STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	)	IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT
Diondrae E. Jackson, #241391, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2021–CP–21–2627 **ORDER OF DISMISSAL WITH PREJUDICE**

This matter comes before the Court by way of Diondrae E. Jackson's (Applicant) application for post-conviction relief (PCR) filed on December 9, 2021. Respondent, the State of South Carolina, filed its Return on March 21, 2022, requesting an evidentiary hearing to resolve the claims set forth in the application. On June 2, 2023, an evidentiary hearing was held at the Florence County Courthouse before the Honorable Walton J. McLeod, IV. Applicant was present and represented by Steven W. Fowler, Esquire. Assistant Attorney General D. Russell Barlow, II, represented Respondent. Applicant proceeded forward on the claims set forth in his original application. In support of these claims, Applicant testified on his behalf, as did Charles Drayton and Marcus Harrison. Respondent presented testimony from William F. Edgeworth, III, 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 of the Florence County Clerk of Court. Applicant was indicted during the August 2018 term of the Florence County Grand Jury for Murder and Attempted Murder (2018–GS–21–01599). Applicant was represented by Trial Counsel. Twelfth Circuit Assistant Solicitor Todd S. Tucker, Esquire, prosecuted the case.

Applicant's case proceeded to a jury trial on April 15–18, 2019, before the Honorable William H. Seals, Jr. The jury convicted Applicant of the lesser included offense of Voluntary Manslaughter only. Judge Seals sentenced Applicant to twenty-eight (28) years imprisonment. Applicant filed a timely notice to set aside the verdict, which Judge Seals denied on May 23, 2019.

Applicant filed a timely Notice of Appeal. Appellate Defender David Alexander perfected Applicant's appeal by filing an *Anders*[1] brief to the Court of Appeals presenting the following issue:

> I. Whether the trial court erred in charging voluntary manslaughter at the State's urging and over the objection of appellant where the reason given by the trial judge could not serve as sufficient legal provocation?

The Court of Appeals affirmed Applicant's conviction and sentence. *State v. Jackson*, Unpub. Op. No. 2021–UP–375 (Ct. App. filed November 3, 2021). The Remittitur was returned to the lower court on November 3, 2021.

FACTUAL SUMMARY

On the day of the shooting, Applicant was driving to a friend's house when he saw another

[1] *Anders v. California*, 386 U.S. 738 (1967).

friend, Latesha Newton (Newton). Applicant and Newton talked for a while, and Newton eventually invited Applicant to a club with her and her friends. Newton drove her car, a black Dodge Charger, and they picked up her friends, Everett Frierson ("Frierson"), Ernestine Mack ("Mack"), and Lawanda Johnson ("Johnson").

Newton had her .9mm firearm in the glove box of her car. Johnson also had a gun in the car, but she had given it to her fiancé, Frierson. Frierson testified that he asked Johnson if they could take the gun to the club "for self-defense purposes because of everything that has been going on in the news about shootings happening at nightclubs." (Trial Tr. pp. 223 – 224). Frierson claimed to know about other shootings at the Downbeat Club, which the lead investigator for the police corroborated.

Most of the witnesses, including Applicant, agreed that Applicant got into an altercation at the club over a pool game. Newton was unsure what happened but heard quarters being thrown at Applicant. Johnson saw Applicant argue with a man wearing a red shirt. Frierson said Applicant played a game of pool with his cousin. Applicant lost the game and went to the bar to get more quarters. Applicant placed his quarters on the table, left, and returned to find Maurice Hickson (Hickson) playing pool. Applicant objected to Hickson cutting in line, and Frierson described Hickson as "apologetic." Applicant was very angry, and another man in a red shirt came over to calm the situation.

According to testimony, the men continued to offer the quarters to Applicant, but he refused to take them and remained angry. Hickson testified that he told Applicant "F you" and threw the quarters at Applicant. (Trial Tr. pp. 227 – 230). Newton separated the men and took Applicant outside.

Applicant testified in agreement that he played one game of pool and lost, then went to the

bar to get more quarters to play another game. When Applicant returned from the bar, someone else's quarters were on the pool table. Applicant testified that they waited on the owner of the quarters to return, but no one came back, so Applicant began playing. Once they started playing, a man wearing a red hat, red shirt, and red pants showed up, pushed the balls around on the pool table, and accused Applicant of using his "MF'ing quarters."

Applicant later learned the man in all red was Malcolm Spates ("Spates"). Applicant testified that he offered to get Spates his four quarters, and another person walked up to calm the situation, but Spates was "mooshing" Applicant in his chest. (Trial Tr. pp. 434 – 437). According to Applicant, Spates flicked a quarter into his face. At this point, Newton took Applicant outside.

Before entering the club, Newton encouraged Applicant to take her gun for protection. When Applicant left the club after the altercation over the pool game, he returned to the car with Newton and smoked a cigarette. Applicant testified he saw a man wearing a black hoodie watching him and tried to convince Newton to leave, but she wanted to stay. Applicant testified he went back into the club because he did not feel safe in the parking lot. Applicant testified he could not leave because he did not know anyone to give him a ride, and he could not just walk because he had no idea where he was.

Once back in the club, Newton said she watched Applicant's facial expressions and could see he was upset. Newton testified she decided to get Applicant to leave and took him by the arm. Applicant then pushed Newton out of the way and started shooting. Applicant fired in the direction of the pool table. Newton and the rest of their group testified that they did not see anyone else with a gun.

Applicant testified that he was in the bar watching "about eight" guys make gang signs at him, and he was scared. Frierson testified he saw the group of men in the back of the club making

gang signs at Applicant. Applicant testified that he saw the man in the black hoodie from the parking lot enter the club and hand a pistol to Spates. According to Applicant, Spates then drew a gun, and Applicant pushed Newton out of the way and fired at Spates. Applicant testified Spates dropped the gun and ran for the bathroom, and then Ronald Oliver (Oliver) reached for the gun, and Applicant shot Oliver in the hip. At this point, testimony revealed that everyone, including Applicant, ran to the parking lot.

Further testimony was provided that Applicant and the group got into Newton's car and left the scene. A police officer responding to the call turned around after seeing Newton's car, and when he activated his blue lights, Applicant threw the gun out of the window. According to testimony, the police never recovered the gun. Testimony provided that police denied taking a gun from Spates, but evidence forms indicated the opposite. The lead investigator testified the forms were in error and the only gun recovered was Lawanda Johnson's gun from the Charger. Spates died due to his gunshot wound, and Oliver survived his gunshot wound. Applicant was charged and indicted for murder and attempted murder.

CURRENT ACTION BEFORE THIS COURT

In his original application for post-conviction relief, filed December 9, 2021, Applicant alleges he is being held in custody unlawfully based on:

1. "Ineffective Assistance of Counsel"
2. "Violation of Due Process of law"
3. "Si[x]th & Fourteenth Amendments"

Applicant also included in his Application an "attached memorandum of law" that further outlines his allegations of why he is being held unlawfully based on the following:

1. Ineffective Assistance of Counsel
   a. "Counsel failed to investigate case presented by the state when its evidence was tampered with by the state. The state admitted the video was altered to combine audio/video

together."

b. "Counsel failed to investigate all the evidence presented by state used, which could exonerate applicant in proving that victim did have a gun."
c. "Counsel had alibi witness in courtroom but failed to call this witness to testify and instead told the witness to leave."
d. "Counsel failed to object to state closing arguments when prosecutor made inflammatory comments."
e. "Counsel failed to object after prosecutor made a request for court to charge manslaughter."
f. "Counsel failed to object during sentencing was improper information given by state."
g. "Counsel failed to object to the erroneously including certain language on verdict form ambiguous and confusing to the charge of not guilty and guilty plea."
h. "Counsel failed to object to charge of self-defense and mutual combat."
i. "Counsel argument during post-trial motion constituted as ineffective assistance of counsel."

Applicant requests relief in the form of his conviction being reversed.

Before this Court is the Florence County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the trial transcript, and the records of this PCR action.

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;
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;

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

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. at 687. 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 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 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 & 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.

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:

I. INITIAL FINDINGS

As a matter of general impression, this Court finds Trial Counsel's testimony at the evidentiary hearing credible and persuasive, where he 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, he 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).

II. Ineffective Assistance of Trial Counsel Allegations on the Merits

Allegation 1a:	Trial Counsel failed to investigate the altered jail video.
Allegation 1b:	Trial Counsel failed to investigate all evidence presented by State which could have exonerated Applicant in proving Applicant did have a gun.

Applicant alleges Trial Counsel was constitutionally deficient for failing to investigate the altered video and audio the State admitted at his trial. Additionally, Applicant alleged Trial Counsel failed to investigate the evidence presented by the State, which would have exonerated Applicant and shown the victim had a gun. The Court finds these allegations are without merit.

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)), abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). The applicant must further present evidence

demonstrating how the discoverable matters or defenses would have resulted in a different outcome. *Id.* Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.* at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. *Ard*, 372 S.C. at 331, 642 S.E.2d at 597 ("this duty is limited to [a] reasonable investigation"). The United States Supreme Court also instructed reviewing courts to "keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. Thus, in applying the *Strickland* standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014).

a. Altered Video

At the evidentiary hearing on direct examination, Applicant testified that the State had admitted a video taken at the county jail allegedly showing Applicant had said something about the case. Applicant testified that when the State admitted the video, they informed the trial court that the footage was blended from multiple videos. Applicant contended this blending showed the State had tampered with the video to make it look like he said something he had not. Applicant testified Trial Counsel should have moved to suppress the video, investigated the tape, or checked authentication, like checking the video's timestamp. Applicant testified Trial Counsel failed to take action against the admittance of the video.

On cross-examination, Applicant testified he recalled Trial Counsel making an argument as to the admissibility of the video based on the production process. On direct examination, Trial

Counsel testified the video admitted by the State was not altered but was two parts—the video and audio—but that it was the same evidence. Trial Counsel testified that he argued the prejudicial nature of the video, but his objection was overruled. Trial Counsel testified that the trial judge ruled the resolution of the video was satisfactory. Trial Counsel testified that the State did its best to make the audio and video consistent.

Trial Counsel further testified he was concerned about the audio and video, and moved to suppress the video in the *Jackson v. Denno*[3] hearing based on best evidence or video not consistent with audio. At the *Jackson v. Denno* hearing, Trial Counsel argued that the video would be prejudicial if presented to the jury as it was modified, and the audio was unclear. Trial Counsel further argued that the video was not in its original production setting and that the State had overlayed two pieces of information. The State confirmed to the trial court that they had overlayed the audio and video to play simultaneously, and the trial court ruled that it was admissible.

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 finds Applicant has failed to show Trial Counsel was deficient and resulting prejudice from Trial Counsel's performance. The record refutes Applicant's claim that Trial Counsel failed object to the admissibility of the video. Trial Counsel credibly testified the video was not altered but separate audio and video that was put together. Additionally, Applicant failed to present any credible evidence or testimony that the State actually altered the video.

[3] 378 U.S. 368 (1964).

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.

b. Evidence Victim Had A Gun

Applicant alleges Trial Counsel was constitutionally ineffective for failing to investigate whether the victim in this case had a gun. This Court finds this allegation is without merit.

At the evidentiary hearing on direct examination, Applicant testified Trial Counsel visited him three times while he was in prison and represented him, and they went over the facts of the case together. Applicant testified there was gun residue on his hands and the victim's hands. Applicant testified that gun residue would get on an individual's hands if they had fired the gun, were in the vicinity of the gun, or were touching someone. Applicant testified he could have been exonerated by testimony that the victim had gunpowder on his hands to contradict the State's assertion that Applicant had gunpowder on his hands because he fired the gun. Applicant testified the expert testified the gunpowder was on both hands but never testified which hand he took it from. Applicant testified Trial Counsel never argued the victim could have fired a gun, and he felt like the jury was leaning toward self-defense.

On cross-examination, Applicant testified Marcus Harrison ("Harrison"), the bouncer, said the victim had a gun on him that night. Investigator Charles Drayton ("Investigator Drayton") later testified he has twenty years' experience as an investigator, and Applicant hired him to contact witnesses and discover the facts that took place the night of the incident. Investigator Drayton testified he was hired a couple of years after the trial. Investigator Drayton testified that Harrison convinced him it was worth it to move forward with the investigations because Harrison told him that the Applicant did not have a weapon on him when he entered the premises the night of the

incident. Investigator Drayton testified that he went to the crime scene to investigate, but it has been closed down since the incident.

On direct examination, Harrison testified that he received a letter from Trial Counsel to appear at trial, but at trial, Trial Counsel told him to go home. Harrison testified Trial Counsel did not give him a reason for dismissing him. Harrison testified that he was in the courtroom for five minutes before he left. Harrison testified he was security at the bar the night of the incident. Harrison testified Trial Counsel never spoke with or called him about the incident, and he would have been a helpful witness to Applicant's case because he was present at the incident. Harrison testified that he believed Applicant could have used self-defense. Harrison testified that he had never seen Applicant before at the bar and always searched new people before they entered the bar. Harrison testified he searched every person that came in, but he was not allowed to search females the same way he searched males. Harrison testified he patted down Applicant thoroughly before he entered the bar. Harrison testified gang members from the bloods and crips were present. Harrison testified that the person who started the altercation pulled a gun on Applicant, but he does not remember his name.

On cross-examination, Harrison testified he was present during Applicant's testimony when he testified he had a gun on him both times he entered the bar. Harrison testified that Applicant could have gotten the gun from the girl who came in with him. Harrison testified he came late to the bar, and had he come earlier he would have found the gun on Applicant and another person who came into the bar with a gun.

On direct examination, Trial Counsel testified that there was no proof the victim had a gun on him other than Applicant's testimony. Trial Counsel testified that law enforcement had no evidence of crossfire, which was consistent with Applicant's testimony that he was a quicker draw.

Trial Counsel testified he hired a private investigator to go to the scene and talk to the owner and witnesses. Trial Counsel testified he attempted to impeach the State's witnesses that the victim had a gun, and there was evidence in the State's file that the victim had firearms in his vehicle, but the State testified those records were inaccurate. Trial Counsel testified that he did not seek a gunshot residue (GSR) test on the victim as the autopsy had already been done. Trial Counsel testified the issue of GSR came up on direct by the State where they argued GSR could have gotten on the victim based on being in the vicinity of a firearm when shot. Trial Counsel testified that he could not recall if the GSR was used in defense theory, but self-defense was the theory of Applicant's case at trial.

At trial, the State's witness, Chase McDaniel (McDaniel), testified that they performed GSR on the victims. Trial Counsel attempted to impeach McDaniel with records showing a gun was seized from the victim, but McDaniel testified that the document did indicate a gun was retrieved from the victim, but that was not correct. Additionally, the State's witness, Tyler Sturkie (Sturkie), testified the victim's GSR results found GSR on the victim and testified that GSR would have gotten on the victim if he had fired the weapon, if he was in the vicinity of the area where the gun was fired, or if he had touched an object that had GSR on it.

This Court finds Applicant failed to establish Trial Counsel was deficient or resulting prejudice from his performance. Trial Counsel credibly testified he hired a private investigator to ascertain the facts and interview relevant witnesses. Trial Counsel credibly testified that his investigations and the State's evidence revealed the victim did not have a gun on him, but Trial Counsel still attempted to impeach the State concerning the possible seizure of a gun from the victim. Applicant produced the testimony of Harrison in support of his argument. However, Harrison did not testify to any new information that Trial Counsel was unaware of, and Harrison's

testimony was internally contradictory and contradictory to Applicant's testimony at trial. Moreover, Applicant's contention that if the jury had heard the victim had GSR on him, he would have been exonerated is not convincing. The State presented testimony that the victim had GSR on him and how the GSR could have gotten on the victim to the jury, and the jury convicted Applicant.

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.

c. Allegation 1c: Allegation of Failure to Call Alibi Witness

Applicant alleges Trial Counsel was constitutionally ineffective for failing to call an alibi witness. Specifically, Applicant asserts Trial Counsel failed to call an employee of the establishment where the crime occurred who served as security on the night in question, Harrison, who would have allegedly testified in Applicant's favor. This Court finds this allegation is without merit.

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 in deficient by failing to call all alibi witnesses when two witnesses who testified 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 corroborated with the defendant or bolstered his 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).

Through an alibi, an accused attempts "to show that because he was not at the scene of the crime at the time of its commission, having been at another place at the time, he could not have committed the crime." *State v. Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (quoting 21 Am. Jur. 2d Criminal Law § 136). To do so, the accused must show "he was at a place so distant that his participation in the crime was impossible." *Id.* Furthermore, the alibi must account for the entire time during which these crimes were committed. *Id.* "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." *State v. Glover*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (citing *Robbins*, 275 S.C. 373, 271 S.E.2d 319).

At the evidentiary hearing on direct examination, Applicant testified that Trial Counsel told him he did not call Harrison to testify because he did not need him and he could change his story on the stand. Applicant testified he did not know what Harrison's testimony was going to be at his

trial. Applicant testified he was prejudiced by Trial Counsel not calling Harrison because his testimony could have changed the outcome of his case. Applicant testified that Trial Counsel subpoenaed Harrison but never called him to testify.

On direct examination, Harrison testified that Trial Counsel called him to testify at trial, but at trial, Trial Counsel dismissed him within five minutes of him being there. Harrison testified Trial Counsel never discussed the incident with him and he would have provided helpful testimony if he had testified at trial. Harrison testified that he had never seen Applicant before the night of the incident and made sure to search Applicant thoroughly before he entered. Harrison testified Applicant did not have gun on him when he entered. Harrison testified females are searched differently.

Trial Counsel testified he did not call Harrison because Applicant's testimony was consistent that he had entered the premises with a gun based on the suggestion of the lady with him that the bar was known for violence. Trial Counsel testified that the private investigator informed him Harrison was protecting himself and said no one would have gotten past him with a gun. Trial Counsel testified he felt like Harrison's testimony would have hurt Applicant's case because Applicant testified he had the gun on him when he entered the premises. On cross-examination, Trial Counsel testified he spoke with Harrison in the hallway at trial, and Harrison seemed protective of his job position. Trial Counsel testified Harrison did not witness the incident and he did not call him because he did not believe Harrison would provide helpful testimony.

This Court finds Applicant failed to establish Trial Counsel was deficient or resulting prejudice from Trial Counsel's performance. First, Harrison is not an alibi witness, as his testimony would not have established it was impossible for Applicant to commit the crime. Harrison merely provided self-serving testimony that he searched every person who came in and

no one got past him with a gun, even though the testimony of Applicant and other witnesses established Applicant had a gun on his person when he entered the bar. Additionally, Harrison's testimony on cross-examination contradicted his testimony on direct. Trial Counsel credibly testified that based on his investigations, he did not believe Harrison's testimony would have been favorable to Applicant's case.

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.

d. Allegation 1d: Trial Counsel failed to object to the States inflammatory comments in closing argument.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to the State's closing argument. Specifically, Applicant avers that Trial Counsel did not object to the following:

> Life. It's cheap in Diondrae Jackson's world. In fact, it's worth one dollar. . . Four quarters, to be exact. This is a case . . . about a man who lost his life for one dollar. Four quarters, to be exact.

Closing arguments allow each side to remind the jurors about key evidence to persuade them to decide the case in their favor. Solicitors are permitted to use hypothetical analogies to make their point, in this case, the motive for Applicant to shoot the victim. Providing however that a solicitor's closing argument "must be carefully tailored so as not to appeal to the personal bias of the juror nor calculated to arouse his passion or prejudice." *State v. Linder,* 276 S.C. 304, 278 S.E.2d 335, 339 (1981). "A solicitor may not rely on statements not in evidence during closing argument." *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). However, "[t]he solicitor has the right to give his version of the testimony and to comment on the weight to be given to the testimony of the defense witnesses." *State v. Raffaldt*, 318 S.C. 110, 115, 456 S.E.2d

390, 393 (1995). "[C]onsiderable latitude is generally allowed in the matter of drawing and arguing inferences and deductions from evidence." *Johnson v. Life Ins. Co. of Ga.*, 227 S.C. 351, 369, 88 S.E.2d 260, 269 (1955).

To prevail on a claim that trial counsel was ineffective for failing to object to a solicitor's purportedly improper comment during closing argument, the PCR applicant "bears the burden of demonstrating the improper comment deprived him of a fair trial." *Johnson v. State*, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997). "Improper comments do not require reversal if they are not prejudicial . . . and the [applicant] has the burden of proving he did not receive a fair trial because of the alleged improper argument." *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). "A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Huggins*, 325 S.C. at 107, 481 S.E.2d at 116.

At the evidentiary hearing on direct examination, Applicant testified that there was no evidence he killed the victim over four quarters. Applicant further testified the solicitor's comments were outside the scope. At trial, Investigator Roger Tilton (Tilton) had testified that Applicant told him that he and another male argued over Applicant using some quarters he found on a pool table at the bar. Tilton testified that Applicant indicated to him this all began over four quarters.

This Court finds Applicant failed to establish Trial Counsel was deficient or resulting prejudice from his performance. Tilton testified at trial that Applicant stated the altercation arose from an argument over four quarters. The solicitor's comments in closing were permitted and not outside the scope of the evidence presented at trial. This Court finds any objection on this issue 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. *See 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 the objection).

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.

e. Allegations 1e: Trial Counsel failed to object after the solicitor requested the trial court charge manslaughter.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to the solicitor's request to include voluntary manslaughter in the charges to the jury. 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). "A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." *State v. Green*, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty only of the lesser offense." *State v. Geiger*, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006). 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).

At the evidentiary hearing on direct examination, Applicant testified that he told Trial

Counsel he did not want a charge of voluntary manslaughter. Applicant testified Trial Counsel objected to involuntary manslaughter. Applicant testified it was prejudicial because Trial Counsel said involuntary instead of voluntary, and the trial judge ended up charging voluntary manslaughter. Applicant testified that the State said they wanted the charge based on Applicant reflecting on the crime, and Applicant testified that sounded like murder to him. Applicant testified Trial Counsel forgot to object.

On cross-examination, Applicant testified that Trial Counsel told him he would see about the voluntary manslaughter charge, but he did not object to the charge. Trial Counsel testified that there was an off-the-record conversation with the trial judge where the trial judge stated he intended to charge voluntary manslaughter, and Trial Counsel objected to the charge. Trial Counsel testified the State initially objected to the charge, but the trial judge gave the State time to determine their position. Trial Counsel testified he believed the State had a good case, and he discussed the pros and cons of requesting the charge with Applicant. Trial Counsel testified the State requested the charge, and he raised his objection again.

At trial, Trial Counsel objected to the trial court charging voluntary manslaughter[4]. The trial court overruled Trial Counsel's objection, and gave the following reasoning:

> I tend to think that it is applicable. You know, we have some testimony that there were -- there were gang signs being made in the background and that there were a bunch of people, maybe eight people, and a lot of them were wearing red. We have testimony that the Bloods were there, which are gangs. Those could be threatening signs made to -overt signs of provocation made to the defendant. And then we have a witness who said she was facing the defendant and she started seeing his face change and mold and he was getting agitated. And then I guess there's a possibility that he just exploded and threw her out of the way and then shot him. So I think there is

[4] Trial Counsel mistakenly objected to the charge of "involuntary manslaughter", but the record reflects the trial court understood Trial Counsel was objecting to the charge of voluntary manslaughter based on the question of the trial court and the trial court's response.

> a possibility of voluntary manslaughter. I think it's a fact question. Clearly, I've thought about it a lot and I listened to his testimony carefully and I listened to the witness' testimony carefully and then I reviewed the voluntary manslaughter while they were testifying and I think it's possible.

(ROA pp. 483 – 84).

In Applicant's case, there was sufficient evidence to allow a jury instruction on the charge of voluntary manslaughter. "To warrant the court in eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *State v. Pittman,* 373 S.C. at 572, 647 S.E.2d at 168 (citation omitted).

This Court finds Trial Counsel credibly testified the trial court indicated to the parties off the record he intended to charge voluntary manslaughter, and Trial Counsel objected. Trial Counsel credibly testified he renewed his objection on the record. The record reflects Trial Counsel objected to voluntary manslaughter being charged, and the trial court overruled his objection. Any further objections by Trial Counsel would not have been meritorious. Additionally, from the record, this Court finds the facts of Applicant's case supported a charge of voluntary manslaughter.

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.

f. Allegation 1f: Trial Counsel failed to object to improper information given by the State during sentencing.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to improper information given by the State. Specifically, Applicant contends that he told Trial Counsel during his sentencing that his NCIC report was not correct. Applicant asserts Trial Counsel did not object to the following:

> He also has a pending drug charge that will more than likely be dismissed by virtue of the trial and the verdict here.

(ROA p. 549). This Court finds this allegation is without merit.

At the evidentiary hearing on direct examination, Applicant testified that at sentencing the solicitor told the trial judge Applicant had a pending drug charge, which caused the trial judge to give a steep sentence. Applicant testified the charge was dismissed against him and it was extremely prejudicial.

This Court finds it is the ordinary practice during sentencing to inform the trial court of existing and pending charges when determining sentencing. Additionally, Applicant contends the charge should not have been considered because it was dismissed. This ignores the fact the charge was pending against him during sentencing and was dismissed as a result 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.

g. Allegations 1g: Trial Counsel failed to object to the erroneous language included on the verdict form that was ambiguous and confusing.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to the verdict form that read "guilty plea" rather than "guilty."[5] Applicant averred this language was ambiguous and confused the jury into believing Applicant had already pled guilty to the charges of Voluntary Manslaughter and Attempted Murder. This Court finds this allegation is without merit.

At the evidentiary hearing on direct examination, Applicant testified the error on the verdict

[5] The verdict form reads as follows: (1) Murder – Not Guilty – Guilty; (2) Voluntary Manslaughter – Not Guilty – Guilty Plea; (3) Attempted Murder – Not Guilty – Guilty Plea.

form confused the jury. Applicant testified Trial Counsel failed to object to the verdict form. Applicant testified that everyone saw the jury form and they had time to change it, but presented it to the jury and it was extremely prejudicial. Applicant testified that had Trial Counsel objected he would have been entitled to a mistrial.

At trial, the trial judge instructed the jurors that the "defendant has entered a plea of not guilty." The trial court additionally charged the jury, as follows:

> Furthermore, it is your exclusive duty to decide all the issues of fact in this case and to determine the effect, value, and weight of the evidence presented. Both the State and the defendant have the right to expect that you will carefully consider and evaluate the evidence and apply the law of the case to it so that, in the end, both the State of South Carolina and this defendant will have received a fair and impartial trial. I want you to understand that when I use the word defendant, I am referring to Diondrae Jackson. The State in this case alleges several offenses against the defendant. The charges are Count I, murder, and Count II, attempted murder. Each charge is a separate and distinct offense. You must decide each charge separately on the evidence and the law applicable to it, uninfluenced by your decision as to any other charge. **The defendant may be convicted or acquitted on any or all of the offenses charged. You will be asked to write a separate verdict of guilty or not guilty for each charge. To these charges, the defendant has entered a plea of not guilty**. This plea of not guilty places the burden of proof on the State to prove the guilt -- the defendant guilty beyond a reasonable doubt on each charge... If you find that the State has failed to prove beyond a reasonable doubt that the defendant committed murder, you may consider whether the State has proved beyond a reasonable doubt that the defendant committed voluntary manslaughter.

(ROA pp. 523; 528) (emphasis added).

This Court finds the inclusion of "guilty plea" on the verdict form amounted to a scrivener's error. Applicant failed to present credible evidence that this error affected the outcome of his trial, and offered pure conjecture in support of his contention that the jury was confused and believed he had pled guilty to the charges. *See Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 267

(1993) (concluding pure conjecture fails to establish prejudice). Moreover, the trial court clearly instructed the jury on their duty and the charges they could convict Applicant of. Applicant's contention this error would have resulted in a mistrial is misguided. *State v. Wasson*, 299 S.C. 508, 386 S.E.2d 255 (1989) (A mistrial should only be granted upon exercise of the greatest of caution and for plain and obvious reasons in cases of manifest necessity).

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.

h. Allegations 1h: Trial Counsel failed to object to the charge of self-defense and mutual combat.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to the charge of self-defense and mutual combat. Specifically, Applicant maintained that the jury instructions confused the jury members. This Court finds this allegation is without merit.

When administering a jury instruction, the instruction must be supported by facts. *State v. Crosby,* 355 S.C. 47, 584 S.E.2d 110 (2003). 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).

To constitute mutual combat, there must be "mutual intent and willingness to fight." *State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). The intent to fight is "manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat."

Id. In *Campbell v. State*, the Court of Appeals found that "when evidence warrants a mutual combat charge, it may be charged to a jury even when read alongside a self-defense charge." 441 S.C. 361, 893 S.E.2d 492, 498 (2023); *State v. Bowers*, 436 S.C. 640, 647, 875 S.E.2d 608, 612 (2022) ("Mutual combat relates primarily to the law of self-defense.").

At the evidentiary hearing on direct examination, Applicant testified that the trial judge charged the jury on self-defense and mutual combat and mutual combat negates self-defense. Applicant testified that the witnesses at trial all testified he and the victim did not know each other. Applicant testified that this charge should not have been sent to the jury. Applicant testified Trial Counsel failed to object to the charge.

On cross-examination, Applicant testified Trial Counsel failed to object to the instruction as it tied self-defense and mutual combat together. Trial Counsel testified the defenses were not confused, and the charge of self-defense and mutual combat was consistent with the testimony presented at trial.

At trial, evidence was presented that Applicant and the victim had an altercation over four quarters prior to the shooting. The trial court charged the jury as follows on self-defense and mutual combat:

> The following elements are required to establish self-defense. First, a defendant must be without fault in bringing on the difficulty. If the defendant ' s conduct was the type which was reasonably calculated to and did provoke a deadly assault, the defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense. Self-defense is not available to a person who uses language which is so contemptuous that a reasonable person would expect it to bring on a physical encounter and which did actually contribute to the physical encounter. If the defendant voluntarily participated in mutual conduct for purposes other than protection, the killing of the victim would not be self-defense. This is true even if dur ing the combat the defendant feared death or serious bodily injury. However, if before the killing is committed the defendant withdraws and tried in good faith to avoid

> further conflict and either by word or act makes the fact known to the victim, he would be without fault in bringing on the difficulty. For mutual combat, there must be a mutual intent and willingness to fight. This intent may be shown by acts and conduct of the par ties and the circumstances surrounding the combat. In addition, it must be shown that both parties were armed with a deadly weapon. The second element of self- defense is that the defendant was actually in imminent danger of death or serious bodily injury or that the defendant actually believed he was in imminent danger of death or serious bodily injury. If the defendant was actually in imminent danger, it must be shown that the circumstances would have warranted a person of ordinary firmness and courage to strike the final blow to prevent death or serious bodily injury. If the defendant believed he was in imminent danger of death or serious bodily injury, it must be shown that a reasonably prudent person of ordinary firmness and courage would have had the same belief. In deciding whether the defendant actually was or believed he was in imminent danger of death or serious bodily injury , you should consider all the facts and circumstances surrounding the crime, including the physical condition and characteristics of the defendant and the victim. The defendant does not have to show that he was actually in danger. It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. The defendant has the right to act on appearances, even though the defendant's beliefs may have been mistaken. It is for you to decide whether the defendant's fear of immediate danger of death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same situation.

(ROA pp. 530 – 32).

This Court finds the trial court properly charged the jury with self-defense and mutual combat. Evidence was presented at Applicant's trial establishing an altercation ensued between him and the victim prior to the shooting over a couple of quarters. Additionally, the Supreme Court has held mutual combat and self-defense may be charged alongside each other if the evidence presented at trial supports the charges. Trial Counsel cannot be deficient for failing to object to a proper jury charge.

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.

i. Allegations 1i: Allegation of Failure to Bring Pre-Trial Motions[6]

Applicant alleged Trial Counsel was constitutionally ineffective for failing to bring pre-trial motions. Specifically, Applicant asserts Trial Counsel should have moved for a self-defense pre-trial motion, alleging that had Trial Counsel done so the action would have nullified the need for a trial. It is the interpretation of this Court that Applicant avers that had Trial Counsel requested a stand-your-ground hearing, he would have been entitled to a directed verdict of acquittal based on self-defense. This Court finds this allegation is without merit.

A defendant may seek immunity from prosecution under Section 16-11-420(E), S.C. Code Ann., by "demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." *State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019) (quoting *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013)); *See* S.C. Code Ann. § 16-11-450. Under this theory, "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." *Curry*, 406 at 371, 752 S.E.2d at 266. To prove self-defense, a defendant must establish, (1) he was without fault; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or actually was in such imminent danger; (3) a reasonable prudent man of ordinary firmness and courage would have entertained same belief; and (4) there were no other probable mean of avoiding danger of losing his own life or sustaining serious bodily injury

[6] During the evidentiary hearing, Applicant testified he intended to assert Trial Counsel had failed to make pre-trial motions concerning Murder and Attempted Murder.

than to act as he in this instance. *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011).

At the evidentiary hearing on direct examination, Applicant testified Trial Counsel should have made a pre-trial motion to see if he would get immunity and not have to go to trial. Applicant testified Trial Counsel never discussed the possibility with him. Trial Counsel testified he had a *Jackon v. Denno* hearing to suppress Applicant's statements. The testimony at trial established that Applicant got into an altercation with the victim. After the altercation, Applicant went to his car and retrieved a gun, went back into the club, and started shooting.

This Court finds from the record that the facts of this case do not support an affirmative defense of self-defense. Applicant was ushered out of the club by others to diffuse tensions—then returned still armed with a gun. Applicant had the opportunity to leave and chose not to and instead re-enter the bar, still armed. Therefore, any affirmative defense claim of self-defense would have been precluded. Nevertheless, Applicant was not precluded from raising self-defense at trial and did so.

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

III. ALLEGATIONS RAISED DURING THE EVIDENTIARY HEARING

a. Allegation: Allegation of Failure to Provide or Review Discovery

Applicant alleged Trial Counsel failed to review discovery with him. This Court finds this allegation is without merit.

At the evidentiary hearing on direct examination, Applicant testified Trial Counsel told him he was a private attorney and did not need to give Applicant discovery. Applicant testified Trial Counsel never gave him discovery. Applicant testified Trial Counsel filed a Brady motion,

but he never provided or went over discovery with Applicant. Applicant testified he was harmed by Trial Counsel not providing discovery. Applicant testified Trial Counsel met with him about three times, and each time Trial Counsel went over the facts of his case.

Trial Counsel testified he received discovery and reviewed discovery with Applicant, and he met with Applicant several times. Trial Counsel testified he met with Applicant three times to go over discovery and case strategy. Trial Counsel testified that he assumed Applicant requested discovery from him, but he provides discovery on a case-by-case basis. Trial Counsel testified Applicant's case involved gang affiliation and he would have discussed the pros and cons of possessing the discovery with Applicant. Trial Counsel testified he shared other discovery from the solicitor with Applicant.

The Court finds Trial Counsel's testimony credible. The Court finds Trial Counsel adequately provided and explained the discovery materials to Applicant prior to trial; therefore, Trial Counsel's performance was not deficient. In addition, to prove prejudice from failure to review discovery, a PCR applicant must present some new evidence or defenses that could have been discovered by counsel's further review of the discovery. *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)), abrogated on other grounds by *Smalls*, 422 S.C. 174, 810 S.E.2d 836. Furthermore, an applicant must also show how the new evidence or defenses would have resulted in a different outcome. *Id.* (citing *David 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)).

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.

b. Allegation: Allegation of Newly Discovered Evidence.

Applicant alleges he is entitled to a new trial based on newly discovered evidence. This Court finds this allegation is without merit.

A person may institute a PCR action if "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice[.]" S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. § 17-27-45(C).

To prevail, Applicant must show the newly-discovered evidence:

1. is such as would probably change the result if a new trial was had;
2. has been discovered since the trial;
3. could not by the exercise of due diligence have been discovered before the trial;
4. is material to the issue of guilt or innocence; and
5. is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

The determination of whether new evidence is credible for the purposes of a new trial rests with the trial court. *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). In particular, "our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment." *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) (citing *Porter*, 269

S.C. at 621, 239 S.E.2d at 643). "When testimony is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence." *State v. Deese*, 266 S.C. 534, 538 225 S.E.2d 175, 176 (1976) (citing *State v. Fowler*, 264 S.C. 149, 155, 213 S.E.2d 447, 450 (1975)). The granting of a new trial based on after-discovered evidence is disfavored. *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011).

At the evidentiary hearing on direct examination, Applicant testified Trial Counsel informed him of new evidence three days before trial, but he did not go over the new evidence and Applicant has no idea what the new evidence is. Applicant testified this prejudiced him. Applicant testified he asked Trial Counsel why he brought up the new evidence, but Trial Counsel never answered him. Applicant testified that Trial Counsel told him there was a person who knew about his case. Applicant testified that he asked Trial Counsel who this person was, and Trial Counsel told him it was not important. Applicant testified he felt like this person could have helped him. Applicant testified the person's name is not in discovery.

This Court finds Applicant's testimony on this issue not credible Further, this Court finds Applicant has failed to establish the existence of newly discovered evidence that would affect the outcome of a new trial if granted relief. Applicant merely provides speculation as to an alleged helpful witness that Trial Counsel mentioned a few days prior to trial. Applicant does not know the witness's name or what he would have testified to that would have been helpful. This Court cannot grant relief based on newly discovered evidence where an applicant fails to present the alleged evidence.

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.

CONCLUSION

Based on the evidence presented at the PCR hearing and a thorough review of the record before this Court, this Court finds Applicant has not proven any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

IT IS SO ORDERED.

THE HONORABLE WALTON J. MCLEOD, IV
Presiding Circuit Court Judge
Twelfth Judicial Circuit

This 20 day of May, 2024.
Lexington, South Carolina

FORM 4

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

FILED
2024 MAY 28 PM 2:40
DORIS FOWLER SHARP
CLERK OF COURT
FLORENCE COUNTY, SC

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2021CP2102627

Diondrae E Jackson	**South Carolina State Of**	

PLAINTIFF(S) **DEFENDANT(S)**

Submitted by: **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

5/28/2024

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on **May 28, 2024**, and a copy mailed first class or placed in the appropriate attorney's box on **May 29, 2024**, to attorneys of record or to parties (when appearing pro se) as follows:

Steven Willard Fowler 730 Main Street Unit # 237 North Myrtle Beach, SC 29582

D Russell Barlow II PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.