RECEIVED
Jul 05 2024
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Maite Murphy, Circuit Court Judge

Case No. 2021-CP-40-00225

Horace E. Watts, ...Petitioner,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

Petitioner, Horace E. Watts, appeals the order of the Honorable Maite Murphy, dated June 21 2024, and filed June 26, 2024. Petitioner received written notice of entry of this order on July 1, 2024.

7/5, 2024

Michael H. Lifsey
Post Office Box 548
Chester, South Carolina, 29706
(803) 899-5040
ATTORNEY FOR PETITIONER

Opposing Counsel:
D. Russell Barlow, II
Assistant Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Horace E. Watts, #355244	)	CASE NO. 2021-CP-40-00225
Applicant,	)	
v.	)	**ORDER OF DISMISSAL WITH PREJUDICE**
State of South Carolina,	)	
Respondent.	)	

Presiding Judge:	Hon. Maité Murphy
Applicant's Attorney:	Michael H. Lifsey, Esq.
Respondent's Attorney:	D. Russell Barlow, II, Esq.
Trial Counsels:	Stephen F. Krzyston, Esq. Adam S. Ruffin, Esq.
Date of Hearing:	January 11, 2024
Court Reporter:	Lisa Carter

This matter comes before the Court by way of Horace E. Watt's (Applicant) Application for Post-Conviction Relief (PCR) filed on January 19, 2021. On May 3, 2021, Respondent submitted its Return and Motion to Dismiss the application as untimely and for failure to present *prima facie* showing of newly discovered evidence pursuant to S.C. Code Ann. §17-27-20 and § 17-27-90.

On April 29, 2021, the Honorable L. Casey Manning issued a Conditional Order of Dismissal provisionally dismissing Applicant's PCR application and granting Applicant twenty days to present specific reasons, legal or factual, why the dismissal should not become final. On May 17, 2021, Applicant filed his response to the Conditional Order of Dismissal asserting that his PCR application was timely submitted, as it was signed, notarized, and placed in the mailroom at the Lee Correctional Institution on December 1, 2020.

On June 1, 2021, Respondent submitted a letter to the Honorable Casey L. Manning, stating Applicant's response necessitated an evidentiary hearing to determine whether Applicant's filing should be considered timely pursuant to *Mose v. State*, 420 S.C. 500, 511-12, 803 S.E.2d 718, 723 (2017). On January 24, 2022, a *Mose* hearing occurred before the Honorable D. Craig Brown. Applicant was present and represented by Michael H. Lifsey, Esquire. Assistant Attorney General Yasmeen E. Klein represented Respondent. Judge Brown issued an Order pursuant to *Mose v. State* granting equitable tolling of the statute of limitations filed on February 7, 2022.

On January 11, 2024, an evidentiary hearing was held at the Richland County Courthouse before the Honorable Maité Murphy. Applicant was present and represented by Michael H. Lifsey, Esquire. Assistant Attorney General D. Russell Barlow, II, represented Respondent. Applicant proceeded with the claims set forth in his amended application. In support of these claims, Applicant testified on his own behalf, and Respondent presented testimony from Adam Sinclair Ruffin and Stephen F. Krzyston, referred to collectively as 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 (SCDC) pursuant to the Richland County Clerk of Court order of commitment. In January 2015, the Richland County Grand Jury indicted Applicant for Murder (2015-GS-40-0083), Attempted Murder (2015-GS-40-0084), Unlawful Carrying of a Pistol (2015-GS-40-0085), and Possession of a Weapon During the Commission of a Violent Crime (2015-GS-

40-0024). Richland County Public Defenders Adam Sinclair Ruffin, Jonathan Comish, and Stephen F. Krzyston represented Applicant. Fifth Circuit Assistant Solicitors Carter Reston Potts, Jessica Nickles, and Brent Hamilton Arant prosecuted the case.

On February 6–9, 2017, Applicant proceeded to a jury trial before the Honorable Clifton Newman. The jury found Applicant guilty as indicted. Judge Newman sentenced Applicant to thirty (30) years imprisonment for Murder, ten (10) years for Attempted Murder, one (1) year for Unlawful Carrying of a Pistol, and five (5) years for Possession of a Weapon During the Commission of a Violent Crime, to run concurrently.

On February 13, 2017, Applicant timely filed a Notice of Appeal. Appellate Defender Robert Dudek perfected Applicant's appeal by filing an *Anders*[1] brief presenting the following issue:

> The court erred by allowing hearsay testimony that alleged witnesses told the police appellant and his brother, Malik Davis, were the shooters, and by also allowing victim Tyrone Johnson to give hearsay testimony that he was told appellant and Davis were the shooters, since this inadmissible hearsay testimony was very prejudicial, and denied appellant his constitutional right to Confrontation.

The Court of Appeals dismissed Applicant's appeal pursuant to *Anders*. *State v. Watts*, Op. No. 2019-UP-385 (Ct. App. filed Dec. 18, 2019). The Remittitur was returned to the circuit court on January 3, 2020.

FACTS GIVING RISE TO THE CONVICTION

On July 12, 2014, in Columbia, SC, Applicant shot sixteen bullets into a crowd at a party, killing Isaac Lewis (Victim) and injuring Tyrone Johnson (Johnson). R. 113–15. Prior to the shooting, an argument ensued between Applicant's brother, Malik Davis (Davis), and Terrell

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

Threatt (Threatt). R. 117. Officer Ivan Birochak responded to the scene at 8:22 PM after the initial altercation but left after he was informed by others at the party that everything was fine. R. 118, 129–30. Thirty minutes later, Officer Birochak responded a second time to a call of multiple shots fired, and witnesses at the scene identified Applicant and Davis as the shooters. R. 118, 137–51. Jamichael Lewis (Lewis), Paris Young, Daquan Cleckley (Daquan), Benjamin Walker, Dominique Tucker, Jasmine Sims, and April Cleckley identified Applicant and Davis as the shooters to investigators who responded to the scene and from a photo lineup. R. 118–22, 183–213, 242–71, 292–319, 320–34, 411–18, 423–29, 600–17.

Investigator Matthew McCoy, the lead crime scene investigator, responded to the scene and made contact with Officer Birochak. R. 698–702. Investigator McCoy testified he interviewed multiple witnesses at the scene and at headquarters who identified the shooters, and Lewis led Investigator McCoy to Applicant's and Davis's residence. R. 702–05. Investigator McCoy testified that once Applicant was identified from a lineup, he prepared a search warrant for Applicant's and Davis's residence and prepared an arrest warrant based on the physical evidence and witness statements. R. 707–08. Investigator McCoy served the search warrant and discovered a box of ammunition matching the brand of the shell casings at the crime scene. R. 121, 710–12. Additionally, Investigator McCoy testified concerning a jail call made by Applicant that was played for the jury. R. 721–722; State's Ex. 174.

Officer Brian Zwolak was part of the fugitive team searching for Applicant and Davis after the shooting on July 14, 2014. R. 581. Officer Zwolak testified they received information that Applicant and Davis were hiding in an apartment complex on the north side of Columbia. R. 582. Officer Zwolak testified the fugitive team responded to the apartment and two females, Kadeisha Gosier and Quiera Durham, opened the door. Officer Zwolak testified that while speaking with the

females, they heard the door to the back bedroom shut and discovered Applicant and Davis in the room and arrested them. R. 122, 578–85, 582–84.

Investigator Chad Smith, a firearms expert at SLED, testified to his findings from his testing of the crime scene evidence. R. 667–87. Investigator Smith testified he received and tested several different calibers, specifically six fired 9mm Luger caliber cartridges, twelve fired 45 auto caliber cartridges, one unfired 9mm Luger cartridge, three fired bullets, one fired jacket fragment, and one miscellaneous metal. R. 673–74; State's Ex.s 125, 128–132, 146. Investigator Smith testified he assessed the cartridges and bullets to ascertain how many different firearms could have been used and determine the caliber of the bullets. R. 675–81. Investigator Smith testified that, in his opinion, two firearms were used in the shooting, one to fire the 9mm Luger caliber cartridges and one to fire the 45 auto caliber cartridges.[2] R. 681–82, 687.

CURRENT ACTION BEFORE THIS COURT

In his application for PCR, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   - "My lawyer did not help/fight to his best abilities. Also did not do the things me and my family asked him to do."
2. Prosecutorial Misconduct
   - "Prosecutors presented false evidence and also called witnesses who were not on the scene or ain't have personal knowledge."
3. Actual Innocence (Newly Discovered Evidence)

[2] After Krzyston's cross-examination of Investigator Smith in the in-camera hearing, Krzyston argued the evidence should be suppressed based on conflicting reports by commentators of the state of foundational validity with regard to this science. R. 665–66. The trial court did not suppress the evidence but limited the testimony of Investigator Smith, ruling that he could testify to his opinion that the bullet came from the same gun based on a reasonable degree of certainty but that he could not testify to his absolute certainty. R. 666–68. On cross-examination, Smith testified the "likelihood of it being fired by another gun would be practically impossible." R. 693:10–11. Krzytson objected to this testimony as the trial court had ruled this testimony was impermissible and requested a mistrial. R. 695. The trial court ruled Krzyston opened the door to the answer by asking Investigator Smith's opinion. R. 696.

- "Murder victim stated he knew (sic) who shot him and that he only remembers one shooter."

On January 4, 2024, by way of PCR Counsel, Applicant amended his PCR application and alleged additional allegations of ineffective assistance of counsel, as follows:

1. Ineffective Assistance of Counsel
   a. Ruffin incorrectly advised Applicant that it was too late for Applicant to seek to have Ruffin relieved as his attorney and refused to bring Applicant's request in front of the Court for a hearing.
   b. Applicant wished to assert a defense of self-defense to his charges. Ruffin refused to allow Applicant to assert this defense.
   c. Ruffin insisted on asserting the defense that Applicant was not present at the scene of the crime, despite there being numerous witnesses to the contrary and despite Applicant's admissions to Ruffin that he was present and was defending himself.
   d. Trial Counsels' refusal to proceed with a self-defense case made it impossible for Applicant to testify in his own defense since his testimony would be contrary to the theory of Trial Counsels.
   e. Because of Trial Counsels refusal to proceed with a self-defense case, no pre-trial immunity hearing was held pursuant to the Protection of Persons and Property Act.
   f. Ruffin was ineffective in his cross-examination of eyewitnesses against Applicant.
   g. Krzyston was ineffective in his cross-examination of expert witness Chad Smith by opening the door to that witness testifying in a manner previously ruled inadmissible by the Court. See pages 666 to 668, 693, and 695 to 696 of the trial transcripts.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act (the Act), S.C. Code Ann. §§ 17-27-10 to -160, provides that any person may seek PCR 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;
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 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 PCR 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 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) ("Without 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.'" (quoting *Strickland*, 466 U.S. at 687)).

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); *see also 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. 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"); *see also 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 various claims of ineffective assistance of counsel through the PCR 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 PCR. *See* Rule 71.1(e), SCRCP ("The [PCR] applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). 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.

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 further finds applicable the strong presumption that at all stages of Trial Counsels' representation of Applicant they 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; *see Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ON THE MERITS

Allegation 1a: Ruffin incorrectly advised Applicant that it was too late to relieve him and refused to bring Applicant's request in front of the Court for a hearing.

Applicant alleges Ruffin was constitutionally ineffective for incorrectly advising Applicant it was too late to remove Ruffin from his case. Specifically, Applicant testified he wanted to relieve Ruffin. This Court finds this allegation is without merit.

Evidentiary Hearing Testimony

At the evidentiary hearing on direct examination, Applicant testified he was initially represented by Anastasia Walker, but she was taken off his case even though he wanted her to represent him. PCR Tr. 7–8. Applicant testified he wanted Ruffin off his case from the first encounter, and that he informed Ruffin he wanted him relieved as counsel. PCR Tr. 8. Applicant testified Ruffin told him he was stuck with Ruffin because they were preparing his case for trial. PCR Tr. 9. Applicant testified he and Ruffin were not on the same page, and that he told Ruffin that he shot in self-defense, but Ruffin said there were numerous witnesses stating he murdered Victim. PCR Tr. 13. Applicant testified that he told Ruffin multiple times he wanted him off his case. *Id.* Applicant testified Ruffin did not advise he could have him relieved as counsel, and a hearing never took place to relieve Ruffin as counsel for Applicant. PCR Tr. 9. Applicant testified Trial Counsel did not take the time to examine what he would say and help fight his case. *Id.*

On cross-examination, Applicant testified he wanted Ruffin relieved as counsel because Ruffin would not listen to his side of the case and told him there was no use trying to fight because there were many witnesses that said he did it. PCR Tr. 14.

On direct examination, Ruffin testified Walker represented Applicant for almost two years and continued as second chair up until she left the Public Defender's Office completely. PCR Tr. 22. Ruffin testified that his notes did not indicate that Applicant requested to have him relieved as counsel. PCR Tr. 25. Ruffin testified it is his usual practice to file a motion to be relieved when a client expresses that they do not want him to represent them anymore. *Id.* Ruffin testified he would have been happy to file a motion had Applicant requested. *Id.*

Findings

This Court finds Applicant has failed to meet his burden of proving Trial Counsel was deficient and that the alleged deficiency prejudiced him. *See Butler*, *supra*. Notably, this Court finds Applicant's testimony **not credible** that he requested to have Ruffin relieved as counsel. Ruffin **credibly** testified it is his usual practice to file a motion to relieve him as counsel when his client wishes to end representation. Ruffin **credibly** testified he had no indication Applicant wanted to relieve him as counsel. Ruffin **credibly** testified he would have filed a motion had Applicant requested him to do so. At trial, there was no indication Applicant expressed his dissatisfaction with Ruffin, nor his wishes to relieve Ruffin.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the *Strickland* test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or

omissions to prove the second prong of *Strickland*—that he was prejudiced by Trial Counsel's performance.

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:	**Applicant wished to assert a defense of self-defense to his charges. Ruffin refused to allow Applicant to assert this defense.**
Allegation 1c:	**Ruffin insisted on asserting the defense that Applicant was not present at the scene of the crime, despite there being numerous witnesses to the contrary and despite Applicant's admissions to Ruffin that he was present and was defending himself.**
Allegation 1d.	**Trial Counsels' refusal to proceed with a self-defense case made it impossible for Applicant to testify in his own defense since his testimony would be contrary to the theory of Trial Counsel.**
Allegation 1e	**Because of Trial Counsel refusal to proceed with a self-defense case, no pre-trial immunity hearing was held pursuant to the Protection of Persons and Property Act Ruffin was ineffective for asserting at trial that Applicant was not present at the scene of the crime instead of asserting self-defense and failed to pursue a pre-trial immunity hearing.**

Applicant alleges Trial Counsel was constitutionally ineffective for asserting that Applicant was not present at the crime scene. Specifically, Applicant averred Trial Counsel should have asserted self-defense and pursued a pre-trial immunity hearing. This Court finds these allegations are without merit.

A defendant must establish four things in asserting self-defense:

> (1) the defendant must be without fault in bringing on the difficulty.
> (2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger.

> (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life.
> (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452 (1984). The Protection of Persons and Property Act (the Act) provides that "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force." S.C. Code Ann. § 16-11-450(A). The Act further provides, in part, that:

> 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.

S.C. Code Ann. § 16-11-440(C).

"[T]he main thrust of the Act, provides a presumption of reasonable fear of imminent peril of death or great bodily injury to a person who uses deadly force if he is attacked by or attempting to remove another from a dwelling, residence, or occupied vehicle." *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). A trial court must consider the elements of self-defense in determining whether a defendant is entitled to immunity. *State v. Glenn*, 429 S.C. 108, 118, 838 S.E.2d 491, 496 (2019) ("[A] defendant may seek immunity from prosecution under the Act by

demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence. . . . [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.") (quoting *Curry*, 406 S.C. at 371–72, 752 S.E.2d at 266–67).

Evidentiary Hearing Testimony

At the evidentiary hearing on direct examination, Applicant testified that he wanted to pursue self-defense at trial. PCR Tr. 7. Applicant testified that there was physical evidence and multiple witnesses that corroborated his version of events.[3] PCR Tr. 12. Applicant testified he told Ruffin he acted in self-defense, and Ruffin said it didn't matter because many people said he did it. PCR Tr. 7. Applicant testified he never denied that he was not present at the scene. PCR Tr. 10. Applicant testified Ruffin considered pursuing a self-defense theory. PCR Tr. 9. Applicant testified Trial Counsel did not want to pursue self-defense and instead argued Applicant was not present. PCR Tr. 9–10. Applicant testified that Trial Counsel advised him they were pursuing defense that the witnesses identified the wrong person based on the amount of witnesses and their differing perceptions. PCR Tr. 10. Applicant further testified he did not have a pre-trial hearing on immunity. PCR Tr. 12. Applicant testified he was not entitled to an immunity hearing because Ruffin's defense strategy was that Applicant was not present. *Id.*

On cross-examination, Applicant testified that Daquan Cleckley invited Applicant to the birthday party at Cleckley's mother's home. PCR Tr. 16. Applicant testified he was present at the scene before the incident unfolded. *Id.* Applicant testified he left for a family event that day and returned later to hang out with Cleckley. PCR Tr. 17. Applicant testified that an incident ensued between Cleckley and his brother earlier that week, and Applicant returned to the party to diffuse

[3] Notably, Applicant failed to present the alleged evidence and witnesses that would have corroborated his version of events that he acted in self-defense.

the situation and had a gun with him. *Id.* Applicant testified he had the gun to protect his family because Cleckley had previously pulled a gun at his mother's home, resulting from Applicant's dealings with Cleckley. *Id.* Applicant testified he recalled the testimony at trial that his brother was beaten, and Applicant returned in defense of his brother. PCR Tr. 18. Applicant testified he did not return to the party in defense of his brother. *Id.* Applicant testified he recalled the testimony throughout trial that Applicant was not invited to the party. PCR Tr. 18. Applicant testified he was legally present at the home. PCR Tr. 19. Applicant testified medical testimony indicated the victim had been shot in the back. *Id.* Applicant testified he never stated he shot the victim, but that he had discharged the firearm into the crowd. *Id.* Applicant further testified he discharged his firearm in self-defense because he was in imminent danger. PCR Tr. 20. Applicant testified that he fired the gun to save his life and his brother's life. *Id.*

On direct examination, Ruffin testified Applicant went to a birthday party with a gun to settle a dispute about a fight that ensued with his brother and someone else. PCR Tr. 26. Ruffin testified Applicant was not without fault in bringing on the difficulty because he went to the party. PCR Tr. 27. Ruffin testified there was nothing to support Applicant acted in self-defense. PCR Tr. 26. Ruffin testified he informed Applicant the only way to obtain a jury instruction for self-defense was if Applicant testified, and Applicant did not want to testify. *Id.* Ruffin testified he was unable to really craft a defense strategy. PCR Tr. 24. Ruffin testified their defense strategy was reasonable doubt. PCR Tr. 25. Specifically, Ruffin testified his strategy was to "poke holes" in the State's case. PCR Tr. 24. Ruffin testified his goal in the case was to obtain a favorable plea resolution leading up to trial. PCR Tr. 27. Ruffin testified that when the plea deal was unsuccessful, he

pursued a *Neil v. Biggers*[4] hearing that lasted a day due to the numerous witnesses who identified Applicant from a lineup. *Id.*

On cross-examination, Ruffin testified he did not think self-defense was a believable defense because there was no evidence to support it. PCR Tr. 30. Ruffin testified he either had to argue that someone else did it or that Applicant did it and was justified. *Id.* Ruffin testified that if Applicant had testified, they would have argued self-defense. PCR Tr. 31. Ruffin testified that Applicant stated multiple times he would not testify at trial. *Id.* Ruffin testified his notes indicated Applicant did not wish to testify, but Applicant did not sign a waiver or form to that effect. PCR Tr. 32. Ruffin testified the evidence consisted of thirteen eyewitnesses who personally knew and identified Applicant and his brother, Malik, at the scene. PCR Tr. 24.

On direct examination, Krzyston testified he was involved extensively in Applicant's trial. PCR Tr. 33–34. Krzytson testified that there was extensive eyewitness testimony, medical evidence, crime scene investigation evidence, and a jail call[5] that ultimately was a huge issue for Applicant. PCR Tr. 36. Krzytson testified self-defense would have been viable, but Applicant did not wish to testify. *Id.* Krzyston testified they intended to pursue reasonable doubt and poke holes. *Id.* Krzyston testified he does not recall pursuing self-defense or indicating anything in his opening statement about self-defense. *Id.*

Findings

This Court finds Applicant has failed to meet his burden of proving Trial Counsel was deficient and that the alleged deficiency prejudiced him. *See Butler, supra.* Ruffin **credibly** testified self-defense was not a believable defense. *See Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996) (stating that, where counsel articulates a valid strategic reason for his action or inaction,

[4] *Neil v. Biggers*, 409 U.S. 188 (1972).
[5] This record memorializes the jail call was played for the jury. Trial Tr. 722; State's Ex. 174.

counsel's performance should not be found ineffective). Ruffin **credibly** testified Applicant was not without fault because he went to the party. Ruffin **credibly** testified there were at least thirteen eyewitnesses who personally knew and identified Applicant at the scene. Ruffin **credibly** testified none of the witnesses' testimony established Applicant acted in self-defense. Ruffin **credibly** testified the only way to obtain a self-defense instruction was if Applicant testified at trial. Trial Counsel **credibly** testified Applicant did not wish to testify at trial. Even if Applicant had pursued self-defense, Ruffin **credibly** testified there was no evidence to support the theory. Therefore, Trial Counsel cannot be deficient for failing to pursue a non-viable defense at pre-trial or at trial.

Additionally, Applicant failed to show that, had Trial Counsel pursued a pre-trial immunity hearing or self-defense at trial, the outcome of his trial would have been different. To be entitled to immunity, Applicant would have had to establish the elements of self-defense by the preponderance of the evidence. However, there was substantial evidence—including the testimony of over a dozen eyewitnesses—that Applicant did not act in self-defense. Based on this, this Court cannot find Applicant would have been entitled to immunity. Moreover, as found *supra*, Trial Counsel **credibly** testified that, unless Applicant testified, self-defense was not a viable defense, and Applicant refused to testify.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the *Strickland* test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of *Strickland*—that he was prejudiced by Trial Counsel's performance.

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:	**Ruffin was ineffective in his cross-examination of eyewitnesses against Applicant.**
Allegation 1g:	**Krzyston was ineffective in his cross-examination of expert witness Chad Smith by opening the door to that witness testifying in a manner previously ruled inadmissible by the Court. See pages 666 to 668, 693, and 695 to 696 of the trial transcripts.**

Applicant alleges Ruffin was constitutionally ineffective in his cross-examination of eyewitnesses. Specifically, at the evidentiary hearing Applicant testified Ruffin failed to effectively cross-examine Ms. Cleckley, Daquan, Lewis, and all the witnesses. Additionally, Applicant alleges Krzyston was constitutionally ineffective in the cross-examination of firearm examiner Smith when he opened the door to testimony the trial court had previously ruled inadmissible. This Court finds these allegations are without merit.

Evidentiary Hearing Testimony

At the evidentiary hearing on direct examination, Applicant testified that Trial Counsels failed to impeach the witness's testimony with their previous statements or argue the witnesses were saying what the solicitors or someone else told them to say. PCR Tr. 12. Applicant testified Ruffin only asked the witnesses a couple of questions. PCR Tr. 13.

On cross-examination, Applicant testified Ruffin failed to effectively cross-examine most of the witnesses. PCR Tr. 20. Applicant testified Trial Counsel was ineffective in their cross-examination of the witnesses. PCR Tr. 20–21.

On direct examination, Ruffin testified he did not believe he was ineffective in his cross-examination. PCR Tr. 28. Ruffin testified they did the best that they could with what they had to work with. *Id.* Ruffin testified that he stood by his representation. PCR Tr. 29.

On direct examination, Krzyston testified leading up to trial, they had asked the trial court to conduct an evidentiary hearing to determine the admissibility of forensic identification stemming from firearms and tool mark analysis under Rule 702. PCR Tr. 35. Krzyston testified they got the trial court to change how the firearm examiner was able to testify about his conclusions to the jury. *Id.* Krzyston testified he cross-examined Smith. Id. Krzyston testified the "witness answered outside the question he specifically asked in proffered testimony that the court had previously ruled he could not proffer." PCR Tr. 35:18–21. However, Krzyston testified the bullets were not the only evidence in the case. PCR Tr. 35. Krzyston testified that there was extensive eyewitness evidence, medical testimony, and crime scene investigation, along with a jail call. PCR Tr. 36. Krzyston testified that after speaking to the jury once the verdict had been rendered and sentencing passed, the jail call was a huge issue for Applicant. *Id.*

On cross-examination, Krzyston testified that the trial judge ruled prior to Investigator Smith's testimony that Smith could not call it a match and instead could say it was "consistent with." PCR Tr. 37–38. Krzyston testified he objected to his own question, and the Court overruled his objection. *Id.* Krzyston testified it is correct that the Judge stated outside the presence of the jury that he had opened the door to that answer and refused to strike it from the record. *Id.*

At trial, Krzyston objected to Smith's testimony, stating, "Judge…I asked a question, he proceeded to then say that he could match them beyond any practical certainty. The witness was instructed not to do that, he did it. That would be a matter of law. I object to the testimony as a whole and ask for a mistrial." Trial Tr. 696:12–17, *see supra* note 2.

Findings

This Court finds Applicant has failed to meet his burden of proving Ruffin was deficient and that the alleged deficiency prejudiced him. *See Butler, supra.* Applicant failed to present testimony or evidence of how Ruffin was ineffective in their cross-examination of the witnesses and what they could have discovered through a more thorough cross-examination that would have affected the outcome of Applicant's trial. *See Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993) (indicating mere speculation as to what a witness's testimony would have been, by itself, cannot satisfy applicant's burden of showing prejudice).

Additionally, this Court finds Applicant has failed to meet his burden of proving Krzyston was deficient and that the alleged deficiency prejudiced him. *See Butler, supra.* Applicant has a right to effective representation, not perfect representation. Further, this Court finds cross-examination is a matter of trial strategy, and Applicant has failed to overcome the presumption that Krzyston "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (citing *Strickland*, 466 U.S. at 690); *see also Abney v. State*, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (Pieper, J., concurring) ("[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. . . . Examples of such decisions include which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, *[and] whether and how a witness should be cross-examined.*") (emphasis added) (citations omitted).

Even if this Court were to find Krzyston's performance deficient, Applicant cannot prove prejudice. The record and Krzyston's **credible** testimony establish there was overwhelming

evidence supporting Applicant's guilt, including extensive eyewitness evidence, medical testimony, a crime scene investigation, and an incriminating jail call.[6]

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the *Strickland* test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of *Strickland*—that he was prejudiced by Trial Counsel's performance.

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 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

[6] Jamichael Lewis (Lewis), Paris Young, Daquan Cleckley, Benjamin Walker, Dominique Tucker, Jasmine Sims, and April Cleckley identified Applicant and Davis as the shooters to investigators that responded to the scene and from a photo lineup. R. 118–22, 183–213, 242–71, 292–334, 411–18, 423–29, 600–17. A box of ammunition matching the brand of the shell casings at the crime scene were discovered at Applicant's residence. R. 121, 710–12. A jail call made by Applicant was played for the jury with incriminating statements. R. 721–722; State's Ex. 174.

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.

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** June **, 2024.**

THE HONORABLE MAITÉ MURPHY
Presiding Judge
Fifth Judicial Circuit

St. Mary, South Carolina