STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Donald B. Hocker, Circuit Court Judge

Case No. 2019-CP-32-00710

Marion Wade Frye, #375354, ... Petitioner,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

Applicant, Marion Wade Frye, appeals the order of the Honorable Donald N. Hocker filed November 15, 2021.

Dec. 2nd, 2021

ASHLEY A. MCMAHAN, ESQUIRE
MCMAHAN & TAYLOR, ATTORNEYS, LLC
PO Box 5501
West Columbia, SC 29171
803-219-1110
ashley@macvance.com
SC Bar No. 71676
ATTORNEY FOR APPLICANT

Opposing Counsel:
Lillian L. Meadows, Asst, Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Marion Wade Frye, SCDC #375354, Applicant, v. State of South Carolina, Respondent.	Case No. 2019-CP-32-0710 **ORDER OF DISMISSAL**

I. INTRODUCTION

This matter comes before the Court by way of post-conviction relief (PCR) action commenced by Marion Wade Frye (Applicant) on February 15, 2019. The State requested an evidentiary hearing through its return on August 22, 2019. Applicant filed an amended application on August 24, 2021.

A hearing into the matter convened before this Court on September 1, 2021, via Cisco WebEx Meetings. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Lillian L. Meadows represented the State. Applicant testified on his own behalf at the hearing. The State presented testimony from Applicant's trial counsel, David M. Mauldin, Esquire.

In addition to the pleadings in this action, this Court had before it a copy of the Lexington County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; and the records of the current PCR action.

After hearing the testimony at the PCR hearing and upon full review of the record, this Court finds Applicant's allegations regarding ineffective assistance of trial counsel are without merit. For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

II. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was arrested on October 2, 2015, following an investigation into the shooting death of Joshua Prine. During its July 2017 term, the Lexington County Grand Jury indicted Applicant for murder (2016-GS-32-01113) and possession of a weapon during the commission of a violent crime (2017-GS-32-2551).

On February 5, 2018, Applicant proceeded to a jury trial before the Honorable R. Knox McMahon. Assistant Public Defender David Mauldin (Counsel) represented Applicant. Deputy Solicitor Suzanne Mayes and Assistant Solicitor Gill Bell of the Eleventh Circuit Solicitor's Office prosecuted the case.

However, during the fourth day of trial, Applicant elected to plead guilty to the lesser-included offense of voluntary manslaughter pursuant to *North Carolina v. Alford*.[1] The negotiated plea agreement provided that Applicant would face a maximum exposure of twenty-two years' imprisonment and the State would drop the firearm charge and a separate child neglect charge. Judge McMahon accepted Applicant's plea and sentenced him to twenty-two years' imprisonment. Additionally, because Applicant was on probation for drug charges at the time of the shooting, Judge McMahon found Applicant in willful violation, revoked his probation, and sentenced

[1] 400 U.S. 25 (1970).

Applicant to serve the original twelve-month sentence to run concurrent with the voluntary manslaughter.

Applicant filed a timely notice of appeal. On March 30, 2018, the South Carolina Court of Appeals dismissed Applicant's appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR, for failure to provide a sufficient explanation as to why an appeal from his guilty plea should proceed. *State v. Frye* (S.C. Ct. App. filed March 30, 2018). The case was remitted back to the circuit court on April 17, 2018. Applicant timely commenced this post-conviction relief action on February 15, 2019.

III. STATEMENT OF FACTS

On September 29, 2019, Applicant moved his belongings into a friend's mobile home, where the victim, Joshua Prine, also resided. (Tr. 171). Applicant woke up on the morning of October 1, 2015, and realized he was missing five-hundred dollars. (Tr. 171). Applicant first accused Ryan Bouleware, another resident of the home, of stealing his money. (Tr. 304). The two got into an argument, but Boueleware eventually offered Applicant his firearm as collateral for the missing money. (Tr. 304–305). Applicant agreed, and put the firearm in the waistband of his pants. (Tr. 305). Applicant then left the residence. (Tr. 305).

Applicant's girlfriend and children were in the car when Applicant returned to the residence later that evening. (Tr. 171). His intention was first to confront Prine's girlfriend, and then Prine, about the missing money. (Tr. 610). By that point, Prine was home from work, and Applicant began questioning him. (Tr. 270). The two started arguing, and the altercation quickly escalated. (Tr. 310–312). However, the altercation did not get physical until Applicant pulled the gun out of his waistband. (Tr. 271, 313). Bouleware and another friend grabbed Applicant's arm in an attempt to disarm him. (Tr. 313, 319). Prine then began to turn around when Applicant broke free and shot

Prine in the back, killing him (Tr. 165, 321). Applicant then ran out of the house, got in the car with his girlfriend and children, and drove away. (Tr. 323).

IV. ISSUES BEFORE THIS COURT

In his original application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (verbatim):

1. "Ineffective assistance of counsel"
   a. "Preparations and presentations of counsel were deficient and insufficient time to prepare for trial because of short consultation with his client before trial"
   b. "Counsel failed to file pretrial motions and argue for an immunity in relation to the case and evidence"
   c. "Counsel failed to obtain discovery, 'in whole,' to review with client, resulted in insufficient time to prepare for trial"
   d. "Counsel failed to utilize and investigator, and proper expert witness, and call/subpoena witnesses about conflicting evidence to present at trial, or investigate the circumstances at defendants request"
2. "Due process/prejudice"
   a. "Unfair trial and unfair evidence the defendants were not givin[*sic*] a fair trial, the defence[*sic*] counsel did violate the defendants Constitutional fifth, sixth, and fourteenth amendments, the defense counsel was in the position to properly scrutinize what was being introduced that didn't have miscarriage of justice has occurred the defense didn't discretion to exclude unfair hearsay or evidence"
3. "Prosecutorial misconduct"
   a. "The prosecutor has introduced false evidence and violated the professional rules as well that conduct the witness tampering, they encouraging the witness to make false statements under oath and offering up evidence that knowingly is false. The prosecutor engaging in misconduct and in violation of ethics rules"

Pursuant to Rule 71.1, SCRCP, Applicant, through PCR counsel, amended his application to include the following allegations:

1. Ineffective Assistance of Counsel as to Assistant Public Defender David M. Mauldin

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a. Applicant's attorney did not obtain all discovery available to him. Had Mr. Mauldin given the Applicant all of the Discovery available to review, Applicant would not have pleaded guilty.
b. Attorney failed to call expert witnesses and other witnesses to counter conflicting evidence at trial. Attorney did not interview witnesses or make an independent investigation of the facts of the case. Applicant contends that had the Attorney conducted an adequate investigation of the facts and circumstances, the Attorney would have discovered the witness' false testimony and would have been able to defend the Applicant during the witness interviews. Moreover, this investigation would uncover the availability of Applicant's immunity claim.
c. Violation of the Professional Rules of Conduct by encouraging false testimony, false evidence, and prosecutorial misconduct. Applicant requested new counsel during the trial, which was denied.

V. STANDARD OF REVIEW

An applicant may seek post-conviction relief on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

2. That the court was without jurisdiction to impose sentence;

3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

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Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in *Strickland v. Washington* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The applicant bears the burden of proving the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of "were outside the wide range of competence" demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 688. To prove prejudice, the applicant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a

probability "sufficient to undermine confidence in the outcome." *Id.* However, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696.

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.' " *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen.*" *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding").

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, *Hill v. Lockhart*, 474 U.S. 52 (1985), extended the two-part *Strickland* test to challenge guilty pleas based on ineffective assistance of counsel. *See Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (recognizing that the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). When reviewing a guilty plea, the analysis of counsel's performance under the first prong of *Strickland* remains unchanged—the applicant

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must show that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 58–59; *accord Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56. The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 58–59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. *Lee v. United States*, 582 U.S. ___, ___, 137 S. Ct. 1958, 1966 (2017). However, the applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372. Judges must "look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee*, 582 U.S. at ___, 137 S. Ct. at 1967. In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the guilty plea and the evidence presented at the PCR hearing. *Harres v. Leeke*, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

Surmounting *Strickland*'s high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." *Lee*, 582 U.S. at ____, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); *cf. Hill*, 474 U.S. at 58

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("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.' "). Reviewing "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee*, 582 U.S. at ____, 137 S. Ct. at 1967. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—*not* whether counsel would have still advised him or her to plead guilty. *Turner v. State*, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

VI. FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims raised in the amended applications and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

A. Failure to Investigate, Review Discovery, and Prepare Defense

Applicant makes a series of claims alleging trial counsel was ineffective in his investigation, preparation, and overall performance prior to his trial and ultimate guilty plea. Specifically, Applicant alleges Counsel was ineffective for spending insufficient time preparing for trial, failing to review discovery with him, failing to adequately investigate, and failing to

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request a pretrial immunity hearing under the Protection of Persons and Property Act.[2]

This Court disagrees, and finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*, 466 U.S. 668). This Court finds credible and persuasive the testimony of Counsel, who presented well-recollected testimony of the events leading up to Applicant's plea. Applicant's own testimony, although predominantly incredible, established he met with Counsel to discuss his case and review discovery several times before his trial. Judge McMahon specifically advised Applicant that by pleading guilty, he would waive any defenses he may have. (Tr. 564). Applicant told the plea court he understood, and wished to waive that right in order to plead guilty. Further, Applicant failed to present evidence of any viable defense, investigative tactic, or alternate strategy Counsel should have explored which would have helped Applicant's case or affected his decision to plead guilty.

1. Discovery

At the outset of the PCR hearing, Applicant testified he believed Mauldin was "overloaded from being a public defender" and therefore was not able to give his case the time it deserved. To this effect, Applicant recalled several instances where he believed that Mauldin failed to allocate adequate time to his case. First, Applicant noted that despite his repeated request for Mauldin to visit him in jail, Mauldin only visited four or five times. During his visits, Applicant believes that Mauldin never provided him with a complete version of the discovery. Consequently, there were several exhibits Applicant was not able to review before the State introduced them at trial.

[2] The Protection of Persons and Property Act, S.C. Code Ann. §§ 16-11-410 to 450, codified the common law Castle Doctrine, "which recognizes that a person's home is his castle." S.C. Code Ann. § 16-11-420.

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At the PCR hearing, Mauldin stated that some of his notes were missing regarding some of the dates he met with Applicant; however, he named approximately ten specific dates and times he visited him at the jail. Mauldin further stated they met in his office for about six to eight hours before trial and spoke on the phone several times. Regarding Applicant's claim trial counsel failed to provide him with a copy of all the discovery, Mauldin explained that he received a significant portion of the discovery right before the trial. Although he may not have been able to physically send Applicant copies of the new discovery, Mauldin credibly testified that he summarized the new discovery to Applicant verbally. He specifically recalled reviewing pictures with Applicant that he received right before trial. However, Mauldin did not believe the late discovery was significant enough to request a continuance.

This Court finds Applicant failed to establish trial counsel was ineffective for failing to adequately review the discovery with him. Although Applicant believes Mauldin did not spend enough time discussing the discovery with him, "[t]he brevity 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 (Ct. App. 2012). An applicant must present evidence to show how additional time spent in consultation regarding discovery would have resulted in a different outcome; mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.* at 500–01, 745 S.E.2d at 382 (citing *Jackson v. State*, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998). The fact that Applicant was not able to review some of the discovery materials that were provided at the last minute is not the fault of trial counsel. Moreover, Counsel credibly testified he spoke with Applicant about these materials, and explained what they were. Applicant nonetheless failed to identify what, if anything, could have been

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achieved had trial counsel spent more time with him in consultation regarding the contents of his discovery. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

2. Preparation and Investigation

Applicant further alleges Mauldin was ineffective in his investigation and preparation for trial. For example, Applicant testified Mauldin failed to ensure that a gunshot residue test was conducted. Applicant believed this was essential to his representation because he doubted that the expert's theory on the trajectory of the bullet. According to Applicant, the bullet's trajectory would prove that the gun was not under his arm. He stated Mauldin should have hired a blood spatter expert. Applicant further testified he told Mauldin he wanted to polygraph Katie Vincent, Raymond Boyer, and other eyewitnesses. Mauldin told him that polygraph results are not admissible in court.

Applicant further stated he was not prepared for trial because Mauldin did not go over what he planned on presenting at trial. To the best of Applicant's knowledge, the only trial preparation Mauldin shared with him was his request for Ryan Boulware to be testify on his behalf. Applicant testified to a laundry list of items that he believed Mauldin should have completed and witnesses Mauldin should have subpoenaed.

Mauldin thoroughly summarized the extent of his investigation. At the outset of the case, Mauldin hired an investigator who reviewed the discovery independently and met with Applicant in jail. Throughout the investigation, the private investigator spoke with several witnesses identified in both the incident report and by Applicant. In the meantime, Mauldin subpoenaed witnesses, created a list of potential backup witnesses, and determined what evidence, if any, he would enter into evidence.

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While Mauldin did not go to the site of the crime, he reviewed the bullet trajectory and the coroner's report. Likewise, he did not call the coroner to testify because coroners receive no medical training, their report is based on information from other witnesses whom he preferred to call instead, and he was unsure whether the coroner's report would come in under a hearsay exception. Mauldin reinforced the numerous individuals he and his private investigator spoke with including Applicant's sister, Jennifer Boyer, and Nate Boyer. Mauldin testified that he called the witnesses he believed necessary to support the self-defense theory and knew it was possible to call the others as witnesses if needed. Regarding the gunshot residue test, Mauldin informed the court that gunshot residue had to be tested within a certain period of time or else it dissipates. In this case, Mauldin believed that by the time Applicant requested the test, it likely had been too long to find any gunshot residue.

This Court finds Applicant failed to establish trial counsel was ineffective in either his investigation or preparation for trial. "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard*, 372 S.C. at 331–32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted). However, counsel need only interview potential witnesses "when it is reasonable to do so." *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

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Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. *See Ard*, 372 S.C. at 331, 642 S.E.2d at 597 ("Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation."). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91; *see Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) (" '[T]he reasonableness of an investigation, or a decision by counsel that forecloses the need for an investigation, must be considered in light of the scarcity of counsel's time and resources in preparing for a sentencing hearing and the reality that counsel must concentrate his efforts on the strongest arguments in favor of mitigation.' ") (quoting *McWee v. Weldon*, 283 F.3d 179, 188 (4th Cir. 2002)). Thus, in applying the *Strickland* standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 63 (Ct. App. 2014).

Here, Counsel's credible testimony indicates he met with Applicant prior to trial, reviewed the discovery materials with him, and discussed his case with him at length. Counsel further testified about his thorough investigation, addressed each of the matters Applicant claimed he failed to investigate, and explained why he did not include them in his preparation. Applicant failed to present any evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris v. State*, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (citing *Jackson*, 329 S.C. at 353–54, 495 S.E.2d at 772), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836

(2018). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.* (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Accordingly, Applicant's claims pertaining to trial counsel's failure to adequately investigate and prepare for trial are **DENIED.**

3. Defense Strategy

Applicant further claims trial counsel was ineffective for failing to file certain pretrial motions, failing to call expert witnesses, and failing to adequately cross-examine fact witnesses regarding inconsistencies in their testimony. Additionally, at the PCR hearing, Applicant testified at the PCR hearing that he believed Mauldin did an insufficient job presenting the evidence to the court. Specifically, Applicant believed the expert's testimony regarding the bullet trajectory was incorrect. He introduced a diagram from the autopsy report[3] that he contends supports his version of events, and testified he pointed this out to Mauldin. However, he ultimately acknowledged that Mauldin cross-examined the State's expert and that she admitted on the stand that she could have been wrong about the bullet trajectory.

Applicant further testified Mauldin failed to cross-examine Katie Vinson regarding inconsistencies in her testimony and the statement she gave to law enforcement. Likewise, he stated Mauldin did an insufficient job in reviewing missing evidence, such as the white t-shirt he was wearing on the night in question and over $700. Applicant further complained that he never heard all of the 9-1-1 calls and was disappointed that his girlfriend's 9-1-1 call was not used. Regarding pretrial motions, Applicant testified he was denied his right to a stand your ground

[3] This page from the autopsy report was introduced into evidence as Applicant's Exhibit #1.

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hearing, a speedy trial hearing, and that Mauldin failed to file a motion to suppress Applicant's statements to law enforcement.

Prior to trial, Mauldin testified he made several pre-trial motions, including a motion to sequester; however, they were denied by the trial judge. Regarding Applicant's claim Mauldin should have pursued a stand your ground defense, Mauldin explained that Applicant would not qualify because the victim had been living in the home for several weeks, and therefore had a legal right to be there. Regarding the 9-1-1 calls, Mauldin testified that he planned on playing the recording of Turner's 9-1-1 call during his closing argument. His strategy was to argue in closing that the State failed to present the 9-1-1 call because it was detrimental to their case. Mauldin was nonetheless able to elicit testimony to the effect that Applicant's girlfriend called 9-1-1 despite the State not admitting into evidence.

Regarding trial strategy, Mauldin testified that initially they discussed a unified strategy between Applicant and Applicant's girlfriend, Katelyn Turner. Brad Kirkland represented Turner. Mauldin testified that he and Kirkland first developed a trial strategy of self-defense. However, when the four of them met at Mauldin's office, Applicant and Turner's statements were inconsistent and they repeatedly fought with each other about what to say. At one point, Kirkland and Mauldin even had to separate them. Consequently, he was concerned about calling Turner as a witness, but felt that pursuing a self-defense strategy was the best option.

To this effect, he managed to get the State's expert to admit that the bullet trajectory could be interpreted to match Applicant's allegation. However, the fact that there were multiple eyewitnesses clearly hurt Applicant's case significantly. Mauldin testified that Applicant's story was wholly inconsistent with what the eyewitnesses reported. Moreover, he was concerned about Applicant's testimony, which was required in order to argue self-defense.

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Mauldin testified that after Applicant heard the expert's testimony on re-direct examination, he decided to plead guilty. When asked about the Applicant's decision to plead guilty, Mauldin testified that "you never know what a jury will do," but he did not believe that his two primary witnesses would have been good witnesses nor was he confident how they would react to the State's aggressive cross-examination. He therefore believed it was in Applicant's best interest to plead guilty.

This Court finds Applicant failed to demonstrate trial counsel's strategic decisions fell below an objective standard of reasonableness. "When 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 v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688–89; *see id.* at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.").

"Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." *Dunn*, 594 U.S. ___, 141 S. Ct. at 2410 (quoting *Harrington*, 562 U.S. at 106–107). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." *Id.* (quoting *Harrington*, 562 U.S. at 108). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to

reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*'s deferential standard.

Here, Applicant failed to overcome the presumption that trial counsel's strategic decisions fell below an objective standard of reasonableness. Mauldin explained that his strategic options were limited given the multiple eyewitnesses to the shooting and the inconsistent statements of Applicant and Turner. *See Curtis v. State*, 500 S.W.2d 478, 481–82 (Tex. Crim. App. 1973) ("[The appellant] tendered his lawyer an extremely weak hand to play in his defense, but it was well played . . . . A lawyer cannot be expected to win a hopeless case,"); *Rockwood v. State*, 524 S.W.2d 292, 293–94 (Tex. Crim. App. 1975) ("There are some cases that cannot be won. An attorney must appraise a case and do the best he can with the facts."). Further, Mauldin correctly assessed the implausibility of pursuing a stand your ground defense. S.C. Code Ann. § 16-11-440(B)(1)("The presumption [of reasonable fear of imminent peril when using deadly force against another] does not apply if the person . . . against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle."

Applicant further failed to demonstrate a reasonable probability that, but for trial counsel's errors, he would not have pleaded guilty," and would have continued with his trial. *Hill*, 474 U.S. at 59. Applicant even admitted he pleaded guilty "to get the deal."

Accordingly, Applicant's claims pertaining to counsel's trial strategy and decisions related thereto are **DENIED.**

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B. Violation of the Rules of Professional Conduct

This Court further finds Applicant's claim that trial counsel and the solicitors violated the South Carolina Rules of Professional Conduct "by encouraging false testimony, false evidence, and prosecutorial misconduct" is patently meritless. At the PCR hearing, Applicant was asked specifically how either Mauldin or the solicitors did that encouraged false evidence. Applicant responded that he "does not understand how [the eyewitnesses] can say certain things that they know are lies." He further stated these witnesses "were saying stuff in front of each other" and that "they should have been separated." As aforementioned, Mauldin's motion to sequester the witnesses was denied. Mauldin testified that Applicant was essentially frustrated that he could not make the witnesses say what Applicant wanted them to say on the stand. He further testified that he had no reason to believe either Deputy Solicitor Mayes or Assistant Solicitor Bell committed any sort of misconduct or ethics rules violations.

Our Supreme Court has unequivocally held that the Rules of Professional Conduct, whose purpose is to regulate and guide the legal profession in ethical conduct, "*have no bearing on the constitutionality of a criminal conviction*" and "[n]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty." *Langford v. State*, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993) (emphasis added) (citing Rule 407, SCACR); *see* Rule 407, Scope of RPC ("Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached."); *see also Nix*, 475 U.S. at 165 (breach of ethical standard not tantamount to denial of defendant's Sixth Amendment rights); *Whelchel v. Bazzle*, 489 F. Supp. 2d 523, 535 (D.S.C. 2006) ("[P]rofessional conduct rules have no bearing on whether a criminal conviction is constitutional . . ."); *Moss v. United States*, 323 F.3d 445, 449 (6th Cir. 2003) (noting that that the Sixth

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Amendment constitutional analysis is independent of attorney rules of professional conduct); *Lambert v. Blodgett*, 393 F.3d 943, 986 (9th Cir. 2004) ("[T]he Supreme Court has never applied the ethical imputed disqualification rule in Sixth Amendment analysis.").

Notwithstanding the fact that the South Carolina Rules of Professional Conduct have no bearing on the constitutionality of a conviction, Applicant failed to provide any evidence that either trial counsel or the solicitors violated ethics the rules. Accordingly, Applicant's request for relief by way of purported ethics rules violations is **DENIED.**

VII. ALL OTHER ALLEGATIONS

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

VIII. CONCLUSION

Based on the evidence presented at the PCR hearing and a thorough review of the record, this Court finds and concludes Applicant failed to meet his burden of proof pursuant to *Strickland* and Rule 71.1, SCRCP. Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, based on the foregoing, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

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. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), 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 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.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 5 day of Nov, 2021.

DONALD B. HOCKER
Presiding Circuit Court Judge
Eleventh Judicial Circuit

Laurens, South Carolina

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S.C. SUPREME COURT