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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Michael S. Holt, Circuit Court Judge

Case No. 2020–CP–13–090

Gary Moore #367744,

Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Petitioner Gary Moore appeals the Honorable Michael S. Holt's Order Denying his Application for Post-Conviction Relief filed on **July 18, 2022**, and the Court's Order Denying Applicant's Motion to Alter or Amend Judgment (Rule 59(e), SCRCP) filed on **March 19, 2024**.

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March 21, 2024

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STATE OF SOUTH CAROLINA COUNTY OF CHESTERFIELD	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTH JUDICIAL CIRCUIT
Gary Moore, #367744, Applicant,	)	Case No.: 2020-CP-13-090
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before this Court by way of Applicant's post-conviction relief application filed January 27, 2020. Respondent made its return on December 21, 2020, requesting an evidentiary hearing be convened. An evidentiary hearing was held on March 14, 2022, virtually via Webex. Dayne C. Phillips, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Trial Counsel Larry Knox, Appellate Counsel Tricia Blanchette, and prosecutor Mary Thomas Johnson-Lee, Esquires, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Chesterfield County Clerk of Court. During its April 2016 term, the Chesterfield County Grand Jury indicted Applicant for attempted murder (2015-GS-13-0398). Applicant was represented by Larry W. Knox, Esquire. Mary Thomas Johnson-Lee and Kenard Redmond, Esquires, of the Fourth Circuit Solicitor's Office prosecuted the case. On

April 5-6, 2016, Applicant appeared before the Honorable Paul M. Burch, circuit court judge, and a jury. On April 6, 2016, Applicant was found guilty as indicted, and Judge Burch sentenced Applicant to eighteen years' imprisonment on April 11, 2016.

Applicant timely filed a notice of appeal on April 14, 2016. Applicant was represented by Tricia Blanchette, Esquire. The South Carolina Court of Appeals affirmed the conviction and sentence by unpublished opinion, filed June 26, 2019. *State v. Moore*, 2019-UP-234 (S.C. Ct. App. filed June 26, 2019). The remittitur was issued July 15, 2019.

Summary of Relevant Facts

According to Applicant at the immunity hearing, he entered the convenience store on the date of the incident, and claimed he was walking down one of the store's aisles to get a soda when Charles Wallace (hereafter "Victim"), stated he would kill him and told him he would catch him somewhere. (R. 263-266). In response, Applicant asserted he turned around, saw Victim blocking his only escape route along with another individual, and tried to go around Victim. (R. 266-67, 292). At that point, Applicant stated Victim slapped his face and when he attempted to push Victim away, Victim pulled him to the ground by his hair. (R. 267). After that, Applicant claimed the other individual began choking him while he was on top of Victim on the ground. He began to pass out from being choked, and he responded by pulling out his knife and stabbing at the men to get them off him. (R. 267-70, 272, 293-94). Once Victim had been stabbed, Applicant asserted he broke free, left the store, called 911, waited for law enforcement to arrive, and reported he was the victim of an attack. (R. 283-84). Applicant claimed he was then handcuffed, taken to jail, and sustained injuries, including swelling and hair loss, which was documented by photographs. (R. 284-285, 289). Applicant stated he thought he would be killed and supported this claim by referencing two prior incidents where Victim allegedly tried to

attack him.[1] (R. 273-77).

Additionally, Victim testified about the details of the incident. (R. 37-76, 303-22). During his testimony, Victim stated he slapped Applicant because he wanted to give him an "ass whipping," with an open hand at the convenience store on the date of the incident but explained he did this because Applicant started making derogatory comments when he entered the store.[2] [3] (R. 39-40, 55-56, 308-09, 311, 313, 315-16). After the slap, Victim stated Applicant engaged him in a fight, they began "tussling," and he pulled Applicant to the ground. (R. 40-43, 315-19). Thereafter, Victim indicated a young man came over to break up the fight, everyone stood back up, and Applicant stabbed him multiple times while the fight was winding down. (R. 43-44, 316-22). Victim stated he needed a "bunch" of stiches from the wounds sustained. (R. 44-45).

Steven Hooks, who was the individual who intervened when the fight broke out, also testified at trial. (R. 109-10, 324-67). During his testimony, Hooks recounted that he saw Applicant and Victim "tussling" on the floor of the convenience store, he grabbed Applicant by the shoulder, pulled him up, and stopped the fight, and Applicant then left the store. (R. 109-10, 324-32, 334-37). Once Applicant was gone, Hooks indicated he helped Victim to the bathroom because Victim was cut, and he noticed he had also received a small "nick" during the skirmish. (R. 110-12, 325, 330, 336).

[1] Regarding the first incident, Applicant alleged Victim attempted to attack him with an axe handle and damaged his vehicle at his fiancée's mother's house. (R. 273-76). Regarding the second incident, Applicant claimed Victim moved towards him in an aggressive manner at a magistrate's court proceeding but was stopped by a law enforcement officer. (R. 277).

[2] Victim acknowledged he damaged Applicant's vehicle on a prior occasion and attempted to "knock [Appellant's] brains out" with an axe handle at Applicant's fiancée's mother's house, but he explained he did so after Applicant first brandished a stick. (R. 51-52, 304-06). Regarding the second prior incident, Victim stated he approached Applicant during a magistrate's court proceeding and was restrained by an officer. (R. 307).

[3] During his testimony, Victim indicated Applicant knew he was inside of the store prior to the incident because his truck was parked outside. (R. 39, 314).

Melissa Ann Griffin, an employee at the convenience store, testified that Victim was in the store when Applicant entered, the two made eye contact, and then "it was just on." (R. 78, 340-41). At that point, she stated the two began fighting, dropped to the floor, she threatened to call 911 to encourage the men to stop, and Hooks intervened and separated them. (R. 77-79, 341-344). After that, Griffin asserted Applicant exited the store, held the store's door closed from the outside, and shouted to Victim he got what he deserved. (R. 79-81, 343-44).

Sergeant Tim Hutchinson and Investigator Greg Burns of the Chesterfield County Sheriff's Office testified about their responses to the incident. (R. 92-108, 150-74, 346-47, 359-60). During his testimony, Sergeant Hutchinson stated he encountered Applicant in the store's parking lot after responding to the scene of the stabbing and Applicant immediately claimed to be a victim. (R. 94, 102, 346-50). Hutchinson further testified he found Victim inside the store with stab wounds to his back and stomach, and he indicated Victim was ultimately transported to a hospital by helicopter due to the severity of his injuries. (R. 96-100, 352-57). Meanwhile, Investigator Burns testified he responded to the store after the stabbing and used his cell phone to record the surveillance footage of the incident because it could not be downloaded from the store's surveillance equipment. (R. 152-74, 360-65). A recording of the footage was admitted into evidence and played for the circuit court judge.[4] (R. 152-74, 360-65).

[4] In the recording, Victim appears to approach Applicant shortly after Applicant entered the convenience store and slap at him. (State's Ex. # 13 (Recording of Incident)). Immediately after that, Applicant appears to tackle Victim to the ground, and the two men briefly struggle with one another on the ground before Hooks intervenes. (State's Ex. # 13). After intervening, Hooks does not appear to choke Applicant by the neck at any point and, instead, appears to pull at Applicant's arm to separate the men. (State's Ex. # 13). Thereafter, the men appear to get to their feet, and Applicant appears to strike at Victim and Hooks several times before running out of the store. (State's Ex. # 13).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. "Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 3 and 14 of the South Carolina Constitution. *See* S.C. Code 17-27-20(A), (4) and (6). Specifically, Trial Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different, *see Strickland v. Washington*, 466 U.S. 668 (1984)."
    a. "Trial Counsel's acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:"
        i. "Trial counsel failed to conduct a reasonable investigation and to develop all available, relevant and admissible or mitigating evidence in preparation of Applicant's defense. *See Wiggins v. Smith*, 539 US 510 (2003)."
            1. "Counsel's failure to investigate and present the Victim's prior statements that he wanted to injure/kill Applicant."
            2. "Counsel's failure to investigate and present the 911 audio recording to discredit the credibility of the State's witnesses and arguments."
            3. "Counsel's failure to investigate and present pictures of the knife in comparison to the body camera video recording to discredit the credibility of the State's witnesses and arguments."
            4. "Counsel's failure to investigate whether the video recordings admitted at trial had been altered."
            5. "Counsel's failure to investigate and present Applicant's rights under the South Carolina Victim's Bill of Rights as a prior victim."
        ii. "Trial Counsel failed to present and argue that the State violated [] the S.C. Victim's Bill of Rights when Applicant was a victim of a prior incident with the Victim."
        iii. "Trial Counsel failed to object to the Trial Court's application of an incorrect evidentiary standard based upon a misunderstanding and misapplication of *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) as advanced by the State, rather than making findings of fact and conclusions of law based upon the preponderance of the evidence standard as required by law. *See .e.g. State v. Cervantes-Pavon*, 426 S.C. 442, 827 S.E.2d 564 (2019)."
        iv. "Trial Counsel failed to object to the Trial Court's failure to make full and complete findings of fact and conclusions of law for the elements of self-defense as applied under a claim pursuant to the Protection of Persons and Property Act."
        v. "Trial Counsel's 'trial strategy' which he conveyed to the Trial Court and Applicant during trial, to not seek jury instructions for the lesser-included

offenses of Assault and Battery of a High and Aggravated Nature, and especially First Degree Assault and Battery, was objectively unreasonable given the facts and circumstances of the case. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding 'counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness.'): *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that 'labeling counsel's actions as 'trial strategy' does not automatically immunize an attorney's performance from sixth amendment challenges.')"

vi. "Trial Counsel failed to request a jury instruction regarding specific intent to kill pursuant to *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017)."

vii. "Trial Counsel failed to object to the Trial Court's confusing jury instructions regarding intent where the charged offense required the specific intent to kill, yet where the instruction included language of far lower, "general intent" standards such as recklessness and criminal negligence. *See e.g.*, *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017)."

viii. "Trial Counsel failed to investigate and obtain any medical records or photographs for diagnosis and treatment of Applicant's injuries by either the detention center of Applicant's personal physician where the Applicant indicated at his immunity hearing that he was seen by both where testifying about injuries he received at the hands of his attacker, and where the State elicited testimony to the contrary from an officer during Applicant's trial. *See Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015)."

ix. "Trial Counsel failed to use the Incident Report dated 04/2014 during either the immunity hearing or the trial where Applicant was attacked not only by the 'victim' Wallace in the present case but also by several other assailants in concert with Wallace at this time, and where Applicant believed the third party pulling him from behind while he fought with Wallace in the present case was likewise working in concert with Wallace to attack him when showing Applicant's response to the attack was reasonable."

x. "Trial Counsel failed to object during the immunity hearing when the State elicited legal opinion testimony from a lay witness striking at the heart of the ultimate issue of self-defense by asking, ". . . at any time did you do anything that would cause [Applicant] to use deadly force against you?"

xi. "Trial Counsel failed to object during the immunity hearing when the State elicited legal opinion testimony from a lay witness striking at the heart of the ultimate issue of self-defense by asking if Applicant was involved in 'what we call mutual combat?'"

xii. "Trial Counsel failed to move to sequester any of the witnesses for either immunity hearing or trial where the State repeatedly referred to prior

witness testimony when questioning later witnesses."

xiii. "Trial Counsel failed to obtain either the audio recording from Applicant's civil summary court proceeding in 2014 against Wallace, or the booking report from Wallace being ordered to jail by the Magistrate Judge for attempting to assault Applicant at the hearing where Wallace denied details of the incident at Applicant's present trial, and where the deputy denied details of the incident at Applicant's present trial, and where the deputy denied any knowledge of the incident at the present trial as well."

xiv. "Trial Counsel failed to quash the jury pursuant to Batson where the State utilized four (4) of its five (5) statutory strikes to strike white males from the petit jury."

xv. "Trial Counsel failed to object to Rules 701 and 702, SCRE, or *Ford v. Watson*, to medical opinion testimony by the EMS technician regarding medical signs and appearances of shock, as well as whether certain wounds were consistent with those needing advanced life support where the State never offered the witness as an expert in the field, no *voir dire* of the witness was performed, and the trial judge made no findings qualifying the witness as an expert required under his gatekeeping role."

xvi. "Trial Counsel failed to object under Rules 701 and 702, SCRE, and *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) to opinion testimony of Sgt. Hutchinson regarding crime scene reconstruction where the State gave leading questions suggesting specifically where in McCormick's Grocery the fight started based upon location of blood on the floor."

xvii. "Trial Counsel failed to object as both leading and giving opinion testimony on an ultimate issue in fact when Sgt. Hutchinson was asked, 'In looking at the case as a whole, who was the victim in this case?' to which he answered, 'In my opinion, would be Mr. Wallace.'"

xviii. "Trial Counsel failed to object under Rule 701 and 702 to Inv. Tim Perry's testimony on redirect examination when the State elicited opinion testimony on whether person in a given scenario would be deemed a 'victim,' where the facts were similar to the present case, where Inv. Perry was not qualified as an expert witness, and where the opinion testimony touched on the ultimate issue in the case."

xix. "Trial Counsel failed to object under hearsay and the Sixth Amendment Confrontation Clause during the immunity hearing where the State obtained testimony from a deputy as to what an EMS technician allegedly said about Wallace's medical condition and subsequent airlift to a hospital in Charlotte, and where the deputy had no first-hand knowledge of either."

2. "Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. Specifically, Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d

142 (1991)."

a. "Appellate Counsel's acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:"

i. "Appellate Counsel failed to file a Petition for Rehearing in the Court of Appeals to preserve Applicant's ability to file a Petition for Writ of Certiorari to the Court of Appeals in the South Carolina Supreme Court on the issues of whether the Trial Court erred in finding Applicant was not entitled to immunity from prosecution under the Protection of Persons and Property Act, whether the Trial Court erred by failing to grant Applicant's motion for a direct verdict, and whether the Trial Court erred in his response to a jury question."

ii. "In the event Trial Counsel properly preserved the issue of whether the Trial Court applied the incorrect evidentiary standard on a misunderstanding and misapplication of *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) in his closing statement to the Trial Counsel at the immunity hearing, Appellate Counsel failed to raise and argue the issue of the Trial Court applying an incorrect evidentiary standard, rather than making findings of fact and law based upon the preponderance of the evidence standard as required by law. *See, e.g., State v. Cervantes-Pavon*, 426 S.C. 442, 827 S.E.2d 564 (2019)."

iii. "In the event Trial Counsel properly preserved the issue of whether the Trial Court failed to make full and complete findings of fact and conclusions of law for the elements of self-defense as applied under a claim pursuant to the Protection of Persons and Property Act at the immunity hearing, Appellate Counsel failed to raise and argue this issue of the Trial Counsel's failure to make full and complete findings of fact and conclusions of law for the elements of self-defense."

At the PCR hearing, Applicant proceeded forward on the above allegations. Any other allegations Applicant could have raised are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Appellate Counsel Testimony

On direct-examination, Appellate Counsel testified that she perfected Mr. Moore's appeal on his behalf. She stated that she reviewed all the materials available to her and turned all materials over to PCR Counsel on August 28, 2018. Appellate Counsel testified that she went to the Chesterfield Clerk of Court to obtain exhibits. When determining what issues to raise on appeal, Appellate Counsel testified that she was bound by the record created at trial. She stated

that she met with a private investigator. On July 9, 2019, Appellate Counsel testified that she met with Applicant about the South Carolina Court of Appeals decision when he was housed at Broad River Correctional Institution. She stated that Applicant informed her he did not want to file a petition for rehearing and wanted to pursue a post-conviction relief action instead. Appellate Counsel testified that this case was unique, specifically because of the immunity hearing. She stated that Judge Henderson oversaw the immunity hearing, Judge Burch was the trial judge. Appellate Counsel testified that she did not think that issues concerning the immunity hearing were properly preserved for appellate review. Appellate Counsel testified that she argued the preponderance of the evidence standard throughout the appeal and relied heavily on the immunity hearing and trial transcripts. Appellate Counsel testified that she reviewed and turned over the indictments to PCR Counsel and that she turned the medical records over to PCR Counsel, though could not definitively state whether she reviewed them. Appellate Counsel testified that she did not make a list of unpreserved issues in this case. She stated she wished the record had been better preserved. She testified that the judge can only rule on what evidence was presented at the immunity hearing and brought forth evidence from the trial in her argument about immunity to give the appellate court a broader picture of the case.

On cross-examination, Appellate Counsel testified that she regularly discussed Applicant's appeal with him, both in person and by phone. Appellate Counsel testified that it was Applicant's decision not to pursue a petition for rehearing and that, if Applicant wanted an appeal, she would have filed one.

Applicant Testimony

Applicant testified that he hired Trial Counsel because he had previously met him before. He stated that they talked several times about the case. When meeting with Trial Counsel,

Applicant testified that they looked at the discovery and reviewed three videos obtained from the State. Applicant testified that he gave Trial Counsel incident reports about the attack on the day they reviewed the discovery together. He stated that Trial Counsel told him not to worry about the videos because they showed Applicant being attacked. Applicant testified that he did not review the 911 call in the case but remembered calling 911 after the incident. He stated that the 911 call was never admitted at trial. He stated that there were two 911 calls in this case; one from the clerk, and one from Applicant. Applicant testified that the 911 calls were never brought out at the immunity hearing.

Applicant testified that he and Trial Counsel never discussed getting medical records. However, Applicant testified that he went to see a doctor after the incident and that an MRI was recommended because of a possible concussion. He stated that his medical records indicate that he has post-traumatic stress disorder. He testified that there were pictures from the incident with his hair being pulled out. He stated these pictures were never discussed with his attorney. Applicant testified that he never saw any body camera footage until he was incarcerated and that the footage was not presented at trial. Applicant testified that Trial Counsel never entered screenshots of the knife at trial.

Concerning the immunity hearing, Applicant testified that Trial Counsel told him not to worry about the videos and that no preparation went into the hearing beyond reviewing the discovery together. Applicant testified he provided Trial Counsel with everything pertaining to the case in his possession. Applicant testified that after the immunity hearing, Applicant went to Texas. He stated that he was not present when the ruling from the immunity hearing was issued but received a call from Trial Counsel about the ruling. Applicant stated that Trial Counsel told him that the videos would be thrown out at trial.

Applicant stated he was previously regarded as a victim, based on a prior incident and that the Victim's Bill of Rights were applicable to him. Applicant testified that he made Trial Counsel aware of his prior exchange with the Victim. Applicant testified that the prior incident involved the Victim damaging Applicant's property.

After the immunity hearing, Applicant testified that he had no further meetings with Trial Counsel because he returned from Texas the day before the trial. At the trial, Applicant testified that there were four videos discussed and provided by the State. Applicant stated that he thought the fourth video was manipulated by the State, but that Trial Counsel did not investigate this video further.

On cross-examination, Applicant testified that he met with Trial Counsel one time to review the discovery and that they never met to prepare for trial. Applicant testified that Trial Counsel told him he would get immunity because he has a right to defend himself. Applicant stated he spoke with Trial Counsel after the immunity hearing and that they spoke about the prior incident with the victim. Concerning discovery, Applicant testified that they reviewed three of the videos with Trial Counsel. He stated these videos were surveillance footage videos from the convenience store and that they featured him being attacked by the victim. Applicant testified they did not receive the fourth video before trial, even though Trial Counsel mentioned that he wanted to introduce all four videos at trial on the record. Applicant testified that he and Trial Counsel did not discuss the 911 calls, but that he knew the clerk called 911 and he knew the contents of the 911 call he made himself.

Applicant stated that the victim testified at trial. He stated he did not see the photographs of his own knife until he was incarcerated. He stated that the only discovery he reviewed with Trial Counsel were the three videos.

Applicant testified that he was the victim in the exchange and that he had a right to be in the place he was in. He stated that he was attacked by multiple people, that he was being choked, and that he used his knife to defend himself. He testified that the evidence showed that the intervener knew he knew the victim and that Hooks was inebriated at the time. When asked why the intervener testified that he did not know Mr. Moore, Applicant testified that the videos showed otherwise.

Applicant testified that everyone was out to get him at the immunity hearing and that this was a "quintessential jury question." He testified that he did not have any audio discovery at the time of the immunity hearing. Applicant testified that the incident can be heard in the background of the clerk's 911 call and that this refuted every witness the State presented. Specifically, Applicant stated that it showed that the attack was unprovoked and that the intervener was yelled at to get a firearm.

On re-direct-examination, Applicant stated that he did not know the intervener's side of the story until he made a FOIA request.

Trial Counsel Testimony

Trial Counsel testified that when Applicant retained Trial Counsel he was "very cocky" and that he thought his case was a slam dunk because he just won another attempted murder case shortly before he incurred this charge. Trial Counsel testified that he and Applicant met for five hours and went over the videos frame by frame. Trial Counsel testified that he discussed the 911 calls during this meeting. Trial Counsel testified that there was no difference between what Applicant said on the 911 call and what he testified to at the immunity hearing. Trial Counsel noticed that Applicant's knife was exchanged from Applicant to the officer and stated he could not tell the condition of the knife at that time. Trial Counsel testified that Applicant had sought

out medical attention for his injuries, but that he never obtained the medical records, nor did he follow up on this.

Trial Counsel testified that he contacted the magistrate court to investigate the prior incident between Applicant and the victim. He testified that the prior incident had no bearing on the incident forming the basis for the attempted murder charge that happened at the convenience store. He testified that that is why he did not call witnesses to the prior incident to testify at trial.

Concerning the immunity hearing, Trial Counsel testified that he did not bring up the incident reports because he thought the best evidence at the hearing was Applicant's testimony. Trial Counsel testified he was present when the judge issued his ruling at the immunity hearing. Trial Counsel testified that the standard of proof was preponderance of the evidence at the time of the immunity hearing. Trial Counsel testified that he thought Judge Henderson made a full finding of fact and conclusions of law concerning this hearing, that the issues were properly preserved on appeal, and that the only issue was that the Court reached a finding that Trial Counsel did not agree with. He stated he did not recall why he did not argue at the immunity hearing that the victim's hands and fists could have been considered deadly weapons.

Trial Counsel testified that Applicant cooperated with law enforcement and that the theory behind the defense's case was self-defense. Trial Counsel testified that Applicant used his knife to defend himself and that Applicant was not the aggressor.

Trial Counsel stated that Applicant was not a likable witness and was very aware of his constitutional rights because this was not his first or second time going through the criminal justice system.

Concerning the videos, Trial Counsel testified he objected to the videos at trial. Specifically, he stated that one of the videos was recorded on an officer's cell phone, which

changed the length of the video.

Trial Counsel testified that he did not believe the State's witnesses were credible. Trial Counsel testified he thought that the officer had the right to offer an opinion on whether the incident constituted mutual combat. Trial Counsel testified that he thought the EMS worker was qualified to give his opinion about the victim's medical conditions, based on his training and experience.

Trial Counsel testified that he did not see a *Batson* issue at trial, nor did he see a race issue behind why the State struck the potential jurors they did. He stated he thought that there was no need to move to sequester witnesses because it "automatically" happens in Chesterfield County. Trial Counsel testified that he did not object to Sargent Hutchinson's testimony because he did not think it was hearsay, nor a violation of the Confrontation Clause. Trial Counsel stated that a lesser-included instruction was not requested because Applicant stated he wanted "all or nothing" in this case, due to his belief that he could not be found guilty.

On cross-examination, Trial Counsel stated that they only met one time, but that that meeting lasted five hours. He testified that he called Applicant after the ruling on the immunity hearing was issued and that they talked the day before trial. Trial Counsel testified that he did not think there was anything objectionable about the testimony concerning the victim being airlifted to Charlotte.

Trial Counsel testified that he received two 911 calls and that he did not think the calls would have added any value to trial, because of the live testimony elicited. Trial Counsel testified that the pictures of the knife would not have made a difference at trial.

Trial Counsel testified that he did not think the officer of the court was a "liar" concerning the videos, like Applicant alleged. He stated that he agrees the record reflects that

Applicant may have been the aggressor, but he did not think the State made its case strongly enough. Trial Counsel testified that Applicant was aware that he could have requested a lesser-included jury instruction but decided not to do so. Trial Counsel testified he did not think that the medical records would have made a difference at trial. He stated that he did not believe that admission of evidence concerning prior incidences between Applicant and victim would have made an impact at trial, because the best evidence on this issue was the testimony elicited at trial. Trial Counsel testified that there was no written record or recording of the Magistrate's Court matter concerning the property damage.

Trial Counsel testified that he thought deadly force and mutual combat were difficult issues for the victim and the jury to understand. Trial Counsel testified that he thought EMS and Sargent Hutchinson properly testified based on their training and experience and, accordingly, no objections needed to be raised concerning the issues alleged in Applicant's application.

Trial Counsel testified that there was no question concerning whether the fight occurred, but the issue brought to the jury was whether the stabbing constituted self-defense or attempted murder. Trial Counsel credibly testified that their defense assumed intent to commit the act; not that the act was committed out of recklessness or negligence.

Prosecutor Testimony

Prosecutor testified that two of the jurors struck by the State had tattoos like Applicant. One was friends with the Applicant on social media, one had a prior conviction, and one had a judicial connection. She stated that any *Batson* motion likely would have been denied because of the neutral reasons for the strikes provided. Prosecutor testified that the clerk from the convenience store and the victim both testified at trial, and several videos were brought out at trial as well. Prosecutor testified that the four videos were all on one disc and one of the vid

was recorded on an officer's cell phone. She testified she did not recall any violations of the Victim's Bill of Rights. She testified that no evidence was ever withheld from the defense. Specifically, she stated that she interviewed the Clerk, and this was given to the defense. She testified she did not recall whether the witnesses were sequestered but stated she did not think sequestration would have made a difference at trial. She testified that the video was the best evidence presented at trial for the State.

On cross-examination, Prosecutor testified that credibility of witnesses is an issue in every case. She testified that the videos were not up close, but were enough to corroborate testimony given at trial. These videos were taken under judicial notice by the PCR Court. Prosecutor stated that she was unsure how many attempted murder cases she had tried before. She stated that attempted murder is a specific attempt crime. Concerning the prior incident between the victim and Applicant, Prosecutor stated that the victim was chased by Applicant with a stick, the victim grabbed an ax out of his truck, Applicant took off running, and the victim busted his windshield. Prosecutor stated she was unsure whether Applicant was present when the Court reached its decision concerning the stand your ground hearing.

On re-direct-examination, Prosecutor stated that the trial occurred in 2016, and *State v. King* was reached in 2017.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Chesterfield County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon

their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington.*

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See *also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."

Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland,* 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Failure to Investigate

Applicant alleges ineffective assistance of counsel for failure to investigate several different things. *Strickland* makes clear that defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. When highlighting failure to investigate as a ground for a larger

ineffective assistance of counsel claim, judicial determination of this claim's validity is evaluated for "reasonableness [under] all the circumstances" with "a heavy measure of deference to counsel's judgments" applied. *Id.* However, counsel is required to, at minimum, "interview potential witnesses and make an independent investigation of the facts and circumstances of the case", *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quoting *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), *aff'd*, 828 F.2d 670 (11th Cir.1987)), including aggressively re-examining all the government's forensic evidence and conducting analyses of all other available forensic evidence." *Id.* (quoting *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases, reprinted in* 31 Hofstra L.Rev. 913, 1015 (2003) (emphasis added)).

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

Victim's Prior Statements

Applicant claims Counsel was ineffective for failure to investigate and present the Victim's prior statements that he wanted to injure/kill Applicant. This Court finds this allegation is without merit. Concerning investigation, Trial Counsel credibly testified that he was aware of the prior incident and that the Victim and Applicant had had prior altercations. Additionally, much of this was brought out a trial. On Trial Counsel's cross-examination of the victim at trial, he elicited testimony from the victim where he made clear that he did not like Applicant, described the prior incident, and where the victim stated that he chased Applicant with an ax and

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smashed his windshield in out of frustration that he could not catch and attack Applicant. (R. 51-54). Specifically, during that prior incident, the victim testified that his stated goal of chasing Applicant with an ax was to "knock his brains out if [he] had caught him." (R. 51). Trial Counsel also elicited testimony about how the victim went towards Applicant when at the Magistrate's Office because of their bad blood and how the victim could not stand Applicant. (R. 54). Thus, this Court finds that Trial Counsel did elicit testimony about how the victim wanted to injure or kill Applicant and, accordingly, declines to find deficiency on this ground. Additionally, because this testimony was elicited, there is no showing further elicitation of similar statements would have made an impact at trial. Accordingly, this Court finds Applicant has failed to meet either prong of the *Strickland* analysis and declines relief on this ground as a result.

911 Audio

Applicant alleges Trial Counsel was ineffective for failure to investigate and present the 911 calls at trial. However, Trial Counsel credibly testified that he received both 911 calls and that he discussed and reviewed these with Applicant. Though Applicant denied this, he testified that he made one of the two calls and that he knew the clerk called 911 as well. After receiving and reviewing these calls, Trial Counsel was not expected to investigate these calls further. Thus, the allegation that Trial Counsel was ineffective for failing to investigate the calls is without merit.

Concerning failure to admit these calls at trial, Trial Counsel credibly testified that he did not think the 911 calls would have added anything at trial, that they would have been duplicative with the testimonies elicited at trial, and that the best evidence available concerning the contents of the calls were live testimonies presented. Thus, Counsel decided not to admit the calls as a part of a reasonable trial strategy and, accordingly, was not deficient. Additionally, because no

showing has been made indicating that admission of the calls would have changed the trial proceedings, prejudice is not found. Thus, relief is denied on this ground.

Pictures of Knife

Applicant claims Counsel was ineffective for failing to introduce pictures of Applicant's knife at trial. However, the knife itself was admitted at trial. (R. 101). Thus, entry of these photographs into evidence likely would be duplicative and Trial Counsel, understanding this, seemingly chose to focus on other avenues for asserting a defense than focusing on these photographs. Focusing on other avenues for asserting a defense that have a greater likelihood of success at trial does not render Trial Counsel deficient. Additionally, Trial Counsel credibly testified that he did not think admitting these photographs would have made a difference at trial. This Court agrees. Accordingly, prejudice has not been established and relief is denied on this ground.

Video Recordings

Applicant claims Counsel was ineffective for failure to investigate whether video recordings were altered. This Court finds Trial Counsel acted reasonably concerning the videos and, accordingly, declines to find deficiency. Specifically, at the immunity hearing, Trial Counsel objected to the video recorded on the officer's cell phone coming in at trial and was overruled by the judge after the officer testified that the video was not altered. (R. 363-64). Additionally, there was a lengthy discussion between the parties on record concerning the videos the second day of trial, where it was made clear that four different versions of the videos existed, and each copy was the same video with a different background conversation from officers attached to each. (R. 1776-78). After this discussion, the Court directed the State to play all four videos. (R. 178-79). This Court finds this was reasonable on the part of Trial Counsel and, thus,

declines to find deficiency. Additionally, this Court has been presented with nothing more than mere speculation that the recordings may have been altered. Accordingly, Applicant has failed to show what Trial Counsel could have discovered through further investigation and, thus, this Court declines to find prejudice as well.

Victim's Bill of Rights

Applicant claims Counsel was ineffective for failure to investigate and present Applicant's rights under the South Carlina Victim's Bill of Rights as a prior victim. This allegation is without merit. Applicant has failed to state what rights should have been presented, how those rights could have been presented, what impact on the trial proceedings those rights would have had, or how his status as a prior victim is even related to this matter, which is a wholly independent incident than the one forming the basis for the attempted murder charge. Accordingly, relief is denied on this ground.

Violation of Victim's Bill of Rights

Applicant alleges that his rights under the S.C. Victim's Bill of Rights were violated. This allegation is without merit. Applicant has failed to state what rights should have been presented, how those rights could have been presented, what impact on the trial proceedings those rights would have had, or how his status as a prior victim is even related to this matter, which is a wholly independent incident than the one forming the basis for the attempted murder charge. Additionally, the prosecutor credibly testified that she did not think his rights under the Victim's Bill of Rights were violated either. Accordingly, relief is denied on this ground.

Incorrect Evidentiary Standard

Applicant claims Trial Counsel was ineffective for failure "to object to the Trial Court's application of an incorrect evidentiary standard based upon a misunderstanding and

misapplication of *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) as advanced by the State, rather than making findings of fact and conclusions of law based upon the preponderance of the evidence standard as required by law. *See .e.g. State v. Cervantes-Pavon*, 426 S.C. 442, 827 S.E.2d 564 (2019)." The standard of proof under the immunity statute is preponderance of the evidence standard. *State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). The case cited by the State, *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013), puts forth this evidentiary standard. Though *Curry* was seemingly misinterpreted by the State, the correct case was discussed by the State and the preponderance of the evidence standard was articulated by Trial Counsel in his closing. (R. 368-71).

Though the Court denied the request for immunity, the Court seemingly did fulfill its duties of sitting "as the fact-finder at the hearing, weigh[ing] the evidence presented, and reach[ing] a conclusion under the Act." *State v. Cervantes-Pavon*, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). Specifically, the Court stated:

> The evidence is as I viewed it is that the slap which was admitted by Mr. Wallace was not of the nature that Mr. Moore should have believed he was going to have to take action to prevent death or great bodily injury. As a matter of fact, my review of the tape once the slap occurred, Mr. Moore appeared to become the aggressor in this situation. The individual who he said was choking him did not appear to be choking him, but rather was having quite a struggle to pull Mr. Moore off of Mr. Wallace.
>
> (R. 380).

After reviewing the evidence, the Court determined that Applicant was the aggressor in the situation. Thus, even if the incorrect standard was applied, re-analyzing the case through the preponderance of the evidence standard would not change the Court's conclusion. Applicant, as the perceived aggressor, would have been denied immunity regardless of the standard used. Thus, no prejudice has been established and relief is denied on this ground as well.

Failure to Object to Immunity Hearing Findings

Applicant claims Trial Counsel was ineffective for failure to object to the Trial Court's failure to make full and complete findings of fact and conclusions of law for the elements of self-defense as applied under a claim pursuant to the Protection of Persons and Property Act. "[T]he trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat." *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). Though determining each element was analyzed by the Court when conducting appellate or post-conviction review and would have been made simpler if conducted explicitly on the record, this requirement was not clarified until several years after the immunity hearing was conducted. *State v. Glenn*, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019) (finding that the circuit court should at least make specific findings on the elements on the record).; *see also Thornes v. State*, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) ("The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements.").

However, much like in *Glenn,* the Court's finding that the elements of self-defense can be inferred from the finding of fact and conclusions of law stated on the record. Specifically, the Court explicitly found Applicant failed to meet the third element of self-defense when the Court found that the slap the victim gave Applicant "was not of the nature that Mr. Moore should have believed he was going to have to take action to prevent death or great bodily injury." Additionally, the Court found that after the slap, Applicant became the aggressor in the situation, indicating the stabbing was not unavoidable and Applicant was at least partially responsible for escalating the situation and, thereby, bringing on the difficulty. Thus, the Court's failure to

address each element of self-defense specifically did not impact his conclusion reached when denying immunity.

Additionally, there has been no showing that failure to make specific findings impacted appellate court proceedings. Specifically, in the Court of Appeals' order, the court did not find that the issue of immunity was not properly preserved for appellate review. Rather, it simply chose to affirm the findings of the lower court. Accordingly, there has been no showing that any failure to make specific findings of fact and conclusions of law in any way impacted Applicant's success on direct appeal. Thus, because this Court declines to find any error on the part of Trial Counsel that impacted circuit or appellate court proceedings concerning the denial of immunity, no prejudice is found, and relief denied accordingly.

Failure to Request Lesser-Included Instructions

Applicant alleges Trial Counsel was ineffective for failure to request lesser-included jury instructions for assault and battery of a high and aggravated nature and first-degree burglary. Concerning deficiency, Counsel must articulate a valid reason for employing a certain strategy, which is measured under an objective standard of reasonableness. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1992). Counsel is not ineffective for failing to request a lesser included offense jury instruction when there is no evidence that the defendant committed the lesser, as opposed to the greater offense. *Bozeman v. State*, 307 S.C. 172, 176, 414 S.E.2d 144, 146 (1992).

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

determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

Trial Counsel credibly testified that he discussed the decision to request a lesser-included instruction with Applicant, but Applicant decided he did not want the instruction because he was convinced he could not be found guilty of attempted murder. Trial Counsel seemingly believed that this was a sound strategy as well, stating that he thought the wrong decision was reached and he thought the State did not present enough evidence for an attempted murder conviction. Failure to request this instruction was a reasonable strategy on the part of Trial Counsel and correlated with Applicant's request from him. Accordingly, deficiency is not found. The fact that there is no deficiency, combined with the fact that no evidence was shown at the evidentiary hearing indicating that the results of the proceeding would have been different had Counsel requested a lesser-included instruction, leads this Court to decline to find prejudice as well. Accordingly, relief is denied on this ground.

Failure to Request Specific Intent Instruction/Object to General Intent Instruction

Applicant alleges Counsel was ineffective for failing to request specific intent jury instructions and failure to object to the trial court's failure to give the specific intent to kill instruction to the jury at trial. Applicant argued that there was no clear statement from the trial court that there must be a specific intent to kill, which is required pursuant to *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017).

Attempted murder is defined by statute as: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied[.]" S.C. Code Ann. § 16-3-29. In 2017, the Supreme Court decided *King*, 422 S.C. at 56-57, 810 S.E.2d at 23 (2017), *aff'g as modified State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), and found "'[T]he

Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder....'" Attempted murder is a specific-intent crime, which requires that "the defendant consciously intended the completion of acts comprising the [attempted] offense." *State v. King*, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017) (quoting *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)). "Attempted murder can be committed only when the accused's acts are accompanied by *express malice*, malice in fact." *Id.* at 56, 810 S.E.2d at 22 (quoting *Keys v. State*, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988)). "Express malice is the 'deliberate intention unlawfully' to kill a human." *Id.*

When analyzing the prejudicial effect of erroneous jury instructions, the Supreme Court has "often applied harmless-error analysis to cases involving improper instructions." *Neder v. United States*, 527 U.S. 1, 9 (1999); *see United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000) ("[W]e join our sister circuits in holding that . . . [erroneous jury instructions are] subject to harmless error analysis."). Whether or not the error was harmless is a fact-intensive inquiry. *State v. Jeffries*, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994) ("We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict.") (citations omitted). When considering whether an error with respect to a jury instruction was harmless, courts must "determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." *State v. Kerr*, 330 S.C. 132, 144, 498 S.E.2d 212, 218 (Ct. App. 1998). This is determined based on all of the evidence presented to the jury. *State v. Gibson*, 416 S.C 260, 265, 786 S.E.2d 122, 124 (2016); *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992).

In *King*, the South Carolina Supreme Court agreed with this Court and held the trial court's jury instruction *in that specific case* could not be deemed harmless. *King*, 422 S.C. 47,

64, 810 S.E.2d 18, 27 (2017). This Court conducted a harmless error analysis regarding the erroneous jury instruction and held "Officer Butler's inadmissible testimony as to the number of shots King fired affected the jury's verdict on attempted murder, and we cannot say that either the admission of the evidence or the erroneous jury charge are harmless beyond a reasonable doubt." *State v. King*, 412 S.C. 403, 417, 772 S.E.2d 189, 198 (Ct. App. 2015).

Trial Counsel credibly testified that he believed *King* was not decided at the time of trial.[5] Trial Counsel should not be found deficient for failing to anticipate subsequent changes in the law. Accordingly, Trial Counsel should not be ineffective for failing to request a specific intent instruction or for failure to object to a general intent instruction.

However, even if this Court were to find deficiency, no prejudice has been established. As Trial Counsel testified, the central issue before the jury was never whether Applicant consciously intended to inflict the harm he did. Rather, the issue before the jury was whether that specific intent was born out of maliciousness against the victim or out of an honest belief the act was needed in self-defense. Trial Counsel also credibly testified that the defense used at trial never indicated that the act could have been committed out of recklessness or negligence. *See State v. Kinard*, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (Ct. App. 2007) (quoting BLACK'S LAW DICTIONARY (7th ed. 1999) ("'General intent" is defiled as 'the state of mind required for the commission of certain common law crimes not requiring specific intent' and it usually

[5] Applicant relies on *King* in support of this allegation. However, the Supreme Court's decision in *King* was filed October 2017, after Applicant's trial in April 2016. Importantly, the relevant lens for analysis is "counsel's perspective at the time" of trial. *Strickland*, 466 U.S. at 689; *see also Thornes*, 310 S.C. at 310, 426 S.E.2d at 766 ("The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements."). Further, attorneys are not required "to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." *Thornes*, 310 S.C. at 309-10, 426 S.E.2d at 765.

takes the form of recklessness . . . or negligence.'"). Accordingly, even if this Court were to presume deficiency, any errors in the jury instructions were harmless and, thus, non-prejudicial. Accordingly, relief is denied on these grounds.

Medical Records/Photographs

Applicant claims Trial Counsel was ineffective for failure to present Applicant's medical records and photographs of injuries incurred in the incident at trial. Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure to explore the decision was a strategic decision. *Strickland,* 466 U.S. at 680. If there is only one line of defense, counsel must conduct a "reasonably substantial investigation" into that line of defense. *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1252). However, if there are several lines of defense, counsel may still be effective even if every single line is not explored. *Id.* "[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Id.* at 681 *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1255). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Regarding failure to alert the Applicant of a defense specifically, Trial Counsel will not be found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at the time of trial, or another avenue of defense existed. *See McGray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing); *Arnette v. State,* 306 S.C. 556, 413

S.E.2d 803 (1992) (stating that failing to inform of a defense was not ineffective when there was no evidence at trial that supported the defense); *Robinson v. State*, 308 S.C. 361, 417 S.E.2d 361, 417 S.E.2d 88 (1992) (stating that Counsel was not ineffective when failing to state a defense that was not recognized by the Court until six years later and was just recently acknowledged by the scientific community).

Trial Counsel acted reasonably in deciding to elicit testimony about the fight through cross-examination and credibly testified that he did not introduce this documentation, at least in part because he did not think it would make a difference at trial. At the immunity hearing, testimony was elicited from Applicant about how the victim slapped him, grabbed him by the hair, and pushed him to the ground. (R. 267). Applicant also testified that his hair was ripped out of his head and how he went to the doctor, showing signs of concussion and had swelling around his neck. (R. 285-86). At trial, testimony was elicited about how the fight was mutual, how Applicant was slapped by the victim, how the victim carried Applicant to the ground, and how Applicant claimed he was the victim. (R. 41-42, 56, 61, 64, 67-68, 78, 87, 103, 105-06, 109, 125, 136-37, 160). This Court finds admission of medical records would have been largely duplicative with the testimonies elicited and evidence presented at both hearings and would not have changed the results of the proceedings. Trial Counsel seemingly understood this when he elected not to pursue this line of defense at trial. Counsel is not required to pursue every avenue of defense possible, but to make reasonable decisions when identifying and pursuing lines of defense. Trial Counsel did this and is not found deficient. Additionally, because the records would not have made a difference at trial, prejudice has not been established. Accordingly, relief is denied on this ground.

Failure to Use 04/2014 Incident Report

Applicant claims Trial Counsel was ineffective for failure to introduce the incident report at the immunity hearing and trial to show Applicant was allegedly attacked by several assailants, including the victim. However, Applicant testified at the immunity hearing that he thought the intervener was choking him from behind. (R. 267-70, 287). Admission of the incident report would have been duplicative. Additionally, Trial Counsel credibly testified that he did not enter this report at the immunity hearing because he thought the best evidence on this point was Applicant's testimony. This was a reasonable strategy on the part of Trial Counsel and, thus, was not deficient on this ground.

Concerning admission of report at trial, testimony was elicited indicating Applicant claimed he was attacked and was the victim in the situation. The incident report would have been largely duplicative at trial, which seemingly factored into Trial Counsel's decision-making. Thus, Trial Counsel was not deficient. Additionally, Trial Counsel credibly testified that he did not think the incident report would have made an impact at trial. This Court agrees. Accordingly, this Court declines to find prejudice and denies relief on this ground.

Failure to Object to Legal Opinion Re: Deadly Force

Applicant alleges "Trial Counsel failed to object during the immunity hearing when the State elicited legal opinion testimony from a lay witness striking at the heart of the ultimate issue of self-defense by asking, '. . . at any time did you do anything that would cause [Applicant] to use deadly force against you?'" Trial Counsel testified that he believed the witness was able to testify to this issue and that this testimony was not objectionable. Trial Counsel is not expected to object to issues he thinks are not objectionable to be found not deficient. However, even if this was objectionable, there is no indication this specific question impacted the Court's decision at

the immunity hearing. This is particularly true, given the fact that this question was asked in a series of other similar questions concerning whether the victim had a weapon or punched Applicant repeatedly. (R. 315). Any sustained objection likely would have led to the prosecutor rephrasing their question and, in doing so, eliciting the same response. Thus, this testimony concerning deadly force is largely duplicative. Thus, this Court finds that the requisite showing of prejudice has not been made and, accordingly, denies relief on this ground.

Failure to Object to Legal Opinion Re: Mutual Combat

Applicant alleges Trial Counsel failed to object during the immunity hearing when the State elicited legal opinion testimony from a lay witness striking at the heart of the ultimate issue of self-defense by asking if Applicant was involved in 'what we call mutual combat?'" At trial, the State followed the question up with "In other words, both of you were tussling?" (R. 42). Even if the initial question was a legal question, it was immediately rectified by the follow up question. The follow up question was not objectionable, and Trial Counsel is not found deficient for failing to launch objections at non-objectionable questions. Even if Trial Counsel was deficient, there is no showing this impacted the Court's decision at the immunity hearing. Accordingly, relief is denied on this ground.

Move to Sequester

Applicant alleges "Counsel failed to move to sequester any of the witnesses for either immunity hearing or trial where the State repeatedly referred to prior witness testimony when questioning later witnesses." Trial Counsel testified that sequestration is automatic in Chesterfield County trials. The prosecutor credibly testified that Trial Counsel was not correct in that assertion, but that the testimonies of witnesses were largely independent of one another and, accordingly, failure to sequester likely would not have changed any of the witnesses' testimonies

or would have impacted the trial proceedings. Applicant has failed to show how this failure on the part of Trial Counsel impacted trial proceedings. Thus, no prejudice for any failure to move to sequester has been shown. Accordingly, relief is denied on this ground.

Failure to Obtain Audio Recording from Prior Civil Action

Applicant alleges that Trial Counsel was ineffective for failure to obtain audio recordings from the prior civil action. Trial Counsel credibly testified that he investigated this and discovered there was no written record or recording of the Magistrate's Court matter concerning the property damage. Thus, Trial Counsel was not deficient for failure to obtain something he investigated and was informed did not exist. Further, this audio recording was not provided to this Court, nor has anything beyond mere speculation about how the results of the proceedings would have been different had the recording been obtained. This is particularly true, given that many details concerning the prior incident were elicited from the victim at the hearing. (R. 46-48, 51-54). Accordingly, no prejudice has been found and relief is denied on this ground.

Batson Motion

Applicant alleges Counsel was ineffective for failing "to quash the jury pursuant to Batson where the State utilized four (4) of its five (5) statutory strikes to strike white males from the petit jury." "The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). "The purposes of *Batson* and its progeny are to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venire person's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." *State v. Haigler*, 334 S.C. 623, 628–29, 515 S.

88, 90 (1999) (internal citations omitted). "When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one." *Shuler,* 344 S.C. at 615, 545 S.E.2d at 810.

In *Purkett v. Elem*, 514 U.S. 765, 767(1995), the Supreme Court of the United States explained the proper procedure for a *Batson* hearing as follows:

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.
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> 514 U.S. at 767.

Step two of this process does not demand an explanation that is persuasive or even plausible. *State v. Cochran,* 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct. App. 2006) (quoting *Purkett,* 514 U.S. at 767–68). In step two, "the proponent of the strike does not carry 'any burden of presenting reasonably specific, legitimate explanations for the strikes.'" *Id.* (internal citations omitted). "Therefore, '[u]nless a discriminatory intent is inherent' in the explanation provided by the proponent of the strike, 'the reason offered will be deemed race neutral' and the trial court must proceed to the third step of the *Batson* process." *Id.* (quoting *Purkett,* 514 U.S. at 768).

"At step three, the opponent of the strike must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." *Cochran,* 369 S.C. at 315, 631 S.E.2d at 298 (internal citation omitted). "The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike." *Haigler,* 334 S.C. at 629, 515 S.E.2d at 91. "This burden is generally established by showing similarly situated members of another race were seated on the jury." *Cochran,* 369 S.C. at 315, 631 S.E.2d at 298. However, the uneven application of a neutral reason does not automatically

result in a finding of invidious discrimination if the strike's proponent provides a race or gender neutral explanation for the inconsistency. *State v. Kelley,* 319 S.C. 173, 460 S.E.2d 368 (1995) (finding the State provided a racially neutral explanation for why the solicitor did not strike a juror with similar characteristics to one previously stricken); *see Purkett,* 514 U.S. at 768, (during step three, "persuasiveness of the justification becomes relevant."); *see also State v. Geddis,* 313 S.C. 37, 437 S.E.2d 31 (1993); *State v. Wilder,* 306 S.C. 535, 413 S.E.2d 323 (1991).

The ultimate question which the trial court resolves under the third step is whether the movant has met his burden in demonstrating purposeful discrimination. *State v. Casey,* 325 S.C. 447, 454, 481 S.E.2d 169, 173 (Ct. App. 1997) (internal citations omitted). The trial court's determination is dependent on whether minimum quantum of evidence has been produced that facially neutral explanation for peremptory strike was mere pretext, as ruling turns on examination of totality of facts and circumstances in record, including credibility and demeanor of strike's proponent and plausibility of neutral but otherwise unpersuasive reason. *Id.* The trial court's finding of purposeful discrimination rests on its evaluation of demeanor and credibility. *Edwards,* 384 S.C. at 509, 682 S.E.2d at 823. "Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an 'evaluation of the [attorney's] mind lies peculiarly within a trial [court's] province.'" *Id.* (quoting *Hernandez v. New York,* 500 U.S. 352, 365 (1991)). The trial court must often base its decision on credibility determinations, and its rulings on discrimination are accorded great deference on appeal. *State v. Casey,* 325 S.C. 447, 454, 481 S.E.2d 169, 173 (Ct. App. 1997) (citing *State v. Green,* 306 S.C. 94, 409 S.E.2d 785 (1991) (finding that absent showing that solicitor intentionally exercised strike because of discriminatory reasons, trial court's findings that the strike was not racially motivated should b

given great deference on appeal)). However, where the trial court's findings are not supported by evidence in the record, such findings will be overturned. *Casey*, 325 S.C. at 454, 481 S.E.2d at 173 (citing *State v. Grate,* 310 S.C. 240, 423 S.E.2d 119 (1991)). When the opponent of the strike proves the proponent of the strike practiced purposeful racial discrimination, the trial court must quash the entire jury panel and initiate another jury selection de novo." *Cochran,* 369 S.C. at 315, 631 S.E.2d at 298.

This Court finds Trial Counsel was not ineffective on this ground. Trial Counsel credibly testified that he did not see a *Batson* issue with the striking of white men. Counsel is not deficient for failure to make a frivolous strike or motion. Additionally, the prosecutor in this case credibly testified that there were race-neutral reasons behind why certain jurors were struck by the State and provided the exact reasons why each juror was struck. Thus, even if Counsel did make a *Batson* motion, it would not have been successful. Accordingly, relief is denied on this ground.

Failure to Object to Medical Opinion Testimony

Applicant alleges "Counsel failed to object to Rules 701 and 702, SCRE, or *Ford v. Watson*, to medical opinion testimony by the EMS technician regarding medical signs and appearances of shock, as well as whether certain wounds were consistent with those needing advanced life support where the State never offered the witness as an expert in the field, no *voir dire* of the witness was performed, and the trial judge made no findings qualifying the witness as an expert required under his gatekeeping role."

At trial, the EMS technician stated "the patient appear[ed] to be sweating and pale at that point when we got there. So far as how much blood he lost, I'm not sure but there was a good amount of blood on the floor." (R. 118). He then stated that that is typically seen in people goi

into shock.

Trial Counsel credibly testified that he thought this witness, as an EMS worker, was able to testify on this basis and the line of questioning was not objectionable. Trial Counsel is not required to make frivolous objections, especially if he perceives the content to be non-objectionable. Further, Trial Counsel's defense at trial was not that the victim was not seriously injured, but that Applicant caused those injuries in self-defense. Thus, there was no reason to object, even if it was objectionable. Further, no prejudice is found, because there has been no showing that had Trial Counsel objected, the results of the trial proceedings would have been different. Accordingly, relief is denied on this ground.

Failure to Object to Opinion Testimony re: Crime Scene Reconstruction

Applicant alleges "Counsel failed to object under Rules 701 and 702, SCRE, and *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) to opinion testimony of Sgt. Hutchinson regarding crime scene reconstruction where the State gave leading questions suggesting specifically where in McCormick's Grocery the fight started based upon location of blood on the floor." Trial Counsel is by no means required to make every single potential objection at trial, no matter how frivolous or unimportant. An objection to this testimony would have been frivolous and, even if it was sustained, likely would have led the prosecutor to asking a similar question that was not objectionable. Additionally, there is no evidence of prejudice based upon this this allegation, nor any indication that the result of trial in any way hinged on this line of questioning. Thus, relief is denied on this ground.

Failure to Object to Opinion Testimony re: Who the Victim was

Applicant alleges "Counsel failed to object as both leading and giving opinion testimony on an ultimate issue in fact when Sgt. Hutchinson was asked, 'In looking at the case as a whole

who was the victim in this case?' to which he answered, 'In my opinion, would be Mr. Wallace.'" Trial Counsel credibly testified that he thought the officer was able to offer his opinion on this matter and that this line of questioning likely was not objectionable. Additionally, this Court finds that the jury likely presumed that was the officer's conclusion, given the fact that the victim was airlifted to Charlotte for medical attention and that Applicant was arrested, charged, and subsequently proceeded to trial on an attempted murder charge. Thus, objecting to this likely would have drawn even more attention to the issue which Trial Counsel probably wanted to avoid, strategically speaking. Additionally, even if the objection was sustained, this objection most likely would not have changed the results of the proceedings. Thus, Respondent contends Applicant has not met his burden of proof on this claim and, consequently, relief should be denied on this ground.

Failure to Object to Opinion Testimony re: Who Victim would be in Similar Situation

Applicant alleges "Counsel failed to object under Rule 701 and 702 to Inv. Tim Perry's testimony on redirect examination when the State elicited opinion testimony on whether person in a given scenario would be deemed a 'victim,' where the facts were similar to the present case, where Inv. Perry was not qualified as an expert witness, and where the opinion testimony touched on the ultimate issue in the case." As analyzed above, Trial Counsel credibly testified that he did not think this was objectionable. Additionally, this Court finds that the jury likely presumed that was the officer's conclusion, given the fact that the victim was airlifted to Charlotte for medical attention and that Applicant was arrested, charged, and subsequently proceeded to trial on an attempted murder charge. Thus, objecting to this likely would have drawn even more attention to the issue which Counsel probably wanted to avoid, strategically speaking. Additionally, even if the objection was sustained, this objection most likely would not

have changed the results of the proceedings. If sustained, the objection likely would have caused the prosecutor to rephrase their question, eliciting a similar response. Thus, Respondent contends Applicant has not met his burden of proof on this claim and, consequently, relief should be denied on this ground.

Failure to Object to Victim's Medical Condition

Applicant claims Counsel was ineffective for failure to object to the victim's medical condition. Counsel credibly testified that he did not think this was objectionable. Additionally, this evidence was not contested by the defense, so there was no strategic reason to object. Specifically, the defense did not contest that a fight occurred, and the victim left the fight in such a precarious situation that he needed serious medical intervention. Instead, the defense was that Applicant inflicted such serious injuries on the victim because he was acting in self-defense. Accordingly, there was no strategic reason to object to this line of questioning. Thus, Trial Counsel was not deficient on this ground. Additionally, there has been no showing that an objection would have been sustained, that this testimony would not have come in through other means, and that it would have made an impact at trial. Thus, no prejudice has been shown. Accordingly, relief is denied on this ground.

Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). "Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). Applicant must show appellate counsel's performance was deficient, and he was prejudiced by the deficiency. *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005); *Anderson*

v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); *Thrift v. State*, 302 S.C. 535, 537, 397 S.E.2d 523, 525 (1990).

Appellate counsel has a professional duty to choose among potential issues according to their merit. *Jones v. Barnes*, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. *Tisdale v. State*, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting *Jones v. Barnes*, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . .")).

When a claim of ineffective assistance of counsel is based upon neglecting to file a merits-based brief, Applicant must show that appellate counsel unreasonably failed to discover non-frivolous issues and file a merits brief raising them, and a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he or she would have prevailed on his appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Applicant must show that a reasonably competent attorney would have found one non-frivolous issue warranting a merits brief, and that the issue identified would have won on appeal. *Id.* at 288.

Petition for Rehearing

Applicant's allegation that Appellate Counsel was ineffective for failure to petition for rehearing is without merit. Appellate Counsel credibly testified that she discussed a petition for rehearing with Applicant, but Applicant informed Appellate Counsel that he did not want to pursue a petition for rehearing. Instead, Appellate Counsel credibly testified that Applicant wanted to end his direct appeal, so he could file a post-conviction relief application as soon

possible. Counsel cannot be found deficient for listening to her client and pursuing the option he has chosen after being informed of his options. Additionally, there has been no showing that a petition for rehearing would have been successful and, accordingly, Applicant has not met his prejudice prong either. Accordingly, relief is denied on this ground.

Evidentiary Standard Given at Immunity Hearing

Applicant claims Appellate Counsel was ineffective for failure to raise and argue the issue of Trial Court applying an incorrect evidentiary standard. Appellate Counsel credibly testified that she did not think the Court potentially using the incorrect evidentiary standard was preserved on appeal. Nonetheless, she testified that she argued the correct standard throughout her briefs and that she relied heavily on the immunity hearing and trial transcripts in doing so. This Court finds Appellate Counsel was not deficient for effectively raising the issue but deciding to do so in a way she perceived was better preserved on appeal and stood a greater chance of success on appeal. Additionally, no prejudice is found because Applicant has not shown that this issue would have prevailed on appeal based upon this issue. Thus, relief is denied on this ground.

Self-Defense Findings

Applicant claims Appellate Counsel was ineffective for failure to raise and argue the immunity hearing Court's failure to make full and complete findings of fact and conclusions of law for the elements of self-defense. However, Appellate Counsel's primary argument on appeal was that the circuit court incorrectly found Applicant failed to meet the elements of self-defense. Thus, the issue Applicant claims Appellate Counsel should have raised was effectively raised on appeal, but in a way Appellate Counsel thought was more properly preserved and stood a greater chance of success on appeal. Appellate Counsel is not deficient for reasonably concluding the

argument she decided to raise was the better issue. Additionally, there has been no showing that this issue Applicant claims he wanted raised would have likely prevailed on appeal. Accordingly, this Court declines to find prejudice. Thus, relief is denied on this ground.

Conclusion

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

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

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 30 day of June, 2022.

MICHAEL S. HOEY
Presiding Judge
Fourth Judicial Circuit

Pageland, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF CHESTERFIELD
IN THE COURT OF COMMON PLEAS

Gary Moore #367744 Applicant,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Filed Order of Dismissal** has been served upon applicant's counsel by mailing one copy in the United States mail, postage prepaid, addressed to:

Mr. Dayne C. Phillips, Esquire.
Price Benowitz LLP
1614 Taylor Street Suite D
Columbia, SC 29201

This 21st day of July 2022.

Summer Etheredge
Legal Assistant for Respondent

SWORN to before me this 21st day of July 2022.

Notary Public for South Carolina.
My Commission Expires: 3/29/2032

JORDAN BAIRD HICKMAN
NOTARY PUBLIC
MY COMMISSION EXPIRES 03/29/2032
STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA COUNTY OF CHESTERFIELD	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTH JUDICIAL CIRCUIT
Gary Moore, #367744, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2020–CP–13–090 **ORDER DENYING APPLICANT'S MOTION PURSUANT TO RULE 59(e), SCRCP**

This matter comes before the Court by way of Gary Moore's (Applicant) Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP, filed August 3, 2022, asking this Court to alter or amend its Order of Dismissal denying Applicant's application for post-conviction relief.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Chesterfield County Clerk of Court. During its April 2016 term, the Chesterfield County Grand Jury indicted Applicant for attempted murder (2015-GS-13-0398). Applicant was represented by Larry W. Knox, Esquire. Mary Thomas Johnson-Lee and Kenard Redmond, Esquires, of the Fourth Circuit Solicitor's Office, prosecuted the case. On April 5-6, 2016, Applicant appeared before the Honorable Paul M. Burch, circuit court judge, and a jury. On April 6, 2016, Applicant was found guilty as indicted, and Judge Burch sentenced Applicant to eighteen years' imprisonment on April 11, 2016.

Applicant timely filed a notice of appeal on April 14, 2016. Tricia A. Blanchette, Esquire, perfected Applicant's appeal. The South Carolina Court of Appeals affirmed the conviction and sentence by unpublished opinion. State v. Moore, 2019-UP-234 (Ct. App. filed June 26, 2019). The Remittitur was returned to the circuit court on July 15, 2019.

CURRENT ACTION

On January 27, 2020, Applicant filed an application for post-conviction relief in which he alleged he was being held in custody unlawfully for the following reasons:

1. "Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 3 and 14 of the South Carolina Constitution. *See* S.C. Code 17-27-20(A), (4) and (6). Specifically, Trial Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different, *see Strickland v. Washington*, 466 U.S. 668 (1984)."
    a. "Trial Counsel's acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:"
        i. "Trial counsel failed to conduct a reasonable investigation and to develop all available, relevant and admissible or mitigating evidence in preparation of Applicant's defense. *See Wiggins v. Smith*, 539 US 510 (2003)."
            1. "Counsel's failure to investigate and present the Victim's prior statements that he wanted to injure/kill Applicant."
            2. "Counsel's failure to investigate and present the 911 audio recording to discredit the credibility of the State's witnesses and arguments."
            3. "Counsel's failure to investigate and present pictures of the knife in comparison to the body camera video recording to discredit the credibility of the State's witnesses and arguments."
            4. "Counsel's failure to investigate whether the video recordings admitted at trial had been altered."
            5. "Counsel's failure to investigate and present Applicant's rights under the South Carolina Victim's Bill of Rights as a prior victim."
        ii. "Trial Counsel failed to present and argue that the State violated [] the S.C. Victim's Bill of Rights when Applicant was a victim of a prior incident with the Victim."
        iii. "Trial Counsel failed to object to the Trial Court's application of an incorrect evidentiary standard based upon a misunderstanding and misapplication of *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) as

advanced by the State, rather than making findings of fact and conclusions of law based upon the preponderance of the evidence standard as required by law. *See .e.g. State v. Cervantes-Pavon*, 426 S.C. 442, 827 S.E.2d 564 (2019)."

iv. "Trial Counsel failed to object to the Trial Court's failure to make full and complete findings of fact and conclusions of law for the elements of self-defense as applied under a claim pursuant to the Protection of Persons and Property Act."

v. "Trial Counsel's 'trial strategy' which he conveyed to the Trial Court and Applicant during trial, to not seek jury instructions for the lesser-included offenses of Assault and Battery of a High and Aggravated Nature, and especially First Degree Assault and Battery, was objectively unreasonable given the facts and circumstances of the case. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding 'counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness.'): *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that 'labeling counsel's actions as 'trial strategy' does not automatically immunize an attorney's performance from sixth amendment challenges.')"

vi. "Trial Counsel failed to request a jury instruction regarding specific intent to kill pursuant to *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017)."

vii. "Trial Counsel failed to object to the Trial Court's confusing jury instructions regarding intent where the charged offense required the specific intent to kill, yet where the instruction included language of far lower, "general intent" standards such as recklessness and criminal negligence. *See e.g.*, *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017)."

viii. "Trial Counsel failed to investigate and obtain any medical records or photographs for diagnosis and treatment of Applicant's injuries by either the detention center of Applicant's personal physician where the Applicant indicated at his immunity hearing that he was seen by both where testifying about injuries he received at the hands of his attacker, and where the State elicited testimony to the contrary from an officer during Applicant's trial. *See Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46,

661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015)."

ix. "Trial Counsel failed to use the Incident Report dated 04/2014 during either the immunity hearing or the trial where Applicant was attacked not only by the 'victim' Wallace in the present case but also by several other assailants in concert with Wallace at this time, and where Applicant believed the third party pulling him from behind while he fought with Wallace in the present case was likewise working in concert with Wallace to attack him when showing Applicant's response to the attack was reasonable."

x. "Trial Counsel failed to object during the immunity hearing when the State elicited legal opinion testimony from a lay witness striking at the heart of the ultimate issue of self-defense by asking, ". . . at any time did you do anything that would cause [Applicant] to use deadly force against you?"

xi. "Trial Counsel failed to object during the immunity hearing when the State elicited legal opinion testimony from a lay witness striking at the heart of the ultimate issue of self-defense by asking if Applicant was involved in 'what we call mutual combat?'"

xii. "Trial Counsel failed to move to sequester any of the witnesses for either immunity hearing or trial where the State repeatedly referred to prior witness testimony when questioning later witnesses."

xiii. "Trial Counsel failed to obtain either the audio recording from Applicant's civil summary court proceeding in 2014 against Wallace, or the booking report from Wallace being ordered to jail by the Magistrate Judge for attempting to assault Applicant at the hearing where Wallace denied details of the incident at Applicant's present trial, and where the deputy denied details of the incident at Applicant's present trial, and where the deputy denied any knowledge of the incident at the present trial as well."

xiv. "Trial Counsel failed to quash the jury pursuant to Batson where the State utilized four (4) of its five (5) statutory strikes to strike white males from the petit jury."

xv. "Trial Counsel failed to object to Rules 701 and 702, SCRE, or *Ford v. Watson*, to medical opinion testimony by the EMS technician regarding medical signs and appearances of shock, as well as whether certain wounds

were consistent with those needing advanced life support where the State never offered the witness as an expert in the field, no *voir dire* of the witness was performed, and the trial judge made no findings qualifying the witness as an expert required under his gatekeeping role."

xvi. "Trial Counsel failed to object under Rules 701 and 702, SCRE, and *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) to opinion testimony of Sgt. Hutchinson regarding crime scene reconstruction where the State gave leading questions suggesting specifically where in McCormick's Grocery the fight started based upon location of blood on the floor."

xvii. "Trial Counsel failed to object as both leading and giving opinion testimony on an ultimate issue in fact when Sgt. Hutchinson was asked, 'In looking at the case as a whole, who was the victim in this case?' to which he answered, 'In my opinion, would be Mr. Wallace.'"

xviii. "Trial Counsel failed to object under Rule 701 and 702 to Inv. Tim Perry's testimony on redirect examination when the State elicited opinion testimony on whether person in a given scenario would be deemed a 'victim,' where the facts were similar to the present case, where Inv. Perry was not qualified as an expert witness, and where the opinion testimony touched on the ultimate issue in the case."

xix. "Trial Counsel failed to object under hearsay and the Sixth Amendment Confrontation Clause during the immunity hearing where the State obtained testimony from a deputy as to what an EMS technician allegedly said about Wallace's medical condition and subsequent airlift to a hospital in Charlotte, and where the deputy had no first-hand knowledge of either."

2. "Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. Specifically, Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991)."
   a. "Appellate Counsel's acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:"
      i. "Appellate Counsel failed to file a Petition for Rehearing

in the Court of Appeals to preserve Applicant's ability to file a Petition for Writ of Certiorari to the Court of Appeals in the South Carolina Supreme Court on the issues of whether the Trial Court erred in finding Applicant was not entitled to immunity from prosecution under the Protection of Persons and Property Act, whether the Trial Court erred by failing to grant Applicant's motion for a direct verdict, and whether the Trial Court erred in his response to a jury question."

ii. "In the event Trial Counsel properly preserved the issue of whether the Trial Court applied the incorrect evidentiary standard on a misunderstanding and misapplication of *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) in his closing statement to the Trial Counsel at the immunity hearing, Appellate Counsel failed to raise and argue the issue of the Trial Court applying an incorrect evidentiary standard, rather than making findings of fact and law based upon the preponderance of the evidence standard as required by law. *See, e.g., State v. Cervantes-Pavon*, 426 S.C. 442, 827 S.E.2d 564 (2019)."

iii. "In the event Trial Counsel properly preserved the issue of whether the Trial Court failed to make full and complete findings of fact and conclusions of law for the elements of self-defense as applied under a claim pursuant to the Protection of Persons and Property Act at the immunity hearing, Appellate Counsel failed to raise and argue this issue of the Trial Counsel's failure to make full and complete findings of fact and conclusions of law for the elements of self-defense."

An evidentiary hearing was held virtually via WebEx on March 14, 2022, before the Honorable Michael S. Holt. Applicant was present and represented by Dayne C. Phillips, Esquire. Assistant Attorney General Chelsey F. Marto represented Respondent. Applicant testified on his behalf. Trial Counsel Larry Knox, Appellate Counsel Tricia Blanchette, and Assistant Solicitor Mary Thomas Johnson-Lee, Esquires, also testified. Following a thorough review of the record and the testimony and evidence presented at the evidentiary hearing, Judge Holt denied Applicant's post-conviction relief application with prejudice by Order of Dismissal filed on July 18, 2022.

Thereafter, on August 3, 2022, Applicant filed his motion pursuant to Rule 59(e), SCRCP. On January 22, 2024, a hearing convened before Judge Holt to hear Applicant's motion pursuant to Rule 59(e), SCRCP.

APPLICANT'S MOTION TO ALTER OR AMEND

In Applicant's motion, he asks the Court to reconsider its ruling pursuant to Rule 59(e). SCRCP. After careful consideration of the arguments of Counsel and review of the record, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or fact not appropriately considered. The order of dismissal issued by this Court contains the appropriate findings of fact and conclusions of law as required by § 17-27-80 of the South Carolina Code of Laws and Rule 52(a) of the South Carolina Rules of Civil procedure. Accordingly, Applicant's motion for reconsideration is **DENIED.**

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

AND IT IS SO ORDERED this 19 day of MARCH, 2024.

THE HONORABLE MICHAEL S. HOLT
Presiding Judge
Fourth Judicial Circuit

CHESTERFIELD South Carolina.