated the video's showing of Applicant as the perpetrator, and the video otherwise clearly identified Applicant as the shooter. Further, because there was more evidence beyond the video indicating Applicant was the perpetrator, this Court finds no indication of prejudice. Finally, Applicant failed to produce any

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evidence or witnesses to show what additional information could be gleaned from additional investigation. Thus, this Court declines to grant relief on this ground.

Failure to Contact the Alibi Witness

Applicant's allegation that Counsel was ineffective for failure to pursue and assert an alibi defense is without merit. At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard. v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). One component of the duty to reasonably investigate the case includes a "duty [] to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented, consistent with the rules of evidence. *Glover v. State,* 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. *Clark v. State*, 315S.C. 385, 434 S.E.2d 266 (1993). "In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." *Buckson v. State,* 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State,* 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any

evidence that established prejudice to the petitioner); *Edwards v. State,* 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover,* 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State,* 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

Applicant alleges he discussed an alibi witness, his now deceased Aunt Penny, with Counsel who could verify "the situation" but Counsel did not pursue this defense. (PCR Tr. 7). Besides his Aunt's alleged testimony, Applicant stated no other evidence existed indicating he was somewhere else at the time of the incident. (PCR Tr. 8). Applicant stated he gave Counsel his aunt's contact information, but did not give Counsel her real name because he did not know her name. (PCR Tr. 16-17). Alternatively, Counsel stated she did not remember Applicant mentioning an alibi witness, but, typically, if Counsel is told about an alibi witness she will investigate it and would have investigated it in this case if told of one. (PCR Tr. 20).

This Court finds Applicant's assertion that he provided Counsel an alibi witness to investigate lacks merit. Counsel was not deficient for failing to contact a witness she was unaware of. However, even if this witness existed at the time of trial, the testimony likely would have been incredulous, because of the strength of the evidence placing him at the scene and identifying him as the shooter. Specifically, two eyewitnesses, both of whom were close friends with him, identified him as the perpetrator and video footage existed that clearly identified Applicant as the shooter. Any testimony counter to this would have likely been false and Counsel has no duty to call a witness knowing they would perjure themselves on the stand by testifying to something easily refused by the remaining evidence. Thus, Counsel was not deficient for failing to investigate and call this alibi witness.

Further, because the witness did not testify and no sworn to statements were presented at the PCR hearing, any prejudicial effect of the failure to contact the alibi witness is speculative, at best. Thus, prejudice is not found. Consequently, this Court finds Counsel's allegation is without merit and Applicant is not entitled to relief on this ground.

Failure to Show Applicant Evidence and Discovery

This Court finds that Applicant's allegation that Counsel was ineffective for failure to show Applicant the discovery and evidence against him is without merit. This Court finds Counsel's assertions that she reviewed all discovery with Applicant, including autopsy photographs, video footage, and photographs with Applicant and, specifically, reviewed the video with Applicant several times which was the most damming part of the discovery against him. (PCR Tr. 19, 21). This is substantiated by the fact that Applicant alleges he was discontent with Counsel's investigation into the potential tampering with the video footage leading up to trial; indicating that Applicant had a chance to review the video footage before trial. (PCR Tr.

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11-12). This Court also finds Counsel's assertion that Applicant never indicated to her that he was discontent with the amount of discovery and specific discovery items shared with him. (PCR Tr. 20). Additionally, this Court finds Counsel credible in that the discovery on the case was plentiful and nothing notable was missing. (Tr. 19). Thus, this Court finds Applicant's allegation lacks merit and denies relief based on this ground.

Failure to Secure Plea Deal

Applicant's allegation that Counsel was ineffective for failure to obtain a plea deal is without merit. "[A] defendant has no constitutional right to plea bargain." *Reed v. Becka*, 333 S.C. 676, 684, 511 S.E.2d 396, 400-01 (Ct. App. 1999). (citing *State v. Easler*, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996), *aff'd as modified*, 327 S.C. 121, 489 S.E.2d 617 (1997)). "Prosecutors have broad powers in the plea bargain process[.]" *Id.* Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety." *Id.*, 333 S.C. at 684, 511 S.E.2d at 400-01. "The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion; however, on occasion, it is necessary to review and interpret the results of the prosecutor's actions." *Id.* Yet, plea offers must be analyzed within the bounds of judicial restraint. *Id.*

Both Applicant and Counsel testified that no formal plea offer was made in this case. (PCR Tr. 6, 21, 24). Counsel credibly testified that she did not throw out an offer to the Solicitor because Applicant was unwilling to accept a plea deal, regardless of whether it was a number, a term or number, or a blind plea. (PCR Tr. 21, 24). Regardless of whether a plea offer was desired or not, Applicant was not entitled to a plea offer, as the decision not to extend a plea offer and to proceed to trial without offering a better deal falls squarely within the prosecutor's discretion. Thus, Applicant is not entitled to relief on this ground because he was not entitled to an offer to

begin with and any consideration on the part of Counsel to ask for an offer on the case was quashed when Applicant informed Counsel he was unwilling to accept any offer Counsel attempted to obtain. Thus, Applicant's allegation that Counsel was ineffective for failure to obtain a plea deal remains without merit and, consequently, Applicant is not entitled to relief on this ground.

Failure to Allow Applicant to Pick the Jury

Applicant's allegation that Counsel was ineffective for failing to let him pick a jury is without merit. "[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." *Palacio v. State*, 333 S.C. 506, 511, 511 S.E.2d 62, 68 (1999). Further, "[i]n PCR proceedings, a defendant must provide credible evidence that the trial attorney's refusal to strike a juror prejudiced the defense." *Id.*

Both Applicant and Counsel stated that Applicant did not choose the jury. (PCR Tr. 10, 21-22). Applicant stated Counsel told him he could pick his own jury, whereas Counsel stated that she, as a standard procedure does not allow her clients to pick the jury, but instead confers with clients regarding whether there is a particular juror they do not like or someone who is sending them a bad look. (PCR Tr. 10, 20-21). Regardless, under law, Applicant did not have the right to pick his jury, absent a showing of prejudice. *See id.* Though Applicant stated that during voir dire the State was striking jurors from the culture or area of town he lived in, which prejudiced him, he did not show exactly how it prejudiced him, who was struck, or specifically state what Counsel did during voir dire that was ineffective. (PCR Tr. 14). Consequently, because no prejudice was shown, Applicant did not meet his burden of proof and has not shown he is entitled to relief on this ground. Thus, relief on this ground is denied.

Failure to Allow Applicant to Testify

Applicant's allegation that Counsel was ineffective for prohibiting Applicant from testifying is without merit. "The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." *Brown v. State*, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations." *Id.* "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." *Id.*

Applicant's decision not to testify was made freely, voluntarily, knowingly and intelligently. Applicant stated that he discussed this decision with Counsel, that he understood he had the right to remain silent, that he was waiving his only chance to provide testimony in his own defense. (Trial Tr. 207). Applicant stated that he discussed the advantages and disadvantages of testifying with Counsel and how he would open himself up to cross-examination if he pled. (Trial Tr. 207-08). Applicant also stated he understood the presiding judge would instruct the jury not to hold his lack of testifying against him. (Trial Tr. 208). Applicant stated he reached his decision not to plead of his own free will and accord after weighing the options and no one pressured him into entering the decision. (Trial Tr. 208-09). Thus, this Court finds Applicant freely, voluntarily, knowingly, and intelligently waived this right and is not entitled to relief upon this ground.

Failure to Request Voluntary Manslaughter Instruction

Applicant's allegation that Counsel was ineffective for failure to request a voluntary

manslaughter instruction is without merit. Concerning deficiency, Counsel must articulate a valid reason for employing a certain strategy, which is measured under an objective standard of reasonableness. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1992). Counsel is not ineffective for failing to request a lesser included offense jury instruction when there is no evidence that the defendant committed the lesser, as opposed to the greater offense. *Bozeman v. State*, 307 S.C. 172, 176, 414 S.E.2d 144, 146 (1992).

In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in a way that violates the Constitution. *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 740 (2009). The law to be charged must be determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

"Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation." *State v. Cooley*, 342 S.C. 63, 67, 536 S.E.2d 666, 668 (2000). "Both heat of passion and sufficient legal provocation must be present at the time of the killing." *Id.* "The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence." *Id* "[B]oth heat of passion and sufficient legal provocation must be present at the time of the killing." *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010).

Here, Counsel credibly testified that she did not pursue a voluntary manslaughter instruction because the video clearly showed premeditation when Applicant waited outside for the victim to emerge from the store before firing multiple shots at Applicant. (PCR Tr. 28). This was supported by video evidence. (PCR Tr. 25-26). Because premeditation was shown, a

voluntary manslaughter instruction was improper in this case. Counsel was not ineffective for failing to request an improper jury instruction. Thus, this allegation lacks merit and Applicant is not entitled to relief on this ground.

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR Application be denied and dismissed with prejudice; and
2. Applicant remain remanded to the custody of Respondent.

AND IT IS SO ORDERED this 30th day of August, 2021.

PAUL M. BURCH
Presiding Judge
Seventh Judicial Circuit

Charleston, South Carolina.

ALAN WILSON
ATTORNEY GENERAL

September 7, 2021

The Honorable Amy W. Cox
Spartanburg County Clerk of Court
Post Office Box 3483
Spartanburg, South Carolina 29304

Re: Dadrin J. Johnson, #316909 v. State of South Carolina
2014-CP-42-0204

Dear Ms. Cox:

Enclosed please find the original **Order of Dismissal** signed by the Honorable Paul M. Burch, in the above-captioned case, for filing in your office.

Should you have any questions, please do not hesitate to call me at (803) 734-3737.

Sincerely,

Chelsey F. Marto
Assistant Attorney General

CFM/ec

Enclosure