STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM MARION COUNTY
William H. Seals, Jr., Circuit Court Judge

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Richard Woodbury, # 358878,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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NOTICE OF APPEAL

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Richard Woodbury, # 358878, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed July 27, 2022, issued by the Honorable William H. Seals, Jr., Presiding Judge, Twelfth Judicial Circuit. Applicant filed a timely Motion Pursuant to Rule 59(e) SCRCP, to Amend, which was denied by Order filed January 10, 2023.

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| STATE OF SOUTH CAROLINA<br>COUNTY OF MARION | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE TWELFTH JUDICIAL CIRCUIT |
| Richard A. Woodbury, #358878,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | ) | CASE NO. 2016–CP–33–182<br><br>**ORDER OF DISMISSAL** |

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Applicant Richard Allen Woodbury on March 15, 2016. Respondent made its Return and Partial Motion to Dismiss on February 2, 2017. Applicant, through counsel, amended his application on June 14, 2019. An evidentiary hearing was held on June 26, 2019, at the Florence County Courthouse before the Honorable William H. Seals, Jr. Applicant was present and represented by Jonathan D. Waller, Esquire. Assistant Attorney General Samuel L. Key represented Respondent. Applicant and his Trial Counsel, Ralph Wilson, Sr., testified at the hearing. Following a thorough review of the trial transcript 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.

## PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections, serving a thirty-year sentence. In February 2013, the Marion County Grand Jury indicted him for the murder of Ian Gause and the attempted murder of Rishawn Gause (2013-GS-33-00069). On February 18-21, 2014, he proceeded to trial before the Honorable D. Craig Brown. Ralph Wilson, Sr. represented Applicant, and Twelfth Circuit Solicitor E. L. Clements, III, prosecuted the case.

The jury convicted Applicant of the lesser-included offense of voluntary manslaughter and acquitted him of all other charges.

Applicant filed a timely Notice of Appeal, which was perfected by Appellate Defender Lara Caudy. The South Carolina Court of Appeals affirmed the conviction on March 2, 2016. State v. Woodbury, Op. No. 2016-UP-111 (S.C. Ct. App. filed March 2, 2016). The remittitur was returned on March 21, 2016.

## SUMMARY OF TRIAL TESTIMONY

At trial, the State relied primarily on the testimony of eyewitnesses Charles Wilson, Ronnie Boatwright, Ky Graham, and Rishawn Gause. According to testimony, Wilson, Boatwright, Ian, and Rishawn were hanging out in the carport of Wilson's house on September 29, 2012. Applicant, Ky Graham, and Lamont Davis drove to Wilson's house in Applicant's Jeep Cherokee. (Trial Tr. 297-99, 385-89). Graham initially got out alone. (Trial Tr. 295-99). A few minutes later, Applicant got out and spoke to everyone except Ian, leading to a verbal confrontation between the two men. (Trial Tr. 299, 389).

The testimony varied somewhat as to what occurred after the initial verbal confrontation. Wilson testified Applicant walked back to his vehicle while Ian remained under the carport. (Trial Tr. 300). Wilson thought it was over, but Ian walked toward the Jeep after Applicant said something else, and the two men started arguing. (Trial Tr. 300-02). Wilson testified he got between them and told Applicant to leave, but Applicant continued "trash talking" and would not leave. (Trial Tr. 301-02). Wilson recalled that while he was standing in between Ian and Applicant, Davis was in the driver's seat of the Jeep, telling Applicant to get in so they could leave. (Trial Tr. 310-11). At one point, Ian tried to "break" past Wilson toward Applicant, and Wilson turned around and noticed Ian had a gun. (Trial Tr. 302). Wilson stepped away, fearing the gun

might discharge. (Trial Tr. 303). However, he stated Ian kept the gun by his side and never pointed it at anyone. (Trial Tr. pp. 302-03, 305).

Wilson recalled hearing one gunshot from his left; Ian was behind him at the time and did not fire the shot. (Trial Tr. 303-04, 327). Although he didn't see who fired the shot, Wilson later learned it was Rishawn. (Trial Tr. 304, 327). Wilson stated Applicant was beside his Jeep, and Wilson thought he was leaving, but Ian and Applicant continued arguing, and both ran under the carport. Wilson heard scuffling noises but could not see what was happening. (Trial Tr. 306-07). He noticed someone run from the carport toward the backyard. (Trial Tr. 306-07). Shortly thereafter, Ian walked out and said he needed to go to the hospital. (Trial Tr. 308). After Ian and Rishawn left, Applicant returned, said he had left something, and picked up a "bamboo stick" from the ground.[1] (Trial Tr. 309). Applicant and Graham then left in Applicant's vehicle. (Trial Tr. 303-313). Wilson testified Applicant had three opportunities to leave before the altercation turned violent. (Trial Tr. 313).

Like Wilson, Boatwight stated that after the initial verbal altercation ended, Applicant walked back to his vehicle but then returned and started arguing with Ian again. (Trial Tr. 390). Boatwright saw Applicant holding something by his side, but he did not see Ian holding a gun. He heard Ian say "you got something" to Applicant. (Trial Tr. 384-90).

Boatwright testified that when efforts to break up the second altercation failed, he saw Rishawn take a gun out of his car trunk, fire one shot into the air, and put the gun back in his trunk. (Trial Tr. 391, 399). Boatwright averred things initially calmed. A few minutes later, however, Applicant, Ian, and Rishawn ran into the carport. (Trial Tr. 392). Ian came out about five minutes later, saying Applicant had stabbed him; at that time, Applicant was "nowhere in sight." (Trial Tr.

[1] The "bamboo stick" was a martial arts tool containing two knives that could be connected. Applicant had previously retrieved it from his vehicle. (Trial Tr. pp. 437, 564).

392). Boatwright testified Rishawn and Ian left for the hospital, and Applicant returned looking for his knife. (Trial Tr. 392). Boatwright saw a knife on the ground and noticed Applicant had another knife in his hand. (Trial Tr. 392-93). Applicant retrieved the knife and left. (Trial Tr. 390-93).

Boatwright testified Applicant had a "million chances" to leave before the second altercation turned violent. (Trial Tr. 397). He recalled Wilson and Applicant's "ride" also tried to get Applicant to leave after the first altercation. (Trial Tr. 396). He reiterated that the first altercation had ended when Applicant went to his car, "got what he got," and returned. (Trial Tr. 412).

Like Wilson and Boatwright, Graham testified Applicant and Ian "had a little words" when Graham and Applicant arrived, but "it calmed down after that." (Trial Tr. 434). Graham stated he and Applicant walked back to the Jeep, and Graham suggested they leave. (Trial Tr. 435). However, Ian continued "saying a little something." (Trial Tr. 435). Graham testified that Applicant got out of the Jeep and retrieved his knife; he thought Applicant got the knife before Ian got the gun. (Trial Tr. 436, 447). Boatwright stated Applicant could have left then, and he and Davis were trying to get him to leave. (Trial Tr. 447-48).

According to Graham, Ian approached the Jeep, and he and Applicant continued to argue. (Trial Tr. 438). Wilson got between them to break up the fight, and Graham and Davis got out of the Jeep and encouraged Applicant to leave. (Trial Tr. 438-39). Graham testified Applicant pulled out his knives, Ian pulled out his gun, and Wilson stepped away. (Trial Tr. 440). At that point, Rishawn fired his gun. (Trial Tr. 441, 458). Graham stated Ian "had [Applicant] go down the street, . . . pointing the gun at him." (Trial Tr. 442). He saw Applicant backing up and noticed Rishawn and Ian were "going towards the car porch" with "the guns out." (Trial Tr. 442). Graham

never saw them swinging but could hear a noise under the carport. (Trial Tr. 443-444). After Ian and Rishawn left, Applicant returned holding a knife; Graham noticed another knife on the ground. (Trial Tr. 445-46). Graham stated Davis left "sometime during the middle" and agreed that if Davis was able to leave, anybody could have left—including Applicant. (Trial Tr. 470).

Rishawn[2] corroborated Wilson, Boatwright, and Graham's testimony regarding the initial confrontation. He testified things used to be "cool" between Ian and Applicant, but they appeared to have a problem that night. (Trial Tr. 477-83, 485). Unlike the others, Rishawn testified that Applicant left in his vehicle after the first altercation but returned about three minutes later. (Trial Tr. 483-84). Rishawn stated Applicant got out of the Jeep and started "messing with his pants," and Ian said, "you went and got something." (Trial Tr. 486). When the second argument started, Rishawn got a gun from his trunk and fired a shot in the air, which calmed them down. (Trial Tr. 487). Rishawn explained he and the others tried to get Applicant to leave before Rishawn fired the shot. (Trial Tr. 488). Although Ian was "steady saying he got something," Applicant said he didn't have anything. (Trial Tr. 489). Rishawn put his gun back in the trunk, thinking Applicant and Ian were just going to fight without weapons. (Trial Tr. 489-90).

When the physical fight started, Rishawn saw Applicant "swinging wildly" and "real low," which was odd. (Trial Tr. 490-91). He tried to get between Ian and Applicant to break it up. (Trial Tr. 490). Rishawn heard Ian say, "so you're gonna cut me," and then saw "blood running down." (Trial Tr. 491). Rishawn was also cut while trying to break up the fight. (Trial Tr. 494-95). Applicant ran away, and Rishawn drove Ian to the hospital, where Ian passed away. (Trial Tr. 494). Rishawn testified Applicant had multiple chances to leave before the fatal fight. (Trial Tr. 500). On cross-examination, Rishawn admitted he initially lied to the police and said he did not

[2] Rishawn was Ian's brother.

know who stabbed him and Ian because he intended to get revenge. Later, Rishawn decided to let the authorities handle it and told the police what he knew. (Trial Tr. 500-06).

A forensic pathologist testified Ian sustained suffered two fatal stab wounds. (Trial Tr. 346-50). The jury found Applicant guilty of the lesser-included offense of voluntary manslaughter as to Ian but acquitted him of the attempted murder charge. He was sentenced to thirty years' incarceration. (Trial Tr. 673-76).

## CURRENT ACTION BEFORE THIS COURT

Applicant *timely* commenced this PCR action on March 15, 2016, alleging he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
   a. Trial Lawyer Ineffective for not investigating to call Eye Witness.
      i. Trial Lawyer didn't present Video Statements or DNA photos or Evidence in my Defense.
      ii. DNA photos's [sic] presented what appeared to be blood. Also the weaponse used against me were not tested to confirm the redsubstance in pictures. (Both weapons) the 380 and the .38 special revolver.
   b. Trial Lawyer Ineffective for failing to Object to Erroneous Charge of Mutual Combat.
   c. Trial Lawyer Ineffective for failing to request Protection of Person and Property Act.
      i. Under the "Stand your Ground Law."

On June 14, 2019, Applicant amended his application to allege the following:

1. Ineffective Assistance of Trial Counsel
   a. Failing to properly present Applicant's defense of self-defense by not calling eyewitness;
   b. Failing to properly object to the mutual combat charge, which shifted the burden from the State having to disprove self-defense, thus failing to preserve a meritorious issue for appeal;
   c. Failing to request a charge on lesser-included offense of involuntary manslaughter;
   d. Failing to seek judicial review of whether Applicant was entitled to immunity under the Protection of Persons and Property Act;

e. Improperly advising Applicant not to testify;
f. Failing to adequately investigate whether Ian Gause was under the influence of drugs at the time of the incident;
g. Failing to move to sequester witnesses at trial;
h. Failing to properly cross-examine witnesses with prior inconsistent statements;
i. Failing to object to evidence introduced during the testimony of Captain Cindy Barr;
j. Failing to properly argue for admission of Defendant's Exhibits #6 and #7, pictures of the weapon;
k. Failing to properly argue for admission of testimony regarding prior scarring on Victim's body to show Victim's propensity for violence, which was known to Applicant;
l. Failure to make a motion in limine to preclude the Solicitor from referring to the weapon as a sword;
m. Failing to adequately cross-examine Ky Graham regarding drug activity, as potential impeachment evidence or evidence of self-defense;
n. Failing to meet with Applicant an adequate amount of time to prepare for trial or request a continuance to adequately prepare.

Additionally, Applicant alleged Appellate Counsel was ineffective for "[f]ailing to raise meritorious issue of the trial court's refusal to charge spoliation of the evidence." At the PCR hearing, Applicant proceeded on the allegations in his original and amended applications.

## SUMMARY OF EVIDENTIARY HEARING TESTIMONY

### *APPLICANT'S TESTIMONY*

Applicant testified Hank Anderson was originally appointed to represent him, and thereafter, Vick Meetze was initially appointed to represent him, both through the Public Defender's Office. Applicant's brother then hired Ralph Wilson, Sr. (Trial Counsel) to represent him approximately three months before the trial. Applicant acknowledged he and Trial Counsel reviewed and discussed evidence, discovery, and defenses, including self-defense. He stated they reviewed an audio statement from Rishawn indicating Ian came at Applicant pointing a gun. However, during the trial, Rishawn described Applicant as the aggressor and claimed he lied in

his prior statement. Applicant testified he reviewed statements from Davis and Graham. He stated Davis's statement indicated Davis ran when he saw the gun being pointed. Applicant testified he also reviewed pictures of the crime scene and the autopsy report. However, Applicant felt unprepared for trial.

Applicant recounted his version of the evening. He stated he drove to Wilson's house so Graham could pick up a bag of weed. Graham got out of the car first, and Applicant later got out to tell Graham to hurry up. Applicant testified he shook hands with Wilson and another person, and Ian said, "That's all you see?" He did not respond but returned to the car to wait for Graham. When Graham returned, he told Applicant that Ian "was saying a little something-something."

Applicant testified he had trouble closing the Jeep door and got out to fix it. According to Applicant, he grabbed his knife and put it in his pants because Ian was looking at him. He stated the knife was closed, and Ian did not see him get it because the Jeep's door obstructed Ian's view.

Applicant testified Ian started walking quickly towards him, accusing him of coming out of the car "like [he] wants to do something." According to Applicant, Ian pulled out a gun and said, "What's up then?" Applicant testified he tried to get in the back seat while everyone else tried to hold Ian back, but Ian broke away, pointed the gun at Applicant, and said, "If you try to get in the car, watch what I do to you." At that point, according to Applicant, Rishawn fired a gun twice into the air and said to Applicant, "Y'all need to ride out now." Applicant claimed he could not leave because Ian was pointing the gun at him. However, he acknowledged Davis was halfway down the street, running away.

Applicant testified Ian kept coming towards him, so Applicant backed up into the middle of the street. He testified Ian raised the gun and said, "This time, try to run and see what I do to you." Applicant testified he started shuffling sideways while Ian continued to point the gun at

him, then ran under the carport where everyone else was. He stated he was in front of the van when Ian came around from the driver's side, still pointing the gun. Applicant testified he tripped and fell on his back, and Ian stood over him with the gun in his face. While he was lying on the ground, someone turned off the lights. Applicant testified he got up slowly, reached for the knife, and started swinging while Ian and Rashawn attacked him.

According to Applicant, Ian pistol-whipped him on the head while Rishawn kicked him; Applicant continued swinging the knife. Applicant testified Ian went to the right side of the car, and Rishawn went to the left, trapping Applicant under the carport. Ian approached within two feet of Applicant with the gun, and Applicant swung again. He stated Ian shot at Applicant, but it went over Applicant's head. Applicant testified he looked to see where Rishawn was, ducked again when Rishawn shot, then ran behind the house and hid.

Applicant testified he waited for a few seconds, heard a car peel out, and then called Graham to confirm that Ian and Rishawn had left. Applicant returned, picked up a knife he had dropped, got in the car with Graham, and left.

On cross-examination, Applicant acknowledged Wilson and the others testified at trial that they tried to hold Ian back when the argument began. He also acknowledged the State presented testimony regarding Rishawn firing a gun in the air, and both a neighbor and the 911 dispatcher indicated multiple shots were fired. Applicant acknowledged that everyone else who testified said only one shot was fired. He also acknowledged the court charged self-defense.

### *Trial Counsel Ralph Wilson, Sr.'s Testimony*

Trial Counsel testified he and Applicant met at least half a dozen times, reviewed discovery, and discussed what would happen at trial, including who the witnesses would be and the defense strategy. He stated Applicant always claimed self-defense. Trial Counsel explained

he had statements from all the witnesses, and the only two that might have helped the defense were Davis and Graham because the others were on Ian and Rishawn's side. Trial Counsel testified he reviewed those statements with Applicant.

Trial Counsel averred he got most of Applicant's version of events in front of the jury and made a case for self-defense through other witnesses. He averred there was no major discrepancy between Applicant's story and the State's version, and there were no material facts that did not come in. Trial Counsel opined Applicant's testimony would not have added anything. He explained the trial testimony indicated Ian was armed with a gun, and he elicited testimony that Ian was the aggressor when Applicant first arrived. Trial Counsel testified he elicited information from Ian's toxicology report while cross-examining the pathologist. He also elicited testimony that the lights went out at some point. Trial Counsel averred that the information or facts from each side were not significantly inconsistent, and this was clearly a jury issue.[3]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the trial transcript in its entirety and heard the testimony at the PCR hearing. This Court had the opportunity to observe the witnesses and evaluate their credibility, and this Court has weighed their testimony accordingly. This Court finds the trial transcript, and the testimony and evidence presented at the evidentiary hearing establish Applicant received effective assistance of Trial Counsel and Appellate Counsel. Accordingly, this Court denies relief and dismisses this application with prejudice. 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.

[3] Additional testimony will be included as relevant *infra*.

### *INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL*

Applicant alleges that he received ineffective assistance from his Trial Counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, post-conviction relief allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in post-conviction relief actions). 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).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." Cherry v. State, 300

S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). 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. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Harrington, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential[, as] it is all too tempting for a defendant to second-guess counsel's assistance after conviction or [an] adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). 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. Thus, 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. Id. (quoting Strickland, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort to be made to

eliminate the distorting effects of hindsight, reconstruct the circumstances of counsel's challenged conduct, and evaluate the conduct from counsel's perspective at the time. Id. 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 reasonable professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed [at] the time of counsel's conduct." Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under de novo review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105.

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. At 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Thus, it is not enough "to show that the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 693 (emphasis added).

The performance and prejudice standards, however, "do not establish mechanical rules . . . [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. Id.

This Court finds Applicant cannot meet his burden as to his claims of ineffective assistance of Trial Counsel. The specific claim is addressed below:

**Allegation 1(a): Failure to Call Witnesses to Support Self-Defense**

Applicant alleges Trial Counsel was ineffective for failing to call Davis to support his self-defense claim. This Court finds this allegation is without merit.

Applicant testified he acted in self-defense and discussed self-defense with Trial Counsel. He testified he asked Trial Counsel to subpoena Davis, but Trial Counsel said he would wait for the State to do so. Applicant complained that Trial Counsel never called Davis to testify even though Davis was present in the courtroom and Trial Counsel said he liked Davis's statement.

Trial Counsel explained he proceeded primarily on a theory of self-defense, but Graham's testimony destroyed any chance of success. He testified he did not call Davis because Davis's statement indicated he begged Applicant to leave once the initial skirmish ended. Trial Counsel anticipated Davis would testify he and Applicant were on the road alone, Davis asked Applicant to leave, and Applicant refused. He further anticipated Davis would testify he left before the shooting occurred, and when he later saw Applicant, Applicant said he "had to fight." Trial Counsel believed this testimony harmed Applicant's self-defense claim and Davis was "absolutely not" a helpful witness. He further opined Graham's testimony hurt Applicant the most, and he was not going to add to that by also putting up Davis.

This Court finds Trial Counsel credibly testified and articulated a reasonable strategic reason for not calling Davis—specifically, he felt Davis's testimony would be harmful to Applicant's case. Further, Trial Counsel's reasoning is based on an adequate understanding of the law of self-defense. See State v. Slater, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007) (providing self-defense requires a defendant to show *inter alia* that he had no other probable means of avoiding the danger). Because Trial Counsel expected Davis to testify, he begged Applicant to leave, but Applicant refused; Trial Counsel's analysis that Davis would be a harmful witness and his decision not to call him was reasonable under prevailing professional norms. Thus, Applicant failed to prove deficiency.

Further—and importantly—Applicant did not call Davis at his PCR hearing and have Davis testify. Thus, he failed to prove prejudice. See Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005), abrogated on other grounds by Smalls v. State, ... ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of

evidence."). Thus, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**[4]

**Allegation 1(b): Failure to Object to Mutual Combat Charge**

Applicant alleges Trial Counsel was ineffective for failing to object to the jury charge on mutual combat. This Court finds this allegation is without merit.

"The law to be charged to the jury is to be determined by the evidence at trial." State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 14 (2011) (citing State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989)). To warrant a charge on mutual combat, there must be evidence showing "mutual intent and willingness to fight." State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003). To apply, there must be evidence showing (1) the fight arose out of a pre-existing dispute, (2) the parties had an "antecedent agreement to fight," and (3) each party was equally armed with deadly weapons. Id. at 233, 589 S.E.2d at 4. "If the defendant is engaged in mutual combat, self-defense is unavailable unless the defendant withdraws from the conflict before the killing occurs." Id. at 232, 589 S.E.2d at 3 (citing by footnote State v. Graham, 260 S.C. 449, 450-51, 196 S.E.2d 495, 495-96 (1973)).

The Court finds Applicant has failed to show Trial Counsel was ineffective for not objecting to the mutual combat charge. First, this Court finds Trial Counsel articulated a valid reason for not objecting and thus was not deficient. At the PCR hearing, Trial Counsel explained he was familiar with the charge and believed it was appropriate under the facts. He further averred ample evidence supported the charged.

Trial Counsel correctly concluded that the evidence fit the charge. First, ample evidence showed pre-existing ill will between the parties. Rishawn testified things used to be "cool"

[4] To the extent this allegation can be construed as alleging Trial Counsel was ineffective for not calling Graham, this Court notes Graham *was* called as a State witness and adequately cross-examined by Trial Counsel. Thus, Applicant has failed to prove Trial Counsel was ineffective in this regard.

between Ian and Applicant, but there appeared to be a problem between them that night, and they argued during their initial encounter under the carport. (Trial Tr. 477-85). Wilson, Boatwright, and Graham agreed that Applicant and Ian got into an argument when Applicant arrived. (Trial Tr. 299-301, 388-89, 434). However, Boatwright stated the initial argument had ended when Applicant went to his car, "got what he got," and returned. (Trial Tr. 412). Notably, Rishawn testified Applicant drove away after the initial confrontation and returned a few minutes later, prompting Ian to respond, "you went and got something." (Trial Tr. 483-86). The foregoing supports a finding of pre-existing ill will or a pre-existing dispute.

Second, evidence was submitted showing an antecedent agreement to fight. According to Rishawn, Applicant left after the initial altercation; when he returned, Ian said, "you went and got something." (Trial Tr. p. 486). Rishawn stated Applicant did not respond but stood there "messing with his pants." (Trial Tr. 486). Even after Rishawn fired the shot, Rishawn stated Applicant "stood right there holding like to his pants like, 'I ain't going nowhere.'" (Trial Tr. 500). Based on this testimony, a jury could infer Applicant's willingness to fight. Further, evidence showed Ian was willing to fight. Wilson testified Ian tried to "break" past Wilson towards Applicant while Wilson was attempting to separate them. (Trial Tr. 302). Wilson further agreed that when Applicant and Ian were in the road—right before they ran under the carport when Ian got stabbed—they were "[b]owed up" in each other's face, "like nose to nose." (Trial Tr. 306). Finally, Rishawn stated that after Applicant returned, "they were still trying to get at each other." (Trial Tr. 521). The foregoing supports a finding of an "antecedent agreement to fight."

Finally, there was evidence from which a jury could find both men knew the other was armed. Rishawn stated that when Applicant returned, Ian said, "you went and got something." (Trial Tr. 486). Boatwright likewise testified Ian said, "you got something," and Boatwright saw

Applicant holding something by his side. (Trial Tr. 384-90). Graham testified Applicant retrieved his knife, and he thought Applicant got the knife before Ian got the gun. (Trial Tr. 436, 447). Wilson testified he saw a gun in Ian's hand while trying to break up the fight. (Trial Tr. 302). Graham testified Applicant pulled out his knives, and Ian pulled out his gun right before Wilson stepped away. (Trial Tr. 440). Finally, Graham stated Rishawn and Ian were "going towards the car porch" with "the guns out." (Trial Tr. 442). Although some of the witnesses testified, that they either did not see the knives or did not see the guns, there was ample evidence from which the jury could infer Applicant and Ian each knew the other was armed—especially given their close proximity to one another at the time Graham stated he saw Applicant pull out his knives and Ian pull out his gun. (Trial Tr. 440). Thus, the evidence supported a mutual combat charge.[5]

Further, Applicant has not shown prejudice. Because evidence supported the charge, it is not reasonably likely the outcome would have been different had Trial Counsel objected. See State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) ("The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence.").

Applicant has not established deficiency or prejudice; thus, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

**Allegation 1(c): Failure to Request Charge on Lesser-Included Offense of Involuntary Manslaughter**

Applicant alleges Trial Counsel was ineffective for failing to request a charge on the

[5] Notably, Rishawn's testimony that Applicant left and then returned makes these facts akin to the facts in State v. Graham, which was recently cited with approval by the South Carolina Court of Appeals as "the quintessential example of mutual combat in South Carolina. See State v. Bowers, 428 S.C. 21, 32, 832 S.E.2d 623, 630 (Ct. App. 2019) (citing Graham, 260 S.C. 449, 196 S.E.2d 495 (1973)). In Graham, the defendant and the decedent "had quarreled prior to the day of the killing" and made threats against each other. 260 S.C. at 451, 196 S.E.2d at 496. "They met in town shortly before the shooting and engaged in a heated discussion, during which [the defendant] waved a pistol in the face of the deceased." Id. "The deceased, who apparently had no weapon at the time, then drove out of town in his truck, returning a short time later with his pistol." Id. When the deceased returned, the defendant "walked into the street, placing himself in a position where an encounter with the deceased could be expected." Id. Both knew the other was armed." Id. The court found mutual combat was properly charged under these facts. Id.

lesser-included offense of involuntary manslaughter. This Court finds this allegation lacks merit.

Trial Counsel testified he requested an involuntary manslaughter charge, but the judge denied his request based on a newly released appellate decision. Further, the trial record indicates Trial Counsel *did* request an involuntary manslaughter charge. (Trial Tr. 572-573). Following the jury charge, Trial Counsel objected on the basis the court did not charge involuntary manslaughter. (Trial Tr. 584).

This Court finds Applicant has not proven Trial Counsel was deficient in this regard because Trial Counsel *did* request the charge. Further, Applicant cannot show prejudice because this issue was adequately preserved for appeal and affirmed on the merits—conclusively showing Applicant was *not* entitled to the charge. See State v. Woodbury, 2016-UP-111 (Ct. App. filed March 2, 2016). Thus, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

**Allegation 1(d): Failure to Pursue Immunity Under the Protection of Persons and Property Act**

Applicant alleges Trial Counsel was ineffective for failing to pursue immunity under the Protection of Persons and Property Act (the Act). This Court finds this allegation is without merit.

Section 16-11-440 of the South Carolina Code provides:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> > (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling residence, or occupied vehicle . . . .
>
> (B) The presumption provided in subsection (A) does not apply if the person:

> (1) 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 . . . .

The Act also provides a person does not have a duty to retreat in such instances. S.C. Code Ann. § 16-11-440(C).

Applicant testified Trial Counsel did not discuss immunity under the Act, and Applicant did not know this was a possibility until his case was on appeal. In contrast, Trial Counsel testified he researched immunity under the Act and explained why he believed it would not apply to Applicant. Specifically, Trial Counsel noted the incident did not occur at Applicant's home, and if anyone was there without invitation, it was likely Applicant. Trial Counsel stated this was problematic because Applicant was not on his property and thus had a duty to retreat. He opined Applicant did not have standing to argue for immunity under the Act and stated he discussed this with Applicant.

This Court finds Applicant has failed to prove Trial Counsel was ineffective for failing to request immunity under the Act. First, Trial Counsel articulated a valid reason for not pursuing immunity under the Act, and Trial Counsel credibly testified he considered the Act but did not believe it applied because Applicant was not on his property and thus had a duty to retreat. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996) ("Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective."). Because Trial Counsel articulated a valid reason for not requesting immunity under the Act, Applicant has failed to prove deficiency.

Further, Trial Counsel's analysis was based on a proper understanding of the law, and this Court finds Applicant would not have been entitled to immunity under the Act. Pertinently, the Act applies when a person is defending his dwelling, residence, or occupied vehicle. As noted by

Trial Counsel, this incident did not occur at Applicant's home. Additionally, no evidence showed Ian approached Applicant when Applicant was in his vehicle or removed Applicant from the vehicle. See § 16-11-440(A)(1) (granting immunity in certain situations when a person "against whom the deadly force is used is in the process of unlawfully and forcefully entering . . . [an] *occupied* vehicle" (emphasis added)).

Further—as noted by Trial Counsel—if anyone was there without invitation, it was likely Applicant. Wilson testified he told Applicant to leave—thus precluding any chance the "no duty to retreat" provision would apply to Applicant. Finally, because evidence showed Ian *was* at Wilson's house by invitation before Applicant arrived, the presumption of subsection (A) would not apply. See 16-11-440(B)(1) (providing the presumption of subsection (A) 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); S.C. Code Ann. § 16-11-430(3) (defining "residence" as "a dwelling in which a person resides either temporarily or permanently or is visiting *as an invited guest*") (emphasis added)).

Thus, Applicant has failed to show how this alleged deficiency prejudiced him, and this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

**Allegation 1(e): Improperly Advising Applicant Not to Testify**

Applicant alleges Trial Counsel was ineffective for advising Applicant not to testify. This Court finds this allegation 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 . . . ." 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.

At the conclusion of the State's case, the trial court explained to Applicant his right to testify as well as his right to remain silent. Applicant asked for a minute to confer with Trial Counsel and was given that time. He then stated he did not wish to testify. (Trial Tr. 547-48).

At the PCR hearing, Applicant testified he was extremely nervous at trial and is generally not good at public speaking—*one of the main reasons he did not take the stand.* He averred his thoughts would be everywhere, and since the State had the burden of proof, it would not be beneficial to testify. Additionally, Applicant testified Anderson and Meetze had previously told him it would not be in his best interest to testify. Applicant recalled asking the judge for time to speak with Trial Counsel, and the judge granted his request. Then, Applicant asked Trial Counsel what he should do, but Trial Counsel just shrugged. He asserted he did not take the stand because when he asked Trial Counsel whether he should testify, Trial Counsel "shook his hands up like I don't know."

Trial Counsel testified he and Applicant discussed whether Applicant should testify. According to Trial Counsel, Applicant was always reluctant to do so because he believed he did not come across well. Trial Counsel stated Applicant wanted Trial Counsel to tell him definitively whether to testify, but Trial Counsel believed his job was to provide Applicant with information—not make the decision. Trial Counsel explained he does not tell clients whether to testify; rather, he gives them options and explains what can happen on cross-examination. In this case, Trial Counsel told Applicant that he would likely have to explain why he did not leave during cross-examination. Trial Counsel advised Applicant that jurors always want to hear from the defendant,

particularly in a case like this. He further advised Applicant that although the judge would instruct the jury not to hold Applicant's decision to remain silent against him, in Trial Counsel's experience, juries tend to consider it anyway.

This Court finds Trial Counsel's testimony on this issue is credible, and Applicant has failed to show Trial Counsel was ineffective in this regard. This Court further finds Trial Counsel adequately explained the pros and cons of testifying, but ultimately it was Applicant's decision whether to testify. Trial Counsel's advice was reasonable under prevailing professional norms; thus, Applicant has not shown Trial Counsel was deficient. Further, Applicant acknowledged during the PCR hearing that he did not want to testify because he was extremely nervous at trial and is generally not good at public speaking—*one of the main reasons he did not take the stand.* This Court finds it was Applicant—not Trial Counsel—who decided not to testify, and his decision was made freely, voluntarily, and intelligently, as evidenced by the colloquy with the trial court.

For these reasons, Applicant has failed to establish deficiency or prejudice, and this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

**Allegation 1(f): Failure to Adequately Investigate Whether Victim was Using Drugs at Time of Incident**

Applicant alleges Trial Counsel was ineffective for failing to investigate whether Victim was using drugs at the time of the incident. This Court finds this allegation is without merit.

"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 v. Catoe, 372 S.C. 318,

331–32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted). However, this duty is limited to a reasonable investigation. Id. at 331, 642 S.E.2d at 597. Further, to prevail on a claim of ineffective assistance based on failure to investigate, a PCR applicant must ordinarily present some probative evidence. See Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998) (reversing the PCR court's grant of relief where the applicant failed to "present any evidence of what counsel could have discovered or what other defenses he would have requested had counsel more fully prepared for the trial").

At trial, the pathologist testified Ian had a blood alcohol concentration of 0.04 and tested positive for a small amount of delta 9THC or marijuana. (Trial Tr. 350-351). On cross-examination, Trial Counsel elicited testimony that Ian had used marijuana within minutes to hours before he died. (Trial Tr. 353-354). As part of that testimony, the pathologist explained that experts could not quantify marijuana found in the system as they can alcohol; they can only identify the presence of a parent drug or its metabolite. (Trial Tr. 353).

Trial Counsel stated testimony was elicited during the trial that Applicant and Graham went to Wilson's house to buy drugs, but there was no evidence Ian was the dealer. He stated it was unclear who they planned to buy drugs from, but no one knew Ian would be there until they arrived.

This Court finds Applicant has failed to show Trial Counsel was ineffective for not further investigating whether Ian was using drugs at the time of the incident. First, Trial Counsel credibly testified he did not have any evidence that Ian was the drug dealer, and no one knew Ian would be there until they arrived. Thus, Trial Counsel gave a valid reason for not further investigating that issue. Additionally, Trial Counsel testified he had Ian's toxicology report and reviewed it with Applicant. At trial, Trial Counsel successfully elicited testimony from the pathologist that Ian likely used marijuana "minutes to hours before he died." Thus, Trial Counsel was not deficient.

Further—and importantly—Applicant has produced no evidence of what Trial Counsel would have discovered by further investigating Ian's drug use. See Jackson, 329 S.C. at 353–54, 495 S.E.2d at 772 (1998) (reversing PCR court's grant of relief when applicant failed to "present any evidence of what counsel could have discovered or what other defenses [he] would have requested [] [] had counsel more fully prepared for the trial"). Thus, Applicant has failed to establish how Trial Counsel's performance was deficient or how Trial Counsel's performance prejudiced Applicant, and this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

**Allegation 1(g): Failure to Move to Sequester Witnesses**

Applicant alleges Trial Counsel was ineffective for failing to move to sequester witnesses. This Court finds this allegation is without merit.

The trial court may order the sequestration of witnesses upon its own motion or by motion of any party. Rule 615, SCRE. A party is not entitled to have witnesses sequestered as a matter of right. State v. Singleton, 395 S.C. 6, 15, 716 S.E.2d 332, 337 (Ct. App. 2011). Rather, the decision to sequester witnesses is left to the trial judge's sound discretion. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981).

At the PCR hearing, Applicant stated that he felt the witnesses not being sequestered was a problem because they were all in the courtroom and could hear each other's testimony. Specifically, he referenced that all of the State's witnesses testified that only one gunshot occurred, not multiple gunshots.[6] However, Trial Counsel presented testimony from a neighbor who called 911 on the evening of the altercation, and she testified that she heard four gunshots. (Trial Tr. 566-567). Ultimately, the jurors had to decide whether to believe the State's witnesses or the defense witness.

[6] Applicant testified a man named "Gator" who worked at the mechanic shop reported multiple gunshots. However, Gator did not testify at trial.

For these reasons, Applicant has failed to establish how Trial Counsel's performance was deficient or how Trial Counsel's performance prejudiced Applicant. Therefore, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

**Allegation 1(h): Failure to Properly Cross-Examine with Prior Inconsistent Statements**

Applicant alleges Trial Counsel was ineffective for failing to properly cross-examine witnesses with prior inconsistent statements. This Court finds this allegation is without merit.

Trial Counsel agreed that Rishawn gave several statements that differed from his testimony. Still, he did not consider offering Rishawn's audio statement into evidence because Rishawn admitted during the trial that he initially lied to the police. Trial Counsel averred there was no reason to introduce the statement once Rishawn admitted to the lie, as he was already impeached.

For these reasons, Applicant has failed to establish how Trial Counsel's performance was deficient or how Trial Counsel's performance prejudiced Applicant. Therefore, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

**Allegation 1(i): Failure to Object to Evidence Introduced During Testimony of Captain Cindy Barr**

Applicant alleges Trial Counsel was ineffective for failing to object to evidence introduced during the testimony of Captain Cindy Barr. This Court finds this allegation is without merit.

At trial, Trial Counsel *did* object to evidence introduced during the testimony of Captain Barr. (Trial Tr. 189). Upon the admission of State's exhibit numbers 6, 7, 8, and 9, the court held a sidebar. (Trial Tr. 189). Another sidebar was held while Captain Barr identified the exhibits. (Trial Tr. 192). The trial court then excused the jury and allowed Trial Counsel to place his objection on the record. (Trial Tr. 193). Subject to Trial Counsel's objection, the court allowed

the pictures to be entered into evidence. (Trial Tr. 193-194).

At the PCR hearing, Trial Counsel testified that if an object were already admitted into evidence, he would not object to a picture of the same object. On cross-examination, he clarified he did object when the State tried to introduce pictures of the knife through one of the officers because the knife had not come in at that point. Trial Counsel noted he objected to the admission of the photos, but the trial court allowed them to be entered into evidence.

This Court finds Applicant has not proven Trial Counsel was deficient in this regard because Trial Counsel *did* object to the evidence being admitted.

For these reasons, Applicant has failed to establish how Trial Counsel's performance was deficient or how Trial Counsel's performance prejudiced Applicant. Therefore, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

**Allegation 1(j): Failure to Properly Argue for Admission of Defense Exhibits Six and Seven (Pictures of Weapon)**

Applicant alleges Trial Counsel was ineffective for not properly arguing for admission of Defendant's Exhibits 6 and 7, which were pictures of a gun. This Court finds this allegation is without merit.

The trial transcript demonstrates Trial Counsel *did* argue for the admissibility of defense exhibits 6 and 7. (Trial Tr. 271). However, the State objected to the admission of the pictures and argued that Applicant's reason for entering the pictures could be construed as improper character evidence of the victim under Rule 404(a)(2), SCRE.[7] (Trial Tr. 274). Trial Counsel argued that the pictures were blow-ups of the original gun pictures, and they sought to admit them to show a

[7] Rule 404 (a)(2) prohibits the admission of evidence of a person's character or trait to prove an action in conformity therewith except for "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

red substance on the gun. (Trial Tr. 275). The State argued no evidence indicated what the red substance was, and the State would not object to the admissibility of the pictures if Trial Counsel had someone from SLED testify to what the substance was. (Trial Tr. 276). The trial judge sustained the State's objection pursuant to Rule 404, SCRE. (Trial Tr. 277).

At Applicant's PCR hearing, Trial Counsel recalled moving to admit pictures of Ian and Rishawn's guns, but he did not recall a red coloration or substance. He explained at least two guns were present that night, and Applicant was aware of both, although only one gun was fired. Trial Counsel did not consider introducing the picture with the red substance because he did not see how that would impact the timing of events, as he would have no way of knowing when the substance got on the gun, as it could have been any time before, during, or after the fight.

This Court finds Applicant has produced no evidence of what Trial Counsel could have or should have argued that would have permitted defendant's exhibits #6 and #7 into evidence.

For these reasons, Applicant has failed to establish how Trial Counsel's performance was deficient or how Trial Counsel's performance prejudiced Applicant. Therefore, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

**Allegation 1(k): Failing to Properly Argue for Admission of Testimony About Scars on Ian's Body to show his Propensity for Violence**

Applicant alleges Trial Counsel was ineffective for failing to properly argue for admission of testimony regarding the scars on Ian's Body. This Court finds this allegation is without merit.

At trial, Trial Counsel attempted to ask the pathologist about scarring on Ian's body. (Trial Tr. 353-354). The State objected based on relevance, arguing the scars were not related to the cause of death or any injuries sustained that night. (Trial Tr. 354). The trial court sustained the objection. (Trial Tr. p. 354). After testimony was concluded with the medical examiner, the judge

permitted Trial Counsel to put his objection argument on the record outside of the jury's presence. (Trial Tr. p. 360). The trial court permitted a proffer examination with the witness. (Trial Tr. p. 362). At the conclusion of the proffered testimony, the State objected on the basis of relevance, confusion, waste of time, and having no bearing on the event. (Trial Tr. p. 363). The trial court permitted the limited question and answer on whether the scars were related to the incident, which was all the trial court would allow based on relevance. (Trial Tr. p. 364).

At Applicant's PCR hearing, Trial Counsel testified he attempted to ask some questions about the previous scarring on the Victim, and the parties argued over the objection. Trial Counsel stated he did not want to argue the scars could show Ian's history of violence because he would have to prove Applicant knew about the scars, and he would need to put Applicant on the stand to do that.

This Court finds Applicant has produced no evidence of what Trial Counsel could have argued that would have made the evidence of the previous scarring on the Victim relevant to his case. The trial court ruled the evidence was inadmissible because it was irrelevant and impermissible victim character evidence pursuant to Rule 404(a)(2), SCRE.

For these reasons, Applicant has failed to establish how Trial Counsel's performance was deficient or how Trial Counsel's performance prejudiced Applicant. Therefore, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

**Allegation 1(l): Failure to Make Motion in Limine to Preclude Solicitor from Referring to Weapon as A Sword**

Applicant alleges Trial Counsel was ineffective for failing move in limine to preclude Solicitor from referring to the weapon as a sword. This Court finds this allegation is without merit.

At trial, Robert Woodbury (Robert) testified as part of Applicant's defense that Robert collected samurai, medieval, and ninja swords. (Trial Tr. 560, 562). He stated he gave the knives

used in this incident to Applicant because Applicant thought they were neat. On cross-examination, Robert described the weapon as a ninja sword used in martial arts. (Trial Tr. p. 564).

At the PCR hearing, Trial Counsel explained he did not object to the Solicitor referring to Applicant's weapon as a "sword" because Trial Counsel thought that was an accurate description. This Court finds the record indicates Applicant's weapon was indeed a sword, and Applicant has provided no evidence to the contrary. In fact, Applicant's own witness said it was a ninja sword.

For these reasons, Applicant has failed to establish how Trial Counsel's performance was deficient or how Trial Counsel's performance prejudiced Applicant. Therefore, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

**Allegation 1(m): Failure to Properly Cross-Examine Ky Graham Regarding Drug Activity as Potential Impeachment Evidence or Evidence of Self-Defense**

Applicant alleges Trial Counsel was ineffective for not properly cross-examining Ky Graham. This Court finds this allegation is without merit.

On cross-examination at trial, Trial Counsel questioned Ky Graham (Graham) about his inconsistent statements to police and his statements in court that day. (Trial Tr. 449-450). Trial Counsel asked Graham if his memory was clearer the day of court than it was within hours after the altercation occurred, and he answered yes. (Trial Tr. 450). Trial Counsel asked Graham if he went to the house to buy drugs, and Graham denied it. (Trial Tr. 451). Trial Counsel reminded Graham he was under oath, and Graham then admitted to buying drugs from the incident location. (Trial Tr. 451).

At the PCR hearing, Trial Counsel testified that their self-defense argument was destroyed after Graham testified. Trial Counsel testified that Graham's original story helped Applicant, but his testimony was not the same as his original statement and was no longer helpful to Applicant.

Trial Counsel explained that Graham's testimony threw them for a loop. Trial Counsel explained that the drug testimony came out at trial, but it was not testimony that could be used for impeachment.

This Court finds Applicant has produced no evidence of what Trial Counsel could have done differently with Ky Graham on cross-examination that would have changed the outcome of his trial.

For these reasons, Applicant has failed to establish how Trial Counsel's performance was deficient or how Trial Counsel's performance prejudiced Applicant. Therefore, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

**Allegation 1(n): Failure to Meet with Applicant an Adequate Number of Times to Prepare for Trial or to Request a Continuance to Adequately Prepare.**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to meet with Applicant an adequate number of times to prepare for trial or to request a continuance to prepare adequately. This Court finds this allegation is without merit.

"[T]here is no established 'minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel.'" Moody v. Polk, 408 F.3d 141, 148 (4th Cir. 2005) (citing United States v. Olson, 846 F.2d 1103 (7th Cir. 1988)). Here, Trial Counsel testified he and Applicant met at least half a dozen times to prepare for trial. He stated they reviewed all discovery and discussed what would happen at trial, who the witnesses would be, and the defense strategy.

This Court finds the trial record demonstrates that Trial Counsel fully understood the facts and the evidence in the case. It further demonstrates Trial Counsel was prepared to try the case and put forth the best defense possible. This Court finds Applicant has produced no evidence of

how additional meetings with Trial Counsel or more time to prepare for trial would have changed the outcome of his trial.

For these reasons, Applicant has failed to establish how Trial Counsel's performance was deficient or how Trial Counsel's performance prejudiced Applicant. Therefore, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

***INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL***

Applicant alleges Appellate Counsel was ineffective for failing to raise the meritorious issue of the trial court's refusal to charge spoliation of the evidence. This Court finds this allegation is without merit.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396-97 (1985) (citing Douglas v. California, 372 U.S. 353 (1963)). "However, appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 752-53 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . .")).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). When a claim of

ineffective assistance of counsel is based upon the failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Applicant testified he gave a statement to law enforcement soon after the incident. According to Applicant, law enforcement provided the Solicitor's office with statements from Applicant, Graham, and Davis three weeks prior to trial. He averred that although the Solicitor's office returned Graham and Davis's statements, they held onto Applicant's statement, which was later lost. Applicant testified he never received a copy of his statement.

Regarding Applicant's statement, Trial Counsel confirmed it was lost, but he was told that the State did not have it, did not know where it was, and did not know who had last had it. Trial Counsel testified he filed a motion for spoliation because he felt it was unfair to allow a statement from the defendant to go missing when all of the State's witnesses' statements were still available.

Here, PCR Counsel did not call Applicant's Appellate Counsel. Furthermore, Applicant did not provide any testimony as to the ineffective assistance of Appellate Counsel. Strikingly, PCR Counsel asked this Court to consider the entire record to include the final briefs of both parties to the Court of Appeals to find the deficiency in Appellate Counsel.

This Court finds Applicant has failed in his burden to prove ineffective assistance of Appellate Counsel. Appellate Counsel has no duty to raise every colorable issue on appeal and is certainly not expected to raise issues not properly preserved. Because no testimony or evidence was provided to this Court regarding ineffective assistance of Appellate Counsel, Applicant has failed to prove deficiency on the part of Appellate Counsel and any prejudice therefrom.

Therefore, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

## CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. This Court finds Trial Counsel and Appellate Counsel provided effective representation. Therefore, this application for post-conviction relief **must be DENIED** and **DISMISSED WITH PREJUDICE.**

Should Applicant wish to appeal, he must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment. 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). Pursuant to Rule 71.1(g), SCRCP, 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. Post-conviction relief is denied and 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 17 day of July, 2022.

WILLIAM H. SEALS, JR.
Presiding Judge
Twelfth Judicial Circuit

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| STATE OF SOUTH CAROLINA<br>COUNTY OF MARION | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE TWELFTH JUDICIAL CIRCUIT |
| Richard A. Woodbury, #358878,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | ) | CASE NO. 2016-CP-33-182<br><br>**ORDER DENYING APPLICANT'S MOTION PURSUANT TO RULE 59(e), SCRCP** |



This matter comes before the Court by way of Applicant's Motion Pursuant to Rule 59(e), SCRCP, to Amend, filed September 19, 2022, asking this Court to alter or amend its Order of Dismissal denying Applicant's application for post-conviction relief.

## PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections, serving a thirty-year sentence. In February 2013, the Marion County Grand Jury indicted him for the murder of Ian Gause and the attempted murder of Rishawn Gause (2013-GS-33-00069). On February 18-21, 2014, he proceeded to trial before the Honorable D. Craig Brown. Ralph Wilson, Sr. represented Applicant, and Twelfth Circuit Solicitor E. L. Clements, III, prosecuted the case. The jury convicted Applicant of the lesser-included offense of voluntary manslaughter and acquitted him of all other charges.

Applicant filed a timely Notice of Appeal, which was perfected by Appellate Defender Lara Caudy. The South Carolina Court of Appeals affirmed the conviction on March 2, 2016. State v. Woodbury, Op. No. 2016 UP 111 (S.C. Ct. App. filed March 2, 2016). The remittitur was returned on March 21, 2016.

## CURRENT ACTION

On March 15, 2016, Applicant filed an application for post-conviction relief in which he alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
   a. Trial Lawyer Ineffective for not investigating to call Eye Witness.
      i. Trial Lawyer didn't present Video Statements or DNA photos or Evidence in my Defense.
      ii. DNA photos's [sic] presented what appeared to be blood. Also the weaponse used against me were not tested to confirm the redsubstance in pictures. (Both weapons) the 380 and the .38 special revolver.
   b. Trial Lawyer Ineffective for failing to Object to Erroneous Charge of Mutual Combat.
   c. Trial Lawyer Ineffective for failing to request Protection of Person and Property Act.
      i. Under the "Stand your Ground Law."

On June 14, 2019, Applicant amended his application to allege the following:

1. Ineffective Assistance of Trial Counsel
   a. Failing to properly present Applicant's defense of self-defense by not calling eyewitness;
   b. Failing to properly object to the mutual combat charge, which shifted the burden from the State having to disprove self-defense, thus failing to preserve a meritorious issue for appeal;
   c. Failing to request a charge on lesser-included offense of involuntary manslaughter;
   d. Failing to seek judicial review of whether Applicant was entitled to immunity under the Protection of Persons and Property Act;
   e. Improperly advising Applicant not to testify;
   f. Failing to adequately investigate whether Ian Gause was under the influence of drugs at the time of the incident;
   g. Failing to move to sequester witnesses at trial;
   h. Failing to properly cross-examine witnesses with prior inconsistent statements;
   i. Failing to object to evidence introduced during the testimony of Captain Cindy Barr;
   j. Failing to properly argue for admission of Defendant's Exhibits #6 and #7, pictures of the weapon;
   k. Failing to properly argue for admission of testimony

regarding prior scarring on Victim's body to show Victim's propensity for violence, which was known to Applicant;

l. Failure to make a motion in limine to preclude the Solicitor from referring to the weapon as a sword;
m. Failing to adequately cross-examine Ky Graham regarding drug activity, as potential impeachment evidence or evidence of self-defense;
n. Failing to meet with Applicant an adequate amount of time to prepare for trial or request a continuance to adequately prepare.

Additionally, Applicant alleged Appellate Counsel was ineffective for "[f]ailing to raise the meritorious issue of the trial court's refusal to charge spoliation of the evidence." At the PCR hearing, Applicant proceeded with the allegations in his original and amended applications.

An evidentiary hearing was held on June 26, 2019, at the Florence County Courthouse before the Honorable William H. Seals, Jr. Applicant was present and represented by Jonathan D. Waller, Esquire. Assistant Attorney General Samuel L. Key represented Respondent. Applicant and his Trial Counsel, Ralph Wilson, Sr., testified at the hearing. Following a thorough review of the trial transcript and the testimony and evidence presented at the evidentiary hearing, Judge Seals denied Applicant's post-conviction relief application with prejudice by Order of Dismissal filed on August 19, 2022.

Thereafter, on September 19, 2022, Applicant filed a Motion Pursuant to Rule 59(e), SCRCP, to Amend. Respondent filed a Return to Applicant's Motion Pursuant to Rule 59(e), SCRCP, on October 13, 2022.

## APPLICANT'S MOTION TO ALTER OR AMEND

In Applicant's motion, he asks the Court to reconsider its ruling pursuant to Rule 59(e). SCRCP. After careful consideration of the arguments of Counsel and review of the record, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or fact not appropriately considered. The order of

dismissal issued by this Court contains the appropriate findings of fact and conclusions of law as required by § 17-27-80 of the South Carolina Code of Laws and Rule 52(a) of the South Carolina Rules of Civil procedure. Accordingly, Applicant's motion for reconsideration is **DENIED.**

**IT IS THEREFORE ORDERED** that Applicant's motion is hereby **DENIED AND DISMISSED.**

AND IT IS SO ORDERED this 21 day of December, 2022.

WILLIAM H. SEALS, JR.
Presiding Judge
Twelfth Judicial Circuit

Marion, South Carolina