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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA COUNTY OF CHESTER	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
Christopher M. Moore, #368837, Applicant,	)	Case No.: 2019-CP-12-0491
v.	)	**ORDER VACATING WEAPON SENTENCE AND DISMISSING REMAINING CLAIMS WITH PREJUDICE**
State of South Carolina, Respondent.	)	

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Christopher M. Moore (Applicant) on September 24, 2019. Respondent filed a return requesting an evidentiary hearing. On February 16, 2023, an evidentiary hearing convened before the Honorable Daniel Coble. Applicant was present and represented by Dayne Philips, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. Following a review of the records before this Court and the testimony and evidence presented at the hearing, this Court finds Applicant's five-year sentence for possession of a weapon during a violent crime should be vacated. This Court further finds Applicant did not meet his burden of proof on his remaining claims. Thus, this Court denies relief and dismisses the remaining allegations with prejudice.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections serving a life sentence. In June 2015, the Chester County Grand Jury indicted Applicant for for murder (2015-GS-12-0086) and possession of a firearm during the commission of a violent crime (2015-GS-12-0085). The charges arose from the fatal shooting of Odell Williams.

On April 18, 2016, Applicant proceeded to a jury trial before the Honorable Paul M. Burch. Applicant was represented by William P. Frick and Devon Nielson. Solicitor Randy Newman and Assistant Solicitors Julie Hall and Riley Maxwell prosecuted the case. Applicant's first trial ended

in a mistrial after the jury announced it was deadlocked.

On June 27-30, 2016, Applicant proceeded to a second jury trial before Judge Burch. The jury convicted Applicant as indicted, and Judge Burch sentenced him to consecutive sentences of life for murder and five years for the weapon charge.

Applicant timely appealed, and Appellate Defender Susan B. Hackett filed an Anders v. California, 386 U.S. 738 (1976). The Court of Appeals dismissed pursuant to Anders, and the remittitur was sent November 7, 2018.

SUMMARY OF TRIAL TESTIMONY

At Applicant's trial, Lieutenant Kyle Cummings testified he responded to a 911 "shots fired" call one evening and found Odell Williams (the victim) in his vehicle, which had crashed into a home. (Tr. 70, 72-74). He stated it was obvious the victim had been shot in the face. Although the victim attempted to speak, he was unable to due to his injury. (Tr. 74).

Lousie Williams, the victim's wife, recalled seeing a strange truck parked outside her home that evening as she, her daughter, and her granddaughter were leaving. (Tr. 88-89). Williams testified she called the victim, who "said he would come check it out." (Tr. 89). Williams drove down the road, stopped, and waited for the victim. (Tr. 90). She testified the truck began driving down the road as the victim entered the neighborhood. (Tr. 90). Williams pointed out the truck for the victim and then left. (Tr. 91). She later received a call and learned the victim had been shot. (Tr. 92). Lana Akin, the victim's daughter, recalled seeing the truck as they were leaving; she identified it as a tan Dodge Ram. (Tr. 103). Like Williams, she testified they called the victim and told him about the truck. (Tr. 101-04).

Jason Binnall testified he loaned his Dodge Ram to Quinton McClinton[1] the evening of the

[1] McClinton was Applicant's codefendant.

shooting; investigators later recovered Applicant's fingerprint from the truck. (Tr. 111-15).

Several people who lived in the area testified to what they witnessed that evening. Jennifer Lowery testified she saw the victim's burgundy car chasing a Dodge Ram and then heard gunshots. (Tr. 117-20). Richard Gray testified police recovered footage of the car chase from his home security system; the recording was entered into evidence during Gray's testimony without objection. (Tr. 127-30). Kiera Bagley recalled seeing the truck chasing the car and hearing two gunshots. Thereafter, she heard "bigger gunshots." (Tr. 132-33). Maurice James recalled hearing gunshots and seeing a man run across the road; the man briefly spoke to a person in a white SUV but did not get in. James testified that as the man approached the SUV, "he was walking stiff like he had something to the side of his leg." (Tr. 141-45).

Rafaell Jackson testified he was driving through the area that evening in his white Yukon and saw Applicant. He stated Applicant asked him for a ride, but Jackson refused. Jackson testified Applicant had what appeared to be a stick in his hand, and Jackson believed Applicant had recently been in a fight. Jackson denied telling investigators that Applicant had a rifle in his hand. He recalled seeing a red car crashed into a house. (Tr. 151-58). Cornell Johnson testified he was in the Yukon with Jackson when Applicant approached their car; however, he acknowledged he did not really know Applicant. (Tr. 161-67). Lashonda Wray testified she picked up Applicant, Derrick Dixon, and "Debo" from the area later that evening. (Tr. 173-74).

Police presented testimony that the victim had a revolver in his vehicle with spent cartridge casings. Police recovered several spent cartridge casings in the area of the vehicle that matched a rifle law enforcement found stashed nearby. Applicant's DNA could not be excluded from a DNA mixture recovered from the rifle.

Applicant's co-defendants Terrance Buchanan, Derrick Dixon, and D'Angelo Roseboro

testified Applicant was with them that evening while they were being chased by the victim, and Applicant got out of the truck with the rifle. Additionally, Stevie Breland testified he was detained with Applicant, and Applicant admitted to shooting the victim. Applicant testified in his defense and acknowledged shooting the victim with the rifle. However, he claimed he fell out of the truck as he was attempting to stash the rifle nearby during the chase, and after he was out of the truck, he shot at the victim in self-defense. [2]

ALLEGATIONS

Applicant timely commenced this PCR action on September 24, 2019, alleging he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
   a. Failing to present evidence of a victimless crime
   b. Failing to request witness testimony helpful to the [Applicant]
   c. Failing to instruct or request mutual combat as a defense to the jury
2. Ineffective assistance of appellate counsel:
   a. Failing to raise the issues in appeal

Applicant requested relief in the form of his case being remanded and reversed.

On February 1, 2023, Applicant amended his application to allege the following:

Ineffective assistance of counsel:

> 1. Trial counsel failed to object to the trial courts' failure to provide complete findings of fact and conclusions of law for the elements of self-defense in denying Applicant immunity pursuant to the Protection of Persons and Property Act.
> 2. Trial counsel failed to raise a Batson challenge when the State (1) used its strikes without explanation as to race or gender and (2) raised a Batson challenge against trial counsel.
> 3. Trial counsel failed to argue the State jailhouse witness Stevie Breland's three prior convictions for check fraud were admissible under Rule 609 for to impeach Breland as crimes of dishonesty that were not subject to time limitations.
> 4. Trial counsel failed to object to the trial court's improper opening

[2] Additional trial testimony will be discussed where relevant below.

comments to the jury that "the end result of any case is to reach a verdict, it's a Latin derivative word which means *search for the truth* or true saying."

5. Trial counsel failed to object to the State's opening statement, "This is a very, very important trial for the victim's family who are here in the courtroom today some of whom you will hear from," when this was impermissible argument that inflamed the jurors' passions and prejudices and invited the jury to make a decision on an improper basis.

6. Trial counsel failed to object and move to strike the State reading directly from Lieutenant Kyle Cummings' incident report during direct examination when the document was not in evidence and the prosecutor was trying to refresh the officer's recollection.

7. Trial counsel failed to object when the prosecutor made leading statements regarding the testimony of Louise Williams, the decedent's estranged wife.

8. Trial counsel failed to object and move to strike hearsay statements made by Lousie Williams during direct examination as to what her daughter Lana Aiken said in a phone conversation with the decedent on the night of the incident.

9. Trial counsel failed to object and move to strike hearsay statements made by Lana Aiken elicited by the State on direct examination regarding what the decedent previously told her: "He always told us to call him, it's also his property so he would like to know things that are going on on his property. He's an ex-police officer so he would know if we needed to call the police or not."

10. Trial counsel failed to move to sequester witnesses pursuant to Rule 615, SCRE, the 6th Amendment, and Fundamental Due Process when the prosecutor asked witnesses Lana Aiken and Lousie Williams if they heard the testimony of prior witnesses and followed up by having one story confirm the other.

11. Trial counsel failed to object to the admission of a video recording of the car chase on a home security camera (State's Exhibit 3) when the State failed to lay a proper foundation, the witness never saw the car chase, and the State used the witness to narrate the video through leading questions as it played to the jury.

12. Trial counsel failed to object to pitting and leading during the prosecutor's direct examination of Cornell Johnson: "[Y]ou heard [Rafael Jackson's] testimony just no, right? . . . And were in the car with him—you heard his testimony just now, right?"

13. Trial counsel failed to object to the admission of a map of the route allegedly taken in the car chase (State's Exhibit 4) when the prosecutor failed to lay a proper foundation.

14. Trial counsel failed to object and move to strike testimony for lacking proper foundation and authentication regarding a note allegedly made by Stevie Breland when (1) Investigator Randy St.

Clair did not receive the note directly from Breland and allegedly received it from Captain Odem at the jail with the assumption Odem received it from Breland, (2) the State directly referred to the note in its questioning, (3) the witness said he "advised the Solicitor's Office of inmate Breland wanting to speak with someone concerning the case of Christopher Moore," and (4) trial counsel previously told the Court, "I don't think I have any standing to object to Mr. Breland's note. I object to Mr. Breland, but will do that at the appropriate time."

15. Trial counsel failed to object under Due Process to the State's question that a DNA buccal swab of the Applicant "was taken pursuant to a court order," where such testimony regarding prior orders and rulings of the court against the defendant effectively lowered the State's burden of proof.

16. Trial counsel failed to object to Agent Melinda Worley's testimony describing cartridges she found as "assault rifle type cartridges" when the trial court had previously ruled in favor of the defense and prohibited the mention of "assault rifle."

17. Trial counsel failed to object and move to strike Agent Worley's testimony regarding tools such as dowel rods and what they indicated, where such testimony was tantamount to expert testimony, Agent Worley was never qualified as an expert, and such testimony was used to attack the defendant's theory of self-defense.

18. Trial counsel improperly elicited testimony during cross-examination of Agent Worley confirming the bullet trajectory and direction of travel for shots into the car of the decedent when such testimony was detrimental to the defense.

19. Trial counsel failed to object and move to strike Agent Worley's testimony regarding ballistics expertise when Agent Worley was never qualified as an expert in ballistics.

20. Trial counsel failed to object and move to strike testimony of Agent Worley regarding firearms expertise when Agent Worley was never qualified as an expert in firearms.

21. Trial counsel failed to object and move to strike testimony of Agent Brittany Burk regarding ballistics expertise when she was never qualified as an expert in ballistics.

22. Trial counsel failed to object to the admission of a latent print report (State's Ex. 68) when examiner Tiffany Hezel testified to its contents when the document itself was a report from a law enforcement agency and inherently contained opinion material.

23 Trial counsel failed to object to the admission of a supplement report (State's Ex. 69) from a SLED agent who didn't testify at trial when the report was from a law enforcement agency and inherently contained opinion material.

24. Trial counsel failed to object to the admission of the SLED DNA report (State's Ex. 77) when the examiner Jennifer Clayton testified

to its contents and the document itself was a report from a law enforcement agency and inherently contained opinion material.

25. Trial counsel failed to object to the admission of the autopsy report (State's Ex. 82) when examiner Robert Thomas, Jr. testified to its contents when the document itself was a report that inherently contained opinion material.

26. Trial counsel failed to object to the admission of the SLED firearm report (State's Ex. 76) when the examiner Frank DeFreeze testified to its contents when the documents itself was a report from a law enforcement agency and inherently contained opinion material.

27. Trial counsel failed to object to testimony of Codefendant Terrance Buchanan indicating Applicant had an "assault rifle" the night of the incident when the trial court previously ruled against such prejudicial terminology.

28. Trial counsel failed to move to strike and for a curative instruction regarding the testimony of Terrance Buchanan indicating Applicant and the other co-defendants were going to a rival gang member's house the night of the incident when the court had previously ruled against such prejudicial language and sustained trial counsel's objection.

29. Trial counsel failed to object and move to strike the State's impermissible use of codefendant Buchanan's statement to police when the prosecutor had Buchanan read verbatim from his previous statement, the statement was not in evidence, and the foundation was not laid for admission pursuant to Rule 613(b), SCRE.

30. Trial counsel failed to object pursuant to hearsay and the confrontation clause and move to strike statements purportedly made by other codefendants embedded in Derrick Dixon's written statement to police that the prosecutor read verbatim on direct examination of Dixon.

31. Trail counsel failed to object and move to strike Stevie Breland's testimony that was tantamount to opinion testimony as a crime scene reconstruction specialist when he was never qualified as an expert and the testimony directly attacked the theory of self-defense.

32. Trial counsel failed to object and move to strike Breland's testimony that was tantamount to opinion testimony as a firearms expert when he was never qualified as an expert and the testimony directly attacked the theory of self-defense.

33. Trial counsel failed to object and move to strike Breland's testimony that was tantamount to opinion testimony as a ballistics expert when he was never qualified as an expert and the testimony directly attacked the theory of self-defense.

34. Trial counsel failed to object as improper opinion by a lay witness that invaded the jury's providence when the State repeatedly

elicited opinion testimony from Breland regarding whether the defendant's theory of events and self-defense was believable.
35. Trial counsel failed to move to strike and move for a curative instruction to Breland's testimony regarding bruising where counsel objected he was not an expert and the court sustained the objection.
36. Trial counsel failed to object and move to strike Breland's testimony where he repeatedly testified to the contents of Applicant's discovery, and counsel failed to object to hearsay within hearsay, and the testimony directly attacked the theory of self-defense.
37. Trial counsel failed to object pursuant to Rule 404(b), 402, and 401 and move to strike Breland's testimony that Applicant had not changed his ways for God, Applicant fought smaller inmates in jail to move to another cell block with a codefendant, and Applicant could have killed that man because he picked him up and slammed him by the face.
38. Trial counsel failed to have the trial court instruct the jury that Breland was moved to another facility when the trial court and prosecutor only sought to ensure the actual location was not revealed, where counsel needed such evidence in the record to argue to the jury that Breland received a benefit when no such instruction was given, making counsel's closing argument ineffective since it was not based upon evidence before the jury and argument by counsel is not evidence.
39. Trial counsel failed to object to the State eliciting testimony from Investigator Christopher Reynolds that Applicant was charged in a warrant for murder, that murder requires the intentional killing of someone with malice aforethought, and a Magistrate had to agree police had probable cause to get the warrant when such testimony violated due process and South Carolina case law by lowering the State's burden by inviting the jury to rely on previous decisions of officials regarding the facts and law.
40. Trial counsel failed to object and move to strike testimony by Agent Lee Blackmon when the State elicited opinion testimony of expert nature in automobiles and Blackmon acknowledged he was not an expert.
41. Trial counsel failed to object and move to strike testimony by a witness regarding the contents of cell phone data when the agent was not the expert who collected or interpreted the information form the cell phones, yet testified to the contents retrieved from the Fusion Center.
42. Trial counsel denigrated his own client during closing argument and joined him with his codefendants as a bad guy doing bad things: "These bad guys out to do bad things were scared."
43. Trial counsel failed to object to facts not in evidence when, during the State's close, the prosecutor stated, "For all [the victim]

knew all of his possessions, or most of them or some of them or whatever, valuable things that he had worked his whole life to get were in the back of that truck and they were leaving and he was tired of being violated, so he went to see what was going one," when the facts presented indicated nothing was stolen or even looked to be stolen.

44. Trial counsel failed to object to facts not in evidence when, during the State's closing argument, the prosecutor said, "I would submit to you what happened is he fires two shows out the window of his car, warning shots to get them to stop."

45. Trial counsel failed to object to facts not in evidence when, during the State's closing argument the prosecutor created a speculative conversation between codefendants during the car chase.

46. Trial counsel failed to object and move for a mistrial based on the State's denigrating trial counsel's role in the judicial system during closing argument: "The defense's job is to confuse you and to believe the defendant's lies. Don't fall for it. We come seeking the truth and we come seeking justice for Odell Williams, but we also come seeking justice for his family."

47. Trial counsel failed to object to the jury instruction as a comment on the facts when the trial court read a list of items considered deadly weapons that included firearms and automatic rifles, and when the deadly weapon utilized in the present case is a firearm—specifically a semi-automatic rifle.

48. Trial counsel failed to seek a jury instruction under the theory of self-defense that a person has no duty to retreat if doing so would increase the danger to himself.

49. Trial counsel failed to seek a jury instruction under the theory of self-defense that a person does not have to wait for an assailant to "get the drop on him" and that he may "act on appearances," especially when the defense theory was essentially that the Applicant acted on the appearances of the decedent chasing him down with a car and handgun.

50. Trial counsel failed to seek a jury instruction seeking direct and circumstantial evidence pursuant to State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), when the majority of evidence presented by the State was attempting to disprove self-defense, show malice, and was circumstantial in nature.

51. Trial counsel failed to seek a jury instruction regarding expert witness testimony.

52. Trial counsel failed to object to the court imposing a consecutive sentence of five years for possession of a deadly weapon during the commission of a violent crime when the court sentenced Applicant to life for murder, and section 16-23-490(A) of the South Carolina Code provides the five-year sentence does not apply when the

defendant receives a life sentence.
53. Trial counsel failed to object to the court's sentence and failed to move for reconsideration of the sentence before another judge when the Court justified the life sentence based in part on decedent's unlawful firing of a handgun and high-speed chase of Applicant and codefendants.
54. All allegations raised in prior pleadings are incorporated by reference.

Ineffective assistance of appellate counsel:

1. Appellate counsel failed to raise and argue the preserved issue of excluding Applicant's prior bad act under Rules 404, 403, and 401 of allegedly attempting to rob another person on the night of the present incident.
2. Appellate counsel provided ineffective assistance in the event trial counsel properly preserved other meritorious issues.
3. All allegations raised by Applicant are incorporated by reference as if fully set forth verbatim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the records before it, including the records of the Chester County Clerk of Court regarding the underlying convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the records from this PCR action. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony. After a careful review based on the Strickland standard set forth below, this Court finds Applicant's five-year sentence for possession of a weapon during the commission of a violent crime should be vacated. This Court further finds Applicant has failed to carry his burden of proof on the remaining claims and therefore denies relief. Below are this Court's findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code.

Ineffective Assistance of Counsel

A PCR applicant bears the burden of proving the allegations. Butler v. State, 286 S.C. 441,

334 S.E.2d 813 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland w. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, court apply the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, an attorney's performance is measured by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690).

"Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. Importantly, the court must evaluate counsel's decision at the time it was made and with a presumption that it fell within prevailing professional norms. See id. ("Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or 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. A fair assessment of attorney performance requires that 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.").

"Moreover, **the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance in the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.**" Strickland, 466 U.S. at 689 (emphasis added). "**[R]easonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law.**" Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (emphasis added). "Fundamentally, a collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances. This is especially true in a retrospective PCR analysis under Strickland, which seeks to determine whether counsel was ineffective at the time of the alleged error." Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019).

In addition to deficiency, a PCR applicant must prove that 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.

Immunity Hearing

Applicant alleges trial counsel was ineffective for not requesting finding of facts and conclusions of law for the elements of self-defense from the pretrial immunity hearing. This Court finds Applicant has failed to meet his burden of proof on this claim.

The General Assembly enacted the Protection of People and Property Act (the Act[3]) to codify the common law Castle Doctrine. State v. Curry, 406 S.C. 364, 372, 752 S.E.2d 263, 267 (2013). "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense

[3] S.C. Code Ann. § 16-11-410 to -450.

must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266. "This includes all elements of self-defense, save the duty to retreat." Id. Upon motion, immunity under the Act must be decided before trial. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011).

During the PCR hearing, trial counsel testified his strategy was self-defense. He testified he did not expect to win the immunity hearing; rather, he used the hearing to lay the groundwork for self-defense. Counsel explained the immunity hearing allowed him to obtain locked-in testimony from State witnesses. When asked why he did not request specific findings of facts and conclusions of law at that hearing, counsel testified the law in effect at that time did not require the judge to make such findings. He recalled Curry but was not aware of any caselaw at the time of Applicant's immunity hearing that required judges to make specific findings of fact and conclusions of law at an immunity hearing.

This Court finds Applicant has not overcome the presumption that counsel's actions fell within prevailing professional norms. See Strickland, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."). Nothing in the plain language of the Act requires courts to articulate findings of facts and conclusions of law when determining immunity. See §§ 16-11-410 to -450; c.f. State v. Duncan, 392 S.C. 404, 409, 709 S.E.2d 662, 664 (2011) ("[T]he Act does not explicitly provide a procedure for determining immunity."). At the time of Applicant's immunity hearing and trial, caselaw regarding the Act was evolving. Although Curry was decided prior to Applicant's trial, Curry did not require trial courts to explicitly set forth specific findings of facts and conclusions of law; it merely required trial courts

to consider self-defense when considering immunity under the Act. See Curry, 406 S.C. at 371, 752 S.E.2d at 266 ("[T]he trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity.").

More recently, our appellate courts have held that trial courts must set forth specific findings of facts and conclusions of law at immunity hearings. See State v. Cervantes-Pavon, 426 S.C. 442, 452 n. 4, 827 S.E.2d 564, 569 n.4 (2019) ("While the Act does not require a written order upon an immunity determination, specific findings of fact and conclusions of law are critical to reviewing courts, particularly given the gravity of the circumstances these cases necessarily involve."); State v. Glenn, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019) ("While we understand that written orders are not always practical given the timing of the immunity hearing, the circuit court, in announcing its ruling, should at least make specific findings on the elements on the record."); State v. McCarty, 437 S.C. 355, 374, 878 S.E.2d 902, 912 (2022) ("We emphasize that a circuit court, as the designated fact-finder in this matter, must provide adequate findings to support its decision so an appellate court can perform its role of reviewing the ruling under an abuse of discretion standard."); State v. Chhith-Berry, 437 S.C. 527, 543, 878 S.E.2d 352, 360 (Ct. App. 2022) ("[T]he [trial] court, in announcing its ruling, should at least make specific findings on the elements on the record." (second alteration in original) (quoting Glenn, 429 S.C. at 123, 838 S.E.2d at 499)).

Importantly, however, this court is not aware of any case prior to 2019 requiring the trial court to set forth specific findings at an immunity hearing. Due to the evolution in this area of law and the fact attorneys are not required to anticipate changes in the law, this Court finds Applicant has not overcome the presumption that counsel acted within prevailing professional norms at the time his June 2016 trial. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016)

("We have never required an attorney to be clairvoyant or anticipate changes in the law. . . ."); c.f id. ("[R]reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law."). Thus, Applicant has not shown deficiency.

Likewise, this Court finds it is not reasonably likely the outcome would have been different had counsel objected and asked the trial court to make specific findings of facts and conclusion of law. Consistent with Curry, counsel argued at the pretrial hearing that the court had to consider self-defense when deciding immunity. (R. 96-97). Further, the court *did* find that Applicant did not present sufficient evidence at the pretrial hearing for the court to find Applicant was in imminent danger or a position that he thought his life was going to be taken. (R. 139). Based on this finding this Court finds it is not reasonably likely the trial court would have changed its ruling if it had been asked to make specific findings of fact and conclusions of law related to self-defense. Likewise, this Court finds it is not reasonably likely the appellate courts would have reversed this issue on appeal had counsel requested more specific findings of fact and conclusion of law. Thus, Applicant has not proved prejudice, and this claim is denied.

Batson Challenge

Applicant next alleges trial counsel was ineffective for not raising a Batson challenge when the State (1) used its strikes without explanation as to race or gender and (2) raised a Batson challenge against trial counsel. This Court finds Applicant did not show counsel was ineffective.

At the PCR hearing, trial counsel testified he did not raise a Batson challenge because he liked the jury that was selected. Although he believed he had a legitimate Batson issue, he ultimately believed he had a good jury and thus did not raise it. This Court finds the foregoing testimony to be **credible**. This Court further finds counsel articulated a valid reason for not raising a Batson challenge and thus was not deficient. Further, Applicant did not set forth what Batson

challenge he believed should have been raised, other than generically asserting counsel should have raised one. Thus, Applicant has not shown deficiency. For the same reason, Applicant has not shown prejudice—i.e., that a Batson claim would be successful. See Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) (providing a PCR applicant bears the burden of proving the allegations); cf. State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 91 (1999) ("The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike."); Juniper v. Zook, 117 F. Supp. 3d 780, 792 (E.D. Va. 2015) (holding a PCR applicant raising a Batson issue "must show that, but for his trial counsel's ineffectiveness in failing to make certain arguments . . . the trial court would have found the prosecutor in violation of Batson"). Thus, this claim is denied.

Impeachment – Stevie Breland

Applicant next contends trial counsel was ineffective for not attempting to impeach Stevie Breland with three prior convictions for check fraud. He avers those convictions were admissible under Rule 609, SCRE, and were not subject to the time limitations of the rule.

Trial counsel testified Breland's prior convictions were remote. He explained Rule 609 does not allow for the introduction of every crime of dishonesty, and he would have had to file a pretrial motion to introduce a crime older than ten years. Trial counsel testified the judge would then apply Rule 403, SCRE, to determine whether to admit the crimes for impeachment. Ultimately, counsel testified he did not believe Breland's prior convictions would be admissible. He stated he chose to impeach Breland by focusing on his pending charges.

This Court finds counsel articulated a valid reason for not seeking to impeach Breland with remote charges. Although Rule 609 allows impeachment using remote charges, it requires advance written notice, a fair opportunity to contest the use of the evidence, and a 403 balancing analysis. See Rule 609(b), SCRE ("Evidence of a conviction under this rule is not admissible if a period of

more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."). This Court finds counsel's decision to focus on other methods of impeaching Breland—including by using recent charges—did not fall below prevailing professional norms, and Applicant did not prove deficiency.

Likewise, Applicant did not prove prejudice. At the PCR hearing, Applicant did not offer evidence of Breland's prior convictions—including when they were incurred, leaving this Court to speculate as to whether any effort to introduce them convictions to impeach Breland with those convictions would have been successful. Further, counsel *did* impeach Breland with his recent charge; thus, it is not reasonably likely the outcome would have been different had counsel also attempted to impeach Breland with more remote convictions. (Tr. 594). Counsel also impeached Breland by insinuating Breland made a statement implicating Applicant after Breland's bond was denied, in the hopes of obtaining a benefit from the State. (Tr. 594-95, 599-601). Based on the foregoing, this claim is denied.

Failed to object - Truth-seeking language

Applicant argues trial counsel was ineffective for not objecting to the trial court's improper opening comments to the jury that "the end result of any case is to reach a verdict, it's a Latin derivative word which means *search for the truth* or true saying." This Court finds Applicant has not met his burden of proof in this regard.

At the PCR hearing, trial counsel testified he did not find this language objectionable. Regardless of whether counsel was deficient for not objecting,[4] this Court finds it is not reasonably likely an objection would have changed the outcome of trial. Importantly, during the jury charge, the trial court properly instructed the jury on the presumption of innocence, the State's burden of proof, and reasonable doubt, and these charges did not include any truth-seeking language. (Tr. 771-73). Thus, it is not reasonably likely these pre-trial comments shifted the burden of proof and made the jury believe Applicant had to disprove the State's case.

In reaching this conclusion, this Court is guided by State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). In Aleksey, our supreme court found that although the truth-seek language was not appropriate, it did not shift the burden of proof when it was not given in conjunction with the charge on the State's burden of proof. See Aleksey, 343 S.C. at 28-29, 538 S.E.2d at 252-53 ("There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court's instructions concerning seeking the truth were given in the context of the jury's role in determining the credibility of witnesses. The remarks were prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof." (footnote omitted)). Although the court here used truth-seeking language in its charge on witness credibility, under Aleksey, such language did not shift the burden of proof because it was not given in conjunction with the court's charge on reasonable doubt, the State's burden of proof, or the

[4] Our supreme court recently acknowledged that "the general sessions benchbook [our supreme court] previously supplied to all circuit judges contained language virtually identical to the disputed language employed by the trial judge"—that a trial is a "search for the truth" and a jury must determine the "true facts" and render a "just verdict. State v. Beaty, 423 S.C. 26, 34 n.2, 813 S.E.2d 502, 506 n.2 (2018). Thus, it appears this charge may have been in the benchbook. But see State v. Daniel, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) ("[W]e instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt.").

presumption of innocence. (Tr. 771-73, 783). To prevail on an ineffective assistance of counsel claim, Applicant must show *both* deficiency and prejudice. Under Aleksey, it is not reasonably likely the outcome of this trial would have been different had counsel objected to this language. Cf. State v. Beatty, 423 S.C. 26, 32-34, 813 S.E.2d 502, 505-06 (2018) (finding defendant not prejudiced by court's pretrial comments that a trial is a search for the truth and the jury's role is to render true and just verdict and determine true facts when these comments "were a mere statement to the jury and not a charge on the law" and "the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges"). Thus, Applicant has not shown prejudice.

Failed to object - State's opening statement

Applicant avers trial counsel was ineffective for not objecting to the State's opening statement, "This is a very, very important trial for the victim's family who are here in the courtroom today some of whom you will hear from." He contends this was impermissible argument that inflamed the jurors' passions and prejudices and invited the jury to make a decision on an improper basis. This Court finds Applicant has not met his burden of proof in this regard.

"As a general rule, inflammatory remarks which are calculated to appeal to the passions or prejudices of a jury should be affirmatively condemned." State v. Bennett, 369 S.C. 219, 231, 632 S.E.2d 281, 288 (2006) "[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made." Id.

Near the conclusion of its opening statement at trial, the solicitor stated,

> I ask that you pay very close attention, and I know you will, to all of the testimony that comes from that witness stand and all of the evidence that we've put in here. I know this is a very important trial for the defendant, it is a very, very important trial for the State, and it's a very, very important trial for that victim's family who are here in the courtroom today some of whom you will hear from. .

(Tr. 63). At the PCR hearing, trial counsel testified he did not believe this language reached the level of improperly inflaming the passions and prejudices of the jury and did not find it objectionable. He further testified he would not object to something he did not find objectionable.

This Court finds **credible** counsel's testimony that he did not object because he did not believe the language reached the level of improperly inflaming the passions and prejudices of the jury. This Court further finds counsel articulated a valid basis for not objecting in that he did not consider the language objectionable. When viewed in context, the State's opening argument did not single out the victims in any way or inflame the juror's passions and prejudices. This Court finds there was no valid basis to object, and Applicant has not met his burden of proving deficiency. Cf. Bennet, 369 S.C. at 231, 632 S.E.2d at 288 (finding solicitor's reference to "blond lady" and "King Kong" did not improperly inflame the passions or prejudices of the jury); contra Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010) (finding counsel ineffective for not objecting to solicitor's description of petitioner as a "domestic terrorist" and solicitor's refence to the events of September 11, 2001, in a trial involving a Muslim defendant). For the same reason, it is not reasonably likely any objection would have changed the outcome of trial, and Applicant has not proved prejudice. Thus, this claim is denied.

Failed to Object – Lieutenant Cummings testimony

Applicant contends trial counsel was ineffective for not objecting and moving to strike the State reading directly from Lieutenant Kyle Cummings' incident report. He asserts the document was not in evidence, and the prosecutor was trying to refresh the officer's recollection. This Court finds Applicant has not met his burden of proof in this regard.

During Lieutenant Cummings' direct examination, the following exchange occurred:

Q Okay. Do you remember what time the call came to you and

what time you responded?
A I don't remember the exact time it came in, it was early at night.
. . . .
Q I'm going to show you this document. Do you know what this is?
A This is the incident report that I typed up.
Q All right. Looking at that, can you tell exactly what time you got a call and what time you responded?
A Yes, ma'am. I was dispatched at 20:19 hours, which is 8:19 p.m., I arrived on scene at 8:20, or 20:20 hours.

(Tr. 76-77, emphasis added). At the PCR hearing, counsel testified he did not see any reason to object. He explained he was not pursuing alibi, so the time Lieutenant Cummings responded did not matter. Counsel also explained he weighs the pros and cons of objecting and does not object every time something is objectionable. He clarified there is an art to objecting, and he does not want to over-object and annoy the jury.

This Court finds Applicant has not overcome the presumption that counsel acted within prevailing professional norms. Initially, this Court finds counsel's foregoing testimony **credible**. This Court agrees with counsel that there was no basis to object. Here, the witness was properly using his report to refresh his recollection of the time he was dispatched. Likewise, this Court agrees with counsel's assessment that the foregoing was not damaging because he was not pursuing alibi. Based on the foregoing, counsel articulated a valid reason for not objecting and thus was not deficient.

Likewise, Applicant has not shown prejudice. Because there was no valid, legal basis to object, it is not reasonably likely any objection would have been sustained. Further—and critically—Applicant was not raising an alibi defense. Thus, any testimony about the time Lieutenant Cummins responded to the incident did not have any impact on Applicant's defense, and it is not reasonably likely the outcome of this trial would have been different had counsel objected to this testimony. Thus, this claim is denied.

Failed to Object – Leading

Applicant contends trial counsel was ineffective for not objecting when the prosecutor made leading statements regarding the testimony of Louise Williams. This Court finds Applicant has not met his burden of proof in this regard.

At trial, the following exchange occurred during Aiken's testimony:

> Q And you are the daughter of Odell Williams and Annie Williams?
> A Yes.
> Q And you heard her testimony just now, right?
> A Yes.
> Q And were you the person who was driving the car when you guys left to go to Wal-Mart?
> A Yes
> Q And your daughter, Ashley, was in the car with you; is that right?
> A Yes.
> . . . .
> Q Okay. And you heard—when you—you heard your mom's testimony. Did you see the truck parked on the street as you guys were leaving to go to Wal-Mart?
> A It was not parked on the street, it was parked on my property.

(Tr. 102). At the PCR hearing, counsel testified, "I didn't think it was detrimental to the case. I don't mind objecting but I probably won't stand up at every single moment."

This Court finds counsel articulated a valid reason for not objecting in that the foregoing was not detrimental to his case. Pertinently, the foregoing did not make it any more or less likely that Applicant was engaged in self-defense when the shooting occurred. Although a few of these questions were leading, counsel articulated a valid reason for not objecting and thus was not deficient. Further, this Court finds it is not reasonably likely the outcome would have been different had counsel objected. This testimony, which was largely cumulative to Williams's testimony, did not make it any more or less likely that Applicant was acting in self-defense. Applicant himself admitted to firing at the victim's car; the only issue in this case—as counsel repeatedly testified at the PCR hearing—was *why* Applicant fired the gun. (Tr. 686). Even if

counsel had objected and managed to exclude the foregoing, it is not reasonably likely the outcome of this trial would have been different. Thus, Applicant has not shown prejudice.

Failed to Object – Louise Williams' hearsay testimony[5]

Applicant asserts trial counsel was ineffective for failing to object and move to strike hearsay statements during Louise Williams' direct examination. This Court finds Applicant has not met his burden of proof in this regard.

At trial, the following exchange occurred during Williams' testimony:

> A And someone called my granddaughter, Ashely, on her phone and **told her that they heard Odell got shot.**
> Q What did you do? What did you do?
> A Well, I had to console my daughter, Elaina, and Ashley both, I had to hold them together. And then we left out of Wal-Mart and got in her car, and by that time somebody was calling, but then I thought to call a policeman I knew. Because when the call came in to us that he had got shot, **she said that he was in Rock Hill** and, you know, I'm not thinking then, and **the granddaughter said she know he hadn't got to Rock Hill that quick.** But anyway, that's what—when we got the word that's what she said.

(Tr. 92, emphasis added).[6] At the PCR hearing, counsel acknowledged the testimony contained hearsay but stated, "What am I gaining by making that objection? That's not what convicted [Applicant]."

Although the foregoing may have contained hearsay, this Court agrees with counsel's assessment that this testimony was not the basis of Applicant's conviction. It was undisputed at trial—even by Applicant—that the victim was shot. Further, testimony that the victim was in Rock Hill and speculation as to whether the victim made it to Rock Hill so quickly was not damaging to

[5] This section addresses allegations raised in 8 and 9 as enumerated above.
[6] Although Applicant's amended application references hearsay testimony by Williams's daughter, this Court finds that was a scrivener's error. This Court has not found any hearsay testimony during William's testimony about what her daughter said; rather, the hearsay testimony referred to what Williams's granddaughter said. Further, this is the portion of the transcript that Applicant questioned counsel about during the PCR hearing.

Applicant's strategy of self-defense. This Court agrees with counsel's assessment that he would gain nothing by objecting here and finds Applicant did not prove that counsel's failure to object fell below prevailing professional norms. Thus, Applicant did not prove deficiency. For the same reason—that the foregoing was not damaging to Applicant's strategy of self-defense—this Court finds Applicant has not shown it is reasonably likely the outcome would have been different had counsel objected. Thus, Applicant has not shown prejudice, and this claim is denied.

Failed to object – Lana Aiken's hearsay testimony

Applicant contends counsel was ineffective for not objecting and moving to strike hearsay statements made by Lana Aiken regarding what the victim previously told her. Specifically, he avers counsel should have objected to the following: "[The victim] always told us to call him, it's also his property so he would like to know things that are going on on his property. He's an ex-police officer so he would know if we needed to call the police or not." (Tr. 103). This Court finds Applicant has not met his burden of proof in this regard.

When questioned at the PCR hearing about why he did not object to this testimony, trial counsel stated this testimony was helpful to his strategy of self-defense. Specifically, it benefited his self-defense strategy that the victim never called the police.

This Court finds counsel's foregoing testimony **credible** and agrees with counsel's assessment that the foregoing was helpful to his strategy of self-defense. At trial, counsel attempted to show the victim chased Applicant and the co-defendants in their car while shooting at them. During the foregoing testimony, Williams was questioned about why she called the victim rather than the police when she saw a suspicious vehicle on the street. William's response made it more likely—not less likely—that Applicant acted in self-defense by suggesting that the victim was taking matters into his own hands rather than calling the police. Thus, this Court agrees it was

helpful to the overall defense strategy and finds counsel articulated a valid reason for not objecting. Based on the foregoing, Applicant has not shown deficiency. Likewise, for the same reason, this Court finds it is not reasonably likely the outcome would have been different had counsel objected. Thus, Applicant has not shown prejudice, and this claim is denied.

Sequestration[7]

Applicant contends trial counsel was ineffective for failing to move to sequester witnesses. He contends the State asked Aiken and Williams if they heard the testimony of prior witnesses and followed up by having one story confirm the other. This Court finds Applicant has failed to meet his burden of proof in this regard.

During the PCR hearing, trial counsel explained Fairfield County had a small courthouse, and when witnesses were sequestered, "[a]ll they're going to do is talk about the case amongst themselves." He explained he'd rather have them in the audience at trial so that he could then argue to the jury that their testimony was based on them being in the audience and listening to other witnesses. Trial counsel agreed he could ask the judge to instruct them not to discuss the case during sequestration, but he believed it was unlikely that they wouldn't discuss it. He testified his general practice was not to request sequestration.

This Court finds counsel's foregoing testimony **credible**. Additionally, this Court finds counsel articulated a valid reason for not requesting sequestration and was not deficient. Different lawyers may employ different strategies and still be within the realm of effectiveness. See Strickland, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."). Importantly, this Court must evaluate counsel's decision at the time it was made and with

[7] This section addresses allegation 10.

a presumption that it fell within prevailing professional norms. See id. ("Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or 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. A fair assessment of attorney performance requires that 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."). This Court finds counsel articulated a valid and sound reason for not requesting sequestration and thus was not deficient.

Likewise, Applicant has not shown a reasonably likelihood the outcome would have been different had counsel requested sequestration. At the PCR hearing, Applicant pointed to the testimony by Akin in response to questions about whether she heard her mother's testimony.[8] However, this testimony did not make it any more or less likely that Applicant was acting in self-defense and thus was not damaging to his strategy. Applicant has not shown it is reasonably likely the outcome of this trial would have been different with sequestration. Thus, he has not shown prejudice, and this claim is denied.

Failed to Object – Exhibits 3 and 4[9]

Applicant contends trial counsel was ineffective for not objecting to States's Exhibit 3 (a video recording of the car chase on a home security camera) and Exhibit 4 (a map of the route purportedly taken during the car chase). He contends the State failed to lay a proper foundation for these exhibits. This Court finds Applicant has not met his burden of proof in this regard.

At the PCR hearing, counsel testified he believed the video was helpful to his strategy of

[8] This was the same exchange discussed above in the section entitled *Failed to Object – Leading.*
[9] This section addresses allegations 11 and 13.

self-defense because it showed the victim chasing Applicant and his codefendants. He stated, "Nobody was driving slow. It looked like they were trying to get away and he was trying to chase them." Likewise, counsel averred the map was useful because it showed the "long and circuitous path" the cars took. He explained he wanted the jury to see the path because it supported his theory that the victim caused the problem.

This Court finds counsel's foregoing testimony **credible**. This Court further finds counsel articulated a valid reason for not objecting to the video and the map and thus was not deficient. This Court agrees with counsel that the video of the car chase and the map of the route supported Applicant's overall trial strategy of self-defense by showing the victim pursued Applicant and his codefendants prior to the shooting. In fact, counsel referenced the map during closing argument. (Tr. 733, 735). Thus, Applicant has not shown deficiency. Likewise, Applicant has not shown prejudice. Applicant did not enter the map or the video into evidence at the PCR, leaving this Court to speculate about how damaging they were. Cf. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) ("[T]o support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Based on counsel's testimony about what these exhibits depicted, this Court finds it is not reasonably likely the outcome would have been different had counsel moved to exclude these exhibits—especially when they supported his theory of self-defense. Thus, Applicant has failed to prove this claim, and it is denied.

Failed to object – Pitting and Leading[10]

Applicant avers trial counsel was ineffective for failing to object to pitting and leading during the prosecutor's direct examination of Cornell Johnson. In support, Applicant points to the following question by the solicitor: "[Y]ou heard [Rafael Jackson's] testimony just now, right? . . . And were in the car with him—you heard his testimony just now, right?" This Court finds Applicant has failed to meet his burden of proof in this regard.

At the beginning of Johnson's testimony, the following exchange occurred:

> Q And you were in the car with [Jackson]—you heard his testimony just now, right?
> A Yes, ma'am.
> Q And were you in the car with him leaving the barbershop, going to his house that night?
> A Yes ma'am.

(Tr. 162). At the PCR hearing, counsel testified the foregoing testimony was not damaging to his strategy of self-defense because they were not arguing Applicant was not there. He further testified he does not object every time something is objectionable but rather weighs the pros and cons of objecting when deciding whether to object.

This Court finds the foregoing testimony by counsel **credible**. This Court further finds counsel articulated a valid reason for not objecting in that the testimony itself was not damaging to his strategy of self-defense. Here, Johnson was merely corroborating Jackson's testimony that Applicant was in the area of the shooting. However, the State had other overwhelming evidence placing Applicant in the area, including Lashonda Wray's testimony that she picked Applicant up from the area (Tr. 169-703); Jennifer Clayton's testimony that Applicant's DNA matched the DNA of blood recovered from Wray's vehicle (Tr. 169, 360); Clayton's testimony that Applicant's DNA matched the DNA of blood recovered from a fence in the area near the shooting (Tr. 362);

[10] This section addresses allegation 12.

Clayton's testimony that Applicant's DNA matched the DNA of blood recovered from Jackson's vehicle (Tr. 151, 360-61); and the codefendants' testimony placing Applicant in the area (Tr. 446-78, 497-27, 542-73). In fact, Applicant admitted to being in the area and firing at the victim. (Tr. 671-98). Overall, Johnson's testimony merely placing Applicant in the area was not damaging to Applicant's strategy of self-defense. Thus, counsel articulated a valid reason for not objecting, and Applicant has not shown deficiency. For the same reason, this Court finds there is not a reasonably likelihood the outcome would have been different had counsel objected. Thus, Applicant has not shown prejudice, and this claim is denied.

Failed to object – note from Stevie Breland[11]

Applicant contends trial counsel was ineffective for failing to object and move to strike testimony about a note allegedly written by Stevie Breland. He contends the State did not lay a proper foundation for the note. Specifically, he avers (1) Investigator Randy St. Clair did not receive the note directly from Breland and allegedly received it from Captain Odem at the jail with the assumption Odem received it from Breland, (2) the State directly referred to the note in its questioning, (3) the witness said he advised the Solicitor's Office that Breland wanted to speak with someone about Applicant's case, and (4) trial counsel told the Court, "I don't think I have any standing to object to Mr. Breland's note. I object to Mr. Breland, but will do that at the appropriate time." This Court finds Applicant has not met his burden of proof in this regard.

During trial, Investigator St. Clair testified Captain Odom gave him a note that Captain Odom had received from Breland. He stated he "advised the solicitor's office of inmate Breland wishing to speak with someone concerning the case of Christopher Moore." (Tr. 215). During this testimony, the note was marked as State's Exhibit 91; however, it was not entered into

[11] This section addresses allegation 14.

evidence during Investigator St. Clair's testimony.[12] During Breland's testimony, Breland identified the note as one he gave to an officer asking to speak with someone. (Tr. 588-99). Thereafter, the State entered the note into evidence. (Tr. 592).

During the PCR hearing, trial counsel testified the note from Breland was simply a note asking to speak to the prosecutor. He averred any objection to the note was not a reason to exclude Breland from testifying and would not have had any consequence to what occurred.

This Court finds the foregoing testimony from counsel regarding this note **credible**. This Court further finds counsel articulated a valid reason in not objecting to the note itself in that doing so would not have been a basis to exclude Breland's testimony. Ultimately, Breland testified under oath and was subject to cross-examination. This Court finds counsel articulated a valid reason for not objecting to the reference to the note—especially when, as counsel testified, it was merely a request by Breland to speak to the prosecutor. Thus, Applicant has not shown deficiency.

Further, Applicant has not shown prejudice. Notably, Applicant did not enter the note into evidence, leaving this Court to speculate as to how prejudicial the note in and of itself actually was. Cf. Glover, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) ("[T]o support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Assuming, as counsel credibly testified, the note was merely a request by Breland to speak to the solicitor, this Court finds it is not reasonably likely any reference to the note itself changed the outcome of trial. Thus, Applicant has not shown prejudice.

[12] Counsel had previously informed the Court, "I don't think I have any standing to object to Mr. Breland's note. I object to Mr. Breland but I will do that at the appropriate time." (Tr. 211).

Failed to object – testimony about a court order for a buccal swab[13]

Applicant asserts trial counsel was ineffective for not objecting under Due Process to the State's question about whether a DNA buccal swab of the Applicant was taken pursuant to a court order. He contends such testimony regarding prior orders and rulings of the court against the defendant effectively lowered the State's burden of proof. Applicant has not proved this claim.

During trial, the State questioned Randy St. Clair about a buccal swab he took from Applicant. The State asked, "Was that a result of a court hearing?" St. Clair replied, "Yes, sir." When asked at the PCR hearing why he did not object to this mention of a court order, counsel replied, "I think it's a lot better than explaining a Schmerber [hearing]. I don't think it's worth the fight and I like to fight those things."[14] He explained it was better to leave it at the investigation got permission to get the swab instead of going into all the procedure of how to get a buccal swab.

Initially, this Court finds Applicant has not shown counsel's failure to object here fell below prevailing professional norms. This Court finds counsel's foregoing testimony is **credible** and counsel articulated a valid reason for not objecting to this passing mention of a court order. Additionally, this Court finds this passing mention of a court order did not rise to the level of a due process violation, and Applicant did not prove deficiency.

Further, Applicant has not shown prejudice. It is not reasonably likely that this passing reference to a court order for a buccal swab changed the outcome of this trial or lowered the State's burden of proof to the jury. During the jury charge, the trial court properly instructed the jury that the State's burden of proof was beyond a reasonable doubt. (Tr. 771-73). Because the jury was properly instructed on the burden of proof, this Court finds this passing statement did not lower the State's burden of proof. Thus, it is not reasonably likely the outcome would have been different

[13] This section addresses allegation 15.
[14] The Court held a pretrial Schmerber hearing. (ROA 1-15).

had counsel objected to this statement, and Applicant has not shown prejudice.

Failed to object – references to "assault rifle"[15]

Applicant contends trial counsel was ineffective for not objecting to references to an assault rifle during Agent Melinda Worley's and codefendant Buchanan's testimony. He points to Agent Worley's testimony describing cartridges she found as "assault rifle type cartridges" and Buchanan's testimony that Applicant had an assault rifle. Applicant asserts the trial court had previously ruled in favor of the defense and prohibited the mention of "assault rifle," which he contends was prejudicial terminology. This Court finds Applicant has not proved this claim.

During Agent Worley's testimony, she testified that as she was collecting evidence from the crime scene, she found "an assault rifle type cartridge case here in the road." (Tr. 247). During Buchanan's testimony, he stated Applicant had "an assault rifle" on the evening of the murder. (Tr. 452). Counsel did not object to either statement.

At the PCR hearing, counsel stated he did not object when Agent Worley mentioned assault cartridges because he did not want to draw more attention to it and he believed it was splitting hairs. Regarding Buchannan's statement, counsel likewise testified he did not object because he did not want to draw further attention to it. He also stated the gun was in evidence, and "the first thing that pops in your head is that's an assault rifle." Counsel testified, "I wish I could have kept the casings out. I wish he had a smaller gun but we get what we get."

This Court finds **credible** the foregoing testimony by counsel, including testimony that the gun itself looked like an assault rifle. This Court further finds counsel articulated a valid reason for not objecting in that he didn't want to draw further attention to this testimony, he weighed the pros and cons of objecting, and the gun itself actually looked like an assault rifle. Overall, this

[15] This section addresses allegations 16 and 27.

Court finds Applicant has not shown counsel was deficient in this regard.

Likewise, Applicant has not shown prejudice. Because this gun—which counsel described as an assault weapon—was in evidence and before the jury, it is not reasonably likely the outcome would have been different had counsel objected to these passing references of "assault rifle type cartridge" and "assault rifle." Based on counsel and Applicant's description of the gun, it is not reasonably likely the outcome would have been different had counsel objected to these passing references to "assault rifle type cartridge" and "assault rifle." Thus, Applicant has not shown prejudice, and this claim is denied.

Failed to Object –Agent Worley[16]

Applicant contends trial counsel was ineffective for failing to object and move to strike portions of Agent Worley's testimony that he contends was expert testimony when Agent Worley was not qualified as an expert. Specifically, he contends counsel should have objected to Agent Worley's testimony about dowel rods, ballistics expertise, and firearms expertise. He further contends counsel was ineffective for eliciting testimony during Agent Worley's cross-examination confirming the bullet trajectory of shots in the victim's car. This Court finds Applicant has not met his burden of proof in this regard.

During trial, Agent Worley testified she collected evidence from the crime scene, including fired cartridge casings. She explained investigators use dowel rods to determine a bullet's path. Agent Worley testified she found six bullet defects on the side of the victim's car and placed two dowel rods through them. She did not place dowel rods in all the defects because a rod required at least two defects to pass through to show the path of the bullet. (Tr. 256-57).

On cross-examination, counsel asked, "What does putting the dowel in there tell you?"

[16] This section addresses allegations 17, 18, 19, and 20.

(Tr. 280). Agent Worley replied, "[T]he path of the bullet basically, where it came from and where it was going to." Later, the following exchange occurred:

> Q What makes you think it's a suspected bullet defect?
> A It shows kind of the direction of a bullet striking a flat surface.
> Q And which direction was that bullet traveling?
> A It appears to be traveling towards the rear of the vehicle.

(Tr. 282). On redirect, the State asked Agent Worley to explain the difference between a projectile and a shell casing. She replied, "The projectile is the actual bullet that comes through the gun. A cartridge case or casing is the part that ejects from the gun out the side of the gun as the gun is shot." (Tr. 285-86). The following exchange then occurred:

> Q But if it was a revolver such as State's 18, which I believe we identified as the gun that came out of the Cadillac—that's the revolver, correct?
> A Right
> Q And the difference between that and something like State's 19—is that an automatic?
> A Yes.
> Q Okay. And the revolver, do the shell casings come out of the gun and hit the ground?
> A No, ma'am.
> Q Do they remain in the gun in the revolving part of it?
> A They do.
> Q But the projectiles does come out; is that correct?
> A Yes
> Q But in an automatic such as this and this, the shell casings would come out and fall on to the ground?
> A That's right.
> Q But the projectiles all come out the same way for all of them.
> A Right.

(Tr. 285-86). At the PCR hearing, counsel testified that had he objected, the State likely would have moved to qualify Agent Worley as an expert, which would not have helped his case. He explained, "They are trained to do this. But it doesn't take an expert to stick a stick in a hole. But they always testify to their training. I didn't want to stop the hearing to have an in-camera hearing to qualify her as an expert." Counsel clarified he was familiar with Agent Worley, and she had

been qualified as an expert in other cases—including the most recent case he had with her. He further explained he did not believe an objection here would have kept out this testimony.

This Court finds **credible** counsel's foregoing testimony, including the testimony that Agent Worley has been qualified as an expert in other cases he's had with her. This Court further finds counsel articulated a valid reason for not objecting to Agent Worley's testimony in that doing so may have led to the State qualifying her as an expert, and it was not likely any objection would have led to this testimony being excluded. Thus, Applicant has failed to prove deficiency.

Likewise, Applicant has not proved prejudice because it is not reasonably likely any objection here would have changed the outcome of trial. Pertinently, placing a dowel rod between two holes to determine the path of a bullet is a relatively simple concept that would not be difficult for the average juror to understand. Further, to the extent Agent Worley gave testimony regarding the general type of bullets that different types of guns can fire, such testimony was general in nature and did not involve examining casings for microscopic markings or testifying that a specific gun fired a specific cartridge. Additionally, the State *did* call a firearms expert who testified that a revolver does not eject cartridges and identified several cartridges from the scene as being fired by the rifle (State's Ex. 12). (Tr. 392-94, 407-10). Finally, the aforementioned testimony regarding dowel rods, the direction of a bullet on the victim's car, the difference between a cartridge and a projectile, and the fact that cartridges remain in revolvers but exit automatic weapons did not undermine Applicant's strategy of self-defense—especially when Applicant himself admitted to firing the rifle (which was in evidence before the jury) at the victim's car. This Court further finds it is not reasonably likely the aforementioned testimony changed the outcome of trial. Thus, Applicant has not shown prejudice.

Failed to object – Agent Burke[17]

Applicant contends trial counsel was ineffective for failing to object and move to strike testimony of Agent Brittany Burk regarding ballistics expertise when she was not qualified as an expert. This Court finds Applicant has not proved this claim.

During her testimony, Agent Burke testified,

> A projectile is actually the bullet part of the cartridge It's what when you fire a gun comes out of the barrel and travels a distance, it's actually what most people refer to as the bullet or the cartridge. The cartridge case is the part that the bullet comes out of, that ejects out of the side of the gun.

(Tr. 292). Additionally, when asked about a cartridge case she found at the scene, she indicated it was a .40 caliber cartridge case. (Tr. 293). During the PCR hearing, counsel was asked why he did not object to this testimony as expert testimony. He replied, "That is her training. They would have proffered her and qualified her as an expert, as we all know that threshold is very very low."

This Court finds the foregoing testimony by counsel **credible**. Additionally, this Court finds counsel articulated a valid reason for not objecting here in that he believed the State would have been able to qualify Agent Burke as an expert based on her training. Finally, based on counsel's overall stated strategy of weighing the pros and cons of objecting and not objecting to things that are not damaging, this Court finds counsel articulated a valid reason for not objecting. Thus, Applicant has not shown deficiency.

Additionally, it is not reasonably likely the outcome would have been different had counsel objected. Even if counsel had been able to exclude Agent Burke from testifying about the difference between a cartridge and a projectile as well as the type of cartridge casing she found, such testimony would have been admissible through Dan Defreese, who was qualified as a firearms

[17] This section addresses allegation 21.

expert. (Tr. 392). Further, given Applicant's overall strategy of self-defense, it is not reasonably likely that the foregoing testimony about the difference in a projectile and a cartridge case or that the casing Agent Burke found was a .40 caliber changed the outcome of this trial. Ultimately, Defreese—a firearms expert—testified he conducted testing and matched several of the casings to the rifle Applicant was using. (Tr. 410). Overall, it is not reasonably likely Agent Burke's testimony changed the outcome of this trial, and Applicant thus has not shown prejudice.

Failed to object – Admission of expert reports[18]

Applicant asserts trial counsel was ineffective for failing to object to the admission of a latent print report (State's Ex. 68), a SLED DNA report (State's Ex. 77), an autopsy report (State's Ex. 82), and a SLED firearm report (State's Ex. 76). He acknowledges that in each of these instances, the examiner testified to its contents but avers each report inherently contained opinion material. This Court finds Applicant has failed to meet his burden of proof in this regard.

Initially, Applicant did not specify *what* objection he believed should have been made to these reports other than they contained opinion testimony. However, in each case, the witness who prepared the report was qualified as an expert, laid a foundation for the report, and was subject to cross-examination. (Tr. 330, 338-39, 357, 359, 383, 384, 392, 421-22). This Court finds any objection to the reports on the basis they contained opinion testimony would have been overruled because experts are permitted to testify to their opinion. See Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."). Applicant did not set forth a valid, legal objection to the reports and thus did not prove deficiency. Likewise,

[18] This section addresses allegation 22, 24, 25, and 26.

Applicant did not show a reasonably probability that the outcome would have been different had counsel objected, especially here when Applicant never denied shooting at the victim but rather claimed self-defense. Thus, Applicant did not show prejudice.

Failed to object – Admission of supplemental report[19]

Applicant contends trial counsel was ineffective for not objecting to object to the admission of a supplemental report (State's Ex. 69) from a SLED agent who didn't testify at trial. He further contends the report was from a law enforcement agency and inherently contained opinion material. This Court finds Applicant has failed to meet his burden of proof in this regard.

At the PCR hearing, counsel testified he did not object to the supplemental report because it indicated they did not find any prints, which did not affect his case. Ultimately, he did not object because he did not believe the evidence was damaging.

This Court finds the foregoing testimony **credible**. This Court further finds counsel's reason for not objecting—that the report itself was not damaging—was reasonable under prevailing professional norms. Specifically, Agent Tiffany Hezel testified that Exhibit 69 was a supplemental latent print report prepared by Special Agent Meres; however, Agent Hezel testified that Agent Meres did not "recover[] any latent prints of value for additional comparison from that evidence." (Tr. 341). Although investigators recovered Applicant's fingerprint from Binnall's truck, that fingerprint was separately analyzed by Agent Hezel and introduced as Exhibit 68—not Exhibit 69.[20] (Tr. 333-39). This Court finds counsel's basis for not objecting here to be reasonable under prevailing professional norms; thus, Applicant did not prove counsel was deficient. Further, because the report itself was not damaging, Applicant has not shown prejudice.

[19] This section addresses allegation 23.

[20] Agent Hezel—who was qualified as an expert in latent print analysis—testified she completed a technical review of Agent Mere's work and independently reviewed it. (Tr. 330-31, 333-34).

Failed to strike/move for curative instruction – gang testimony[21]

Applicant contends trial counsel was ineffective for failing to move to strike and for a curative instruction the testimony of Terrance Buchanan that Applicant and the other codefendants were going to a rival gang member's house the night of the incident. He avers the court had previously ruled against such prejudicial language and sustained trial counsel's objection to this testimony at trial. This Court finds Applicant has failed to meet his burden of proof in this regard.

Initially, counsel *did* object to this testimony. (Tr. 453-55). Counsel's objection prompted an *in camera* discussion where the solicitor indicated she had instructed Buchannan not to make that reference, and the trial court admonished Buchannan not to "do one more thing like that to try to cause a mistrial." (Tr. 454). At the PCR hearing, counsel testified he did not move to strike or request a curative instruction because he did not want to draw more attention to the comment. He further testified he did not request a curative instruction because he did not want to waive any objection for appellate purposes.

This Court finds counsel articulated a valid reason for not moving to strike the testimony or moving for a curative instruction in that doing so could effectively bring more attention to the reference. Thus, Applicant did not prove deficiency. Likewise, this Court finds it is not reasonably likely the outcome of this trial would be different had counsel moved to strike the testimony or moved for a curative instruction. Thus, Applicant did not prove prejudice.

Failed to object –Buchanan's prior statement[22]

Applicant contends trial counsel was ineffective for failing to object and move to strike the State's impermissible use of codefendant Buchanan's statement to police when the prosecutor had Buchanan read verbatim from his previous statement, the statement was not in evidence, and the

[21] This section addresses allegation 28.
[22] This section addresses allegation 29.

foundation was not laid for admission pursuant to Rule 613(b), SCRE. This Court finds Applicant has failed to meet his burden of proof in this regard.

At the PCR hearing, Buchanan testified Applicant said, "Let me out," and then "kind of fell out of the truck." (Tr. 470). He stated McClinton pulled away and they heard a gunshot. (Tr. 470). Buchanan testified he did not hear any more gunshots thereafter. (Tr. 472). Thereafter, the State elicited the following statements that Buchanan made to law enforcement:

> I didn't look back and we went around the—and Quinton stopped and the rest of us continued to Roundtree Circle. I looked back towards where the shooting was coming from.
> . . . .
> . . . I don't believe [Applicant] attempted to fire the first shot, it was fired because he fell out of the truck. I didn't look back, we went around the curve where I couldn't see back toward where the shooting was coming from. As we were getting into the curve I heard more fire, about seven shots, I believe those shots were coming from the SKS rifle . . . .
> . . . .
> . . . [Applicant] fired several shots at the Cadillac, I think he shot at least seven times. The rest of us were still in the truck and kept going on down Roundtree.

(Tr. 493-94). At the PCR hearing, counsel testified he did not object to this testimony because it was not damaging to his strategy of self-defense. He recalled the codefendants' statements generally supported his theory of self-defense in that they all indicated the victim was chasing them, they were trying to get away, and the victim was shooting at them.

This Court finds counsel articulated a valid reason for not objecting and thus was not deficient. Specifically, Buchanan's statement, "I don't believe [Applicant] attempted to fire the first shot, it was fired because he fell out of the truck," was beneficial to and supported Applicant's theory of self-defense. Thus, Applicant has not shown deficiency.

Further, this Court finds it is not reasonably likely the outcome would have been different had counsel objected. The statements elicited by the State that Applicant fell out of the vehicle

and his gun fired was consistent with Buchanan's direct testimony. (Tr. 470). Once Buchanan testified that he did not hear any more shots, the State could introduce his prior statement to police for impeachment. (Tr. 472). See Rule 613(b), SCRE ("Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible."). Further, Buchanan's statement that Applicant fired several shots at the Cadillac was consistent with Applicant's testimony that he shot at the Cadillac "a bunch" of times. (Tr. 685-86). The primary issue in this trial was not *whether* Applicant shot the victim but *why*. Thus, this Court finds it is not reasonably likely the outcome would have been different had counsel objected to these statements, and Applicant did not prove prejudice.

Failed to object – hearsay in Derrick Dixon's statement[23]

Applicant contends trial counsel was ineffective for failing to object pursuant to hearsay and the confrontation clause and move to strike statements purportedly made by other codefendants embedded in Derrick Dixon's written statement to police that the prosecutor read verbatim on direct examination of Dixon. This Court finds Applicant has not proved this claim.

During Dixon's direct examination, the following exchange occurred:

> Q I'm going to go back to the statement that you gave. We'll refer to page two. Do you remember telling, "The driver of the Cadillac was flashing his lights and he said"—hang on a second. "The only person in the truck who knew the driver of the Cadillac was Buchanan, he told the driver of the Cadillac it's a man who used to coach him in football. I did not know the man." Did Buchanan tell you he was on police stuff?

[23] This section addresses allegation 30.

A Yes, ma'am.
Q Was he referring to the driver of the Cadillac when he said that?
A Yes, ma'am

(Tr. 556). At the PCR hearing, trial counsel was asked why he did not object to this testimony. Counsel agreed the statement contained hearsay and a confrontation issue but averred it supported his theory of self-defense. Specifically, he questioned why a police officer would pursue the vehicle rather than calling someone for help.

This Court finds counsel articulated a valid reason for not objecting to the forgoing testimony in that it was not damaging to his theory of self-defense. Specifically, testimony that the victim was a police officer who chose to pursue the vehicle rather than call police supported a theory that the victim was taking matters into his own hands—further bolstering Applicant's claim of self-defense. As counsel explained, during jury trials he weighs the pros and cons of an objection before making one. Here, where the testimony was not damaging to his overall strategy of self-defense, this Court finds counsel's decision not to object did not fall outside prevailing professional norms. Thus, counsel was not deficient. Further, it is not reasonably likely the outcome would have been different had counsel objected. Even if counsel had objected and this testimony had been stricken, it is not reasonably likely this testimony—that Buchanan said the victim was a police officer—changed the outcome. Thus, Applicant has not shown prejudice.

Failed to object –Breland "expert" testimony[24]

Applicant contends trial counsel was ineffective for failing to object and move to strike various portions of Stevie Breland's testimony that were tantamount to expert opinion as a crime scene reconstructionist, a firearms expert, and a ballistics expert. He avers Breland was never qualified as an expert, and the testimony directly attacked the theory of self-defense. Applicant

[24] This section addresses allegations 31, 32, 33, and 34.

also contends counsel was ineffective for failing to object when the State elicited opinion testimony from Breland regarding whether the defendant's theory of events was believable, asserting this was improper opinion by a lay witness that invaded the jury's providence.

During Breland's testimony, the following exchange occurred:

> Q . . . What did [Applicant] tell you?
> A He was saying at a point of time that he was being chased by the councilman. And one of the photos showed that they turned on a street where it was a very sharp left turn, and [Applicant] said that the gun had dropped on the ground, that he got out to retrieve the gun, and he said that when he got out they pulled off and they left him, and then as he was running across the street he said that he hold the gun up and was shooting over his left shoulder. And at the time when I said, "Well, Chris, I'm about 5-10 and a half and you are about 6-3, about 6-4, usually I stand when I stand up to my car and my car catches me about the top of my chest, so if you were shooting at your shoulder length you should have shot over the councilman's car and it shouldn't have hit it." But he said he was running and shooting at the same time.
> Q Did you do any military service or anything in your background?
> A Marine Corps.
> Q Have you ever seen a gun like . . . State's Exhibit 12 . . . ?
> A Similar to that, yes, ma'am.
> Q Did you and [Applicant] have any conversations about what kind of gun he was talking about shooting over his shoulder?
> A No, ma'am. We didn't talk about the type of gun he had but it was a semiautomatic. And it was a semiautomatic and I told him, "If you were shooting over your shoulder and normally a M16 or AK usually it would deafen your ear." And one of the motion of discovery all of the shells—he said he fired 17 times, but he stated that he was running and shooting over his shoulder. Well, on the motion of discovery it should have been some shells in the same direction that he was traveling and shooting, because guns of this particular kind eject the bullets out on the right side. So there wasn't—on the motion of discovery investigators said there wasn't no shells as he was traveling like he said he was.
> Q So did you kind of call him out on that?
> A Well, I told him, I said, "well, Chris, you know, I mean, it seems like according to what's on the paper that you turned and fired, it didn't seem like you were running and shooting." Because the evidence kind of state that because 17 shells are in one place—and normally when you fire this type of weapon if you move slightly to your left, but that's what one of the motions says is there's a lot of

cases in one spot, but then it slightly move from right to left, so that means that he was firing and aiming and moving at the same time.
Q Have you ever shot a gun like that?
A Similar to that, M16, AK.
Q Under what circumstances were you firing a gun like that?
A A military—type of gun like that is made for military, it's not made for hunting rabbits or squirrels or deers.
Q So when you shot that gun you had done it in a military setting?
A Yes, ma'am.
Q When you said that to him and were talking about the way that the cartridges had been ejected from that gun, what did he say to you?
A He just stated that, you know, he was firing at him because he said the councilman was firing at him, and he said he fired six times and he said that he could hear the bullets coming by. I asked Chris I said, "Did the investigators get any shells out of the councilman's car?" because if he fired six times it's kind of impossible for him to reload and drive trying to chase someone, because normally you're driving at a speed of maybe about 45 to 50, 55 to 60 miles an hour, you've got the wheel with one hand and pop the revolver and load with the other.

(Tr. 585-87). On cross-examination, the following exchange occurred:

Q What was your job in the Marines?
A Start out truck driver M-35, then I went to brunt.
Q So you were a truck driver in the Marines.
A Yes, sir.
Q Okay. I missed the part, Mr. Breland, when you became qualified as an expert in ballistics.
A I never said I was an expert in ballistics. I compared the type of weapon that I shot in the Marine Corps.
Q And you talked about where shell casings should have landed if someone is standing in one direction, wouldn't that be your opinion?
[Solicitor]: Objection, Your Honor. [Trial counsel] should have—if he wanted Mr. Breland not to have testified to that he should have objected when I was directing him, there was no objection made to that. Mr. Breland was not qualified as an expert, he was just testifying based on his knowledge and his experience as a member of the military.
The Court: I'm going to have to overrule you on that. I'll give you the opportunity to cross examine him on that, but that doesn't mean we're going to get into an argument now.

(Tr. 596-97).

At the PCR hearing, counsel testified his strategy with Breland was to attack his credibility as a jailhouse snitch seeking to obtain a favor by testifying for the State. Counsel sought to introduce evidence that after Breland spoke to investigators about Applicant's case, he was moved from Chester to Charleston, near his family. However, the trial court would not allow evidence about where Breland was located. (Tr. 595-96). Counsel testified this interfered with his strategy of attacking Breland's credibility by asserting he was moved near his family in exchange for his testimony. However, counsel attacked Breland's credibility by asserting he received a benefit in exchange for his testimony. (Tr. 599-601, 743).

When questioned about why he didn't challenge Breland's testimony as expert testimony, counsel replied, "I don't know if you have to be an expert to know this story doesn't make any sense." He further averred Breland may have had some knowledge of firearms from his experience in the Marines. Counsel testified he viewed Breland's testimony as his personal opinion and stated he was not as concerned with this specific testimony as he was other things about Breland. He testified Breland had just had bond denied, which he testified about at trial. (Tr. 593-94, 599-601). Counsel averred, "Then he gets back to jail, and [Applicant] spills his guts. I don't think [Applicant] would ever have talked to him. But [Breland] magically after this gets moved down to Charleston where he's from. And I wanted to bring that in but wasn't allowed to."

When asked why he didn't object based on lack of expertise to Breland's testimony that it was impossible for the victim to reload while driving, counsel responded, "I think it's just his personal opinion. His personal opinion was not the issue here. Even if it gets stricken then it doesn't change anything. I wanted to say 'you're a jail house snitch, you're trying to get a benefit and you got that benefit so there."

This Court finds counsel's foregoing testimony is **credible** and counsel articulated a valid

reason for not objecting to any "expert" testimony in that (1) he didn't believe a person needed to be an expert to know Applicant's story about shooting over his shoulder didn't make sense, (2) he believed this was more of Breland's personal opinion rather than expert testimony, and (3) he was more focused on other aspects of Breland's testimony, including attempting to impeach him by showing he received a benefit in exchange for his testimony. Likewise, counsel articulated a valid reason for not objecting to Breland's testimony that Applicant's story was not believable in that he believed this was more of Breland's personal opinion rather than expert testimony, and he was more focused on other aspects of Breland's testimony, including attempting to impeach him by showing he received a benefit in exchange for his testimony Counsel's general strategy of weighing the pros and cons of objecting was reasonable, and under such a strategy, it was reasonable for counsel to not object to the foregoing—especially when his primary strategy for Breland was to impeach him by trying to show he received a benefit in exchange for his testimony. Because counsel articulated a valid reason for not objecting, Applicant did not prove deficiency.

Finally, it is not reasonably likely the outcome of this trial would have been different had counsel objected based on lack of expertise. Breland's testimony regarding ballistics and firearms expertise was essentially that cartridge casings from the rifle would eject to the right. It is not reasonably this testimony changed the outcome of trial. Thus, Applicant has not shown prejudice.

Failed to strike/request curative instruction—bruising testimony[25]

Applicant also contends trial counsel was ineffective for failing to move to strike and move for a curative instruction to Breland's testimony regarding bruising when counsel objected he was not an expert and the court sustained the objection. Applicant has not proved this claim.

During Breland's redirect, the following exchange occurred:

A Well, you know a truck that's moving and he said he fell out, he

[25] This section addresses allegation 35.

> did say—I said, "Chris, you should have some bruises or something on your arm."—
>
> [Trial counsel]: Your Honor, I object. He's not been qualified as an expert in bruising.
>
> [Solicitor]: And that's fine, I'll clear it up.

(Tr. 603-04).

This Court finds Applicant has not shown counsel was deficient for not moving to strike and moving for a curative instruction as to the bruising testimony. Counsel *did* object to this testimony; at the PCR hearing he testified he primarily objected because he got tired of hearing Breland speak—not because he found the testimony to be critically damaging to their theory of self-defense. Overall, this Court finds counsel's failure to move to strike or request a curative instruction here did not fall below prevailing professional norms. Likewise, this Court finds it is not reasonably likely the outcome of trial would have been different had the foregoing testimony been stricken. Thus, Applicant has not shown prejudice, and this claim is denied.

Failed to object—Breland hearsay testimony[26]

Applicant contends trial counsel was ineffective for failing to object and move to strike Breland's testimony where he repeatedly testified to the contents of Applicant's discovery. He avers this constituted hearsay within hearsay and directly attacked the theory of self-defense. This Court finds Applicant has not proved this claim.

When asked why he did not object to Breland's references to Applicant's discovery, counsel replied, "I thought it was better fodder for cross exam. I have a witness saying that my client went and bared his soul to him when really, I think they may have both watched the news featuring this case and he wants to say he became some father figure. So I was going to attack his

[26] This section addresses allegation 36.

credibility."[27] Counsel articulated a valid reason for not objecting on the basis of hearsay in that his primary strategy with Breland was to attach his credibility, and he believed it would be better to attack this testimony through cross-examination rather than through a hearsay objection. Because counsel had a valid, strategic reason for not objecting, Applicant did not prove deficiency.

Likewise, this Court finds it is not reasonably likely the outcome would have been different had counsel raised a hearsay objection here. Breland's testimony about Applicant's discovery involved testimony that (1) "one of the photos showed that they turned on a street where it was a very sharp left turn" and (2) the shell casings were located in one spot rather than spread out. This Court finds it is not reasonably likely the outcome would have been different had counsel objected to Breland's testimony that a photo "showed that they turned on a street where it was a very sharp left turn"—especially when Applicant's primary strategy was they were being chased by the victim (who was firing at them) and he fired in self-defense. Likewise, any testimony about where the casings were located would have been cumulative to photographs of the casings from the scene and a diagram of where they were located that was entered into evidence by the State. (Tr. 258, 265-68, 296-304). Based on the foregoing, it is not reasonably likely the outcome would have been different had counsel objected to this testimony, and Applicant has not shown prejudice.

Failed to object – Breland testimony about Applicant[28]

Applicant contends trial counsel was ineffective for failing to object pursuant to Rule 404(b), 402, and 401 and move to strike Breland's testimony that Applicant had not changed his ways for God, Applicant fought smaller inmates in jail to move to another cell block with a codefendant, and Applicant could have killed that man because he picked him up and slammed

[27] The testimony Applicant pointed to at the PCR hearing was the same testimony set forth in the section entitled *Failed to object –Breland "expert" testimony.*
[28] This section addresses allegation 37.

him by the face. This Court finds Applicant has not proved this claim.

When questioned about the foregoing testimony, counsel testified,

> At some point I mean it's obvious that [Breland] is going to far, and the jury can see that he is just making stuff up. So, I just want him to say everything he wants to say, beat him up on cross. I don't think he was credible and that showed. Just let him put it all out there and let the jury decide because if you look at his whole statement as a whole it isn't credible.

This Court finds counsel articulated a valid reason for not objecting in that (1) he did not find Breland's testimony credible and did not believe the jury found it credible, and (2) he was more focused on other aspects of Breland's testimony, including impeaching him by showing he received a benefit in exchange for his testimony. Further, counsel's general strategy of weighing the pros and cons of objecting was reasonable, and under such a strategy, it was reasonable for counsel to not object to the foregoing—especially when his primary strategy for Breland was to impeach him by trying to show he received a benefit in exchange for his testimony, and counsel believed this testimony in and of itself was not believable. Because counsel articulated a valid reason for not objecting, Applicant did not prove deficiency. Likewise, and for the same reason, this Court finds it is not reasonably likely the outcome of this trial would have been different had counsel objected and moved to strike this testimony. Thus, Applicant has not shown prejudice.

Failed to request jury instruction regarding Breland[29]

Applicant contends trial counsel was ineffective for failing to have the court instruct the jury that Breland was moved to another facility when the trial court and prosecutor only sought to ensure the actual location was not revealed, and counsel needed such evidence in the record to argue to the jury that Breland received a benefit. He contends counsel's failure to request such an

[29] This section addresses allegation 38.

instruction made his closing argument ineffective because it was not based upon evidence before the jury, and argument by counsel is not evidence. Applicant has not proved this claim.

This Court finds counsel articulated a valid reason for not requesting a jury instruction regarding Breland in that his primary objective—to show Breland testified favorably for the State so he could be moved closer to his family—was thwarted when the court would not allow evidence about where Breland was located. Further, counsel *did* argue that Breland received a benefit in exchange for his testimony by being moved to another facility. (Tr. 743). To the extent Applicant contends counsel was ineffective for arguing evidence that was not before the jury, this Court finds such contention without merit when the State did not object to this argument. Ultimately, counsel *was* able to make this argument. Thus, Applicant has not shown deficiency. Likewise, it is not reasonably likely the outcome would have been different had counsel requested a charge that Breland was moved to another facility, especially when counsel argued that to the jury without objection. (Tr. 743). Thus, Applicant did not prove prejudice.

Failed to object to testimony that Applicant was charged with murder[30]

Applicant contends trial counsel was ineffective for failing to object to the State eliciting testimony from Investigator Christopher Reynolds that Applicant was charged in a warrant for murder, that murder requires the intentional killing of someone with malice aforethought, and a Magistrate had to agree police had probable cause to get the warrant when such testimony violated due process and South Carolina case law by lowering the State's burden by inviting the jury to rely on previous decisions of officials regarding the facts and law. This Court finds Applicant has failed to meet his burden of proof in this regard.

During Investigator Reynolds' testimony, he testified he served Applicant a warrant. (Tr.

[30] This section addresses allegation 39.

614). He explained Detective St. Clair signed the warrant, so another officer had to serve it. (Tr. 614-15). Investigator Reynolds stated he read the information from the warrant when serving it and informed Applicant he was being charged with murder. (Tr. 614-15). On cross-examination, the following exchange occurred,

> Q The warrant charges [Applicant] with murder.
> A That's correct.
> Q Murder requires the intentional killing of someone with malice aforethought; is that correct?
> A That's correct.
> Q To get that warrant you've got to get a magistrate to agree that you have probable cause, correct?
> A That' correct.
> Q In the interview you tell [Applicant], "We know ya'll didn't mean to do that."
> A That's correct.
> Q Were you being truthful with him when you told him that?
> A That's part of the procedure that we use, kind of a tactic . . . .

(Tr. 1682). At the PCR hearing, counsel was questioned about the foregoing cross-examination. He explained he was attempting to attack Investigator Reynolds' credibility by insinuating Investigator Reynolds was lying to Applicant during the interview and not being straight with him. Counsel also explained his strategy was not to deny that Applicant shot the victim but rather to explain *why* it happened (i.e. self-defense). Finally, counsel testified the court properly charged the jury on the burden of proof.

This Court finds counsel articulated a valid strategy for this line of questioning and was not deficient. Additionally, Applicant failed to show what objection counsel should have made during direct examination to exclude Investigator Reynolds' testimony that he served a murder warrant on Applicant. Thus, Applicant did not prove deficiency. Additionally, it is not reasonably likely the outcome would have been different without the foregoing testimony. Applicant was indicted for murder, so clearly the jury knew he had been charged with murder. Further, the trial

court properly instructed the jury on the burden of proof, and it is not reasonably likely the foregoing testimony lowered the burden of proof. (Tr. 771-73). Cf. Aleksey, 343 S.C. at 28-29, 538 S.E.2d at 252-53 ("There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court's instructions concerning seeking the truth were given in the context of the jury's role in determining the credibility of witnesses. The remarks were prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof."). Thus, Applicant did not prove prejudice.

Failed to object – Agent Blackmon[31]

Applicant contends trial counsel was ineffective for failing to object and move to strike testimony by Agent Lee Blackmon when the State elicited opinion testimony about automobiles and Blackmon acknowledged he was not an expert. This Court finds Applicant has not met his burden of proof in this regard.

Agent Blackmon testified,

> When I arrived that night you could see a pool of fluid in the roadway shortly after you turned off Parkway onto Roundtree Circle. I'm not an automobile expert, but I leaned over and what I first observed it and gave the appearance of being radiator fluid. I leaned over and smelled it, it smelled like antifreeze. I stuck my finger in there and rubbed it together and it felt like antifreeze that was there in the roadway.

(Tr. 642-43). Counsel did not object. At the PCR hearing, counsel testified he did not believe a person needed to be qualified as an expert to testify the fluid appeared to be antifreeze. He further testified the testimony was not damaging to his strategy of self-defense—especially when Applicant acknowledged shooting at the car.

[31] This section addresses allegation 40.

This Court finds counsel articulated a valid reason for not objecting in that the foregoing was not damaging to his strategy of self-defense—especially when Applicant acknowledged he shot at the car. (Tr. 686). Thus, Applicant has not shown counsel was deficient. Likewise, it is not reasonably likely any objection here would have changed the outcome of the trial, especially when Applicant acknowledged shooting at the vehicle and police recovered several fired cartridges in the area where the vehicle was shot. Ultimately, the critical issue was whether Applicant was acting in self-defense; the presence of antifreeze in the road does not make it any more or less likely that Applicant was acting in self-defense. Thus, Applicant did not prove prejudice.

Failed to object – Cell phone data[32]

Applicant contends trial counsel was ineffective for failing to object and move to strike testimony by Investigator Blackmon regarding cell phone data when Investigator Blackmon was not the expert who collected or interpreted the data Applicant did not prove this claim.

At the PCR hearing, counsel **credibly** testified he did not object to cell phone testimony because he wanted to show that 911 was never called—even by the victim. This Court finds counsel articulated a valid reason for not objecting to the cell phone data testimony in that he *wanted* evidence that showed the victim did not call 911. This Court finds such evidence supported counsel's overall strategy that the victim was chasing Applicant, and Applicant fired at him in self-defense. This strategy was reasonable based on the evidence. Because counsel had a valid, strategic reason for not objecting, Applicant did not prove he was deficient in this regard.

Likewise, it is not reasonably likely the outcome would have been different had counsel objected to this testimony. This was not a case where the State used cell phone data to link Applicant to the area where the crime occurred; it was undisputed—even from Applicant's

[32] This section addresses allegation 41.

different had counsel *not* made this argument. It is likely the State would have painted Applicant and his codefendants as "bad guys doing bad things" even if counsel had *not* made this argument. Ultimately, counsel had to confront the reality that the demeanor of the witnesses and the rifle supported that inference. Thus, it is not reasonably likely the outcome would have been different had counsel *not* made this argument, and Applicant has not shown prejudice.

Failed to object – State's closing argument[34]

Applicant contends trial counsel was ineffective for failing to object to portions of the State's closing argument that were not supported by facts in evidence. He asserts evidence did not support the following: (1) "For all [the victim] knew all of his possessions, or most of them or some of them or whatever, valuable things that he had worked his whole life to get were in the back of that truck and they were leaving and he was tired of being violated, so he went to see what was going one."; (2) "I would submit to you what happened is he fires two shows out the window of his car, warning shots to get them to stop."; and (3) the solicitor's speculative conversation between codefendants during the car chase. Applicant has not proved this claim.

"A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence

[34] This section addresses allegations 43, 44, and 45.

testimony—that he was the shooter. The *only* issue for the jury was whether Applicant fired in self-defense. Investigator Blackmon's only testimony about the data recovered from the cell phones was that no one—*including the victim*—called 911. (Tr. 646). Ultimately, testimony that the victim did not call 911 supported Applicant's strategy of self-defense. It is not reasonably likely the outcome would have been different had counsel objected here, and this claim is denied.

Counsel's closing argument[33]

Applicant contends trial counsel was ineffective for arguing during closing argument, "These bad guys out to do bad things were scared." He avers this denigrated Applicant and joined him with his codefendants as a bad guy doing bad things. Applicant has not proved this claim.

At the PCR hearing, trial counsel testified that he was attempting to tell the jury that just because the State wanted to paint Applicant and his codefendants as bad guys did not mean Applicant should be convicted of murder. He explained that based on the demeanor of the witnesses and the rifle that was entered into evidence, the jury was likely going to conclude Applicant and his codefendants were gang-affiliated. He questioned, "How do you overcome that? I have to say that even if you don't like what he does, he still deserves fairness and if someone is shooting at you then you can shoot back."

This Court finds counsel's foregoing testimony **credible** and counsel articulated a valid reason for this argument. Counsel's goal was not to denigrate Applicant; it was to explain to the jury that even if they believed Applicant was a "bad guy," they still had to give him the benefit of innocence and require the State to prove its case beyond a reasonable doubt. This strategy is apparent from counsel's closing argument and reasonable in light of the evidence. Thus, Applicant has not shown deficiency. Likewise, it is not reasonably likely the outcome would have been

[33] This section addresses allegation 42.

of the defendant's guilt." Id. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Id. "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

At the PCR hearing, counsel testified he did not believe the foregoing was objectionable. He explained the solicitor is permitted to put her spin on the evidence during closing argument, which is what she was doing here. This Court finds counsel's foregoing testimony is **credible** and counsel articulated a valid reason for not objecting in that the foregoing was not objectionable. Solicitors are permitted to argue reasonable inferences from the evidence, and the foregoing statements by the solicitor were reasonable inferences based on the evidence. See Vasquez, 388 S.C. at 458, 698 S.E.2d at 566 ("A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony."). This Court agrees this argument did not rise to the level of warranting an objection; thus, counsel was not deficient.

Additionally, Applicant has not shown prejudice. Because the foregoing argument contained reasonable inferences from the evidence, it is not reasonably likely any objection would have been sustained. This Court also finds that none of these comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process.". See Vasquez, 388 S.C. at 458, 698 S.E.2d at 566 ("The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."). Applicant has not shown a reasonable probability the outcome would be different had counsel objected to these comments and thus has not shown prejudice.

Failed to object – State closing[35]

Applicant contents trial counsel was ineffective for failing to object and move for a mistrial when the solicitor argued, "The defense's job is to confuse you and to believe the defendant's lies. Don't fall for it. We come seeking the truth and we come seeking justice for Odell Williams, but we also come seeking justice for his family."

At the PCR hearing, counsel stated the law changed after this trial, and although lawyers are no longer permitted to use truth-seeking language, that was not the case at the time of the trial.

Initially, Applicant has not provided any law at the time of Applicant's trial that prohibited attorneys from arguing truth-seeking language during closing argument. Although Aleksey and Daniel found such language improper by courts, they did not prohibit attorneys from making such arguments. See Aleksey, 343 S.C. at 27, 538 S.E.2d at 251 ("[W]e have urged trial courts to avoid using any 'seek language when charging jurors on either reasonable doubt or circumstantial evidence . . . . (emphasis added)); State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) ("[W]e instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties." (emphasis added)); cf. Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("[T]he PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law."). Ultimately, in PCR, the applicant bears the burden of proving his allegations. Here, he has not proven deficiency.

Further, it is not reasonably likely Applicant's conviction would have been reversed based

[35] This section addresses allegation 46.

on the solicitor's truth-seeking language. Cf Aleksey, 343 S.C. at 28-29, 538 S.E.2d at 252-53 (finding trial court's truth-seeking language did not shift the burden of proof when it was not given in conjunction with the charge on the State's burden of proof); Beatty, 423 S.C. at 32-34, 813 S.E.2d at 505-06 (finding defendant not prejudiced by court's pretrial comments that a trial is a search for the truth and the jury's role is to render true and just verdict and determine true facts when these comments "were a mere statement to the jury and not a charge on the law" and "the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges"). Finally, although the solicitor's comments regarding "defense counsel" was not appropriate, this Court finds this passing reference did not so infect the trial with unfairness such as to constitute a due process violation. Thus, Applicant has not proven counsel ineffective in this regard.

Failed to object – jury instruction[36]

Applicant asserts trial counsel was ineffective for failing to object to a jury instruction as a comment on the facts when the trial court read a list of items considered deadly weapons that included firearms and automatic rifles, and when the deadly weapon utilized in the present case is a firearm—specifically a semi-automatic rifle. Applicant did not prove this claim.

During its charge on possession of a weapon during the commission of a violent crime, the trial court instructed the jury, "As used in section 16-23-490 of the South Carolina Code, a firearm is described as any machine gun, automatic rifle, revolver, pistol, or any weapon which will or is designed to or may be readily converted to expel a projectile." At the PCR hearing, counsel testified he did not object to this language because this charge was an older form of the charge that was typical of this judge, and as of the time of Applicant's trial there had never been a problem with this language. This Court finds counsel articulated a valid reason for not objecting in that

[36] This section addresses allegation 47.

this was a common charge at the time of trial. Notably, effectiveness under the Sixth Amendment does not require an attorney to make novel arguments or advance changes in law; it merely requires an attorney to act within prevailing professional norms. See Teamer, 416 S.C. at 183, 786 S.E.2d at 115 ("[T]he PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law."); Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019) ("Fundamentally, a collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances. This is especially true in a retrospective PCR analysis under Strickland, which seeks to determine whether counsel was ineffective at the time of the alleged error."). Counsel's failure to object to this language at the time of Applicant's trial did not fall outside prevailing professional norms, and Applicant did not prove deficiency.

Further, it is not reasonably likely the outcome would have been different had counsel objected to this language and removed it from the jury's consideration. Notably, this rifle, which was described by counsel as a large assault-looking weapon, was before the jury during trial. Based on counsel's description of the rifle, which this Court finds **credible**, the issue of whether this was a deadly weapon was not a primary issue. In other words, it is not reasonably likely the jury would have concluded the rifle was *not* a deadly weapon but for this language. Further—and critically—this instruction was given as part of the charge on the possession of a weapon during a violent crime charge, not as part of the charge on murder. Thus, it is not reasonably likely this charge had any bearing on the jury's consideration of whether Applicant committed murder. Based on the foregoing, Applicant has not shown prejudice.

Jury instruction – self-defense[37]

Applicant contends trial counsel was ineffective for failing to seek a jury instruction under the theory of self-defense that a person has no duty to retreat if doing so would increase the danger to himself. He likewise contends counsel was ineffective for failing to seek a jury instruction that a person does not have to wait for an assailant to "get the drop on him" and may "act on appearances," especially when the defense theory was Applicant acted on the appearances of the decedent chasing him down with a car and handgun. Applicant has not proved this claim.

At the PCR hearing, counsel testified he sought law on basic self-defense. He explained he had previously gotten a trial court to charge that a defendant did not have a duty to retreat, but that charge was ultimately overruled by the South Carolina Supreme Court. See Curry, 406 S.C. at 373, 752 S.E.2d at 267. Regarding his failure to request a change about the defendant's right to act on appearances, counsel testified he did not believe the victim was lying in wait and thus a charge related to that did not really apply to the facts of this case.

This Court finds counsel articulated a valid reason for not requesting a charge that defendant had no duty to retreat because such a charge is not proper under the law. In Curry, our supreme court found it was error for the trial court to charge the jury provisions of the Immunity Act. Curry, 406 S.C. at 373, 752 S.E.2d at 267 ("[T]he trial court had denied Appellant immunity, and section 16-11-440(C) should not have been charged to the jury."). Shortly after Curry, the Court of Appeals found that the Act is a procedural provision that "does not contain any substantive provisions of law"; thus, it "is not relevant to the work of a jury." State v. Marin, 404 S.C. 615, 625, 745 S.E.2d 148, 154 (Ct. App. 2013). Because it is not proper to charge the Act to the jury,

[37] This section addresses allegations 48 and 49.

counsel was not deficient for not requesting this charge.[38] For the same reason—that such a charge would be reversible error—Applicant has not shown a reasonable probability the outcome would be different had counsel requested this charge.

Likewise, counsel articulated a valid reason for not requesting a charge that a person does not have to wait for an assailant to get the drop on him. Applicant's theory was the victim was chasing their vehicle and shooting at it. This was not a situation where Applicant fired the first shot; rather, the evidence showed the victim had been chasing and shooting at the vehicle Applicant was in before Applicant got out of the car. This court agrees with counsel's assessment that such a charge did not really fit the facts here and was not critical to the jury's determination. Thus, counsel was not deficient. For the same reason, Applicant has not shown prejudice.

Finally, the trial court properly instructed the jury that a defendant can act on appearances. (Tr. 781-82). Specifically, the court charged,

> Let me speak to you about a right to act on appearances. The defendant does not have to show that he was actually in danger. It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. The defendant has the right to act on appearances even though the defendant's belief may have been mistaken.

(Tr. 781). When considered as a whole, the court's self-defense charge constituted a proper charge, and counsel's failure to object did not fall outside prevailing professional norms. Likewise, this Court finds it is not reasonably likely the outcome would have been different had counsel objected

[38] Such a charge also would have been improper under the common law castle doctrine, which provides a person does not have a duty to retreat *from his home.* See State v. Glenn, 429 S.C. 108, 117, 838 S.E.2d 491, 495 (2019) ("Under the Castle Doctrine, [o]ne attacked, without fault on his part, *on his own premises*, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense." (alteration in original) (emphasis added) (internal quotation marks and citation omitted)); id. ("The Act codified the common law Castle Doctrine *and extended its reach.*" (emphasis added)); S.C. Code Ann. § 16-11-420(A) (2015) ("It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and *to extend the doctrine to include an occupied vehicle* and the person's place of business" (emphasis added)).

to the charge or requested additional instructions. Thus, this claim is denied.

Jury instruction – Logan charge[39]

Applicant contends trial counsel was ineffective for failing to seek a jury instruction regarding direct and circumstantial evidence pursuant to State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). He contends such an instruction was appropriate because the majority of the State's evidence attempted to disprove self-defense and show malice, and was circumstantial in nature. This Court finds Applicant has failed to meet his burden of proof in this regard.

In Logan, our supreme court endorsed the following charge (the Logan charge):

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Logan, 405 S.C. 83, 99, 747 S.E.2d at 452. At the PCR hearing, counsel testified he did not request a Logan charge because the State's case was not based only on circumstantial evidence. He further stated he was not disputing that Applicant was there, and he did not believe a Logan charge would have affected the outcome.

[39] This section addresses allegation 50.

This Court agrees with counsel's foregoing testimony and finds Applicant failed to prove deficiency in this regard. Notably, the jury was presented with *direct* evidence that Applicant shot at the victim—including Applicant's own testimony. This is not a situation where the State relied only on circumstantial evidence. This Court agrees with counsel that because this case did not rely on circumstantial evidence, a Logan charge was not necessary. Thus, counsel's decision to not request it did not fall below prevailing professional norms. Likewise, it is not reasonably likely this charge would have changed the outcome of trial; thus, Applicant did not prove prejudice.

Jury instruction – expert witness testimony[40]

Applicant asserts trial counsel was ineffective for failing to seek a jury instruction regarding expert witness testimony. This Court finds Applicant has failed to meet his burden of proof in this regard.

At trial, the expert witness testimony consisted of a fingerprint expert who testified Applicant's fingerprint was recovered from Binnell's truck (Tr. 333-39); a GSR expert who testified the victim had GSR on his hand (Tr. 348, 351-527); a DNA expert who testified (1) Applicant's DNA matched the DNA of blood recovered from Wray's vehicle, Jackson's vehicle, and a fence in the area of the shooting, and (2) Applicant's DNA could not be excluded from a mixture of DNA found on the rifle (Tr. 356-62); a pathologist who testified to the victims' cause of death; and a firearms expert who testified casing from the scene matched the rifle. (Tr. 410). At the PCR hearing, counsel explained he did not generally like "pointing at a specific witness like 'oh, you're that pers we said was really smart, well just give them the regular treatment."

This Court finds Applicant did not prove counsel's failure to request a charge on expert testimony fell outside prevailing professional norms. Thus, Applicant did not prove deficiency.

[40] This section addresses allegation 51.

Further, and critically, it is not reasonably likely a charge on expert testimony would have changed the outcome of trial here when none of the expert testimony undermined Applicant's strategy of self-defense. Notably, evidence that the victim had GSR on his hand actually supported Applicant's theory of self-defense by supporting the argument that the victim had fired at the truck. The fingerprint and DNA evidence merely placed Applicant near the scene of the shooting and was cumulative to Applicant's own testimony that he was there. Finally, Applicant himself testified he fired the rifle at the victim's car—making it not reasonably likely the expert testimony from the firearms examine affected the outcome of this trial. Overall, this was ultimately a case about whether Applicant acted in self-defense. The expert testimony here did not make that any more or less likely. Thus, it is not reasonably likely any instruction to the jury regarding expert testimony would have changed the outcome, and Applicant did not prove prejudice.

Failed to object – 5-year sentence for weapon charge[41]

Applicant contends trial counsel was ineffective for failing to object to the court imposing a consecutive five-year sentence possession of a deadly weapon during the commission of a violent crime when the court sentenced Applicant to life for murder. This Court agrees.[42]

Because Applicant received a life sentence for murder, it was error for the trial court to impose a five-year sentence for the weapon charge. See S.C. Code Ann. § 16-23-490(A) ("This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime."). The State has conceded this issue. Thus, this Court vacates Applicant's five-year sentence for the weapon charge.[43]

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[41] This section addresses allegation 52.
[42] Respondent conceded this issue at the PCR hearing.
[43] Applicant's conviction for the weapon charge, however, shall remain intact. Likewise, Applicant's conviction and sentence for murder shall remain intact.

Failed to object – Sentencing[44]

Applicant asserts trial counsel was ineffective for failing to object to the court's sentence and move for reconsideration of the sentence before another judge when the Court justified the life sentence based in part on decedent's unlawful firing of a handgun and high-speed chase of Applicant and codefendants. This Court finds this argument is manifestly without merit. At the PCR hearing, counsel questioned,

> Wait, you wanted me to ask the trial judge to have a different sentencing judge? When he puts his opinion in and its purely speculative? No. It was not going to happen. I can't think of any conceivable way that that would be successful, nor a judge to do the sentencing after another judge.

This Court agrees that counsel would not have been successful in asking the presiding judge to have another judge sentence Applicant. Further, this Court finds that asking the presiding judge to have another judge sentence the defendant is not withing prevailing professional norms. Thus, Applicant has not shown deficiency. Finally, this Court finds it is not reasonably likely the presiding judge would have asked a different judge to sentence Applicant had he been asked; thus, Applicant has not shown prejudice.

Ineffective assistance of appellate counsel

A defendant is entitled to effective assistance of appellate counsel. *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client

[44] This section addresses allegation 53.

would disserve the very goal of vigorous and effective advocacy. . ." Jones, 463 U.S. at 754.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Prior Bad Act Evidence

Applicant argues appellate counsel was ineffective for not raising the preserved issue of excluding Applicant's prior bad act under Rules 404, 403, and 401 of allegedly attempting to rob another person on the night of the present incident. Applicant did not prove this claim.

Prior to trial, counsel moved to exclude testimony that he and his codefendants had planned to rob a house prior to the car chase that led to the fatal shooting. (R. 140-14). Counsel argued such evidence was not admissible as prior bad act evidence under Rule 404(b). He further argued it was not relevant and was unfairly prejudicial. (R. 140-41). The State argued testimony about the planned robbery was part of the res gestae of the overall offense, was relevant, and was admissible. (R. 142-43). The trial court agreed with the State and found the planned robbery was intertwined with the overall chase. (Tr. 143). At the PCR hearing, appellate counsel testified that, in hindsight, she should have raised an issue regarding this ruling.

This Court finds it is not reasonably likely that Applicant's convictions would have been reversed had appellate counsel raised this issue. "The admission or exclusion of evidence is a

matter within the trial court's sound discretion, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of a manifest abuse of discretion accompanied by probable prejudice." State v. Dennis, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013)

> Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.

State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923); see also Rule 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."). "Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine." Lyle, 125 S.C. at 406, 118 S.E.at 807.

> The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime.

Id.

"Under the res gestae theory, evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. Dennis, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013) (internal quotation marks omitted).

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so

> intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context. . . . And where evidence is admissible to provide this full presentation of the offense, (t)here is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae. As the Court said in United States v. Roberts, 548 F.2d 665, 667 [(6th Cir.1977)], cert. denied, 431 U.S. 920, 97 S.Ct. 2188, 53 L.Ed.2d 232[,] "(t)he jury is entitled to know the 'setting' of a case. It cannot be expected to make its decision in a void without knowledge of the time, place and circumstances of the acts which form the basis of the charge."

Id. at 627, 63-64, 742 S.E.2d at 26 (quoting U.S. v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)).

This Court finds Applicant did not prove prejudice from appellate counsel's failure to raise this issue on appeal. Applicant only generally argued this issue should have been raised based on Rule 404(b), 403, and 401; however, Applicant did not set forth any additional law at the PCR hearing to show this would be reversible error. Further, this Court finds evidence of the robbery was admissible as part of the res gestae of the crime. See id. (finding trial court did not abuse its discretion in allowing under res gestae testimony that defendant tried to sell a stolen gun "for fifty dollars so he could buy some crack cocaine" shortly before attempting to rob and shooting the victim). Additionally, this testimony was relevant to the State's burden of disproving self-defense—i.e., it was relevant to the jury's consideration of whether Applicant had engaged in wrongdoing. Finally, this Court finds this testimony was not unfairly prejudicial, especially due to the fact the State had the burden of disproving self-defense. Overall, Applicant has not proven this was an issue that would have led to a reversal of his conviction had it been raised. Thus, this claim is denied.

Although Applicant generally asserted in his application that appellate counsel was ineffective for not raising any other preserved issue of merit, he did not set forth at the PCR hearing what preserved, meritorious claims should have been raised other than the claim related to bad act

evidence. Thus, he has not met his burden of proving appellate counsel was ineffective, and this claim is denied.

CONCLUSION

Based on the foregoing, this Court finds Applicant has proven the sentence for possession of a weapon during the commission of a violent crime should be vacated. This Court further finds counsel has not established any other constitutional violations or deprivations that would require this Court to grant relief. Thus, the remaining allegations are denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. Applicant's five-year sentence for possession of a weapon during a violent crime is vacated;

2. The remaining allegations in this applicant are denied and dismissed with prejudice; and

3. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED this 29th day of June, 2023.

DANIEL COBLE
Presiding Judge
Sixth Judicial Circuit

Columbia, South Carolina