

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Jul 29 2024**

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Post Conviction Relief

**S.C. SUPREME COURT**

George M. McFaddin, Jr., Circuit Court Judge

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Lower Court Case No.: 2019-CP-40-2444

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Dexter L. Myers #365377,..... Petitioner

vs.

State of South Carolina, .....Respondent.

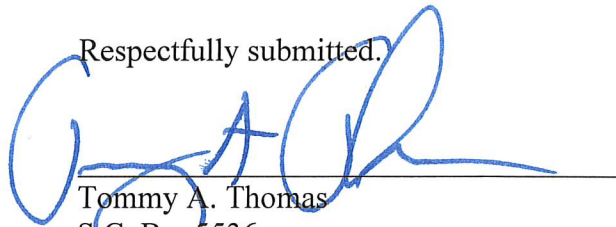
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NOTICE OF APPEAL

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The Petitioner, Dexter L. Myers #365377, appeals the Order of Dismissal signed by the Honorable George M. McFaddin, Jr. on July 15, 2024 and filed on July 25, 2024. Petitioner received written notice of this order on July 29, 2024.

Respectfully submitted.



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July 29, 2024

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Dexter L. Myers, #365377,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTH JUDICIAL CIRCUIT

) CASE NO. 2019-CP-40-2444

**ORDER OF DISMISSAL  
WITH PREJUDICE**

Presiding Judge:	Hon. George M. McFaddin, Jr.
Applicant's Attorney:	Tommy A. Thomas, Esq.
Respondent's Attorney:	D. Russell Barlow, II, Esq.
Trial Counsel:	Tracy E. Pinnock, Esq. J. Rhodes Bailey, Esq. Catherine Mubarak, Esq.
Solicitors:	K. Luck Campbell, Esq. Meghan Walker, Esq. J.J. Shellenberg, Esq.
Date of Hearing:	January 11, 2023
Court Reporter:	Karen Ambroziak

RICHLAND COUNTY  
 FILED  
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This matter comes before the Court by way of Dexter L. Myers's (Applicant) application for post-conviction relief (PCR) filed on May 1, 2019. Respondent, the State of South Carolina, made its Return and Motion for a More Definite Statement on February 28, 2020, requesting an evidentiary hearing to resolve the claims as set forth in the application. On November 7, 2022, Applicant, through appointed post-conviction relief counsel, Tommy A. Thomas, Esquire, filed an Amendment to Post-Conviction Relief Application asserting additional claims of ineffective assistance of trial counsels.

An evidentiary hearing was convened on January 11, 2023, at the Richland County Courthouse before the Honorable George M. McFaddin, Jr. Applicant was present and represented by Tommy A. Thomas, Esquire. Assistant Attorney General D. Russell Barlow, II, represented

Respondent. At the hearing, Applicant proceeded forward on the claims set forth in his original and amended applications. In support of these claims, Applicant testified on his own behalf, and Respondent presented testimony from Tracy E. Pinnock, Esquire.

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 Richland County Clerk of Court. Applicant was indicted at the August 2014 term of the Richland County Grand Jury for attempted murder (2014-GS-40-5481) and murder (2014-GS-40-5482). Applicant was represented by Fifth Circuit Assistant Public Defenders Tracy E. Pinnock, J. Rhodes Bailey, and Catherine Mubarak, Esquires. Fifth Circuit Assistant Solicitors K. Luck Campbell, Meghan Walker, and J.J. Shellenberg, Esquires prosecuted the case.

Applicant proceeded to a jury trial from August 31—September 4, 2015, before the Honorable J. Derham Cole. The jury convicted Applicant of the lesser-included offense of voluntary manslaughter and as indicted for attempted murder. Judge Cole sentenced Applicant to serve an aggregate term of fifty years' imprisonment—twenty years for attempted murder and thirty years for voluntary manslaughter. On September 9, 2015, Trial Counsel filed a motion to reconsider. On May 2, 2017, the trial court denied the motion to reconsider.

Applicant filed a timely Notice of Appeal. Appellate Defender Susan B. Hackett represented Applicant on appeal and briefed the following issue:

1. Did the trial judge err in concluding a text message was a present sense impression, and therefore admissible as an exception to the rule against hearsay, where the state failed to present that (1) the statement described or explained an event or condition; (2) the statement was contemporaneous with the event it was describing; and (3) that the declarant personally perceived the event allegedly described or explained?

The case was submitted on briefs to the Court of Appeals on February 1, 2019. On March 27, 2019, the Court of Appeals affirmed Applicant's convictions and sentences. State v. Myers, Op. No. 2019-UP-119 (Ct. App. filed Mar. 27, 2019). The Remittitur was returned to the circuit court on April 17, 2019.

#### **FACTS GIVING RISE TO THE CONVICTION**

Applicant was charged with the attempted murder of his sister, Mahogany Speech-Harris (Victim 2), and the murder of his brother-in-law, Dajuan Harris (Victim 1). Victim 2 lived in an apartment with Victim 1, their two children, Applicant, and her other brother. (Trial Tr. p. 223). Applicant and his brother had lived with Victim 2 periodically for three years but were told in March 2014 that they needed to move out. (Trial Tr. pp. 223 – 224). Victim 2 and Victim 1 had a bedroom, their daughters had a bedroom, and her brothers slept in the living room. (Trial Tr. p. 224).

In July 2014, the brothers were still living in the apartment. On July 2, 2014, one of the children could not sleep, so Victim 2 got up to make breakfast. (Trial Tr. p. 225). She took her youngest daughter with her to wake up Victim 1 and have him join them to eat. (Trial Tr. pp. 226 – 227). Victim 1 and the children were at the table and began eating. According to Victim 2, there were no arguments between her and her brothers or anyone and her brothers that morning. (Trial Tr. pp. 231; 233 – 234). Victim 2 turned to fix her own breakfast and heard, "Something go pow, pow." (Trial Tr. pp. 228 – 229). She said it sounded like fireworks, but then she heard her brother

saying: "No, Dexter, no," and when she looked up, she saw the gun. (Trial Tr. p. 229). Victim 2 never saw her husband; she only saw Applicant and indicated: "He just kept shooting . . . ." (Trial Tr. pp. 230 – 231).

Victim 2 ran across the hall to her neighbor's apartment to call 911. (Trial Tr. p. 231). Her neighbor heard three gunshots. (Trial Tr. p. 93). Thereafter, Victim 2 ran into the neighbor's apartment, "screaming and hollering 'My brother shot my husband.'" (Trial Tr. p. 94). Victim 2 told her neighbor she had been shot, and her neighbor indicated that Victim 2 was bleeding. (Trial Tr. p. 94).

Master Deputy Fairbanks was the first officer on the scene. He found Victim 2 at her neighbor's apartment. He indicated Victim 2 had been shot in the leg. (Trial Tr. p. 99). He entered the other apartment and found Victim 1 locked in a bedroom. (Trial Tr. pp. 99-100). After kicking the door open, he found Victim 1 leaning up against the door. (Trial Tr. p. 100).

EMS arrived and located Victim 1. He was "wedged behind the door lying prone in a pool of blood with obvious . . . trauma to his face and chest area." (Trial Tr. pp. 119 – 120). Victim 1 was not breathing, his pupils were fixed and dilated, and he was "cold." According to EMS, he was "obviously dead." (Trial Tr. p. 120). EMS then approached Victim 2, who had five holes in her outer thigh and buttocks area from where she had been shot. (Trial Tr. p. 121). According to the ER doctor, Victim 2 had two-to-three gunshot wounds. (Trial Tr. p. 284).

The pathologist performed the autopsy on Victim 1. (Trial Tr. p. 404). She indicated Victim 1 had a gunshot wound to the left side of his head, which exited on the right back of his head; another gunshot wound to the right side of his neck; and a gunshot wound to his lower back. (Trial Tr. p. 406). The pathologist indicated the gunshot wound to the head was nonfatal as it missed the brain. (Trial Tr. pp. 410 – 411). The bullet that entered through Victim 1's neck

perforated his trachea, then perforated the major subclavian artery, went through the left upper lobe of the lung, and ultimately entered the soft tissue of his left arm. (Trial Tr. p. 412). The gunshot to the neck was the fatal gunshot. (Trial Tr. pp. 412 – 413). The final gunshot entered Victim 1's lower back and hit his small intestine twice. (Trial Tr. p. 413).

After the shooting, Applicant fled the apartment. (Trial Tr. p. 510). He sought a ride from a neighbor who happened to be leaving at the time. (Trial Tr. p. 214). This neighbor gave Applicant a ride from the Apartment complex. Applicant told her he was in a fight with his girlfriend and he "just wanted to get away." (Trial Tr. p. 215). Applicant was later arrested at a friend's house. (Trial Tr. pp. 324; 510; 512).

Captain McDonald interviewed Applicant after he was arrested. After reading Applicant his Miranda<sup>1</sup> rights Applicant agreed to speak with Captain McDonald. Applicant initially denied any involvement and any knowledge of the shooting and further denied being present. (Trial Tr. p. 328). Even after being confronted with some of the facts that the officers knew from Victim 2, Applicant continued to deny involvement. However, Applicant's story changed to indicate he was at the apartment that morning but had gotten up and left to buy some marijuana and had not returned by the time of the incident. (Trial Tr. p. 329). Applicant's story changed again as the questioning continued. His third version indicated he was present at the apartment, awakened in the living room, and found a gun on the floor. Applicant indicated the gun was a dangerous gun because the hammer was always cocked. He said he picked it up, and it just went off and struck Victim 1. Applicant told Captain McDonald he had the gun in his hand, and it "kept going off and struck [Victim 2]." (Trial Tr. p. 329).

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436 (1966).



Eventually, Applicant led other investigators to where he had disposed of the gun. (Trial Tr. p. 331). After returning, he again spoke with Captain McDonald and gave a written statement which differed from his prior statements. He indicated they had a gun at the apartment for protection and kept it under the couch in the living room. Applicant stated Victim 1 picked up the gun so none of the children would get it. (Trial Tr. p. 332). Victim 1 put the gun in Applicant's hand after Applicant warned him about the hammer being cocked. Applicant explained the gun just went off and hit Victim 1, and then it went off a few more times, and it hit Victim 2. (Trial Tr. p. 333). He indicated there was no argument with Victim 1 that morning and that he did not intentionally shoot Victim 1. (Trial Tr. p. 334).

Applicant later gave a second written statement. (Trial Tr. p. 582). In this statement, Applicant indicated Victim 2 entered the kitchen mad with Victim 1 in tow. Victim 1 then looked at him and said, "Man," which the Applicant took to mean that Victim 1 wanted him to move. Victim 1 was coming at him and going for the gun. (Trial Tr. p. 583). Applicant said he grabbed the gun, and it fired, shooting Victim 1. He said Victim 1 was still on him, so he shot him again. Victim 2 then charged Applicant, and Applicant shot her. (Trial Tr. p. 584). This is a similar version of events to the one Applicant testified to at trial, but, at trial, he had difficulties remembering many details of the events. (Trial Tr. pp. 519 – 523).

The trial court ultimately charged the jury with murder, voluntary manslaughter, and involuntary manslaughter as it related to the killing of Victim 1. The trial court charged both attempted murder and assault and battery of a high and aggravated nature (ABHAN) as it related to the wounds sustained by Victim 2. The trial court also charged accident and self-defense. (Trial Tr. pp. 666 – 684). The jury convicted Applicant of voluntary manslaughter for killing Victim 1 and attempted murder as to Victim 2.

CURRENT ACTION BEFORE THIS COURT

In his application for post-conviction relief, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
  - a. Failing to object to the trace evidence examination of the victim's clothing;
  - b. Failing to hire an expert to show it was a close encounter/struggle;
  - c. Failing to properly advise Applicant regarding the issues and motions in his trial;
  - d. Counsel never attempted to have Applicant's case settled and conveyed a false plea offer of fifteen years but never brought Applicant to accept the plea offer;
  - e. Failing to object to the trial court only re-charging the jurors on lesser-included offense; and
  - f. Failing to obtain any information regarding the lease of the apartment.
2. ~~Prosecutorial Misconduct.~~<sup>2</sup>

On May 15, 2019, the Richland County Clerk of Court appointed Lir P. Derieg, Esquire, to represent Applicant in his PCR action. On July 23, 2019, Applicant filed, while represented by counsel, a filing captioned "Grounds for Post Conviction Relief." On August 6, 2019, Applicant filed another filing captioned "Grounds for Post Conviction Relief." On April 8, 2020, Applicant filed a filing captioned "Motion to Amend Applicant's Post-Conviction Relief Application."

On November 7, 2022, Applicant, through retained counsel, amended his PCR application adding the following additional claims for relief:

3. That Trial Counsel's theory of defense was self-defense and that this incident was an accident.
4. That an offer was made at Trial for a plea to thirty (30) years. That the Jury had been out for a day and a half before reaching

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<sup>2</sup> Applicant withdrew the allegation of prosecutorial misconduct at the evidentiary hearing. (PCR Tr. p. 6).

a verdict. The Applicant is informed and believes that he was ill advised regarding accepting the plea offer.

5. The Applicant was found guilty of Voluntary Manslaughter and Attempted Murder and received consecutive sentences totaling Fifty (50) years.
6. Trial Counsel filed a Motion for Reconsideration. This Motion for Reconsideration was not ruled upon until several years after conviction. That due to this passing of time, trial counsel failed to provide the Court with a transcript of the trial. Nor did she brief the Court on their position and reasons why Applicant should be granted reconsideration. No oral argument was made before the Court regarding the Motion.

Before this Court is the Richland County Clerk of Court general sessions records from the underlying conviction, the complete trial transcript, Applicant's complete records from his appeal, Applicant's records from the South Carolina Department of Corrections, and the records of this PCR action.

#### STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act<sup>3</sup> (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;
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[.]

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<sup>3</sup> S.C. Code Ann. §§ 17-27-10 to -160.

S.C. Code Ann. § 17-27-20(A).

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

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

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

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

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

#### *INITIAL FINDINGS*

This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant, she rendered adequate assistance and exercised reasonable professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every

effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

*INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS ON THE MERITS*

- Allegation 1a:** Trial Counsel failed to object to the trace evidence examination of the victim's clothing.
- Allegation 1b:** Trial Counsel failed to hire an expert to show it was a close encounter struggle.
- Allegation:** Trial Counsel failed to consult and call an expert witness in GSR and ballistics.<sup>4</sup>

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to object to the trace evidence examination of the Victim's clothing. Applicant also alleged Trial Counsel failed to hire an expert witness in GSR, ballistics, and accident reconstruction. This Court finds these allegations are without merit.

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

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<sup>4</sup> This allegation was not pled; rather, it was raised for the first time at the evidentiary hearing.

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.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

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

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

### **PCR Evidentiary Hearing**

On direct examination, Applicant testified that Trial Counsel should have gotten an expert witness to show that gunshot residue (GSR) was present on both of the Victim's hands and his clothing. Applicant testified that had Trial Counsel done that, the result of his trial would have been different. (PCR Tr. p. 25). Applicant testified that the SLED expert at trial testified that Applicant had three of the three elements of GSR on his person and the Victim had two of the three elements. (PCR Tr. p. 26). Applicant testified that Trial Counsel was not prepared to cross-examine the SLED expert. (PCR Tr. p. 26). Applicant testified that Trial Counsel told him to "just put it on your PCR" when the State did not examine the Victim's clothing or "GSR kit fully." (PCR Tr. p. 27). Applicant testified that Trial Counsel did not "do her part" in "securing an expert witness to demonstrate that gunshot residue was on both [Applicant's and the Victim's] hand." (PCR Tr. p. 27).

Applicant testified that the pathologist testified at trial, but he did not understand anything that was said by the pathologist. (PCR Tr. p. 28). Applicant testified that he asked Trial Counsel at trial if there were two elements present then that showed GSR present. (PCR Tr. pp. 28 – 29). Applicant testified that he thought it would have shown there was a struggle when the gun discharged. (PCR Tr. p. 29). Applicant testified that the gun was not in good shape and "it could have easily like went off." (PCR Tr. pp. 29 – 30).

On cross-examination, Applicant testified that Trial Counsel should have objected to the examination of the trace evidence on the clothing and secured an expert in GSR. (PCR Tr. pp. 39 – 40). Applicant testified that they positively identified GSR on his hands but could not positively

identify GSR on the Victim's hands. (PCR Tr. pp. 40 – 41). Applicant testified that he could not recall that Trial Counsel argued in closing that the Victim had two of the three particles that make up GSR on him and he got that on his hands when he grabbed the gun. (PCR Tr. pp. 41 – 42).

On direct examination, Trial Counsel testified that she did not hire an accident reconstruction expert. (PCR Tr. p. 72). Trial Counsel testified that, in hindsight, she thought having an expert to testify on GSR and ballistics could have been helpful in their self-defense and accident claims. (PCR Tr. p. 77). Trial Counsel testified that she would put an expert up if she could do it again.

On cross-examination, Trial Counsel testified that she did consult with a ballistics and GSR expert but could not recall why she did not call them to testify. (PCR Tr. p. 83). Trial Counsel testified that a ballistics and GSR expert could have been helpful to their case. (PCR Tr. pp. 83 – 84).

### **Findings**

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, supra. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, supra. Applicant presented nothing to this Court to show that had Trial Counsel objected to the examination of the trace evidence on the clothing, it would have been a meritorious objection. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for

exclusion of the evidence). Thus, Applicant has failed to prove deficiency in Trial Counsel's performance, or any prejudice flowing therefrom.

Turning to the next allegations wherein Applicant contends Trial Counsel was deficient for not securing an expert witness in ballistics, GSR, or accident reconstruction. As an initial matter, this Court finds Applicant failed to meet his burden of proof as to this allegation because he did not present the testimony of an expert in any of these fields at the evidentiary hearing, and therefore, he has not established he was prejudiced by Trial Counsel's allegedly deficient representation. See, e.g., Bannister v. State, 509 S.E.2d 807 (1998) (holding "a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial."); Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding a PCR applicant failed to show prejudice from his Trial Counsel's failure to hire an expert because he failed to have an expert testify at his PCR hearing), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Additionally, Trial Counsel testified that, in hindsight, she would handle Applicant's trial differently. However, this Court must scrutinize Trial Counsel's performance in a highly deferential manner, making every effort "to eliminate the distorting effects of hindsight" and "evaluate the conduct from Trial Counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. Here, it is Applicant's burden to prove his claims, and Applicant presented no experts to this Court to establish had Trial Counsel hired experts, the results of his trial would have been different. Mere speculation and conjecture are not sufficient to substantiate an allegation that counsel's deficient performance was prejudicial. See Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008), abrogated on other grounds by Smalls v. State, 422 S.C. 174,

810 S.E.2d 836 (2018).

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, these allegations must be **DENIED** and **DISMISSED**.

**Allegation 1c: Trial Counsel failed to properly advise Applicant regarding the issues and motions in his trial.**

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to properly advise Applicant regarding the issues and motions in his trial. This Court finds this allegation to be without merit.

**PCR Evidentiary Hearing**

On direct examination, Applicant testified that Trial Counsel never discussed his defenses with him. (PCR Tr. p. 23).

Applicant testified that he did not understand what Trial Counsel was doing in her motions because he did not understand what lawyers "have going on." (PCR Tr. p. 45).

On direct examination, Trial Counsel testified that when she met with Applicant they were able to devise a defense strategy. (PCR Tr. p. 63). Trial Counsel testified that leading up to trial, her conversations with Applicant were lengthy and she explained some things two or three times with him. (PCR Tr. p. 67).

### Findings

As an initial matter, this Court finds Applicant's testimony **not credible**. This Court further finds that Applicant has 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*. Also, this Court finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Trial Counsel **credibly** testified that she and Applicant in their meetings were able to craft a defense strategy. Notably, Applicant has presented no credible evidence to this Court that Trial Counsel did not discuss the issues in the case and the motions made in his case.

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, these allegations must be **DENIED** and **DISMISSED**.

A handwritten signature in black ink, appearing to be a stylized 'D' or similar character, located at the bottom center of the page.

**Allegation 1d:** Trial Counsel never attempted to have Applicant's case settled and conveyed a false plea offer of fifteen years but never brought Applicant to accept the plea offer.

**Amended Allegation:** Trial Counsel misadvised Applicant on rejecting the plea offer of thirty (30) years, where Applicant received fifty (50) years at trial.

Applicant alleged Trial Counsel's representation was constitutionally ineffective for misadvising him to reject a plea offer of thirty (30) years, where he received fifty (50) years at trial. This Court finds these allegations are without merit.

A defendant has the right to effective assistance of counsel during the plea-bargaining process. Davie v. State, 381 S.C. 601, 607, 675 S.E.2d 416, 419 (2009), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000).); Lafler v. Cooper, 566 U.S. 156, 162 (2012) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). Misadvising a defendant such that he rejects a plea offer and instead proceeds to trial may constitute deficient performance. See, e.g., Lafler, 566 U.S. at 161 (counsel misadvised defendant "that the prosecution would be unable to establish his intent to murder [the victim] because she had been shot below the waist."); Lee v. United States, 582 U.S. 357 (2017) (counsel misadvised a noncitizen defendant that he would not be deported as a consequence of his guilty plea). To show prejudice from the improvident rejection of a plea offer based upon the misadvice of counsel, an applicant must show (1) that but for the ineffective advice there is a reasonable probability the plea offer would have been presented to the court, (2) that the court would have accepted its terms, and (3) that the conviction, sentence, or both would have been less severe under the terms of the plea than was in fact imposed. Lafler, 566 U.S. at 164.

### PCR Evidentiary Hearing

On direct examination, Applicant testified that he asked for a plea offer but there was never one offered until trial. (PCR Tr. p. 13). Then, the following colloquy with Applicant occurred:

Q All right. Let's talk about -- it's a little bit ahead, but let's talk about your plea offers. When you and I discussed this, were there two plea offers?

A No.

Q Okay.

A As far as like what you mean were there two plea offers?

Q What was the deal with a 15 -- was it a 15 --

A It was a 15-year plea offer, like, while I was in trial. The day the jury was asking for clarification on deliberations, they came to me. They came to me. They was like, "Myers, how much time would you be willing to do?"

I said, "Shoot. Time served."

They were, like, "No. Be reasonable."

So I was like, "Well, what you think? How would 15 years be?"

"Would you sign it if we bring you 15 years?"

And I was, like, "Of course, I will sign it if you bring me 15 years."

They were, like, "All right. We'll bring it."

They put me back in the holding cell downstairs and they left. So when they left out, I was in the holding cell. I went to sleep. So the next thing I know, I was waking back up, they were pulling me out and like, hey, you've got to come back upstairs for jury clarification on deliberation again. So I'm, like, all right. When I came back up here, it was over with. I was, like, "So what's going on?" They was like, "You are about to be sentenced." I'm, like, "I'm about to be sentenced?" They was like, "Yeah." Luck Campbell basically went to my sister, and my sister told them, "We don't want him to get 15 years. I want him to get the maximum because he killed my husband." And that's what was done. They never put no 15 years on the table. I guess that's what it was.

Q So you were hoping for 15?  
A Well, yes, I guess. I guess as far as what they told me and I guess that's how it happened.  
Q All right. Now, but there was a 30-year plea offer that was made, 30?  
A Yeah, they said 30 mandatory or go to trial. That's what she said, something about 30 mandatory or go to trial.  
Q And did you discuss that with Ms. Pinnock?  
A Yeah. Ms. Pinnock is the one that told me that.  
Q Okay. Did you accept that offer?  
A No, sir, I didn't accept it.

(PCR Tr. pp. 13 – 15).

Q Now, you and I have talked about it and you've indicated to me that you feel like your attorney was ineffective for not negotiating on your behalf a plea agreement?  
A Yes, sir.  
Q And how do you feel that she was ineffective in not doing that?  
A Because, like, it was times when I asked -- I asked them to -- I was like, hey, if you get me 20 years, I'll that and go. I'll take 22. I'll take 20 years. I'll take 25 and I'll go. It was, like, oh, I guess, they would -- they was oh, she's not going to do that. Then they waited until, like I said, come at me, like, would you take 15 years. It was like a day -- like, matter of fact, the time when I did the deliberation, when I was going to deliberation, you know, like I said, I came back upstairs and that's when they told me I was getting sentenced. I still knew that I was in the deliberation phase, but they never really tried to get me to plea from the 30 mandatory I heard.  
Q Well, you didn't have an offer for 30, 30 mandatory; is that correct?  
A Yeah, that's what I heard in the beginning. Like, I had 30 mandatory. I could take that or go to trial.  
Q Why didn't you accept that?  
A Because I felt like, you know, I ain't meant to kill this person. Then I was thinking in my mind like 30 mandatory, that's, basically, like murder. Y'all going to be convicting me of murder. I was pleading to murder.  
Q So was there an understanding from Ms. Pinnock as to what you were likely to receive at trial?  
A Yeah, I could be receiving life sentence. I could be receiving life, plus whatever with the attempted murder.  
Q Did she explain the difference to you between, basically, the 30-year mandatory and the life without parole?

A No. No. I just know it was 30 mandatory. Basically, saying  
30 mandatory, I'm going to be doing 30 day-for-day.  
Q And you have -- instead of a 30, you have a 50?  
A I have a 50.

(PCR Tr. pp. 34 – 35).

On cross-examination, Applicant testified that he was downstairs in holding and he was asked if he would take fifteen years—to which he told them that he would take it if they brought it to him. (PCR Tr. p. 48). Applicant testified that he dozed off and was awoken by an officer because he had to go back upstairs before jury deliberations had ended. Id. Applicant testified he asked where the fifteen-year offer was and was told that the Solicitor had removed the offer. Id. Applicant testified that they offered him thirty years, and he declined that offer and went to trial. Id. Applicant testified that Victim 2 told the Solicitor that she wanted Applicant to get the max, so the fifteen-year offer was never on the table. (PCR Tr. pp. 48 – 49).

On direct examination, Trial Counsel testified that there were no plea offers prior to trial. (PCR Tr. pp. 64 – 65). Trial Counsel testified that at some point during the trial, there was a solid offer for thirty years. (PCR Tr. p. 65). Trial Counsel testified that while she and Applicant discussed different numbers that he would be willing to accept, there was never a firm offer of fifteen years. (PCR Tr. p. 66). Trial Counsel testified that, in hindsight, Applicant should have accepted the thirty-year plea offer, but she could not recall their exact conversations at that time because everything was happening so fast. (PCR Tr. pp. 67 – 68).

### **Findings**

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, supra. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any

resulting prejudice from that alleged deficiency. See Butler, supra. Trial Counsel **credibly** testified that no fifteen (15) year offer was ever extended or on the table for consideration. While Trial Counsel testified that Applicant would be in a better position had he taken the thirty (30) year plea offer—she also testified that her assessment was based on hindsight. See Strickland, 466 U.S. at 689 ("It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.).

Additionally, this Court finds Trial Counsel's representation objectively reasonable under the prevailing professional norms. Trial Counsel presented the offer to Applicant, and Applicant refused the offer. Lastly, this Court finds that while Trial Counsel could not recall specifics, Applicant presented no credible evidence to this Court that Trial Counsel misadvised Applicant on the plea offer. Notably, Applicant testified that he was offered the thirty year plea off, but he rejected it.

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 1e: Trial Counsel failed to object to the trial court only re-charging the jurors on lesser-included offense.**

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to object to the trial court only recharging the jurors on the lesser-included offense. This Court finds this allegation to be without merit.

An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).



When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

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). "[A] charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Burton, 302 S.C. 494, 498, 397 S.E.2d 90, 92 (1990) (citing State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980)). If the charge "is substantially correct and covers the law [it] does not require reversal." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (citing State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996)).

### Trial

After receiving a note from the jury for clarification on the difference between voluntary and involuntary manslaughter, the trial court recharged the jurors as follows:

So I'm gonna instruct you again on what constitutes voluntary manslaughter and involuntary manslaughter and then you'll be asked to go back and continue. And if what I provide you is not sufficient to assist you in answering your question, you be sure and let me know and I'll bring you back to give you further information, okay?

Voluntary manslaughter is defined as the unlawful killing of another human being which is committed in a sudden heat of passion provoked by a sufficient legal provocation. The law recognizes that a sudden heat of passion arising out of exasperation, rage, anger, sudden resentment, fear or terror, may for the time being affect the self-control of an individual temporarily disturbing the ability to properly reason creating an uncontrollable impulse to do violence and, therefore, reduces the crime from that of murder to that of voluntary manslaughter provided that the sudden heat of passion arose from a sufficient legal provocation. The sudden heat of passion aroused by sufficient legal provocation which may reduce an unlawful homicide from that of murder to that of manslaughter need not be something which dethrones reason entirely or shuts out knowledge or volition, but it must be such heat of passion provoked by such facts or circumstances as would naturally disturb the ability of an ordinary, reasonable and prudent person to properly reason rendering his mind enable of cool reflection and reducing what according to human experience may be described as an uncontrollable impulse to do violence. Therefore, as stated, *involuntary manslaughter* is an unlawful homicide committed in the absence of malice, but in a sudden heat of passion, aroused by a sufficient legal provocation.

Involuntary manslaughter is defined as the unintentional killing of another person without malice while engaged in a lawful activity with a reckless disregard for the safety of others. Unintentional means that the Defendant was acting without malice and did not intend to kill or seriously injure anyone, but acted recklessly in the handling of a dangerous instrumentality which resulted in the death or injury to some other person. A reckless disregard for the safety of others and recklessness refers to a state of mind in which a person consciously acts notwithstanding knowledge that his conduct creates a risk to the safety of another person. Before the Defendant can be found guilty of involuntary manslaughter, it would be necessary that the evidence establishes to your satisfaction beyond a reasonable doubt that the Defendant without malice unintentionally killed another person while he was engaged in a lawful activity, but with a reckless disregard for the safety of others.

All right. So please retire to your jury room. Continue with your deliberations. **If you need further guidance, please let me know.**

(Trial Tr. pp. 691 – 693) (emphasis added).

### **PCR Evidentiary Hearing**

On direct examination, Applicant testified that counsel failed to object to the improper jury instruction on voluntary manslaughter. (PCR Tr. p. 30). Applicant testified that the trial judge "misconstrued voluntary manslaughter evidence with involuntary manslaughter statute." *Id.* Applicant testified to the following:

"[The] trial judge saying as stated involuntary manslaughter is an unlawful homicide committed in the absence of malice, but in a sudden heat of passion aroused by sufficient legal provocation did not give clarification. And counsel should have objected to this error. Had counsel objected to this error, the outcome of my trial would have been different."

(PCR Tr. pp. 30 – 31). Applicant testified that the jury sent a note asking for clarification on the difference between voluntary and involuntary manslaughter. (PCR Tr. p. 31).

### **Findings**

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe, supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler, supra*. Here, the record provides that in recharging the jury on voluntary and involuntary manslaughter, the trial court inadvertently inserted involuntary in the last sentence of the voluntary charge. The trial court went on to correctly charge involuntary manslaughter. This Court finds the jury instructions, when considered as a whole, were correct, and the isolated one-word mishap does not rise to the requisite prejudice to reverse Applicant's convictions and sentences. *See State v. Jackson, 297 S.C. 523,*

377 S.E.2d 570 (1989) (recognizing that jury instructions must be considered as a whole and if as a whole, they are free from error, any isolated portions that might be misleading do not constitute reversible error).

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: Trial Counsel failed to obtain any information regarding the lease of the apartment.**

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to investigate the information on the lease of the apartment. This Court finds this allegation is without merit.

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

investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id.

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

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

### Trial

On cross-examination, Victim 2 testified that she told Applicant in March 2014 that he had until July 2014 to be out of the apartment. (Trial Tr. p. 394).

On cross-examination of Applicant, the following colloquy occurred regarding the lease:

Q. So I guess in this entire relationship you've kind of been victimized by your sister. She's threatened you?

- A. Well, she told you on the stand what she did. She came home going crazy, right? That's what she said when she got on the stand, right? She came home -- she came home going crazy throwing my stuff out, right?
- Q. You were living in her apartment, right?
- A. Yeah, but --
- Q. What -- what rent were you paying?
- A. But what she told, it's not -- it's not -- it's confusing how you trying put it, but what she told you prior to her doing it, she had hearsay that we was buying a gun, right? That's hearsay. That's like I tell you somebody just said that about you, but you're gonna slap that person because I told you that? Now you're in jail because of what you heard or you got an assault charge because of what you heard.
- Q. You were living in her apartment, right?
- A. Yeah.
- Q. Were you paying rent?
- A. Occasionally she asked for rent. She asked for rent. She asked for rent.
- Q. And you would pay rent?
- A. No, I ain't -- I ain't give her nothing. I ain't give her nothing.
- Q. Right.
- A. Yeah.
- Q. And so at some point she wanted you to get out?
- A. No, that's what she say out of her mouth. Today I heard that out of her mouth.
- Q. So that day when she was putting your clothes outside, she didn't want you to leave?
- A. No, she did not do that. She say she start putting clothes -- it never -- it never -- your clothes out the -- for you to put someone out, you need a thirty day notice if their name's on the lease. That's how Investigator Truluck say he knew that I stayed there because my name was on the lease. So for you to put someone out, you've got to give them thirty days, right?
- Q. **So your testimony now is that your name was on the lease of that apartment.**
- A. **That's what he said.**
- Q. **I'm asking you if your name was on the lease of that apartment?**
- A. **I don't know.**
- Q. **Did you go sign a lease?**
- A. **No, ma'am, I never signed a lease. I never mess with anything dealing with that.**
- Q. **Okay. And at some point it was just -- you understood it to be your sister's apartment, right?**

- A. Yes, ma'am.  
Q. She was the one paying the bills?  
A. If you want to -- if you want to say that.  
Q. Were you paying the bills?  
A. No, ma'am.  
Q. Okay. And at some point she asked you to leave?  
A. Not leave. That's what I'm saying she said out of her mouth. She never said Dexter, you're gonna leave.  
Q. So in none of your statements to police would you say that she asked you to leave?  
A. Can you find that statement?  
Q. I'm asking you.  
A. No, ma'am.  
Q. What about when they said were you asked to move out recently by your sister and you said no, not recently, that shit happened in April? So she did ask you to leave?  
A. No, she didn't ask me to leave.  
Q. Okay. So you never got asked to leave the apartment?  
A. No.

(Trial Tr. pp. 562 – 564) (emphasis added).

#### **PCR Evidentiary Hearing**

On direct examination, Applicant testified that Trial Counsel was ineffective because she never investigated the lease of the apartment to see if he was supposed to be in the apartment or not. Applicant testified that the State tried to imply that Applicant was not supposed to be at the apartment. (PCR Tr. pp. 19 – 20). Applicant testified that he did not "think" Trial Counsel looked into it. (PCR Tr. p. 20).

On cross-examination, Applicant testified that he never signed a lease, but Victim 2 told him she put him on the lease. (PCR Tr. pp. 50 – 51).

On recross-examination, Applicant testified that he gave Victim 2 money to pay rent for the first three months. (PCR Tr. pp. 60 – 61). Applicant testified that on cross-examination when he said he did not pay rent and Victim 2 did pay rent—he meant Victim 2 took the money to pay rent, not him. (PCR Tr. p. 61). Applicant testified that he was not employed at the time, but he

was able to pay rent. Id.

### Findings

As an initial matter, this Court finds Applicant's testimony in this allegation **not credible**. For instance, Applicant testified at the evidentiary hearing that he gave Victim 2 rent money for the three months he was living there, yet at trial he testified that he never gave her any rent money—he gave her nothing. Applicant went so far as to testify that he had money coming in—thus, he could potentially pay rent—because he was the beneficiary of his brother's disability check. (PCR Tr. pp. 60 – 61). Again, at trial, Applicant testified that Victim 2 attempted to collect rent from him, but he never gave her anything.

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Applicant has further failed to present any probative evidence to this Court that he, in fact, was listed on the lease and what that would have done to have changed the outcome of his trial.

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**.

**Amended Allegation:**        **Trial Counsel filed a Motion to Reconsider but failed to provide the trial court with a transcript and failed to argue the motion to the trial court.**

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to provide the trial court with a transcript and failing to argue the motion for reconsideration. This Court finds this allegation to be without merit.

#### **PCR Evidentiary Hearing**

On direct examination, Applicant testified that Trial Counsel told him she filed a motion to reconsider. (PCR Tr. p. 37).

On cross-examination, Applicant testified that he was prejudiced because the shootings all happened at once and the trial judge did not give him a chance to make his sentences concurrent. (PCR Tr. p. 56).

#### **Findings**

As an initial matter, there is no professional obligation to file a motion for reconsideration of a sentence absent a specific legal reason to do so. In South Carolina, a trial judge is given wide discretion in determining what sentence should be imposed and whether multiple sentences should run consecutively or concurrently. See State v. Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (S.C. Ct. App. 1997); see also 21 Am.Jur.2d Criminal Law § 552 (1981) (trial court has the power to order sentences to be served consecutively). The sentence imposed on Applicant was not an illegal sentence, nor was there any allegation that the trial court acted with partiality, prejudice, oppression, or corrupt motive when sentencing Applicant. Id.

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Trial Counsel filed Applicant's motion to reconsider. Whether any argument before the trial judge or providing a copy of the trial transcript to the trial court would have changed the ruling on the motion to reconsider is pure speculation. Mere speculation and conjecture are not sufficient to substantiate an allegation that counsel's deficient performance was prejudicial. See Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

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**.

***ALLEGATIONS NOT PLED BUT RAISED AT THE EVIDENTIARY HEARING***

**Allegation: Trial Counsel Failed to have a competency evaluation completed on Applicant prior to trial.**

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to have a competency evaluation completed before trial. This Court finds this allegation to be

without merit.

In order for a defendant to be competent to stand trial, he must have "sufficient present ability to consult with his lawyer with a reasonable degree of relational understanding" and must have a "rational as well as factual understanding of the proceedings against him." Ramirez v. State, 413 S.C. 351, 366, 776 S.E.2d 101, 110 (S.C. Ct. App. 2015) (citing Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992)), rev'd on other grounds, Ramirez, at 22, 795 S.E.2d at 845; Dusky v. United States, 362 U.S. 402 (1960) (per curiam) (internal quotations omitted). A defense attorney may reasonably rely upon his own perceptions in determining whether a mental competency evaluation is required. Jeter, at 233, 417 S.E.2d at 596.

If an applicant for post-conviction relief establishes that his counsel's performance was deficient due to counsel's failure to request a mental competency evaluation when one was warranted, the applicant must then demonstrate that there is a reasonable probability he was incompetent at the time of trial in order to be entitled to relief. See Ramirez, at 22, 795 S.E.2d at 845 (applying this prejudice standard in a case in which applicant pleaded guilty but mentally ill after one mental evaluator concluded he was competent to stand trial, but another concluded applicant was severally mentally retarded) (citation omitted).

"Due process of law prohibits the conviction of a person who is mentally incompetent." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992). An accused is competent to stand trial if he or she has sufficient capability to consult with his or her lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings. Id., 308 S.C. at 232, 417 S.E.2d at 596. "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he [or she] has the *ability* to understand the proceedings."

Garren v. State, 423 S.C. 1, 14, 813 S.E.2d 704, 711 (2018) (quoting Godinez v. Moran, 509 U.S. 389 (1993)).

As to the deficiency prong under Strickland, an attorney may reasonably rely upon his or her own perceptions of a defendant in determining whether or not their client should be mentally evaluated. Jeter, 308 S.C. at 233, 417 S.E.2d at 596. When establishing Strickland prejudice in the context of counsel's failure to request a mental competency evaluation, the applicant need only show a reasonable probability that he was incompetent at the time of the original proceeding. Garren, 423 S.C. at 12, 813 S.E.2d at 710 (citing Ramirez v. State, 419 S.C. 14, 21, 795 S.E.2d 841, 845 (2017)). As is the case with any other allegation that a defense attorney failed to adequately investigate some matter, an applicant must present some proof of identifiable mental health issues which undermine his or her competency; mere speculation and conjecture by the applicant is insufficient to establish prejudice. Id., 423 S.C. at 13-14, 813 S.E.2d at 711.

An applicant alleging incompetence *in fact* must show by a preponderance of the evidence that he was incompetent at the time of his original proceedings. Id., 423 S.C. at 16, 813 S.E.2d 704, 713; Hall v. Catoe, 360 S.C. 353, 358, 601 S.E.2d 335, 338 (2004).

### **PCR Evidentiary Hearing**

On direct examination, Applicant testified that he had "been on mental health since a child." (PCR Tr. p. 17). Applicant testified to the following:

- Q Do you know what your diagnosis is?  
A Even now, like, you know, like a lot of stuff happened, but like I said, ADHD. I've been bipolar, schizophrenic, stuff like that, you know, just -- not PTSD and stuff like, but I'm saying even that time, like, ADHD, bipolar, schizophrenic and things of that nature.  
Q Did you tell Ms. Pinnock about that?  
A Yeah, because they asked me on the stand. I had told them that before I even got on the stand. I'm, like, man, you know, I'm figuring if I'm on mental health in the county jail or

anything or when I was mental health on the street, like I'm feeling -- she probably knew because I was on mental health, and mental health was helping me in the county jail.

Q Now, when you were working with her in preparing your case for trial, did you understand what was going on?

A No, I didn't. I didn't understand what was going on. Like I said, my counsel was telling me what to do, so I went off what they told me to do.

(PCR Tr. p. 17).

Applicant testified that Trial Counsel should have had a competency evaluation completed on him prior to trial because "the records would have shown [he] was mentally incompetent." (PCR Tr. p. 33). Applicant testified that he "had a record of psychiatric treatment" and his "trial would have been different." (PCR Tr. p. 33). Applicant testified that he did not understand what was going on at trial because of his mental incompetence. (PCR Tr. p. 33).

On cross-examination, Applicant testified that he was not competent to stand trial because he did not know anything and was just following Trial Counsel's lead. (PCR Tr. p. 56).

On cross-examination, Trial Counsel testified that she did not think Applicant needed to be evaluated for competency based on her interactions with Applicant. (PCR Tr. p. 81).

### Findings

As an initial matter, this Court finds Applicant's testimony **not credible** and Trial Counsel's testimony **credible** on this issue. This Court further finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe, supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler, supra*. Trial Counsel **credibly** testified that based on her interactions and observations of Applicant that she did seek a competency evaluation because she did not think one was necessary.

Additionally, Applicant failed to introduce any credible evidence that Trial Counsel's decision fell below an objective standard of reasonableness.

This Court finds Trial Counsel reasonably relied upon her own perception that Applicant's mental competency was not disputed and did not warrant a request for an evaluation. See Garren v. State, 423 S.C. 1, 13, 813 S.E.2d 704, 710 (2018) (finding that counsel reasonably relied upon his own perceptions of his client's competency because, based on counsel's interactions with his client, he believed that a competency evaluation was not needed, believed that his client was competent, and continued to believe that his client was competent at his plea hearing). Simply put, Applicant has failed to show any deficiency in Trial Counsel's representation because Applicant has provided no evidence Trial Counsel should have questioned his mental competency at the time of his trial.

Furthermore, this Court finds Applicant has failed to show any resulting prejudice from Trial Counsel's decision in not having Applicant's mental competency evaluated. Applicant has not demonstrated that there was a reasonable probability that he would have been found incompetent if his competency had been evaluated before his trial. Applicant's testimony did not establish that he lacked the sufficient ability at the time to consult with Trial Counsel with a reasonable degree of relational understanding about his criminal case or the consequences of proceeding with his trial. Applicant's assertion that he suffered prejudice from the lack of a competency examination is purely speculative. See Garren, at 13, 813 S.E.2d at 711 (finding that there was no evidence to support the PCR court's finding that Garren suffered prejudice from his defense attorney's failure to have Garren's mental competency evaluated because Garren did not introduce evidence at his PCR hearing that there was a reasonable likelihood that he would have been found incompetent if the evaluation had been conducted).

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: Trial Counsel failed to advise Applicant on taking the stand and testifying.**

Applicant alleged Trial Counsel was constitutionally ineffective for failing to advise Applicant on taking the stand and testifying in his own defense. This Court finds this allegation to be without merit.

"The right to testify on one's own behalf at a criminal trial is guaranteed by the Fifth, Sixth, and Fourteenth Amendments." State v. Wright, 416 S.C. 353, 372, 785 S.E.2d 479, 489 (Ct. App. 2016) (citing Rock v. Arkansas, 483 U.S. 44, 51-52 (1987)). "The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. [However], if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations." Id. "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id.

This right may be waived, and all that is necessary for a defendant to waive the right is to know that a right to testify exists. United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991).

### Trial

At trial, the following colloquy occurred before Applicant took the stand:

THE COURT: Okay. Have you talked with your client about his right to testify or not?

MS. PINNOCK: I have, Your Honor.

THE COURT: You have?

MS. PINNOCK: Yes, sir.

THE COURT: And what does he indicate to you he wishes to do?

MS. PINNOCK: He has indicated that he would like to testify in his own defense.

THE COURT: All right. Mr. Myers, you understand when you're charged with a crime, you have an absolute right to remain silent. Have you been instructed on that?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that you don't have to take the witness stand and testify, you don't have to make any statement, you don't have to answer any questions. However, should you make a decision to take the witness stand and testify, you've got to answer not only your lawyer's questions, but you'll have to answer any questions asked of you by the prosecutor, to the extent that they're relevant, even if the responses to those questions might tend to prove you guilty. Do you understand your right to testify?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you'll have to be cross-examined by the prosecution?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you'll have to answer their questions also even if they tend to prove you guilty of some crime?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that nobody can make you testify? That it's your choice?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that if you choose not to testify I'll instruct the jury that they cannot hold that against you or consider it in any way?

THE DEFENDANT: Yes.

THE COURT: Have you had plenty of time to talk with your lawyers about your decision to testify or not?

THE DEFENDANT: Yes, sir.

THE COURT: Have they discussed with you the advantages and disadvantages of testifying, as well as not testifying?

THE DEFENDANT: Yes.

THE COURT: And do you appreciate what those advantages and disadvantages are?

THE DEFENDANT: Yes, sir.

MS. PINNOCK: Do you understand?

THE DEFENDANT: Yes.

THE COURT: And you have made a decision about whether or not you'll testify?

THE DEFENDANT: Yes, sir.

THE COURT: And what is that decision?

THE DEFENDANT: I'm gonna testify.

THE COURT: And is that a decision that you've made of your own free will and accord?

THE DEFENDANT: Can you say that again?

THE COURT: Is that a decision that you have made of your own free will and accord?

THE DEFENDANT: Oh, yes, sir.

THE COURT: And are you satisfied with your decision?

THE DEFENDANT: Yes, sir.

THE COURT: You've had plenty of time to reflect upon it?

THE DEFENDANT: Yes, sir.

THE COURT: Has anybody forced you into that decision?

THE DEFENDANT: No, sir.

THE COURT: Has anyone even suggested what decision you should make?

THE DEFENDANT: No, sir.

THE COURT: You made that decision on your own?

THE DEFENDANT: Yes, sir.

THE COURT: And you're satisfied with it?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Thank you.

(Trial Tr. pp. 491 – 494).

### PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel told him to testify so he could tell his story to the jury. (PCR Tr. pp. 35 – 36). Applicant testified that Trial Counsel came the day or night before he was to take the stand to prepare him for it. (PCR Tr. p. 36).

On cross-examination, Applicant testified that he took the stand so he could tell his version to the jury. (PCR Tr. p. 54). Applicant testified that he recalled the trial court reviewing his rights before he took the stand. (PCR Tr. p. 55).

### Findings

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Applicant was fully aware of his right to testify and the advantages and disadvantages of doing so. The record reflects Applicant engaged in a thorough colloquy with the trial court and knowingly chose to assert his right 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: Trial Counsel failed to meet with Applicant a sufficient number of times.**

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to meet with Applicant a sufficient number of times. This Court finds this allegation to be without merit.

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

South Carolina case law has established that even if counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter) ("First, there is no question that counsel met with [Applicant] on several occasions prior to the first trial. Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation."). Mere speculation and conjecture are not insufficient to substantiate an allegation that counsel's deficient performance

was prejudicial. See Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

### PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel met with him about four times before his trial date, and then he saw her on his trial date. (PCR Tr. p. 12).

On cross-examination, Applicant testified that Trial Counsel only met with him four times up until he went to bond court. (PCR Tr. p. 39).

On direct examination, Trial Counsel testified that her notes reflected that she met with Applicant for the first time in July of 2014 and then fifteen to eighteen more times after that. (PCR Tr. p. 63).

### Findings

As an initial matter, this Court finds the testimony of Trial Counsel credible and the testimony of the Applicant not credible. This Court further finds Applicant has 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. Also, this Court finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, supra. Trial Counsel credibly testified that she met with Applicant fifteen to eighteen times after their initial meeting. See Campbell, Olson, and Easter, supra.

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: Trial Counsel failed to review discovery with Applicant.**

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to have a competency evaluation completed before trial. This Court finds this allegation to be without merit.

An applicant who alleges his or her defense attorney was ineffective in failing to spend more time preparing or providing a copy of the discovery materials must demonstrate prejudice by showing what evidence could have been discovered or what other defenses could have been pursued. 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)).

#### **PCR Evidentiary Hearing**

On direct examination, Applicant testified that he did not really look at discovery. (Trial Tr. p. 16). Applicant testified that there was stuff he did not know about until he went to trial. Id.

Applicant testified there were reports and stuff he did not know about until trial started. Id.

On cross-examination, Applicant testified that Trial Counsel only went over the multiple statements he made to police. (PCR Tr. p. 38).

On cross-examination, Trial Counsel testified that she reviewed discovery with Applicant. (PCR Tr. p. 80).

### Findings

As an initial matter, this Court finds the testimony of Trial Counsel credible and the testimony of the Applicant not credible. This Court further finds Applicant has 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. Also, this Court finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, supra. Trial Counsel credibly testified that she went over discovery with Applicant. Furthermore, Applicant has failed to present what evidence or defenses could have been discovered had Trial Counsel further reviewed discovery with Applicant.

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: Trial Counsel failed to object to Applicant's juvenile record being brought up by the prosecutor so that his time would be run consecutively.**

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to the prosecutor bringing up his juvenile record so that his time would be run consecutively. This Court finds this allegation to be without merit.

"At sentencing, a judge has an obligation to consider information material to punishment." Hayden v. State, 283 S.C. 121, 123, 322 S.E.2d 14, 15 (1984) (citing State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976)). "A sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited as to either the kind of information he may consider, or the source from which it may come.'" Hayden, 283 S.C. at 123, 322 S.E.2d at 15 (quoting United States v. Tucker, 404 U.S. 443 (1972)); see State v. Cantrell, 250 S.C. 376, 379-80, 158 S.E.2d 189, 191 (1967) (sentencing judge entitled to "inquire into any relevant facts in aggravation or mitigation of punishment" so that he "is the possession of the fullest information possible concerning the defendant's life and characteristics." (citations omitted).

#### **PCR Evidentiary Hearing**

On direct examination, Applicant testified that Trial Counsel was ineffective for failing to object to the prosecutor bringing up his juvenile record and using it to have his time run consecutively.



### Findings

This Court finds Applicant has 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 overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds that Trial Counsel cannot be deficient for failing to object when there was no legal basis for the objection.

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: Trial Counsel failed to challenge the ballistics reports.**

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to challenge the ballistics reports. This Court finds this allegation to be without merit.



### PCR Evidentiary Hearing

On direct examination, Trial Counsel testified that she did not recall anything in the ballistics reports that they wanted to challenge. (PCR Tr. p. 72). Trial Counsel testified that she did not object to the reports because they used information within them in Applicant's defense. Id.

### Findings

This Court finds Applicant has 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 overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, supra. This Court finds Trial Counsel credibly testified that they used information from the ballistics reports to support Applicant's theory of the case. This Court finds Trial Counsel's strategic reasoning to be well within the range of reasonable professional judgment and Trial Counsel's performance here was not deficient.

Furthermore, any contention from Applicant that Trial Counsel should have objected to the reports is also unfounded. This Court cannot find a legal basis for an objection. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

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: Trial Counsel failed to properly advise Applicant on whether or not to waive his stand-your-ground hearing.**

Applicant alleged Trial Counsel's representation was constitutionally ineffective for improperly advising Applicant about a stand-your-ground (SYG) hearing. This Court finds this allegation to be without merit.

Protection of Persons and Property Act<sup>5</sup> (the Act) provides the following:

- (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
  - (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
  - (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
- (B) The presumption provided in subsection (A) does not apply if the person:
  - (1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or

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<sup>5</sup> S.C. Code Ann. § 16-11-410 to -450.

occupied vehicle including, but not limited to, an owner, lessee, or titleholder; . . . .

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

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

"[T]he legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act." State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). Thus, upon motion, the issue of immunity under the Act must be decided prior to trial. Id. A party seeking immunity under the Act must show entitlement to immunity by a preponderance of the evidence. Id. at 411, 709 S.E.2d at 665. Moreover, the Act is predicated on the absence of aggression or fault on the defendant's part in bringing on the difficulty. State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), citing State v. Grantham, 224 S.C. 41, 45, 77 S.E.2d 291, 292 (1953). Notably, the Act is a procedural provision that "does not contain any substantive provisions of law"; thus, it "is not relevant to the work of a jury." State v. Marin, 404 S.C. 615, 625, 745 S.E.2d 148, 154 (Ct. App. 2013). A defendant must establish four things in asserting self-defense:

- (1) the defendant must be without fault in bringing on the difficulty.

  
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- (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.

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), citing Curry, 406 S.C. at 371-72, 752 S.E.2d at 266-67.

### Trial

THE COURT: All right. Do y'all have pre-trial motions you need to have addressed?

MS. PINNOCK: Yes, Your Honor. I can hand up -- well, to begin with, Your Honor, we filed notice seeking to the Solicitor's Office of our intentions of going forward on an immunity hearing under Section 16-11-440(c). It's our position now that we're going to withdraw that request for a hearing and just move forward with the trial.

THE COURT: And you've discussed that hearing with Mr. Myers?

MS. PINNOCK: Yes, sir.

THE COURT: And have you had lengthy discussions about the impact of such a hearing and the potential that it could be granted?

MS. PINNOCK: Yes, Your Honor. We explained the purpose of the hearing. We discussed that with Mr. Myers leading up to us filing the motion. We filed the motion on Thursday afternoon of last week and we explained to him leading up to this week about, you know, what could

happen -- what we believed was going to happen during the motion and what the possible outcomes would be. Like I said, at this point we are changing our position and request to withdraw that motion.

THE COURT: All right. Mr. Myers, have you heard what your lawyer just told me?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Did she explain to you, and your other lawyers, did they explain to you the purpose of an immunity hearing pursuant to 16-11-440?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you understand the purpose of that hearing?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And Ms. Pinnock tells me that y'all have discussed it and that you prefer not to go forward with such a hearing and wish to simply proceed with any other motions that might be necessary to be heard before we select a jury in the case. Is that true?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you understand the significance of waving your right to have a hearing pursuant to 16-11-440?

THE DEFENDANT: Yes, sir.

THE COURT: And you've had plenty of time to discuss that with your lawyers?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you do not wish to proceed with that motion?

THE DEFENDANT: No, Your Honor.

THE COURT: You wish to have the motion withdrawn?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions you need to ask me about that decision?

THE DEFENDANT: No, sir.

THE COURT: Do you need to discuss it with your lawyers further?

THE DEFENDANT: No, sir.

THE COURT: All right. Thank you. What other motions do we have?

(Trial Tr. pp. 15 - 17).



### PCR Evidentiary Hearing

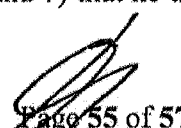
On direct examination, Applicant testified that he was told to waive his SYG hearing. (PCR Tr. p. 21). Applicant testified that Trial Counsel never discussed his defenses with him. (PCR Tr. p. 23).

On cross-examination, Applicant testified that if Trial Counsel had advised him correctly, he could have been found "guilty of self defense" at an SYG hearing. (PCR Tr. p. 44).

### Findings

As an initial matter, this Court finds Applicant's testimony not credible. This Court further finds that Applicant has 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. Also, this Court finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, supra. Notably, Trial Counsel was not questioned on this claim. Nevertheless, this Court finds Applicant's contention that he would have been successful at an SYG hearing is not supported by the record, and Applicant voluntarily and knowingly withdrew his motion for an SYG hearing.

Moreover, the record provides the trial court conducted a thorough colloquy where Applicant engaged with the trial court. Applicant testified in affirmation that Trial Counsel 1) explained the purpose of an immunity hearing pursuant to the Act; 2) that he and Trial Counsel discussed the hearing and he preferred not to move forward with it; 3) that he understood the significance of waiving his right to an immunity hearing; 4) that he had plenty of time to discuss it with Trial Counsel; 5) that he wished to withdraw his motion for an immunity hearing; 6) that he had no questions for the trial court; and 7) that he did not need any further time to speak with



**CONCLUSION**

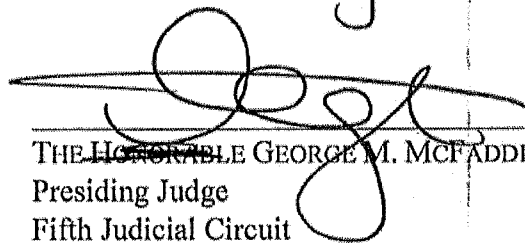
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

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 review of the denial of PCR. Rule 71.1(g), SCRPC, 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 15<sup>th</sup> day of July, 2024.

  
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THE HONORABLE GEORGE M. MCFADDIN, JR.  
Presiding Judge  
Fifth Judicial Circuit

Sumter, South Carolina