State of South Carolina
The Circuit Court of the Ninth Judicial Circuit

Jennifer B. McCoy
Judge

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March 21, 2024

Horry County Clerk of Court
Attn: Common Pleas Clerk
1301 2nd Ave
Conway, SC 29526

RE: Roger Grate, #379507 v. State of South Carolina
Case Number: 2022CP2606928

Dear Clerk,

I have enclosed the original Order of Dismissal, signed by Judge McCoy for the above referenced case. Please file this order.

Please do not hesitate to contact my office if you need anything else.

Thank you!

Brooke Slade

Brooke Slade
Administrative Assistant
The Honorable Jennifer B. McCoy

Enclosure (as stated)

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Roger D. Grate, #379507, Applicant, v. State of South Carolina, Respondent.	)	CASE No. 2022–CP–26–6928 **ORDER OF DISMISSAL WITH PREJUDICE**

Presiding Judge:	Hon. Jennifer B. McCoy
Applicant's Attorney:	Steven W. Fowler, Esq.
Respondent's Attorney:	Suzanne J. Shaw, Esq.
Trial Counsel:	Kia T. Wilson, Esq.
Date of Hearing:	September 18, 2023
Court Reporter:	Kay H. Richardson

This matter comes before the Court by way of Roger D. Grate's (Applicant) application for post-conviction relief (PCR) filed on November 1, 2022. Respondent, the State of South Carolina, submitted its Return and Motion for a More Definite Statement on December 2, 2022, requesting an evidentiary hearing after Counsel amended Applicant's PCR application to resolve the claims outlined in the application and amendment.

On September 18, 2023, an evidentiary hearing was held at the Georgetown County Courthouse before the Honorable Jennifer B. McCoy. Applicant was present and represented by Steven W. Fowler, Esquire. Assistant Attorney General Suzanne J. Shaw represented Respondent. Applicant proceeded forward on the claims set forth in his application.[1] In support

[1] Counsel for Applicant did not amend the application.

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of these claims, Applicant testified on his own behalf, and Respondent presented testimony from Kia T. Wilson, Esquire (Trial Counsel).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. During its February 2017 term, the Horry County Grand Jury indicted Applicant for Murder (2017-GS-26-00930) and Possession of a Weapon During the Commission of a Violent Crime (2017-GS-26-00931). Applicant was represented by Kia T. Wilson and DeShantell R. Singleton Coles, Esquires. Assistant Solicitors Christopher D. Helms and Catherine D. Owens, Esquires, of the Fifteenth Circuit Solicitor's Office, prosecuted the case.

On March 11-14, 2019, Applicant proceeded to a jury trial before the Honorable Steven H. John. Applicant was found guilty on both charges. Judge John sentenced Applicant to thirty-five (35) years' imprisonment for Murder and five (5) years' imprisonment for the Possession of a Weapon During the Commission of a Violent Crime, sentences running concurrently.

Applicant filed a timely Notice of Appeal on March 20, 2019, that was perfected by Appellate Defender Susan B. Hackett, Esquire, raising the following issue:

> Did the trial judge err in allowing the state to call a witness to testify that approximately one year prior to the shooting for which Appellant stood trial, Appellant was angry at another individual with whom he was playing cards and as a result of that anger, Appellant drew his gun and pointed it at the individual were the evidence was not admissible to prove habit and it did not fall within any of the

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exceptions to the prohibition on character evidence.

The Order affirming the convictions was issued by the South Carolina Court of Appeals on November 3, 2021. State v. Grate, 2021-UP-384 (Ct. App. filed Nov. 3, 2021). Applicant filed a Petition for Rehearing, which was denied on November 18, 2021. On January 18, 2022, Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. The Supreme Court denied certiorari on September 7, 2022. The Remittitur was returned on September 8, 2022.

FACTS GIVING RISE TO THE CONVICTION

On December 25, 2016, Applicant hosted a Christmas party with family at his residence in Horry County. (R. pp. 249-250). Applicant and his stepson, Gregory, walked outside into the neighborhood cul-de-sac to have a private discussion, which soon turned into an argument. (R. pp. 223-24). Darrell Doctor ("Victim"), Applicant's nephew, approached Applicant and Gregory to see why they were arguing and was told to leave. (R. pp. 79-80, 272). Moments later, Victim was walking toward his truck and toward Applicant's general direction; without hearing a threat or seeing Victim with a weapon, Applicant pulled out his pistol and fired a single shot into Victim's head. (R. p. 155). Responding EMS declared Victim dead at the scene. (R. p. 39).

CURRENT ACTION BEFORE THIS COURT

In his *pro se* PCR application, Applicant alleges he is detained unlawfully for the following reasons:

1. Ineffective assistance of trial counsel.
   a. Failure to investigate and present evidence concerning gunshot residue on Victim.
   b. Failure to obtain testimony from an expert witness regarding ballistics and rifling.
   c. Failure to present independent testimony, reports, and analysis of the incident scene from a geological survey.
   d. Failure to adequately investigate, contact, and subpoena potential trial witnesses.
   e. Failure to object to use of the term "unanimous consent."

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f. Conflict of interest.
g. Failure to object to preserve the record on appeal.
h. Failure to adequately develop a defense.
i. Failure to investigate and procure exculpatory evidence.
j. Failure to adequately communicate trial strategy with Applicant.
k. Failure to object to the State commenting on Applicant's silence.
l. Failure to object to the State improperly vouching for witnesses' credibility.
m. Failure to object to the State pitting witnesses against one another.
n. Failure to object to the State speculating that the Applicant was lying.
o. Failure to object to witnesses pronouncing the Victim was dead.
p. Failure to request jury instruction that the jurors can consider prior inconsistent statements in determining credibility.
q. Failure to admit audio recording of Applicant's police statement.

2. Ineffective assistance of appellate counsel.
   a. Failure to raise non-frivolous issues such as admission of gory photographs.
   b. Failure to raise on appeal the admission of Applicant's police statement.
3. The court was without jurisdiction to impose a sentence.
   a. The court improperly abdicated its role as the finder of fact in the pre-trial stand-your-ground motion.
   b. The indictment was not filed properly.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[2] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;

[2] S.C. Code Ann. §§ 17-27-10 to -160.

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4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required

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showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best

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practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S.at 112.

Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that

under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

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Initial Findings

As a matter of general impression, this Court finds Trial Counsel's testimony at the evidentiary hearing **credible** and **persuasive,** where she presented well-recollected testimony of relevant background, facts, and discussions leading up to and during the trial. This Court finds Applicant's testimony at the evidentiary hearing generally **not credible or persuasive**. This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant she rendered adequate assistance and exercised reasonable professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689, 104 S.Ct. 2052; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Ineffective Assistance of Trial Counsel Allegations on the Merits

Applicant has alleged multiple claims of ineffective assistance of Trial Counsel and asserts that as a result of Trial Counsel's purported errors, he is entitled to a new trial. This Court finds Applicant has failed to meet his requisite burden of proof as to each allegation. Each allegation is addressed below:

Allegation 1a: Failure to investigate and present evidence concerning gunshot residue on Victim.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to investigate and present evidence of gunshot residue on Victim. This Court finds this allegation is without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete

investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

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At the evidentiary hearing on direct examination, Applicant testified that a State witness testified that Victim was going to get a gun, and the witness said they heard more than one gunshot. Applicant testified that a bullet was retrieved from the roadway, and it was not tested to see if it was a bullet from his gun or not. Applicant testified that Victim's hands were not checked for gunshot residue. When asked if he thought the bullet came from Victim, Applicant testified that someone testified that Victim was getting a gun.

Applicant testified that Victim bought a gun from him, and he feared for his life because he knew how Victim got when he was drinking. Applicant testified that this was not addressed at trial, and it precluded his chance of pointing the finger at Victim.

On direct examination, Trial Counsel testified that she did not seek ballistics testing and gunshot residue testing because Applicant admitted to the shooting, and she did not feel it was necessary based on his statement to law enforcement and what he had indicated to her. Ultimately, Trial Counsel **credibly** testified that the evidence was not necessary in the defense of the case.

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. Trial Counsel **credibly** articulated a valid reason for not investigating the ballistics and gunshot residue because of Applicant's own admission to the shooting. Trial Counsel also **credibly** testified that she did not recall there being a second shooter or second shot that was in evidence. Rather, Applicant relied on his assertions that there was a second shot but provided no evidence to support his conjecture. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

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Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

Allegation 1b: Failure to obtain testimony from an expert witness regarding ballistics and rifling.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to obtain testimony from an expert witness regarding ballistics and rifling. This Court finds this allegation is without merit.

As an initial matter, this Court finds Applicant failed to meet his burden of proof as to this allegation because he did not present the testimony of an expert at the evidentiary hearing, and therefore, he has not established he was prejudiced by Trial Counsel's allegedly deficient representation. See, e.g., Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding a PCR applicant failed to show prejudice from his Trial Counsel's failure to hire an expert because he failed to have an expert testify at his PCR hearing), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). The South Carolina Supreme Court has repeatedly held that a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony per the rules of evidence at the PCR hearing to establish prejudice from the witness' failure to testify at trial. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice).

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This Court finds that Applicant cannot meet his burden of proving any deficiency by Trial Counsel or any prejudice from the alleged deficiency in Trial Counsel not obtaining testimony from an expert witness. Applicant testified at length to this allegation only to surmise that if ballistics had been done on the bullet, it would have shown it was not his bullet. Applicant did not offer the testimony of an expert or any testing done to support his conjecture. Therefore, Applicant's "mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, *supra*, 318 S.C. at 498–99, 458 S.E.2d at 540.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1c: Failure to present independent testimony, reports, and analysis of the incident scene from a geological survey.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to present independent testimony, reports, and analysis of the incident scene from a geological survey. This Court finds this allegation is without merit.

As an initial matter, this Court finds Applicant failed to meet his burden of proof as to this allegation because he did not present the testimony of an expert at the evidentiary hearing, and therefore, he has not established he was prejudiced by Trial Counsel's allegedly deficient representation. See, e.g., Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding a PCR applicant failed to show prejudice from his Trial Counsel's failure to hire an expert because he failed to have an expert testify at his PCR hearing), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). The South Carolina Supreme Court has

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repeatedly held that a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony per the rules of evidence at the PCR hearing to establish prejudice from the witness' failure to testify at trial. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice).

At the evidentiary hearing on direct examination, Applicant testified that had Trial Counsel gotten a google map of the area, it would have shown that NaQuishe Gause could not have seen what she said she saw. Applicant then testified that the crime scene photos would have shown the vehicles would have prevented NaQuishe Gause from seeing anything.

Trial Counsel testified that she did not feel like a geological survey would have been necessary or beneficial to Applicant's defense. Trial Counsel testified that she could not recall anything at the crime scene that would have prevented NaQuishe Gause from seeing what she testified to.

This Court finds that Applicant cannot meet his burden of proving any deficiency by Trial Counsel and any prejudice from the alleged deficiency in Trial Counsel not obtaining a geological survey. Applicant did not provide this Court with a geological survey, crime scene photos, or testimony from any independent persons to corroborate his conjecture. Instead, Applicant merely speculated as to what these geological surveys may or may not have shown. Therefore, Applicant's "mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, *supra*, 318 S.C. at 498–99, 458 S.E.2d

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at 540. Furthermore, Trial Counsel adequately cross-examined the witness Applicant contends could not see what transpirted on the night of the murder. As presented, this Court cannot ascertain how a geological survey would have changed the outcome of trial.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

Allegation 1d: Failure to adequately investigate, contact, and subpoena potential trial witnesses.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to adequately investigate, contact, and subpoena potential trial witnesses.[3] This Court finds this allegation is without merit.

At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. Ard. v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness

[3] One of the witnesses Applicant claims should have been called was the second officer, Bernard Grate, that responded to the crime scene.

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against the identifiable risks." Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. See e.g. Smith v. State, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); Edwards v. State, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); Glover, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was not deficient by failing to call alibi witnesses when two witnesses who testified at PCR hearing did not establish the alibi).

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

At the evidentiary hearing on direct examination, Applicant testified that Bernard Grate gave a statement to Horry County Police that he was going to make sure that Applicant never saw a day out of jail because he believed that Applicant was having an affair with his wife. Applicant

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testified that he asked Trial Counsel why she did not subpoena Bernard Grate and why he did not turn in any bodycam footage when he questioned witnesses that night. Applicant testified that Trial Counsel never said anything to him about it and he felt like it would have been helpful for his case. Applicant testified that he never asked Trial Counsel to get Bernard Grate's notes from his interviews with witnesses on scene.

On direct examination, Trial Counsel testified that after Applicant asked her about the evidence with Bernard Grate, she had in her notes that she inquired about the relationship and spoke with the Solicitor.

On cross-examination, Trial Counsel testified that she did not interview Bernard Grate because she did not think he would be a helpful witness, especially if there were allegations of an affair.

As an initial matter, this Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. Further, this Court finds the combination of the record and Trial Counsel's **credible** testimony that Bernard Grate was not a favorable witness, especially if there were allegations of an affair. This Court further finds Applicant has failed to meet his burden in proving Trial Counsel was deficient in this matter. Applicant did not present any testimony from Bernard Grate or any other witness he deemed necessary to his defense at trial. Applicant has the burden to prove every allegation in his application. See Butler, 286 S.C. at 441, 334 S.E.2d at 814.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

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Allegation 1e: Failure to object to the use of the term "unanimous consent."

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to use of the term "unanimous consent." This Court finds this allegation is without merit.

"A leading work on criminal procedure explained that if a statute authorizes [a jury] to find a verdict upon anything short of ... unanimous consent, it is void." <u>Ramos v. Louisiana</u>, 590 U.S., 140 S. Ct. 1390 (2020) (quoting J. Bishop, <u>Criminal Procedure</u> § 761, p. 532 (1866)) (internal quotations omitted). "A widely read treatise on constitutional law reiterated that by a jury, is generally understood to mean a body that must unanimously concur in the guilt of the accused before a conviction can be had." <u>Id.</u> (quoting G. Paschal, <u>The Constitution of the United States</u> 210 (1876)) (internal quotations omitted) (capitalization omitted).

Applicant testified at the evidentiary hearing that Trial Counsel should have objected to the trial judge using "unanimous consent" in his jury charge.

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." <u>Ard v. Catoe</u>, *supra*. Applicant's complaint stems from the trial judge reading the caption from the jury verdict sheet. This Court finds there was no legal basis for Trial Counsel to object because there was nothing wrong with what the trial judge did.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

Allegation 1f: Conflict of interest.

Applicant alleges Trial Counsel was constitutionally ineffective due to a conflict of interest. This Court finds this allegation is without merit.

"An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants." State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005), citing Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001). "The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction." See Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) citing Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008), quoting Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984). "However, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief." Id. (quoting Staggs v. State, 372 S.C. 549, 551–52, 643 S.E.2d 690, 692 (2007)).

Applicant testified at the evidentiary hearing that Trial Counsel had a conflict of interest because she wanted to discuss a defense she raised with her boss. Applicant testified that Trial Counsel had a duty to his interest.

Trial Counsel **credibly** testified that she may discuss significant cases with attorneys and supervisors at her office, but at the end of the day, it is her decision on how the case proceeds.

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. Further, this Court finds the combination of the record and Trial Counsel's **credible** testimony that there was no conflict of interest. This Court finds Applicant has failed to prove that Trial Counsel actively represented conflicting

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interests. Applicant has the burden to prove every allegation in his application. See Butler, 286 S.C. at 441, 334 S.E.2d at 814.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1g: Failure to object to preserve the record on appeal.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to preserve the record on appeal. Specifically, Applicant averred that Trial Counsel did not properly object to photos and witness statements and did not properly argue the directed verdict motion. This Court finds this allegation is without merit.

Failure to Object to Photos

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable

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probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

At trial, Trial Counsel objected to photo number seven (7), nine (9), nineteen (19), twenty (20), twenty-one (21), twenty-four (24), twenty-five (25), twenty-six (26), thirty-three (33), and thirty-six (36) as being more prejudicial than probative. The trial judge allowed all of the photos in except twenty-one (21), twenty-five (25), and thirty-six (26). (Trial Tr. pp. 126-144). Trial Counsel renewed her objections to the photos. (Trial Tr. p. 145; pp. 186-187; p. 199).

This Court finds the record wholly refutes Applicant's allegation regarding Trial Counsel not objecting to photos and preserving the record. Trial Counsel objected multiple times and also renewed her objections multiple times to photos based on them being more prejudicial than probative. This Court finds any further objection would not have been meritorious, and Trial Counsel cannot be deficient for failing to make a non-meritorious objection, nor can Applicant be prejudiced by this failure.

Accordingly, Applicant's allegation that Trial Counsel failed to object to photos and preserve the record is **DENIED** and **DISMISSED**.

Failure to Properly Move for a Directed Verdict

When considering a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Larmand, 415 S.C. 23, 30, 780 S.E.2d 892, 895 (2015) (citing Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). The role of the trial court is only to determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). If there is any direct or circumstantial evidence reasonably

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tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). "In deciding motions for a directed verdict. . . the evidence and all reasonable inferences which may be drawn from it must be viewed in the light most favorable to the non-moving party. If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury." Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 611, 518 S.E.2d 591, 597 (1999). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict . . . must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (citing State v. Fogle, 256 S.C. 149, 181 S.E.2d 483 (1971)). The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

At trial, Trial Counsel moved for a directed verdict and argued the following:

> Your Honor, I have the directed verdict motion. I am moving for a directed verdict on the basis that the evidence that the state has presented thus far is not direct, that it's circumstantial and that doesn't reasonably -- the circumstantial evidence that they've presented, doesn't reasonably tend to prove the guilt of my client. At best, it raises a suspicion of guilt and we are asking the Court to grant a directed verdict motion on – in particular the murder, but by default, the possession of a weapon during the commission of a violent crime.

(Trial Tr. pp. 371-372). That motion was denied. (Trial Tr. pp. 372-374).

At the end of the State's case, Trial Counsel again moved for a directed verdict as follows:

> Your Honor, I believe at this point and the Court can direct me. It is so rare that I have to put a case that I am going to again move for a directed verdict and my basis is the same as previously stated. I feel that through the presentation of the defense witnesses, it's very clear

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that there is a set of events that didn't happen the way that the state has characterized it and that they have failed in their burden of proof of the defendant's guilt as to murder and possession of a weapon during the commission of a violent crime. Again, I'm arguing that the evidence is not direct, that it's primarily circumstantial and doesn't reasonably tend to prove his guilt.

(Trial Tr. p. 450). That motion was denied. (Trial Tr. pp. 450-451).

After the jury returned a verdict, Trial Counsel made the following motion:

> Your Honor, at this time, the defense would move for a judgment in arrest of verdict. The basis of our motion, Your Honor, is that the jury's verdict is against what we believe is the greater weight of the evidence presented at this trial. Certainly, there was quite a few witnesses from the state. In particular, I think there were two that got up, one was a habit witness, one was a rebuttal witness, in particular. Clearly, their testimony had been impeached through use of -- directly by a witness who said the opposite was true. In addition, through the timeliness of this statement, I believe, of Veronica Doctor, about what she says occurred. Your Honor, I'm requesting that the Court vacate the jury's verdict in favor of a not guilty on the charge of murder.

(Trial Tr. p. 548). That motion was denied. (Trial Tr. p. 549).

As an initial matter, this Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. Further, this Court has reviewed the relevant portion of the transcript and finds no deficiency in Trial Counsel's handling of this motion.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

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Failure to Object to Witnesses Inconsistent Testimony at Trial

On direct examination at the evidentiary hearing, Applicant testified that Trial Counsel should have objected to "two" State's witnesses' inconsistent testimony at trial.

As an initial matter, this Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds that Applicant's assertion that Trial Counsel should have objected to the inconsistent testimony is wholly without merit. The credibility of a witness is for a jury to determine. If anything, the inconsistent testimony was in Applicant's favor because it was the State's witnesses and not defense witnesses. Also, this Court has reviewed the record and finds Trial Counsel adequately cross-examined the witnesses on their inconsistencies. Thus, Applicant has failed his burden in showing Trial Counsel was deficient.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1h: **Failure to adequately develop a defense.**
Allegation 1i: **Failure to investigate and procure exculpatory evidence.**
Allegation 1j: **Failure to adequately communicate trial strategy with Applicant**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to develop a defense, investigate, procure exculpatory evidence, and communicate the trial strategy with Applicant. This Court finds these allegations are without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete

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investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

In order to prevail upon a claim that counsel did not investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

At the evidentiary hearing on direct examination, Applicant testified that Trial Counsel was ineffective for not bringing the bullet James Grate testified hit his car to light at trial.

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On cross-examination, Applicant testified that on the night of the shooting, James Grate gave a statement that the bullet struck the Victim and hit his car. Applicant testified that James Grate did not testify to this at his trial because he kept changing his story. Applicant then testified that it just "go[es] to [James Grate's] credibility that he keep changing his statement." (PCR Tr. p. 75).

On cross-examination, Trial Counsel testified that she met with Applicant five to seven times before he bonded out.

On redirect examination, Trial Counsel testified that her recollection was that Applicant told her about the bullet hitting the car, but she did not recall that coming from anywhere else. Trial Counsel testified that there was no exculpatory evidence.

Here, Applicant presented no witnesses, witness statements, or exculpatory evidence. The only thing Applicant offered as evidence to these allegations was his self-serving assertion that Trial Counsel failed to develop a defense from the bullet that allegedly hit James Grate's vehicle. This Court finds Trial Counsel's testimony **credible**— thus, he has failed to show this Court how the result at trial would have been different with additional preparation and what further defenses Trial Counsel could have pursued regarding this alleged bullet in James Grate's vehicle. Also, this Court finds the record reflects Trial Counsel was well-prepared in Applicant's defense and was familiar with the facts of the case and the law surrounding the charges. This Court finds Trial Counsel was not deficient in their representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Trial Counsel's performance in this matter.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

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Allegation 1k: Failure to object to the State commenting on Applicant's silence.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to the State commenting on Applicant's silence. This Court finds this allegation is without merit.

On direct examination at the evidentiary hearing, Applicant testified that the Solicitor repeatedly commented on his silence, and Trial Counsel did nothing about it. Applicant testified that it happened throughout trial.

On cross-examination, Applicant testified that he was not sure where the Solicitor commented on his silence, but it is in the record. Applicant testified that it might be in closing, but he knew he read it.

On direct examination, Trial Counsel testified that she did not recall the Solicitor commenting on Applicant not testifying or his silence.

This Court has combed the record and has been unable to find any remarks from the Solicitor regarding Applicant not testifying or that his silence was an admission of guilt. Applicant was unable to provide where in the record the Solicitor made these comments. Notably, Applicant testified in his defense at his trial. Thus, after a thorough review of the record and the testimony at trial this Court finds Applicant has failed to overcome his burden of proving Trial Counsel was deficient.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

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Allegation 11: Failure to object to the State improperly vouching for witnesses' credibility.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to the State improperly vouching for witnesses' credibility. This Court finds this allegation is without merit.

"It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." United States v. Francisco, 35 F.3d 116, 120 (4th Cir. 1994); see also State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony."). A prosecutor should "prosecute with earnestness and vigor" and "may strike hard blows, [but] is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." New, 338 S.C. at 319, 526 S.E.2d at 240. "On the other hand, a closing argument may be held improper where it appeals to personal bias or arouses the jury's passions or prejudice." Id. "[I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger, 295 U.S. at 88.

"Generally, the assessment of witness credibility is within the exclusive province of the jury." Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016) (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). Solicitors may not make explicit personal assurances or indicate there is information not presented which supports the testimony, i.e. vouch, as doing so improperly invades the province of the jury and places the

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government's prestige behind the witness. Id., 416 S.C. at 250, 785 S.E.2d at 477 (citing Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004)).

To find whether a prosecutor's comments in closing argument violated a defendant's due process rights, the Court must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (quoting Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998)). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." Id. A PCR court must view the alleged impropriety of the prosecutor's argument in the context of the entire record, and the applicant has the burden of proving he did not receive a fair trial because of the alleged improper argument. Id.

At the evidentiary hearing on direct examination, Applicant testified that it was improper for a government officer to vouch in front of the jury.

On direct examination, Trial Counsel testified that if, in the Solicitor's closing, there had been a comment that the witnesses had no reason to lie, she may or may not have objected. Trial Counsel testified that both sides are pushing that their witnesses are telling the truth and it would not be alarming to her.

This Court has reviewed the closing arguments at trial and finds that Solicitor Helms did not improperly invade the province of the jury and vouch for the witnesses. Rather, Solicitor Helms, on several occasions, repeated to the jury that they were the fact finders, that they were the

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judges of the credibility of the witnesses. (Trial Tr. p. 479; p. 486; p. 489). Thus, Applicant has failed to overcome his burden and prove Trial Counsel was deficient.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**

Allegation 1m: **Failure to object to the State pitting witnesses against one another.**

Allegation 1n: **Failure to object to the State speculating that the Applicant was lying.**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to the State pitting witnesses against one another and for failing to object to the State speculating that Applicant was lying. This Court finds this allegation is without merit.

"[W]itnesses are generally not allowed to testify whether another witness is telling the truth." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (holding it is improper "pitting" to ask a witness "to comment on the truthfulness ... of an adverse witness")); State v. Sapps, 295 S.C. 484, 485–86, 369 S.E.2d 145, 145–46 (1988) (holding it was improper for solicitor to "ask[ ] appellant if each of the other three witnesses was lying")). "[I]mproper pitting constitutes reversible error only if the accused is unfairly prejudiced." Sapps, 295 S.C. at 486, 369 S.E.2s at 145-46. In order to prevail on a claim of improper pitting, an applicant must show there is a "reasonable probability that the result of his trial would have been different if counsel had objected to the solicitor's improper questions." Burgess, 329 S.C. at 91, 495 S.E.2d at 447 (citing Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of a trial." Id.

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At the evidentiary hearing on direct examination, Applicant testified that the Solicitor pitted witnesses against each other, and Trial Counsel did not object. Applicant was asked to provide a specific instance within the record, in which Applicant testified that he could not point to any specific instance of the Solicitor pitting witnesses against each other.

On cross-examination, the following colloquy occurred:

Q: Okay. Now, you claim that the solicitor was pitting witnesses against each other. That's relatively specific term. Who do you specifically claim the solicitor pitted against any other witness?
A: They pitted me against the witness so they could make -- so they could decide who was lying instead of looking at the facts of the case.
Q: So, they're just saying -- you're just saying that the solicitor presented witnesses other than you, who contradicted your testimony, and that's pitting? Is that what you're saying?
A: (No audible response.)
Q: Yes or no?
A: No.
Q: No, that's not what you're saying?
A: (No audible response.)
Q: So, who specifically did the solicitor pit anyone against?
A: The state witness, the state witness testimony against my testimony.
Q: So, the solicitor presented testimony that was not favorable to you, and that's what you're arguing as pitting?
A: No. My statement stayed the same throughout the trial.
Q: Okay. Your statement is reflected in the transcript. I'm just asking you who the solicitor pitted against you, and all you can tell me is that their witnesses versus you.
A: Yes.
Q: But you can't point to that, you know, any specific location. You can't give the Court a cite that she can rely on to confirm that statement?
A: If I had time to go through the whole transcript.

(PCR Tr. pp. 76-77).

On direct examination, Trial Counsel testified that she was not really sure what Applicant was claiming, but she did not recall any pitting of witnesses in his trial.

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This Court has reviewed the trial transcript and was unable to find any instances of the Solicitor pitting witnesses against each other. Rather, from the testimony provided at the evidentiary hearing, Applicant contended that witnesses' testimony contradicted his testimony, which he considers pitting. This Court finds that Applicant has failed to meet his burden of establishing any deficiency by Trial Counsel.

Further, this Court finds Applicant's allegation that Trial Counsel failed to object to the State speculating he was lying was deficient and prejudiced him to be without merit. Applicant did not point this Court to anywhere in the record where a viable objection on this basis would have been fruitful. Again, Applicant failed to present any evidence to support these claims, and therefore, he has failed in his burden by the preponderance of the evidence on these claims.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

Allegation 1o: Failure to object to witnesses pronouncing the Victim was dead.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to witnesses pronouncing the witness dead. This Court finds this allegation is without merit.

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." Rule 602, SCRE. Usually, a lay witness cannot state an opinion, however Rule 701, SCRE, allows a lay witness to offer an opinion if certain criteria are met. See State v. Gibbs, 431 S.C. 313, 847 S.E.2d 495 (Ct. App. 2020), aff'd as modified, 438 S.C. 542, 885 S.E.2d 378 (2023). A lay witness' opinion or inferences which are rationally based on their perception, are helpful to a clear understanding of the witness'

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testimony or the determination of a fact in issue, and do not require special knowledge, skill, experience, or training. See Rule 701, SCRE; State v. Ostrowski, 435 S.C. 364, 867 S.E.2d 269 (Ct. App. 2021) (Investigator's testimony about the significance of certain objects found during the search of defendant's residence was admissible lay testimony in prosecution for trafficking methamphetamine, notwithstanding that court declined to qualify investigator as an expert in methamphetamine packaging, distribution, paraphernalia, and valuation, where investigator discussed how the objects he found were sometimes used in drug trafficking based on what he had seen in previous investigations and how it informed his perception of what he saw while investigating defendant.)).

At trial on direct examination, Joshua Drew testified that he was employed for nearly three years with the Horry County Fire and Rescue as a Firefighter/EMT. (Trial Tr. p. 177). Joshua Drew testified that he had worked in the fire service for almost thirteen years and as an EMT for almost five years. (Trial Tr. p. 177). Joshua Drew testified that they arrived on the scene, and the Victim was lying on the ground with a gunshot wound to the head. (Trial Tr. p. 179). Joshua Drew testified that the Victim was not breathing, and there were no signs of life. (Trial Tr. p. 179). Joshua Drew testified that they placed the AED pads on the Victim's chest, and there was no heartbeat. (Trial Tr. p. 180). Joshua Drew testified that they determined the Victim was deceased approximately two to three minutes after arriving on the scene. (Trial Tr. p. 180).

At trial on direct examination, James Grate testified that after Victim was shot, they started to do CPR on Victim, and he checked for a pulse. James Grate testified that there was no pulse, and he was "probably dead when he hit the ground." (Trial Tr. p. 303). James Grate testified that he was trained in CPR with his military training. (Trial Tr. p. 313). James Grate testified that he felt for a pulse and knew how to find a pulse. (Trial Tr. p. 313).

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This Court has reviewed the testimony of Joshua Drew and James Grate at trial. This Court finds the record establishes the testimony was permissible lay witness testimony, and Trial Counsel was not deficient for failing to object to the above portions of testimony. The record further establishes both Joshua Drew and James Grate were trained in basic life support. Moreover, Applicant failed to establish how Trial Counsel objecting to the testimony would have changed the outcome of his trial.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

Allegation 1p: Failure to request jury instruction that the jurors can consider prior inconsistent statements in determining credibility.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to request jury instruction that the jurors can consider prior inconsistent statements in determining credibility. This Court finds this allegation is without merit.

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). In reviewing a trial judge's jury instructions, the court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons , 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009).

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At the evidentiary hearing on direct examination, Applicant testified that Trial Counsel should have requested a jury instruction on prior inconsistent statements so the jury would know they could believe all of a witness's testimony or some of it.

This Court finds Applicant has failed to meet his burden and has not proven Trial Counsel was deficient in this matter. This Court is unaware of any South Carolina caselaw requiring Trial Counsel to request a limiting instruction on prior inconsistent statements. Notably, at the outset of the jury charges, the trial judge charged the following:

> All right, ladies and gentlemen, it's now my duty and responsibility to give you the law that you will apply to the facts and evidence you have heard in this case. I told you at the very beginning, one of your jobs, duties and responsibilities was to judge the credibility and that is the believability of the witnesses that came before you and testified under oath in this case. Now, in doing so, you can believe one witness against several, you can believe several against one, you can believe a portion of what a witness says. If you got a good and sound reason of doing so, you could disregard in its entirety the testimony of a particular witness. You look at whether or not that witness has exhibited to you any kind of interest, motive, bias, prejudice they might have in giving you the testimony. And, obviously, you consider the opportunity for knowledge; how did they come about that information that they gave you from the witness stand. In your examination of the witnesses in this case, you don't have any friends to reward, you don't have any enemies to punish. You have to examine the facts and evidence in this matter and determine what in evidence convinces you whether or not the state has proven to you the guilt of the defendant of the crime charged beyond a reasonable doubt.

(Trial Tr. pp. 519-520).

This Court finds the trial judge correctly charged the jury and finds no error in Trial Counsel's failure to request a limiting instruction on prior inconsistent statements. Therefore Applicant has failed in his burden of proving Trial Counsel's alleged deficiency and any prejudice from that alleged deficiency.

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Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

Allegation 1q: Failure to seek in discovery the entire video of Applicant's statement to law enforcement.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to seek in discovery the full taped version of his statement to law enforcement. This Court finds this allegation is without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more

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prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997)); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

At the evidentiary hearing on direct examination, Applicant testified that after Trial Counsel showed him the audiotaped statement that he gave to law enforcement officers, he informed Trial Counsel that it was not the entire interview.

On cross-examination, Applicant testified that he was there when the trial court determined that certain portions of the interview had to be redacted. Applicant testified that he was there when the officer testified that it was the original interview and the officer had reviewed it. Applicant testified that it was not the whole interview.

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. Applicant failed to produce the video and any evidence to support his assertion. Additionally, this Court finds Applicant has failed to meet his burden proving Trial Counsel's alleged deficiency prejudiced him. Whether the evidence Applicant contends was not his entire interview would have changed the outcome of Applicant's trial is mere speculation. Consequently, speculation cannot satisfy Applicant's burden of proving prejudice. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure

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conjecture fails to establish prejudice).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396-97 (1985) (citing Douglas v. California, 372 U.S. 353 (1963)). "However, appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 752-53 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . .")).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel: an applicant must show that appellate counsel's performance was deficient and that he or she was prejudiced by the deficiency. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273,

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276 (2009). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Allegation 2a: **Failure to raise non-frivolous issues such as the admission of gory photographs.**

Applicant alleges Appellate Counsel was constitutionally ineffective for failing to raise non-frivolous issues such as the admission of gory photographs. This Court finds this allegation is without merit.

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every nonfrivolous issue that is presented by the record." Thrift, *supra*. "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. . . ." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Jones, 463 U.S. at 754). 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. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

At the evidentiary hearing on direct examination, Appellate Counsel testified to the following:

> Q: And did you raise an argument as to the photographs that the Court admitted over Ms. Wilson's objection?
> A: I did not raise the issue regarding photographs.
> Q: Why not?
> A: Reviewing the transcript in preparation for my testimony, I can look and say that the reason I think that I did not raise

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that issue is because the standard of review for the admission of evidence in that, specifically for photographs, is an abuse of discretion standard. Judge John held a pretty lengthy hearing, reviewed each of the photographs individually, excluded some photographs as cumulative, at least the one that I recall was excluded as cumulative. He also required at least one, Number 20, to be submitted only in black-and-white. I thought it would be very difficult to get an appellate court to say that Judge John had abused his discretion when there was such a good record for him to show that he had in fact exercised his discretion and conducted the 403 analyses. He said it for each photograph that he found that it was more probative -- that the probative value was not substantially outweighed by the danger of unfair prejudice.

. . .

Q: Okay. So, you raised that issue, you elected not to raise the photographs because of the 404 analysis.
A: On the photographs, it was because of the 403 analysis.
Q: 403 ---
A: That's okay.
Q: I apologize. Okay. So, you did -- so, did you feel that if you had raised that, that that would've been a claim that would be successful or not?
A: On the photographs, no; I did not think that the appellate court would have determined that Judge John had not -- or had abused his discretion. I think the Court would've determined that he had exercised his discretion properly with the way that he went through each and every photograph and assessed the probative value and the danger of unfair prejudice.

(PCR Tr. pp. 122-123).

This Court finds Appellate Counsel provided a valid strategic reason based on her reasonable professional judgment in not appealing the admission of the photographs. Thus, Applicant has failed in his burden of proving Appellate Counsel was deficient in this matter.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Appellate Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

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Allegation 2b: Failure to raise on appeal the admission of Applicant's police statement.

Applicant alleges Appellate Counsel was constitutionally ineffective for failing to raise on appeal the admission of Applicant's police statement. This Court finds this allegation is without merit.

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every nonfrivolous issue that is presented by the record." Thrift, *supra*. "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. . . ." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Jones, 463 U.S. at 754). 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. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

At the evidentiary hearing on direct examination, Appellate Counsel testified to the following:

> Q: Got you. And so that second complaint is that you did not make an argument regarding the admission of his recorded statement that was partially redacted. And why didn't you do that?
> A: The statement that Mr. Grate gave to King Hemingway, I believe is the statement that we're discussing.
> Q: Uh-huh, (affirmative response).
> A: There was a Jackson v. Denno hearing that was held prior to trial, and arguments that were made to exclude that statement, but then when it was admitted, there was no contemporaneous objection. And South Carolina requires a contemporaneous objection in order for something to be preserved for appellate review.

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Q: Okay. And so, it was not preserved, but even if it had been, do you think it would've materially affected the outcome of the appellate case?

. . .

A: I likely would not have raised that issue if it had been preserved because the primary argument for excluding it was one aspect of the totality of the circumstances analysis, and that was essentially the timeframe. This shooting happened late at night. Mr. Grate had been held on the side of the road for about 30 minutes, I believe, then he was transported to the Loris Police Department, and there he remained for approximately three or four hours before King Hemingway interrogated him. And that was the primary reason to get this statement out. And I likely would not have raised it because that wouldn't have been an extremely strong issue considering Miranda had been given, Mr. Grate was intelligent, he had waived his Miranda rights. And then we also had the problem in the immunity hearing transcript where there was a stipulation regarding the statement that had been given to King Hemingway. There was a colloquy between -- it was Judge Hyman and Mr. Grate in which Mr. Grate said that he gave the statement voluntarily. And I thought that would also damage the merits of that issue on appeal.

Q: And also, there had been the Jackson v. Denno hearing where there were specific findings regarding Miranda and that certain statements were excluded for Miranda violations and others were admitted. Do you recall reading that?

A: Well, that was with Mr. -- or Officer Santiago. So, Santiago arrived on the scene, and he was asking everybody -- or according to his testimony was, what happened here, what did you see. When he approached Mr. Grate, Mr. Grate said I don't know what happened, but I shot him. And that statement, the Court ruled, was admissible, that Miranda wasn't required, he wasn't in custody, and that it was a voluntary statement. Statements given to Officer Santiago subsequent to that, the Judge ruled inadmissible saying, as soon as Mr. Grate admitted to shooting, the officer should have given him his Miranda warnings, and therefore, the Judge would not allow any subsequent statements to come in.

Q: Okay. But he was re-Mirandized by Officer Hemingway?

A: Yes.

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Q: Okay. And so, the Judge did determine that those were appropriately admitted as voluntarily?
A: Right.

(PCR Tr. pp. 123-126).

On cross-examination, Appellate Counsel testified that she did not think it was a meritorious issue.

This Court finds Appellate Counsel provided a valid strategic reason based on her reasonable professional judgment in not appealing the statement provided to law enforcement by Applicant. Thus, Applicant has failed in his burden of proving Appellate Counsel was deficient in this matter.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Appellate Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

JURISDICTION OF THE COURT

Allegation 3a: **The court improperly abdicated its role as the finder of fact in the pre-trial stand-your-ground motion.**

Applicant alleges the trial court improperly abdicated its role as the finder of fact in the pre-trial stand-your-ground (SYG) motion. This Court finds this allegation fails as a matter of law.

Protection of Persons and Property Act[4] (the Act) provides the following:

(A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

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

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(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

(B) The presumption provided in subsection (A) does not apply if the person:

(1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder; . . . .

(C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

The General Assembly enacted the Act to codify the common law Castle Doctrine. State v. Curry, 406 S.C. 364, 372, 752 S.E.2d 263, 267 (2013). "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266. "This includes all elements of self-defense, save the duty to retreat." Id.

"[T]he legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act." State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). Thus, upon motion, the issue of immunity under the Act must be decided prior to trial. Id. A party

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seeking immunity under the Act must show entitlement to immunity by a preponderance of the evidence. Id. at 411, 709 S.E.2d at 665. Moreover, the Act is predicated on the absence of aggression or fault on the defendant's part in bringing on the difficulty. State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), citing State v. Grantham, 224 S.C. 41, 45, 77 S.E.2d 291, 292 (1953). Notably, the Act is a procedural provision that "does not contain any substantive provisions of law"; thus, it "is not relevant to the work of a jury." State v. Marin, 404 S.C. 615, 625, 745 S.E.2d 148, 154 (Ct. App. 2013).

At the SYG hearing, the trial judge made the following findings:

> And the finding I make is that the defense in this matter has failed to carry its burden of establishing by a preponderance of the evidence that 16-11-440 that would provide immunity from prosecution in this particular matter. It boils down to reasonableness of his action. By the defense's agreement or stipulation, 16-11-440(c) is the section that we must look at in this matter. I am really concerned with the fact that there is no history of violence or aggression towards the defendant by the victim in the past. There is no evidence of any statement or offer -- verbal offer to do harm to the defendant. The only thing I hear is that the defendant attempted to interject himself between a disagreement between the defendant and his son, was asked to leave. He's on a public street, where he also has a right to be, and by all testimony was shot because he stuck his hand in his pocket. The reasonableness of that -- of the defendant's act can be determined by the jury upon instruction of a self-defense -- self-defense charge. I think it is a matter that should be decided by a jury. I'm not convinced by a preponderance of the evidence that he is entitled to immunity, and I deny the motion.

(SYG Tr. pp. 207-208).

This Court finds no error in what the trial court did at the SYG hearing. Accordingly, this allegation must be **DENIED** and **DISMISSED.**

Allegation 3b: The indictments were not filed properly.

Applicant alleges the trial court lacked subject matter jurisdiction because the indictments were not filed properly. This Court finds this allegation is without merit.

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Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, *supra*; Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act – notably the statute of limitations and successiveness. See S.C. Code §§ 17-27-45 *and* -90 (2003).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, *supra*. However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, *supra*, 610 S.E.2d at 499; See also S.C. Const. Art. V, § 7. Thus, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside.

At the evidentiary hearing on direct examination, Applicant testified that the indictments were never filed with the Clerk of Court's Office.

This Court finds Applicant has failed to meet his burden in proving this allegation. Applicant's convictions involved criminal charges in General Sessions Court. Thus, the circuit

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court had subject matter jurisdiction. Furthermore, this Court finds the indictments on their face valid and sufficient.

Accordingly, this allegation must be **DENIED** and **DISMISSED.**

ALLEGATIONS RAISED AT THE EVIDENTIARY HEARING

Allegation: **Failure to raise that Applicant had sold a gun to Victim.**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to bring to the jury's attention that he sold a gun to Victim. This Court finds this allegation is without merit.

At trial on direct examination, Applicant testified that he thought Victim had a gun in his pocket and had reason to believe that because he had sold a firearm to Victim previously. (Trial Tr. pp. 420-421). Applicant testified that he felt threatened and thought Victim was going to shoot him. (Trial Tr. p. 421).

This Court finds the record directly refutes this allegation; thus, Applicant has failed in his burden of proving any deficiency by Trial Counsel and any prejudice from that alleged deficiency.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Appellate Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

Allegation: **Trial Counsel failed to meet with Applicant a sufficient number of times.**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to meet with him a sufficient number of times. This Court finds this allegation is without merit.

At the evidentiary hearing, Trial Counsel **credibly** testified to at least seven meetings. Regardless of the number of times they met, the record reflects that Trial Counsel was clearly prepared for trial and fully defended Applicant at the trial.

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Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. Campbell v. Polk, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency); United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with his client twice before trial as long as counsel devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.).

South Carolina case law has established that even if Trial Counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter) (finding "Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation."), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

As stated *supra*, this Court finds the record reflects Trial Counsel was well-prepared in her defense of Applicant and was familiar with the facts of the case and the law surrounding the charges. Importantly, this Court finds Applicant has failed to present "any evidence of how additional preparation or communication would have resulted in a different outcome." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012); see Harris, 377 S.C. at 75, 659 S.E.2d at 145 (finding that, when there is evidence counsel met with a defendant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the

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outcome at trial, counsel cannot be said to have been ineffective). This Court finds Trial Counsel was not deficient in their representation of Applicant, and Applicant cannot demonstrate how he was prejudiced by Trial Counsel's performance in this matter.

Accordingly, Applicant's allegation Trial Counsel did not meet with him a sufficient number of times is **DENIED** and **DISMISSED**.

|CONCLUSION PAGE FOLLOWS|

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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 application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the 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 a right to an appellate counsel's assistance in seeking a review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

FILED
HORRY COUNTY
2024 MAR 25 P 1:15
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, S.C.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 21 **day of** March **, 2024.**

THE HONORABLE JENNIFER B. MCCOY
Presiding Judge
Fifteenth Judicial Circuit

Charleston, South Carolina

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