

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Chesterfield County

Honorable Michael S. Holt, Circuit Court Judge

GARY MOORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000459

APPENDIX

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INDEX

INDEX	i
<u>DUNCAN</u> HEARING TRANSCRIPT DATED FEBRUARY 17, 2016	1
TRIAL TRANSCRIPT DATED APRIL 5-6, 2016.....	123
OPINION NO. 2019-UP-234 FILED JUNE 26, 2019	374
APPLICATION FOR POST-CONVICTION RELIEF	377
RETURN AND MOTION FOR A MORE DEFINITE STATEMENT	389
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	419
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED MARCH 14, 2022	431
ORDER OF DISMISSAL	577
MOTION TO ALTER OR AMEND PURSUANT TO RULE 59(e), SCRCP	619
ORDER DENYING APPLICANTS MOTION PURSUANT RULE 59(e), SCRCP	651
INDICTMENT	658

G. Moore- Redirect Examination by Mr. Phillips

71

1 correct?

2 A. Ma'am?

3 Q. Do the other person that placed a 911 call
4 testify on behalf of the State?

5 A. Yes, ma'am.

6 Q. Okay. But it's your -- your testimony now that
7 the 911 call she placed would contradict all of the
8 State's witnesses including her?

9 A. Yes, ma'am.

10 Q. Okay.

11 MS. MARTO: No further questions, Your Honor.

12 THE COURT: Mr. Phillips, anything else of this
13 witness?

14 MR. PHILLIPS: I apologize. I was on mute.

15 Redirect Examination by Mr. Phillips:

16 Q. Mr. Moore, you testified on cross regarding the
17 911 call of the store clerk specifically, you said
18 that you had not had that discussion regarding or you
19 had not reviewed that recording with Mr. Knox prior
20 to trial or prior to the immunity hearing and that
21 you personally obtained that recording?

22 A. Yes, sir. I retained -- I retained that
23 recording my second month in Kirkland. So
24 approximately May ---

25 Q. How did you get that?

1 A. Through the FOIA process. I sent a Freedom of
2 Information request to the, I want to say the
3 dispatchers office, at which point the county's
4 attorney contacted me with the information that I
5 have. I then had that information sent to Garrett's
6 (ph) discovery out of Florida and had them enhanced
7 the audio so that you could hear everything that was
8 happening in the background during that 911 call.

9 Q. Was that before or after you'd provided it to Ms.
10 Blanchette?

11 A. Ms. Blanchette, I would say -- well, it was
12 enhanced after Ms. Blanchette -- Ms. Blanchette
13 didn't have it enhanced. I gave ---

14 Q. You gave Ms. Blanchette the normal audio
15 recordering?

16 A. Yes, sir.

17 Q. Okay.

18 MR. PHILLIPS: Your Honor, at this time, the
19 applicant would mark the 911 reporting call of the
20 store clerk as Exhibit Number, Applicant's Exhibit
21 Number 11, would move to admit that into evidence at
22 this time?

23 THE COURT: Ms. Marto?

24 MS. MARTO: Just to clarify, Your Honor, this is
25 the 911 call that was a part of the State's evidence,

G. Moore- Redirect Examination by Mr. Phillips

73

1 correct, that was obtained through FOIA? It's not an
2 alter ---

3 MR. PHILLIPS: No. This is the one that I
4 received through Tricia Blanchette, not an altered.
5 This is the 911 recording that she received as part
6 of his FOIA request.

7 MS. MARTO: Okay. No objection.

8 THE COURT: Without objection. It's so ordered.
9 That's Plaintiff's Number 11?

10 MR. PHILLIPS: Yes, Your Honor.

11 (Whereupon, the 911 Call has been marked and entered
12 into evidence as Applicant's No. 11)

13 Q. Mr. Moore, you testified regarding Mr. Hooks, in
14 the immunity hearing it shows that right before the
15 immunity hearing started the State provided on the
16 morning of that hearing to Mr. Knox with some late
17 discovery regarding Mr. Hooks's interview initially
18 made a discovery motion or the failure to provide a
19 timely Rule 5 and, ultimately, withdrew that motion,
20 had you, at that point, was that the first time
21 you'd ever seen Mr. Hooks's interview?

22 A. I still haven't seen Mr. Hooks's interview. I
23 was told that he would testify today. So I never --
24 I've never seen Mr. Hooks's interview until
25 incarceration.

1 Q. Until after -- until you requested it, that was
2 part of the full file that you received?

3 A. Yes, sir. Yeah. Yes.

4 Q. Pursuant to your FOIA request?

5 A. Yes sir.

6 MR. PHILLIPS: Your Honor, that applicant would
7 like to mark the video recording in the sheriff's
8 office file of the interview with Steven Hooks, one
9 of the witnesses that testified, as Applicant's
10 Exhibit Number 12, and would move that into evidence
11 at this time.

12 THE COURT: Ms. Marto?

13 MS. MARTO: No objection, Your Honor.

14 THE COURT: Without objection. It's so ordered. It
15 would be Plaintiff's 12.

16 (Whereupon, the Interview of Steven Hooks has been
17 marked and entered into evidence as Applicant's No.
18 12)

19 MR. PHILLIPS: And, Your Honor, as a mater of
20 bookkeeping or housekeeping, is the court taking into
21 judicial notice all the transcripts as part of the
22 record? The AG's office can certainly provide their
23 response on that?

24 MS. MARTO: Yes. My understanding all of the
25 pleadings in this case including the immunity hearing

G. Moore- Redirect Examination by Mr. Phillips

75

1 transcript and the trial transcript are attached to
2 the pleadings and can be taken under judicial notice
3 along with any exhibits that are at trial.

4 MR. PHILLIPS: We would request that Your Honor
5 take the transcripts as well as any of the exhibits
6 that were admitted at trial under judicial notice at
7 this time.

8 THE COURT: All right. So noted.

9 MR. PHILLIPS: No further questions, Your Honor.

10 THE COURT: Ms. Marto, anything else of this
11 witness?

12 MS. MARTO: Nothing further with this witness,
13 Your Honor.

14 THE COURT: All right. Folks, it's 1:51, I need to
15 give staff a break. Mr. Phillips, how many more
16 witnesses do you have, sir?
17 It's just Mr. Knox that's left, Your Honor.

18 THE COURT: All right. Ms. Marto, who do you
19 have?

20 MS. MARTO: We have Ms. Johnson-Lee.

21 THE COURT: All right. So I anticipated at least
22 another forty-five minutes to an hour. It's already
23 two o'clock. I've got to give staff a break. Let's
24 take a forty-five minute break, okay. I'll leave the
25 monitor up but I'm gonna mute on my end. So I'll see

1 y'all back in forty-five minutes.

2 MR. PHILLIPS: Thank you, Your Honor.

3 MS. MARTO: Thank you, Your Honor.

4 (Whereupon, the court takes a short recess for lunch)

5 THE COURT: All right. Mr. Phillips, we have
6 everybody back. You're muted, Mr. Phillips.

7 MR. PHILLIPS: I apologize. Yes, Your Honor.

8 THE COURT: Okay. All right. I appreciate
9 everybody's patience with the break. Okay. W're
10 back on the record. We have everyone back. This is
11 Mr. Gary Moore's PCR hearing. And everybody who was
12 part of the hearing earlier is back online. All
13 right. Mr. Phillips, your next witness, sir.

14 MR. PHILLIPS: Thank you, Your Honor. At this
15 time, the applicant would call Mr. Knox as a witness.

16 THE COURT: All right. Mr. Knox, do you swear or
17 affirm to tell the truth, the whole truth, and
18 nothing but the truth so help you God? Check and see
19 if you're muted.

20 MR. KNOX: Okay.

21 THE COURT: Thank you, Mr. Knox. Just state your
22 name for the record?

23 MR. KNOX: Larry W. Knox.

24 THE COURT: All right, Mr. Knox. All right. Mr.
25 Phillips, your witness, sir.

L. Knox- Direct Examination by Mr. Phillips

77

1 MR. PHILLIPS: Thank you, Your Honor.

2 LARRY KNOX, first being
3 duly sworn, testified as follows:

4 Direct Examination by Mr Phillips:

5 Q. Good afternoon, Mr. Knox.

6 A. Good afternoon.

7 Q. Could you explain when you received this case?
8 Or how you become involved in this case, to be more
9 specific?

10 A. I became involved, let me check my file, on July
11 17, 2015.

12 Q. And Mr. Moore retained you?

13 A. Yes. Well, he came in for an interview and
14 shortly, thereafter, I was retained.

15 Q. And through -- once after you were retained, what
16 investigation did you do?

17 A. Well, Mr., Mr. Moore told me what the case was,
18 was about. I looked into it I asked him for
19 potential witnesses. He gave me names of the people
20 who were at the McCormick Market and the victim's
21 name. I immediately contacted the solicitor's office
22 and requested a Rule 5. Also, upon my representation
23 of Mr. Moore, he gave me a copy of his request for a
24 preliminary hearing. That was on the 16th and, I
25 stated, I think that was the 17th and I submitted it

1 to the magistrate on the 21st of July way within the
2 ten days for the request for the preliminary hearing.
3 The preliminary hearing was done I think around
4 October 4th. And it was, the charges were sent to
5 General Sessions.

6 Q. Did you speak to any of those witnesses?

7 A. At the time I did not. I had spoke with Mr.
8 Moore. I had not received my full Rule 5. Mr. Moore
9 could not give me any addresses of the witnesses
10 except for I think his father-in-law or the alleged,
11 the alleged victim. I did contact him. He did not
12 want to speak. I was waiting to receive the Rule 5
13 from the solicitor's office before I went any further
14 in trying to contact witnesses. Mr. Moore in his
15 initial interview told me what it was about and I
16 said, well, this is probably the case of self-
17 defense. And that was probably the initial visit.
18 Once I received the Rule 5, I had been used to
19 getting Rule 5's in paper manner and then they
20 switched over to give them to us in a CD. Once I
21 receive the DC(ph), I got in contact with Mr. Moore.
22 I called him into the office. We went over the CD.
23 He came, accompanied by his wife. And I think they
24 had a child with them at that time too. He came to
25 the office. We went over the CD. I think that

1 meeting last for about four or five hours. I showed
2 him every frame of the CD's. He explained to me what
3 had happened. And his biggest argument was that all
4 of this was a result of something that happened
5 previously. He told me that case had gone to the
6 magistrate's office and it was a big disturbance at
7 the magistrate's office. But during that proceeding
8 I contacted the magistrate to see whether or not
9 there was a record. There was not. Now, whether or
10 not she give me a record of -- no, it was in
11 Pageland, he did not give me a copy of the record.
12 So I, basically, when along with what Mr. Moore told
13 me that had happened. But it was confirmed by an
14 officer who was on duty at the magistrate's office
15 doing that hearing that there was a confrontation of
16 some type at the hearing, a disturbance that people
17 had to be restrained. So it was bad blood between
18 Mr. Moore and the alleged victim.

19 Q. And what was the name of that officer that she
20 spoke to?

21 A. I can't recall. It's been six years ago. I
22 don't remember the name of the officer.

23 Q. But you, ultimately, did speak to someone
24 specifically and they remembered that event?

25 A. Yes. I spoke with magistrate who did say that

1 that occurred. And the officer, I think it was a
2 Pageland Town police, who was on duty at that
3 particular time.

4 Q. Was there any specific reason why you didn't call
5 the magistrate or that officer as witnesses at the
6 immunity hearing?

7 A. Well, no, there was no reason to call. That was
8 a prior hearing that I thought at the particular time
9 had no bearing on that incident since we were
10 pleading self-defense. After reviewing the videos,
11 and after the statement from my client, it was
12 determined that my client did use a knife to defend
13 himself at the McCormick Market up in Jefferson and
14 that whatever happened at the magistrate's office was
15 about an incident damaged to property which I thought
16 had no bearing on the case in hand even though there
17 was, the victim, that the person who was involved in
18 the magistrate's case was the same person who was
19 involved in the McCormick store incident. And Mr.
20 Moore had told me what had happened. The video
21 proved that to be correct. So that's what I was
22 going on. There was no need for me to call of the
23 magistrate or the police officer there.

24 Q. Isn't it -- and what the magistrate and officer
25 confirmed though, that there were threats? There was

L. Knox- Direct Examination by Mr. Phillips

81

1 a an altercation, essentially, that occurred at the
2 magistrate's court?

3 A. They said it was an altercation. He didn't
4 mention anything about threats or any verbiage that
5 was exchanged between the two people. He said there
6 was a disturbance, a commotion at the magistrate's
7 which in Chesterfield County is not unusual.

8 Q. And that -- that occurred prior to the incident
9 before ---

10 A. Yes. Yes. Probably about a year before, a
11 couple of years before.

12 Q. Now, as far as these other prior incidents, these
13 incident reports on April of 2014, did you do
14 anything with those incident reports as far as trying
15 to use those -- I mean, was there any specific reason
16 why you didn't use those incident reports in your
17 presentation during the immunity hearing?

18 A. Well, I looked at them and was going to have my
19 witness, Mr. Moore, to testify. I think he was the
20 best evidence of what happened since he was there.
21 So I didn't use -- I used the testimony of Mr. Moore.

22 Q. So you made a conscious decision not to admit
23 those incident reports to help corroborate Mr.
24 Moore's testimony?

25 A. No, I did not. I used Mr. Moore to corroborate

1 that. And the other witnesses confirmed that's what
2 had happened so....

3 Q. But you don't dispute that you have the incident
4 reports, you were aware of them?

5 A. Yes. I got the incident reports in my discovery
6 package and, but I didn't use them.

7 Q. As far as the 911 recordings, did you review
8 those prior to the immunity hearing?

9 A. The 911 recording that was on the video that I
10 saw and I found out with my session with Mr. Moore,
11 we went over that. Mr. Moore spoke of 911 transcript
12 or call that he received while he was incarcerated, I
13 have no knowledge of that one, if he, in fact ---

14 Q. Well, I guess -- I guess I'll be specific, so in
15 your meeting when Mr. Moore you reviewed his 911
16 calls as well as the 911 of the store clerk?

17 A. I reviewed -- yes, he showed me that he made a
18 call on his phone and I listened to the call on his
19 phone in my office that he had made to 911. Yes, I
20 did review that. But as far as getting a transcript
21 of it, no.

22 Q. Or audio recording of it, was that ever provided
23 by the State?

24 A. I -- I can't recall at this time. Everything --
25 everything was in CD form and -- yes, there was a

1 recording from the officer's cam in the car while Mr.
2 Moore was in the car, then retained. I did see that
3 and that's on the video.

4 Q. And going back to the 911 recording, was there
5 any specific reason why you didn't admit that during
6 the immunity hearing?

7 A. No. I had my client testify as to what he had
8 said and what was told to whom. He testified that he
9 had received threats in the past and that he was the
10 one to call 911. And that he told him -- that he
11 told the people that he had been attacked at the
12 store, you know, I think that's on the record.

13 Q. And again, just for the immunity hearing as well
14 as the trial, specifically, is showing that the
15 testimony, I guess, let me take it back -- the audio
16 recording, the 911 call of Mr. Moore, you, you felt
17 like his testimony alone was sufficient? You didn't
18 want to provide the fact that, I mean, literally
19 moments afterward after this incident occurred that
20 he called 911 and, basically, described what had
21 happened in that moment?

22 A. No. Because there was no difference between what
23 he had told me, what he had testified to, and what
24 was on the recording.

25 Q. Now, the State tried to attack his credibility,

1 is that right, at trial?

2 A. They always do. They always do. That's nothing
3 unusual.

4 Q. And in attacking his credibility that 911 call
5 would've helped actually corroborate or bolster his
6 credibility that what he said was exactly what he
7 said as an excited utterance or an present sense
8 impression, whatever hearsay objection you want to
9 get to get it in, that you had that opportunity --
10 you knew you had the opportunity to get it in if you
11 wanted. You agree with that?

12 A. No. No. My recollection is that the State tried
13 to attack his credibility based on that he was a
14 violent person. And based on that I decided that his
15 testimony would be the best that he was attacked, he
16 was trying to defend himself.

17 Q. And when you talk about that all through your
18 notes, do you have any other notes where you've met
19 with Mr. Moore other than one time prior to trial?

20 A. What happened after we had that initial
21 conversation and went over the evidence, Mr. Moore
22 disappeared. He gave me a number that I could reach
23 him on. I called those numbers several times. I
24 think at the time, right after the initial interview,
25 he and his wife or the person that he claimed to be

L. Knox- Direct Examination by Mr. Phillips

85

1 his wife, had a falling out and there was no way for
2 me to communicate with him. So finally maybe a week
3 before trial or a couple of days before trial, I did
4 receive a call from Mr. Moore. He gave me a new
5 number. He stated that he was a Texas. And I said,
6 well you need to get your behind here because the
7 State is getting ready to try you and there's a lot
8 of things that we need to do. Mr. Moore returned the
9 day before trial.

10 Q. Earlier you said the body one camera that you did
11 review that with him that Mr. Moore is there, you saw
12 that from the responding officer, was there any
13 reason why you didn't seek to admit the body worn
14 camera at immunity hearing or the trial to try to
15 either impeach the officer or try to further the
16 presentation of your, your defense?

17 A. No. My defense was self-defense. And the
18 testimony of Mr. Moore and at the time I believe the
19 evidence that was obtained from McCormick's store was
20 the best evidence.

21 Q. Now, at the immunity hearing there was a second
22 day where the judge came back and provided a ruling,
23 Mr. Moore was not present for that?

24 A. I don't know whether it was the second day, but I
25 did receive the ruling I think from him, the

1 Honorable Judge Henderson that immunity was denied.

2 Q. The one page transcript that we have of that were
3 you present for that?

4 A. I was present in the courtroom because that was
5 general sessions week. Judge Henderson took it under
6 advisement and he issued an oral ruling. And I don't
7 think that I received the written order.

8 Q. Did you ask the judge to wait before issuing his
9 ruling to have Mr. Moore present during this, during
10 the issuance of the ruling the following day? You
11 said you were, basically, in court, right?

12 A. Yeah, I was in the courtroom at the time so
13 no....

14 Q. And you didn't provide any further objections at
15 that point or clarifications regarding that standard
16 at that time?

17 A. No. I'd begged at the beginning of the trial I
18 renewed my objection to the stand your ground ruling
19 to make it part of the record.

20 Q. Now, in reviewing the body worn camera, did you
21 notice the exchange between Mr. Moore giving the
22 officer the black blade knife?

23 A. Yes, I saw that.

24 Q. Okay. And ultimately, the officer lays the knife
25 on his seat of his patrol car. Was there any reason,

1 specifically, why you didn't want to try to show that
2 to the jury as far as Mr. Moore's interactions with
3 the officer, his demeanor, the way knife looked at
4 that time, was there a specific reason you didn't
5 want to present that evidence during neither the
6 immunity hearing or the trial?

7 A. No. Because there was no doubt that, that was Mr.
8 Moore's knife. That was a knife that he had, that
9 he used to defend himself. And I wasn't gonna get
10 bogged down in minutia about whether or not it was
11 the knife or the condition of the knife. It was
12 admittedly the knife that was used so....

13 Q. Okay. So you don't believe there was any issue
14 regarding the way the knife looked at the time it was
15 handed over? In other words, that it looks different
16 from when he handed it to the officer til when
17 there's pictures taken later?

18 A. Well, by the video I couldn't tell what condition
19 the knife was in. I asked Mr., when I interviewed
20 Mr. Moore, I asked him was that the knife, he said,
21 yes. I said, why do you carry a knife like that? He
22 said because that's one of the tools in his trade
23 so....

24 Q. And you agree that Mr. Moore cooperated with law
25 enforcement? He handed over the knife? He didn't

1 try to conceal his identity, he called 911? I mean,
2 that whole interaction between the 911 recording and
3 then the officer, responding officer with the body
4 worn camera, there was cooperation on his end with
5 law enforcement?

6 A. Yes. No doubt.

7 Q. And that never occurred to you to try to provide
8 the jury that context as well?

9 A. No. You know, I go back to what my case is all
10 about. My case was about self-defense. That he was
11 attacked. He had a knife. He used that knife to
12 defend himself. At the immunity hearing that was the
13 evidence that was presented. Mr. Moore, himself,
14 testified. Other witnesses testified. The court did
15 not see it that way. They ruled adversely. At trial
16 that same evidence was presented. The only thing
17 different was Mr. Moore did not testify. And the
18 jury found Mr. Moore guilty based upon that self-
19 defense was not used. So that -- that was my case.

20 Q. In your meeting with Mr. Moore, did you review
21 his specific rights to testify and then prepare him
22 to testify?

23 A. Yes. You know, Mr. Moore wasn't completely
24 truthful with the court in terms of what happened in
25 those five hours. Previous to me getting involved

1 with Mr. Moore, he had another trial which he was
2 successful in beating. So Mr. Moore came to me very
3 cocky saying that this should be a slam dunk. I said
4 in my, at the time in my fifteen or sixteen years of
5 practice, nothing is a slam dunk. And I called and
6 spoke with his attorney. He gave me permission to
7 speak with his attorney that represented him in the
8 prior trial. And we discussed the strategies that we
9 used, the, um, what type of witness Mr. Moore would
10 be. And I discussed this all with Mr. Moore. And I
11 discussed the fact that Mr. Moore had some prior
12 dealings with the solicitor, the sheriff's
13 department, and just about everybody of significance
14 in Chesterfield County. And I advised him I said Mr.
15 Moore, you may not be a good witness. You're not a
16 likable witness. They may hold that against you.
17 And at the immunity hearing Mr. Moore showed to be an
18 unlikeable witness.

19 Q. Now ---

20 A. We discussed -- I'm not finished. Let me finish.

21
22 Q. Yes, sir. That's fine.

23 A. We -- we discussed whether or not he should
24 testify at his own defense. The fact was brought out
25 that he had a very short fuse. And I said they will

1 get to you, they will light that fuse and you would
2 explode. He was agreed before trial that he would
3 not testify. This is not his first rodeo nor his
4 second rodeo. He was very well aware of all of his
5 constitutional rights even though he was well aware
6 of them, I went over them again with him.

7 Q. Though specifically, as to his medical records,
8 the ones where he went and saw the physician or
9 medical doctor after this incident, was there any
10 specific reason why you didn't want to present those
11 medical records to show....

12 A. Because the medical records were not available to
13 me before trial. They were not made available to me
14 at the stand your ground hearing. It was only what
15 he told me. He did not give me the name of doctors,
16 attending physicians or anything.

17 Q. But he told you he went and saw a doctor, you'll
18 admit to that?

19 A. I can't recall whether or not he told me that.
20 He said he was injured and that they treated his
21 injuries at the sheriff's department.

22 Q. And so when he said that they was treatment of
23 his injuries, you didn't do any follow up
24 investigation after knowing that as far as asking,
25 well, you know, let me figure out who these, you

L. Knox- Direct Examination by Mr. Phillips

91

1 know, who these people who provided the treatment to
2 try to get those documents, you didn't ask any
3 further questions?

4 A. No, I did not. That I -- no, I did not.

5 Q. Now, had you discussed or did any investigation
6 research into the fact that he was listed as a victim
7 with Mr. Wallace previously, Victim's Bill of Rights?

8 A. I saw that -- I saw that -- I saw that on the
9 report in the magistrate's case that happened about a
10 year or two before that. To me it had no bearing.
11 It had no relevance or what I was retained to do.

12 Q. So the case where Mr. Wallace took the axe handle
13 and said he was gonna beat his brains in and smashed
14 his windshield, you felt ultimately try to look to
15 see whether you can use his rights as a prior victim
16 of this person during the immunity hearing or trial,
17 you felt that was no relevance?

18 A. Well, I looked into it. He was charged with, the
19 defendant was charged with malicious injury to
20 personal property. That is a property crime. It may
21 no relevance that there were any physical alterations
22 or anything. So that's what I went on, that this was
23 a property crime, the defendant was found guilty.
24 That restitution was made. Yes, Mr. Moore was the
25 victim.

1 Q. And -- and I apologize for any confusion there, I
2 was referring to the incident reports, separate
3 incident other than just the magistrate's court
4 incident that happened in court. I'm referring to
5 the incident report that specifically reference,
6 references the altercation with Mr. Moore and Mr.
7 Wallace where Mr. Wallace is considered the defendant
8 and Mr. Moore is considered the victim were there was
9 an ax handle involved.

10 A. Is this the magistrate's case or the case in
11 chief? I don't understand which one you're talking
12 about.

13 Q. It's another prior incident specifically the,
14 I'll pull it up. Give me one second. It is the
15 incident report that's dated April 17, let me go back
16 to my list here. That is marked as Applicant's
17 Exhibit Number 2, specifically where Mr. Wallace
18 tried to hit Mr. Moore with the axe handle and hit
19 the windshield or busted, busted out the side, the
20 driver side mirror and windshield of Mr. Moore?

21 A. Yes. I think that was brought about the immunity
22 hearing.

23 Q. Yes, sir. So, I guess again, specifically, as to
24 him being a victim of that incident, was there any
25 specific reason why you didn't want to do any

1 research to try and present any additional facts
2 where there is a legal proceeding establishing that
3 Mr. Wallace was, essentially, the defendant, an
4 attacker, an assailant, and Mr. Moore was a victim
5 under a legal sense of a prior incident?

6 A. No. Because the, again, going on self-defense. I
7 think that was brought out at the immunity hearing
8 that they did have a prior confrontation and that
9 there was bad blood between these individuals. That
10 was dated I think April 16, 2014, according to my
11 records.

12 Q. Yes. And the incident report, I think, has the
13 date of 4/17, that's correct.

14 A. Yeah.

15 Q. As far as the video recordings that were
16 ultimately admitted at trial there's a big debate
17 dispute between the three videos versus the four
18 videos. Could you provide your perspective on that
19 issue? Because you do make motion to the court
20 regarding potential discovery violation and there is.
21 there is a colloquy on the record regarding that
22 issue.

23 Q. Yes. I was somewhat disturbed that the three
24 versions that were given me too, to me according to
25 my discovery request when we get in court, there was

1 another short version. But it seemed different from
2 what I had seen and when Mr. also he admit, he said
3 it was different too. And I think we have discussion
4 outside of the jury about that and I think the
5 explanation was given that the recording that was at
6 McCormick's store, the officer -- it was transferred
7 from the McCormick's recording device to the
8 officer's cell phone, if I remember correctly. But
9 yes, that issue did come up. I objected to it.
10 Obviously, obviously the judge overruled it and let
11 it in so....

12 Q. But you did believe that there was a -- you were
13 provided three different versions of that copied
14 video from the surveillance because they couldn't
15 download it, so to speak, and that at trial there was
16 a another, as you said under oath, a short version
17 that was admitted in court that ultimately triggered
18 you to make that objection?

19 A. Yes. Mmm, hmm.

20 Q. Did you request to have those marked as court's
21 exhibits?

22 A. I can't recall. Without looking at the
23 transcript, I don't know.

24 Q. Did you -- did it ever occur that you could have
25 marked the three videos that you were provided as

1 court's exhibits to show the difference between the
2 other, the fourth, we'll just reference it as a
3 fourth short version, to show the difference? That
4 you could have marked the three that you were
5 provided by the State as court's exhibit to preserve
6 that issue for appellate review?

7 A. I can't recall. I don't know.

8 Q. Is there any specific reason that you didn't move
9 to sequester any of the witnesses at the, at the
10 immunity hearing?

11 A. Well, it's custom in Chesterfield that the court
12 does that on its own without motion. And the
13 witnesses were sequestered. They were brought into
14 the courtroom one at a time. Now, whether or not
15 outside the courtroom, I don't know what happened
16 outside of the courtroom. But no, I didn't file -- I
17 didn't ask for a motion to have any witnesses
18 sequestered, no.

19 Q. Did the judge specifically order it and it's just
20 not in the transcript?

21 A. I don't think he specifically ordered it, no.

22 Q. And you agree that this immunity hearing was
23 largely based, if not entirely based, on credibility
24 of the witnesses that testified at that hearing?

25 A. Well, yes. You know, you know, I think there

1 were -- I don't think the State's witnesses were
2 credible. I have some problems with my own witness
3 also. I thought he was a bit confrontational outside
4 of the regular confrontation that you have in a
5 trial. But, you know, based on the witnesses I
6 thought that immunity would be granted.

7 Q. And so knowing with credibility being a major
8 issue and the judge didn't provide a specific ruling
9 to sequestered, you didn't have any specific reason
10 why you didn't move to for sequestered the witnesses?

11 A. No. I think in testimony that were -- the
12 testimony was different from the immunity hearing. I
13 think that I brought that to the attention of the
14 witnesses that they had changed their testimony and
15 why did they change their testimony, I think that's
16 in the transcript. So I think that was covered.

17 Q. Now, again, just to make sure in case I've
18 narrowed the scope earlier, so specifically as to
19 these incident reports from April, Applicant's
20 Exhibit, I believe Number 1 and Number 2, the two
21 reports, you said you made the specific decision not
22 to present those at the trial as well and that was
23 based on you didn't feel it was necessary in
24 presenting self-defense because of Mr. Moore's
25 testimony?

1 A. Yes.

2 Q. Was there any reason why you didn't object at the
3 immunity hearing when the prosecutor elicited
4 improper legal opinion testimony from a lay witness,
5 essentially, during Wallace's cross-examination, the
6 prosecutor asked, "At any time did you do anything
7 that would cause him to use deadly force against
8 you?" That's on Page 61 of the immunity hearing.

9 A. And what was your question.

10 Q. Was there any reason why you didn't object to
11 that when the prosecutor asked for a legal opinion of
12 lay witness, specifically, the key witness of the
13 State?

14 A. I didn't think it was a legal, a legal opinion.
15 I think it was an opinion of a witness who was there
16 at the time.

17 Q. Okay. So you don't find that question
18 objectionable?

19 A. Hindsight, it's fifty/fifty. At the time that we
20 had to hearing I didn't think so.

21 Q. Again, the question was on Page 60 of the
22 immunity hearing, "At any time did you do anything
23 that would cause him to use deadly force against
24 you?" And specifically this is during Wallace's, the
25 complaining witness's examination by the prosecutor?

1 A. If that's what the record says, yes.

2 Q. The, I believe it's on Page 65 of the immunity
3 hearing, again, during the State's examination of
4 Charles Wallace, was there any specific reason why
5 you didn't object immunity hearing when the
6 prosecutor again elicited another question, again,
7 legal opinion testimony from the lay witness striking
8 at the heart of the ultimate issue of self-defense
9 when he asks specifically if Mr. Moore was involved
10 in "What we call mutual combat?"

11 A. No. I did not object to that. It was mutual
12 combat.

13 Q. So you -- so that was your -- again, under -- if
14 your theory is self-defense, you believed it was
15 mutual combat, could you clarify that?

16 A. No. My theory was self-defense. That there was
17 an altercation. That my client, Mr. Moore, used a
18 knife to defend himself. Now, whether or not one
19 would consider that mutual combat, I don't think so
20 because Mr. Moore was not the aggressor. Mr. Moore
21 was attacked. And he defended himself.

22 Q. And I guess, if I can clarify and be a little
23 more specific, I apologize if this is on my end,
24 specifically, instead of the prosecutor asking, you
25 know, to explain what type of altercation occurred

1 between Mr. Moore and Mr. Wallace, instead he uses
2 the phrase, basically, you know, if, what was
3 involved was mutual combat, used the legal definition
4 of mutual combat to have Mr. Wallace confirm that, do
5 you do not find that objectionable?

6 A. As far as I recall I don't think he gave a
7 specific definition of mutual combat. I think those
8 words were used. But as far as a legal definition of
9 it I don't think that was ever given.

10 Q. And I guess that's where the prejudice lies, it's
11 not that he was defining mutual combat, but he was
12 allowing Mr. Wallace to say that they engaged in
13 mutual combat which was a finding for, or the
14 immunity hearing judge.

15 A. Well, there was a lay witness and I think a lay
16 witness is entitled to their opinion and his opinion
17 was that it was mutual combat.

18 Q. Now, as far as the immunity hearing is concerned,
19 the evidentiary standard that the judge, or that the
20 State argued and then the judge, ultimately, kind of
21 reiterated, specifically, looking at Pages 116
22 through 120 of the immunity hearing record, the State
23 argues that, essentially, that the standard of what
24 we, of what we're presenting in this PCR is an
25 incorrect interpretation of State versus Curry,

1 specifically, that the State argued that the proper
2 evidentiary standard to apply immunity hearing under
3 Curry was, "Almost akin to a summary judgment." And
4 then later argues, essentially, that if there's a
5 material issue of fact, then it should go to the
6 jury. And again it says, "When you look at the
7 nature of what happened with the reaction I think it
8 comes to a reasonable standards. One of the
9 hallmarks of our criminal justice system." So the
10 State, basically, one mentions that it's "almost akin
11 to a summary judgment" states "if there's a material,
12 issue of material of fact, then it should go to the
13 jury." And then also states that "when it comes to a
14 reasonable standard it's a hallmark of criminal
15 justice given the actual legal standard under State
16 versus Curry that's being clarified through case law
17 in South Carolina," was there any specific reason why
18 you didn't object to the State's arguments or provide
19 counter arguments as to the correct legal standard?
20 A. Well, at the time based on my research, what the
21 standard was preponderance of the evidence and I
22 didn't think that the State met its burden based on
23 preponderance of the evidence. And I think, again, I
24 objected to that to preserve the record.
25 Q. Okay. And, I guess specifically, was there any

L. Knox- Direct Examination by Mr. Phillips

101

1 reason why you didn't provide specific arguments
2 against the incorrect standard presented by the
3 State?

4 A. From none that I can recall.

5 Q. And then on the following day, on February 18,
6 2016, after the immunity hearing where the ruling was
7 provided, I believe it's on Page 4, Line 17 through
8 21, Judge Henderson indicated his ruling and this is
9 where you stated that Mr. Moore was not, was not
10 present for this. " Because of the way I view the
11 evidence, I certainly find that this is a matter that
12 should be submitted to the jury, and as pointed out
13 by the solicitor yesterday, this is a quintessential
14 jury question based on my view of the evidence."

15 Now, there was no objection made. There was no
16 follow ups for requesting specific findings of fact
17 or conclusions of law regarding each and every
18 element of self-defense. Was there any specific
19 reason why you didn't do that?

20 A. No. I knew that I could object again at the
21 trial and to preserve it. And I think the record was
22 properly preserved at trial and at the immunity
23 hearing.

24 Q. But you would agree that the judge, judge
25 Henderson didn't provide specific findings of fact or

1 conclusions law on the elements of self-defense with
2 that ruling?

3 A. No. I would not agree with that. I agree that
4 the judge made a decision. I did not agree with it,
5 that objected to it at the immunity hearing and then
6 objected to it again at the, at the trial.

7 Q. So, just to make sure we're again being on the
8 same page, as far as, you know, with the law of self-
9 defense it was -- you said there was no written
10 order, was there any other place where the judge,
11 specifically, ruled on each element of self-defense?

12 A. Are you thinking at the immunity hearing or at
13 the trial?

14 Q. Specifically, at the immunity hearing because
15 that's what the purpose of that hearing was for. You
16 said there was no written order.

17 A. There was no written order, no, that I had seen.

18 Q. Right. And And so again, all I have is the
19 transcript and there's no specific findings of fact
20 regarding the elements of self-defense, are you say
21 -- you say you disagree with that, was there another
22 place where these were, were made by the judge?

23 A. No. Not that I can recall.

24 Q. Okay. So his ruling was limited solely to that,
25 that following day, that transcript?

1 A. I believe, yes.

2 Q. Okay. Now, in providing your argument at the at
3 the end of the immunity hearing, was there any
4 specific reason why you failed to include how the,
5 how Wallace started the fight that he slapped over
6 the back of the head or in the head?

7 A. Well, if that was left out, you know -- during
8 arguments you try to cover all the bases and I think
9 the evidence showed that Mr. Moore was attacked and I
10 think I covered that, that he was attacked and that
11 he used a knife to defend himself. Now, whether or
12 not that's on the record or in the arguments, you
13 know, I don't understand why not. If your -- if your
14 question is did I fail to mention the fact that Mr.
15 Moore was attacked I think the record is very clear
16 where there's plenty of evidence that he was
17 attacked.

18 Q. And as far as your argument was concerned at the
19 immunity hearing, was there any specific reason why
20 you didn't want to address to the trial court the
21 timing of when Mr. Moore had pulled the knife?

22 A. No. There's no particular reason why.

23 Q. And in relation to the prior incident of Mr.
24 Moore being, essentially, assaulted by multiple
25 people in 2014 with Wallace being present, was there

1 any reason why you didn't want to tie that together
2 with the other individual that was in the store that,
3 ultimately, comes up behind Mr. Hooks, comes up
4 behind Mr. Moore and tries to pull him off,
5 basically, around his neck in the joking manner, was
6 there any reason why you didn't want to tie that
7 argument as to Mr. Moore's point of view from a prior
8 incident?

9 A. No. There isn't, no.

10 Q. Was there any specific reason why you didn't make
11 the argument to the immunity hearing judge that South
12 Carolina, our common law in South Carolina that hands
13 and fist can be considered deadly weapons in certain
14 situations?

15 A. No, I did not.

16 Q. Was there any reason at the trial that you
17 decided not to move to quash the jury panel pursuant
18 to Batson?

19 A. Well, my understanding of Batson I don't see
20 where race or gender play any part in this. He was
21 tried by a jury of his peers. He's the white male
22 and white males were seated. I'm at a loss of words
23 to understand why he would raise that issue anyway.
24 Because here's my client, a white male, with a
25 Confederate tattoo on his chest and he would not want

1 other white males on his jury. You know, I don't, I
2 don't understand that. I don't think Batson ---

3 Q. Specific -- understood. The specific question
4 was, essentially, with the State utilizing four of
5 its five statutory strikes to strike white males from
6 the petit jury?

7 A. No, I didn't see where Batson came in to play in
8 that.

9 Q. Now, was there any reason why during the EMS
10 technician, Justin Threat (ph), I'm looking at Pages
11 118 and 120 of the trial transcript, any specific
12 reason why you did object under Rule 701 and 702
13 under the South Carolina rules of Evidence or arguing
14 under Ford versus Watson about medical opinion
15 testimony being provided by the lay witness?

16 A. If you're speaking about the EMS I think EMS is
17 qualified to give his opinion based on his training
18 and experience in the field of providing emergency
19 medical service. No, I didn't not object to it.

20 Q. And so it's your opinion that when somebody is
21 making that a specific opinion based on training and
22 experience they don't have to be qualified as an
23 expert to do so?

24 A. No, I'm saying that I think he was qualified to
25 give his experience in the work that he performed. I

1 don't think he was testifying as an expert witness.
2 He was testifying as to what he saw and what he
3 reacted to as an emergency technician.

4 Q. Now, again, regarding, I think testimony,
5 regarding trauma and life support and certain medical
6 signs of a person going into shock, would those be
7 matters of which a layperson or the average juror
8 would understand and know?

9 A. I think the EMS -- if EMS was the witness, I
10 think the EMS is qualified to determine whether or
11 not a person is in shock.

12 Q. If they're qualified as an expert in that area?

13 A. Well, I ---

14 Q. They could provide an opinion -- you understand
15 -- I'm not sure if I'm being clear, do you understand
16 the difference?

17 A. No, I'm not saying that he was an expert in
18 shock. I'm saying that based on his day-to-day
19 experience as an EMS he can determine whether or not
20 a person is in shock. I mean, I would hate to have
21 or be in shock and EMS, EMS would not know that I was
22 in shock. I think that's part of their basic
23 training.

24 Q. Right. And the State, in this case, never
25 offered that witness as an expert in any field, you

1 agree with that?

2 A. I agree with that. Yes.

3 Q. Okay. And you didn't object when he provided
4 that testimony?

5 A. No, I did not object to the testimony that he
6 provided as an EMS....

7 Q. Now, as far as Sergeant Hutchinson, who testified
8 at, again, at the immunity hearing as well as the
9 trial, was there any specific reason why you didn't
10 object under hearsay or confrontation clause as to
11 when Mr. Hutchinson or, excuse me, Sgt. Hutchinson
12 testified to what the paramedic told the, EMS worker,
13 told him that they were going to take Wallace to the
14 treatment -- in other words, to be more specific,
15 Sgt. Hutchison testified as to what the EMS worker
16 told him regarding Wallace's treatment. Was there
17 any reason why you didn't object on the basis of
18 hearsay and the confrontation clause?

19 A. Well, I don't think it was hearsay because the
20 witnesses were available for cross-examination and he
21 was only telling what he was told by that person who
22 was available for testify, to testify ---

23 Q. Right. And that would've been for the EMS worker
24 to testify, you agree with that?

25 A. I beg your pardon?

1 Q. That would have been -- I apologize. That would
2 have been for the EMS worker to testify, not for Sgt.
3 Hutchinson?

4 A. Well, I think Sgt. Hutchison testified as to what
5 was, he was told by the EMS.

6 Q. Right.

7 A. That would not be ---

8 Q. Which would ---

9 A. --- hearsay because the EMS was available for
10 testing. That was not an out-of-court witness, ah,
11 out-of-court statement.

12 Q. So the EMS workers, I mean, I'm not trying to --
13 I'm not trying to beat you up with this, but the EMS
14 worker statement to Mr. Hutchinson was not, you're
15 saying, is not an out-of-court statement?

16 A. I'm saying it was not hearsay.

17 Q. Okay. All right. So was there any specific
18 reason why you didn't object under Rule 701 and 702
19 as well as arguing under State versus Ellis regarding
20 opinion testimony that was provided by Sgt.

21 Hutchinson regarding crime scene in reconstruction,
22 specifically, where the State provides some leading
23 questions regarding location in McCormick's Grocery
24 store where the fight, at least, where they believed
25 started, I'm referencing Pages 100 and 101 of the

1 trial transcript?

2 A. No. That was not objected to because my client
3 testified to where the fight occurred and the State's
4 witnesses testified to where the fight occurred. The
5 fact that they said it occurred at different basis,
6 it was at the McCormick Store and it did happen
7 so....no, there was no need to object to that.

8 Q. And just for the record, to be clear, the prior
9 question regarding hearsay that was, I was
10 referencing, Page 97 of the trial transcript,
11 specifically. Was there any reason why you didn't
12 object to, again, as leading or giving opinion
13 testimony on the ultimate issue when Sgt. Hutchinson
14 was asked "In looking at the case as a whole, who was
15 the victim in this case?" To which Sgt. Hutchinson
16 answered, "In my opinion it would be Mr. Wallace."
17 I'm referencing pages or Page 107 in the trial
18 transcript.

19 A. No, I did not object, I mean, giving his opinion
20 of who the victim was.

21 Q. And you don't believe that to be improper?

22 A. At the time, I did not.

23 Q. Was there any reason why you didn't object under
24 Rule 701 and 702 to Investigator's Tim Perry's
25 testimony on redirect examination when the state

1 elicited testimony on whether a person in a given
2 scenario would be deemed "a victim" when the facts
3 were similar to the present case and this type thing,
4 and where Investigator Perry is not qualified as an
5 expert witness and ultimately where the opinion
6 touched on the ultimate issue of the case referencing
7 Page 126 and 127 of the testimony on 126 and 127 of
8 the trial transcript?

9 A. No, I did not object.

10 Q. Was there any specific reason why?

11 A. Well, you know, as I stated in the beginning,
12 this was a case of self-defense. My job was to
13 produce based on the witnesses and the evidence that
14 my client acted in self-defense. I believe that he
15 did both at the stand your ground hearing, immunity
16 hearing and at the trial. I think that we had
17 presented in of evidence. I think the video showed
18 that he was attacked and he used force to repel that
19 attack and, you know, let the jury decide. I think I
20 presented that evidence.

21 Q. And also referencing Page 141 of the trial
22 transcript, so the State, going back through this,
23 specifically, is they keep referencing about what
24 makes Mr. Wallace a victim. You didn't believe that
25 was important to object to since that point,

L. Knox- Direct Examination by Mr. Phillips

111

1 specifically, at the heart of the issue of who is to
2 be believed in this case?

3 A. No, I do not object.

4 Q. Now, with this during this jury instructions or
5 prior to jury instructions and going with the
6 specific request of the defendant, was there any
7 reason why you didn't provide request that the trial
8 court provide a jury instruction on specific intent
9 to kill?

10 A. Yes. Based on my confidentiality with my client,
11 he wanted all or nothing. And he didn't believe that
12 the jury had enough evidence to convict him of
13 attempted murder so that request was not asked.

14 Q. And so, I'm not asking about lesser included
15 offenses, specifically request to an instruction on
16 specific intent to kill was later clarified in the
17 case, State versus King, shortly after this trial.
18 Was there any specific reason why you didn't request
19 that instruction?

20 A. No. I can't recall whether I had a specific
21 reason or not.

22 Q. Did it ever occur to you, occur to you to make
23 that request?

24 A. No.

25 Q. Now, where you'd said with the lesser included

1 offenses, you did have a conversation with Mr. Moore
2 and he specifically wanted all or nothing, no lesser
3 included offenses?

4 A. Yes. He -- he -- he -- he was so cocky and so
5 determined that he was going to win because he had
6 success in a prior case and he was rolling the dice
7 and he struck out. It's just that simple. He rolled
8 the dice.

9 Q. Now, when the trial court provide his, his jury
10 instructions and he provides instructions on intent,
11 was there any specific reason you didn't object to
12 the trial, the trial court instructions regarding a
13 lower standing general intent such as recklessness or
14 criminal negligence?

15 A. No, I did not object.

16 Q. Was any specific reason why?

17 A. No.

18 Q. And in hindsight now looking back at the case law
19 with State v. King, a specific instruction for
20 specific intent to kill were an objection as to this
21 general intent language, you would agree that that is
22 something that you could have requested and could've
23 objected to at trial in hindsight?

24 A. Well, hindsight I could have did a lot of things
25 different. I could not have taken this case looking

L. Knox- Direct Examination by Mr. Phillips

113

1 at it in hindsight. My client ---

2 MR. PHILLIPS: Would you hold on for a second?

3 MR. KNOX: Sure.

4 MR. PHILLIPS: Your Honor, I see that Mr. Moore
5 has stepped out. I don't know if he had to run to the
6 restroom or what but....

7 THE COURT: We'll give him a moment, otherwise,
8 we're gonna keep going or we gonna continue the
9 hearing.

10 MR. PHILLIPS: Understood, Your Honor. Give him
11 just a few. Thank you.

12 THE COURT: 'Cause he didn't alert the court why
13 he was stepping out, he just did.

14 MR. PHILLIPS: Yes, sir.

15 (Whereupon, the court give the applicant a few
16 moments)

17 MR. PHILLIPS: Thank you, Your Honor. We'll start
18 back.

19 THE COURT: All right. Just let the record reflect
20 ---

21 MR. MOORE: Thank you, sir.

22 THE COURT: --- Mr. Moore, he's back -- he had to
23 step out and is back on the vertical hearing. All
24 right. Mr. Phillips?

25 MR. PHILLIPS: Thank you, Your Honor.

1 Q. And Mr. Knox earlier when I was referring to
2 Pages 218 through 224 of the trial transcript where
3 the trial court's jury instructions, you would agree
4 that under the case law you could've object under --
5 you could have objected to the general intent
6 standards that were, that were provided instead of a
7 specific intent to kill standard?

8 A. Yes.

9 MR. PHILLIPS: No further questions, Your Honor.

10 THE COURT: Mr. Marto?

11 MS. MARTO: Yes, Your Honor.

12 **Cross-Examination by Mr. Marto:**

13 Q. That you for being here Mr. Knox. I appreciate
14 your patience. Now , you stated that you only met
15 with Mr. Moore one time and that was because Mr.
16 Moore left the state and give you a bad contact
17 information, is that correct?

18 A. You know, I met with Mr. Moore at the initial
19 hearing when I was retained. He gave me the
20 specifics of what was going on. Once I receive the
21 Rule 5 we had a meeting which lasted about five
22 hours, he, his wife, and I think that was a minor
23 child was present also. There was a telephone call
24 from Mr. When I informed him of the ruling from the
25 immunity hearing and after then he had gone silent.

1 He had given me a telephone number which I think was
2 his wife's telephone number. She was not answering
3 the call. In fact, I believe she had her number
4 changed because they were having some type of marital
5 problems. And I -- but I did hear from him again I
6 think it was today for trial, the day for trial. I
7 told him he needed to get his behind back in
8 Chesterfield County for the trial.

9 Q. Now, testimony from the victim about how he
10 previously wanted to injure or kill the applicant was
11 well brought out at both the immunity hearing and the
12 trial, correct?

13 A. Yes, it was.

14 Q. There was no dispute on that, correct?

15 A. No.

16 Q. Now, you received two 911 calls, correct, one
17 from applicant and one from somebody else?

18 A. Yes.

19 Q. And you didn't think that entering those at trial
20 was going to be useful because it would have been too
21 indicative given the fact that both Mr. Moore and the
22 cashier both testified or evidence ---

23 A. Well -- well, to me it was self-defense and I
24 don't think the phone calls could have added any
25 value to it.

1 Q. And was that also your position concerning
2 pictures of the knife that it wouldn't of added any
3 value at trial?

4 A. No. All that was on the video, evidence that I
5 received it was explained to me Mr. Moore what type
6 of knife it was. I think all of that was brought out
7 that it was a knife that was used in his trade in
8 business. So the pictures I don't think would've
9 added anything else.

10 Q. And any issues concerning alteration of a video
11 recordings was brought out at both hearings as well?

12 A. Yes. I was really concerned about that. And, you
13 know, earlier Mr. Moore made a statement that I did
14 not want to offend the solicitor. What he was asking
15 me to do in open court is to call the solicitor a
16 liar. And under my oath that I took as an attorney,
17 I would never call any lawyer, judge, court official
18 a liar on the record. That is something that you
19 just don't do. You don't have to be in cahoots with
20 anyone to do that. It's just not proper decorum for
21 a lawyer.

22 Q. Is there think about the videos that you thought
23 you could've investigated further or, otherwise,
24 brought out more at trial that you didn't?

25 A. No. I think we went over those videos at trial

1 frame by frame. The jury saw them. The court saw
2 them. So I think that was exhausted.

3 Q. Did you think that any of applicant's rights
4 under the South Carolina Victims Bill of Rights as a
5 prior victim was at all relevant here?

6 A. Not -- not relevant to my defense, no.

7 Q. Now, concerning the immunity hearing, did the
8 judge, do you recall make any determinations
9 concerning who was seemingly the aggressor and who
10 wasn't on the record?

11 A. I think Judge Henderson took an advisement after
12 the hearing was completed. And the next day I happen
13 to be in the courtroom and he gave his decision. I
14 can't remember exactly what it was and it may have
15 been that he thought my client was the aggressor.

16 A. Would you be surprised if he stated that on the
17 record at the hearing that he thought that Mr. Moore
18 was the aggressor in the situation and the individual
19 choking him did not or he claimed was choking did not
20 appear to be choking him but having quite a struggle
21 to pull Mr. Moore off of Mr. Wallace?

22 A. If that's on the record that's what it says, yes.

23 Q. And did you at the time think that the court
24 failed to make any fuller complete findings of fact
25 or conclusions of law concerning self-defense?

1 A. No. I think in my directed verdict I may have
2 mentioned that the State did not prove every element
3 of this case. And, obviously, the court did not buy
4 that and they sent it to the jury.

5 Q. Now, you had a brief discussion about whether you
6 wanted to request the lesser included offense
7 instruction, instruction on the record before the
8 jury was instructed, correct?

9 A. Yes. I had that conversation with my client.

10 Q. And both of you decided that it would be in your
11 best interest to not request that instruction?

12 A. Mr. Moore decided that. I -- Mr. Moore decided
13 that. Attorney Moore decided that.

14 Q. Okay. So that was his decision based upon, I
15 guess, prior experience?

16 A. Prior experience, yes.

17 Q. Now, did y'all ever contest whether or not Mr.
18 Moore intended to stab Mr. Wallace?

19 A. I believe that was bought up that he pulled the
20 knife out and he, and he stabbed him. Whether or not
21 he intended to or not, he stabbed him, I mean, you
22 know....

23 Q. But it was your defense at trial that he intended
24 to stab him but out of self-defense ---

25 A. No.

L. Knox- Cross-Examination by Ms. Marto

119

1 Q. --- not have maliciousness, correct? That was
2 the ultimate question for the jury?

3 A. Right. In order to repel the, he stabbed Mr.,
4 the victim in self-defense.

5 Q. And so your argument was never that he acted
6 negligently stabbing ---

7 A. No.

8 Q. --- or rather intended to ---

9 A. No. It wasn't a negligent act it was an
10 intentional act.

11 Q. Okay. Did you think that obtaining medical
12 records or photographs and then presented to the jury
13 or at the immunity hearing would've made any
14 difference?

15 A. No.

16 Q. His medical conditions were also brought up at
17 those hearings, correct?

18 A. Yes. Well, you know, the victim was flown out.
19 Mr. Moore walked to the police vehicle, sat in the
20 car, gave them the knife. He sought medical
21 treatment the day after so I didn't think that was
22 any relevance to that.

23 Q. So you -- you concluded that his injuries were
24 probably pretty minor given the fact that he could
25 walk out, talk to the police, get in the car and go

1 off on his own volition as opposed to what Mr.

2 Wallace dealt, correct?

3 A. Yes.

4 Q. Did you think that admission of incident reports

5 at the immunity hearing or trial about prior

6 incidents would have had effect?

7 A. No. I think the best evidence was Mr. Moore's

8 testimony ---

9 Q. That ---

10 A. --- about what had happened at those prior

11 hearings.

12 Q. And the general contents of those reports was

13 brought at both of the hearings, correct?

14 A. Yes.

15 Q. Now, did you think that there was anything

16 objectionable to asking, I believe it was Mr. Wallace

17 about at any time would you do anything that would

18 cause applicant to use deadly force against you, do

19 you think it was objection at the immunity hearing?

20 A. No. I didn't think that was objectionable.

21 Q. Did you think that deadly force would be a

22 difficult concept for Mr. Wallace to grasp or

23 otherwise, speak about ---

24 MR. PHILLIPS: Objection. That's speculation.

25 THE COURT: I'd overruled the objection. Go ahead,

1 Ms. Marto.

2 A. What was the question again?

3 Q. Did you think that the terms "deadly force" would
4 have been a difficult concept for Mr. Wallace to
5 testify concerning or given an opinion on?

6 A. Yes. It's a difficult thing for attorneys to
7 understand.

8 Q. Did you think that he could testify concerning
9 that ---

10 A. Probably not.

11 Q. But you didn't find anything objectionable in the
12 question?

13 A. No.

14 Q. And is that the same case with mutual combat?

15 A. The same thing with mutual combat.

16 Q. Did you think that any failure to move to
17 sequester the witnesses at either hearing had any
18 impact at trial or at the immunity hearing?

19 A. No. I, you know, as I said I don't know whether
20 or not the court on its own, off the record prior to
21 trial, said the witnesses would to be sequestered,
22 but on the record there was no motion. I did not
23 make a motion to have the witnesses sequestered. But
24 given that I don't think it made a difference anyway.

25 Q. Now, did you obtain the audio recording from the

1 summary court proceeding in 2014 against Mr. Wallace,
2 the booking report from Wallace being ordered to
3 jail?

4 A. Well, when I spoke with the State and the
5 magistrate court judge, I told there was not a
6 record. There was not a written record. There was
7 not a recording record. He did tell me what had
8 happened there and that a Pageland police officer was
9 there also. I spoke with the Pageland police officer
10 and he said it was a circus. It was a ruckus. And
11 that everybody including Mr. Moore acted like bats
12 out of hell. But as far as giving me a transcript,
13 there was no transcript to be given to me, at least,
14 upon my request.

15 Q. You were given enough information from others on
16 this issue, though, to think that that maybe wouldn't
17 be necessary if it existed, is that fair to say?

18 A. Well, I think that if one was existed I would
19 have subpoenaed that, but there was nothing to
20 subpoena. In Chesterfield County Magistrate's Court
21 is very informal. And not unless the parties ask for
22 a court reporter and paid for it, none will be
23 provided. Sometimes the judge may record himself and
24 other times there are no recording. I've had
25 situations where I tried to appeal a magistrate

1 decision and there's nothing to appeal because
2 there's no record. So, no, I don't there was a
3 record.

4 Q. So you didn't think there was any Batson
5 challenge to be raised, correct?

6 A. Not at all. I mean, no.

7 Q. And you thought that an EMS technician could
8 testify concerning an appearances of shock?

9 A. Yes. Based on his training as an EMS, yes.

10 Q. Okay. And he wouldn't need to be qualified as an
11 expert to do that?

12 A. Not at all.

13 Q. Is the same to be said for Sgt. Hutchinson when
14 he was asked for his opinion concerning the crime
15 scene reconstruction?

16 A. No. The same thing applies, yes.

17 Q. Was there ever any question as to whether or not
18 the incident occurred at McCormick's?

19 A. That the incident occurred? No. There was never
20 no question that it occurred. Now, different people
21 were there. If ten people were there, there would be
22 ten different opinions on how it occurred, but the
23 fact is that it did occur.

24 Q. And -- location of the blood on the floor, would
25 really have no bearing impacts at trial?

1 A. No. I mean, that, you know, that's really, you
2 know, grasping at straws at that point. There was
3 testimony given that he was stabbed. That he bleed.
4 There were pictures taken of him with blood on him.
5 So, no, with, you know, no, I didn't think it had any
6 bearing on it.

7 Q. Do you think it was inappropriate for Sgt.
8 Hutchinson to be asked who the victim in the case
9 was?

10 A. No. I don't think that was inappropriate.

11 Q. Even if he wasn't asked that, wouldn't -- would
12 the determination already be clear given who they
13 determined the victim is?

14 A. Yes. They, I think, in their call they said
15 that, that I think Mr. Wallace was the victim and
16 Mr., Mr. Moore was indicating to me that he was the
17 one that made the call. And I said plenty of times
18 that people who make calls turned out to be not the
19 victims and sometimes the defendant so I didn't think
20 it was relevant.

21 Q. Did you think there was anything objectionable in
22 the State asking a hypothetical for the officer to
23 them state who he thought the victim would be in that
24 case?

25 A. No.

1 Q. And then at the immunity hearing, did you think
2 there was anything objectionable under hearsay under
3 the confrontation clause where the State obtained
4 testimony from a deputy as to what the EMS had said
5 about Wallace's medical condition and airlift?

6 A. No. That was there from the evidence that he was
7 airlifted so, no, I don't think that was
8 objectionable.

9 MS. MARTO: One moment, Your Honor. No further
10 questions, Your Honor.

11 THE COURT: All right. Mr. Phillips, anything
12 else?

13 MR. KNOX: I can't hear him.

14 THE COURT: Mr. Phillips, anything else, sir.

15 MR. PHILLIPS: I apologize, Your Honor, I'm on
16 mute again. No, Your Honor.

17 THE COURT: All right, sir. Thank you, Mr. Knox.

18 MR. KNOX: May I be excused?

19 THE COURT: Any objection to this witness being
20 excused?

21 MS. MARTO: No, Your Honor.

22 MR. PHILLIPS: None, Your Honor.

23 THE COURT: All right. Thank you, Mr. Knox. Nice
24 to see you.

25 MR. KNOX: Nice seeing you again, judge.

1 THE COURT: All right. Mr. Phillips, what else
2 you got?

3 MR. PHILLIPS: We have no further witnesses. The
4 applicant has no further witnesses, Your Honor.

5 THE COURT: All right, sir. All right. Ms. Marto?

6 MS. MARTO: Yes, Your Honor, the state would call
7 Ms. Mary Johnson-Lee.

8 THE COURT: Okay. All right. Ms. Johnson-Lee, do
9 you swear or affirm to tell the truth, the whole
10 truth and nothing but the truth so help you God?

11 MRS. JOHNSON-LEE: I affirm.

12 THE COURT: Thank you. Your witness?

13 MS. MARTO: Thank you, Your Honor. Thank you for
14 being here. So patient.

15 MARY JOHNSON-LEE, first being
16 duly sworn, testified as follows:

17 Direct Examination by Ms. Marto:

18 Q. Now, why inserting the facts and challenge issue,
19 why did you decide to strike the individuals you did?

20 A. Juror 107 was struck because he had tattoos like
21 the defendant. Juror 124 was struck for the same
22 reason. Juror 143 was struck because he was friends
23 with the defendant and read Facebook. We had
24 Facebook postings that we had printed out from the
25 defendant which would be prejudicial such as saying

1 that Judge Henderson was in the State's pocket or
2 something there about.

3 MR. PHILLIPS: Which number was that?

4 A. Sorry?

5 MR. PHILLIPS: I apologize. What number?

6 A. I'm sorry. That was juror number 146 Jared
7 White. He said he was friends -- I've got written on
8 my notes, friends with defendant and read Facebook.
9 But I don't think he read that specific posting, but
10 that was something the defendant had posted on his
11 public post that anybody that anybody could pull.
12 Then juror number 71 was struck because he admitted
13 he had a prior record out of Lancaster County. It
14 wasn't something that would keep him off the jury,
15 but it was something that I did not want him serving
16 on, a jury and that's were the white males that were
17 struck. That was four, I believe. And then the
18 fifth juror struck was a female who actually, at that
19 time, was working -- well, I believe she still works
20 for Attorney Tonya Little and her mother-in-law is
21 with the public defender. She's the sister-in-law of
22 chief public defender, Matt Rivers.

23 Q. So you think that even if counsel had pursued a
24 Batson motion it would have been successful?

25 A. I believe so. Yeah, I believe it would've been

1 for the State, I'm sorry. I don't believe that
2 counsel would've won on a Baston motion.

3 Q. Okay. Now, what evidence did you have in this
4 case?

5 A. I beg the court's indulgence. In this particular
6 case there was the clerk from the store who called
7 911 who saw the defendant and the victim on the
8 floor. The defendant was on top of the victim. And
9 the second individual, Mr. Hooks, was actually
10 trying, according to her, pull the defendant off of
11 the victim. The victims testimony. Those videos.
12 The store video could not be downloaded for whatever
13 reason so the officers with the sheriff's office
14 actually took cell phones and recorded with their
15 cell phones. That's why they were four. And all
16 four were on one disk that was turned over at one
17 time. And the issue, and I think if you go back and
18 look at the transcript it should be in there, I
19 remember there was an issue where the defense
20 thinking, oh, you've changed up the video. We don't
21 have that. But once we put the defense disk in to
22 check it after court that one day, you actually, if
23 you waited all four videos were on that one disk.
24 Anyway, it was either three or four, whatever, all of
25 them were there on that one disk, I believe.

1 Q. To the best of your knowledge were any of the
2 videos altered?

3 A. Absolutely not. Not by me. Now, there was --
4 something did come up after court one day where and I
5 thought I was being accused by the defense, directly,
6 I thought I was, of changing or altering the video.
7 And so I did, obviously, did take exception to that.
8 I do not act unethically. So I did take exception to
9 that, obviously, and that's when we said give us your
10 disk that we gave you so we can put it in and play it
11 to show that all of the videos are on there.

12 Q. Do you recall any violation of the South Carolina
13 Victim's Bill of Rights concerning applicant as a
14 prior victim?

15 A. I do not know of any violations.

16 Q. Okay. Now, in your opinion concerning the
17 immunity hearing, do you recall whether full findings
18 of facts and conclusions of law were made?

19 A. I have my notes from the hearing, I mean, I
20 thought the judge had complied with whatever he was
21 required to do. I beg the court's indulgence. Do you
22 want me to find those specific notes? Q. Do you
23 recall whether or not those findings were made?

24 A. I think what he did was sufficient.

25 Q. Okay.

1 A. But that's my, my legal ---

2 MR. PHILLIPS: Objection. Your Honor ---

3 A. I said that's my ---

4 THE COURT: Hold on!

5 MR. PHILLIPS: Your Honor, I have to object ---

6 THE COURT: Hold on! All right. What's your
7 objection, Mr. Phillips?

8 MR. PHILLIPS: Specifically, she's providing her
9 opinion about whether the judge provided specific
10 findings of fact or legal conclusions at a prior
11 hearing based on her notes of how she felt. This is
12 a Post-conviction relief matter specifically for
13 ineffective assistance of counsel. Her specific
14 feeling about whether the judge did or did not is not
15 for her to say but for, Your Honor, to review the
16 record and the testimony of the defense counsel's
17 specific mindset as far as what we cross-examined on
18 or direct examine since I called him as a witness,
19 that it wouldn't be proper for her to provide this
20 testimony.

21 THE COURT: Well, I mean, if she wants to say she
22 was satisfied with the court ruling or how the court
23 ruled, I don't have a problem with that. But just
24 your next question, Ms. Marto.

25 MS. MARTO: Thank you, Your Honor.

1 Q. Now, do you recall whether any evidence was
2 withheld from the defense in this case?

3 A. Absolutely not. I mean, we always keep going and
4 if additional evidence becomes available, we
5 immediately try to get that to the defense and I
6 think it should be the transcript of the guy who
7 actually pulled the defendant off of the victim was
8 Steven Hooks, but we didn't know his last name for a
9 while. And I actually told law enforcement go find
10 him. And anyway, it ended up they did get him. Did
11 get an interview. And it should be in the
12 transcript, 'cause within like thirty minutes of my
13 getting that actual interview, I immediately turn
14 that over to Mr. Knox.

15 Q. So do you have like a open file policy as
16 mentioned ---

17 A. Back then it was it an open file policy. Now,
18 now I do the domestic violence cases as so I can't
19 just -- 'cause literally the open file policy back
20 then was if an attorney wanted to look at a file and
21 with non-DV files now, like at court appearances,
22 defense, especially, the public defender's office
23 will pick up our file and open it up and look through
24 it. But with the domestic violence files now, I
25 don't. But with this back then, if that had been an

1 issue, I mean, yeah, there'd be no problem with it.

2 Q. You recall whether the witnesses were sequestered
3 in this case?

4 A. I do not recall.

5 Q. You with think that whether they were or not it
6 would have made a difference and the testimony given
7 by the State witnesses?

8 A. I don't think so because the videos that the
9 officers made keep themselves and the, um, like the
10 store clerk actually had a written statement, for
11 example, and if she testified any differently Mr.
12 Knox certainly would've impeached her with her
13 written statement.

14 Q. Well, were the surveillance videos, in your
15 opinion, the most compelling piece of evidence in the
16 case?

17 A. I think they were very compelling. They backed
18 up what the victim testified to I thought. It was
19 the best available evidence we had to substantiate
20 what Mr. Wallace testified to, that and the testimony
21 of the store clerk.

22 MS. MARTO: No further questions, Your Honor.

23 THE COURT: All right. Mr. Phillips?

24 MR. PHILLIPS: Thank you, Your Honor.

25 Cross-Examination by Mr. Phillips:

1 Q. Ms. Lee, specifically, as to the sequestration,
2 you don't have any knowledge as far as whether there
3 was a specific order, right? The judge didn't
4 sequester the witnesses?

5 A. I do not recall in this case.

6 Q. And you would agree that credibility was a big
7 issue in this case?

8 A. The credibility is an issue in every case.

9 Q. That's right. Especially, in this one?

10 A. For me it's the same in every case.

11 Q. Do you know -- again -- okay. Specifically, as
12 sequestration is concerned where the State, yourself,
13 had elicited additional other witness testimony, you
14 were present for that and so you don't believe that
15 other witnesses would have been able to hear it?

16 A. Would have been able to hear what?

17 Q. In other words, do you have any knowledge that
18 any of the witnesses that testified were not able to
19 hear the other witnesses testify? In other words, do
20 you have any knowledge that they weren't sitting
21 there being able to listen to the testimony -- the
22 whole point of sequestration, do you have any
23 knowledge as far as where the witnesses were the
24 entire time?

25 A. I do not recall if they were sequestered, I'm

1 sorry.

2 Q. As far as the store surveillance you would admit
3 that those videos are very brief and very difficult
4 to see? There's not -- it's not a good clear picture
5 of exactly what happened, you'd agree to that, right?

6 A. It's not an up close picture of exactly what
7 happened. But there was enough there to definitely
8 corroborate, in my opinion, what the victim described
9 and what and what the store clerk described.

10 Q. How long do you say that those videos are?

11 A. It's been, what, six years since I've looked at
12 those and that was in court. So I do not recall
13 right offhand, I'm sorry.

14 Q. And those were all admitted into evidence?

15 A. The disk was admitted into evidence and I think
16 that we're all on that same disk.

17 MR. PHILLIPS: Your Honor, just for, just for the
18 air of preservation purposes and appellate record, if
19 it -- if these videos were not taken under judicial,
20 it doesn't fall under the umbrella of judicial
21 notice, we would like to have them entered as
22 applicant's exhibit, Your Honor, just for the full
23 court's review.

24 THE COURT: These -- were these brought in
25 previously or....

1 MRS. JOHNSON-LEE: Yes, sir, they're just a disk
2 -- yes, they are already in. They were in during the
3 trial.

4 THE COURT: But not for the purposes of this
5 hearing, they've not been previously raised as an
6 exhibit or offered as exhibit.

7 MR. PHILLIPS: No, Your Honor.

8 THE COURT: All right. And Mr. Phillips, you want
9 the court to take notice of such and be able to
10 review such videos?

11 MR. PHILLIPS: Yes, Your Honor.

12 THE COURT: All right. Ms. Marto, any objections?

13 MS. MARTO: No objection, Your Honor.

14 THE COURT: All right. So noted.

15 A. And I need to add one additional thing, there was
16 an issue at trial and I don't know if this was
17 discussed on the record or off the record, so I don't
18 know if it's in the transcript. But I know that at
19 one time I wanted the sound turned all the way down
20 because since the officers recording on their cell
21 phones you could hear them actually speaking. But I
22 think there was an issue with, I think the defense
23 may wanted the sound turned up a little bit so I'm
24 not sure if the jury heard the officers talking or
25 not, I don't recall. But the the transcript should

1 reflect whether they....I'm guessing.

2 Q. And how many attempted murder charges or cases
3 have you tried?

4 A. Oh, gosh, I'm not sure. I've tried murder;
5 attempted murder; CSC first; burglary, first; DV,
6 first; ABHAN; drug distribution; drug trafficking;
7 PWID; grand larceny ---

8 Q. Well, as to attempted murder, how many do you
9 think more than ten?

10 A. As far as going to trial, I would say less, ten or
11 less, I would say going to trial. I don't want to
12 lie to you. I've never been one of those attorneys
13 that keeps up with all those number so I can brag
14 about it down the road. I really don't. When I
15 finished my case, I'm, I'm moving on.

16 Q. Understood. But you agree that attempted murder
17 is a specific intent crime?

18 A. It is.

19 Q. And that ---

20 A. And I don't know if that ruling came out after
21 this case or before this case. I think that ruling
22 may have come in after this case about it being a --
23 I don't recall, I'm thinking it did, but you guys are
24 the experts on that.

25 Q. Right. And in State vs. King, ultimately, the

1 lawyer can make that argument the who is able to get
2 that specific ruling in that case for that opinion.
3 But you agree that attempted murder is a specific
4 intent crime?

5 A. It is now. I can't say what it was then. I know
6 it is now. Is that correct? I believe it is.

7 Q. And you agree that what the facts that were
8 presented was that Mr. Wallace had previously
9 attacked Mr. Moore?

10 A. That was not my understanding. My understanding
11 of the multiple meetings I've had with Mr. Wallace
12 and I'm not -- I haven't read this transcript because
13 I just kind of looking at it today when I got here.
14 But Mr. Wallace always told me that, apparently, he
15 lived with, at some point in time, the defendant's
16 mother-in-law or girlfriend's mother, whatever that
17 relationship was, and the defendant had gotten a
18 stick after him. So he then got the axe handle and
19 chased the defendant, and he then, when he couldn't
20 catch the defendant, he then the window and busted
21 the window out.

22 Q. And I think his specific words was he's gonna
23 beat his brain in?

24 A. I don't recall the specific words. But, yeah,
25 he's an old school kind of fellow. And when you get

1 a stick after him, he was gonna, I guess, he was
2 gonna respond in kind. I'm not sure.

3 Q. Now, when you say you think about a stick, are
4 you 100% positive on that? You can testify under
5 oath ---

6 A. I would think ---

7 Q. --- that's exactly right?

8 A. I'mma 100% that Mr. Wallace told me the defendant
9 got a stick after him. Now, I don't know what size
10 stick, if's it's a walking stick. I don't know if
11 it's a stick off a tree. I don't know.

12 Q. Now, this is referring to the 2014 incident?

13 A. Whatever incident that had caused, you know,
14 caused this bad blood to begin with.

15 Q. Were you present when Judge Henderson issued the
16 ruling the following day?

17 A. I was. I got notes from the ruling.

18 Q. Was Mr. Moore present?

19 A. I do not recall. I can check my notes to see if
20 I wrote it down.

21 Q. Well, while you're checking your notes, was there
22 any other specific findings he presented, a written
23 order? Did he go through the elements of self-
24 defense that's not included in the transcript?

25 A. That's what I was trying to look for earlier to,

1 to answer about that. A beg the court's indulgence.

2 THE COURT: Yes, ma'am.

3 A. The stand your ground hearing it looks like it
4 was on February 17, 2016. I got that the judge
5 denied the request for immunity. He said that the
6 evidence is that, I can't read my handwriting -
7 anybody knows me knows it's really bad then - the
8 evidence that it admitted "slap" was not of nature to
9 make defendant that needed to avoid death or get
10 bodily injury. In other words, the judge was saying
11 that the victim slapping him wasn't enough to make
12 Mr. Moore think that he needed to stab him in order
13 to avoid being killed or suffering bodily injury.
14 And he said, um, found rather that was something to
15 be submitted to the jury as one of potential jury
16 question. And then I've got set April 4th, whatever
17 that is. That's what my notes say.

18 Q. And as far as the arguments that are presented to
19 the judge about it being akin to summary judgment,
20 the, again, let me -- the arguments about it being a
21 reasonableness standard, that's not the correct legal
22 standard presented in an immunity hearing, you would
23 agree to that, correct?

24 A. I do not know. That was not argument. I think
25 the deputy solicitor may have argued that. I've got

1 some notes here about the general assembly codifying
2 the Castle Doctrine, etc. And then I just can't --
3 Yeah, Kernard Redmond did the closing. So I can't
4 say I agree or disagree without my doing my own
5 research. I mean, I think that would not be proper
6 for me to say I agree when I don't know 100% certain.
7 That's only for the judge to decide.

8 MR. PHILLIPS: No further questions, Your Honor.

9 THE COURT: All right. Anything else, Ms. Marto?

10 MS. MARTO: Yes. Just briefly, Your Honor.

11 **Redirect Examination by Ms. Marto:**

12 Q. This trial occurred in 2016?

13 A. I think so, yes.

14 THE COURT: Would you -- would you repeat your
15 question, you went out on me?

16 Q. Sorry, I said this trial occurred in 2016,
17 correct?

18 A. And I said that is correct.

19 Q. And would you be surprised to find out State
20 versus King was decided in 2017?

21 A. Now, was that Tyrone King? State vs. ---

22 Q. I'm not sure ---

23 A. --- Tyrone King, isn't that Marlboro County?

24 Assistant Solicitor Mia David who is now the, um, if
25 that is the same case, she's now the chief magistrate

1 in Marlboro County tried that case. I actually sat
2 with her for that trial so I'm familiar with that
3 case.

4 MR. PHILLIPS: This is Rakeem King.

5 A. Different one.

6 MR. PHILLIPS: Out of Charleston County. A
7 different case.

8 A. I'm not familiar.

9 MS. MARTO: No further questions, Your Honor.

10 THE COURT: All right. Anything else?

11 MS. MARTO: No further witnesses, Your Honor.

12 THE COURT: All right. If there's nothing further,
13 any closing statement?

14 MR. PHILLIPS: Your Honor, If I may. I say in
15 these PCR cases sometimes it's easier to submit
16 proposed orders outlining the issues and the law. I
17 understand giving a closing certainly can help
18 sometimes, Your Honor, frames some things. But in
19 PCR I've found, and of course, it's Your Honors
20 discretion, that proposed orders outlining everything
21 sometimes it's easier for the court digest when we
22 have a significant number of issues.

23 THE COURT: I don't have any objections to, to
24 receiving the proposed orders and if there's
25 something you want to tell, though, before we close,

1 obviously, I'mma have to take this under advisement,
2 'cause I don't have the exhibits. The exhibits have
3 to be sent to me and I want to look at all of those.
4 And we've delved into a number of issues that I've
5 got to look at as well.

6 MR. PHILLIPS: Yes, Your Honor.

7 THE COURT: All right.

8 MR. PHILLIPS: Specifically, we just believe that
9 the evidence presented and testimony during this
10 hearing, again, as we stated at the beginning of the
11 hearing, specifically, that trial counsel's denied,
12 trial counsel's representation denied applicant's
13 right to effective assistance of counsel as
14 guaranteed by the 6th and 14th Amendments to the United
15 States Constitution Article I, Sections 3 and 14 of
16 South Carolina Constitution as well as appellate
17 counsel's representation denied his right to
18 effective assistance of counsel as guaranteed by the
19 6th and 14th Amendments. United States Constitution
20 and Article 1 and Section 3 and 14 on the South
21 Carolina Constitution. And again, we'd be happy to
22 provide specific arguments. Our -- our position is
23 that each of the allegations proves both prongs of
24 deficient performance as well as prejudice that trial
25 counsel's and as well as appellate counsel's

1 unreasonably deficient performance fell below an
2 objective standard of reasonableness under prevailing
3 professional norms. And the second, and satisfy the
4 second prong, and ultimately prejudiced applicant
5 because there's a reasonable probability that but for
6 trial counsel and appellate counsel errors that the
7 results of the proceedings would have been different.

8 THE COURT: All right, sir.

9 MR. PHILLIPS: Thank you, Your Honor.

10 THE COURT: Ms. Marto?

11 MS. MARTO: Yes, Your Honor. And we will argue
12 that based upon all the allegations raised here today
13 the applicant has not met its burden of proof in
14 showing that the trial or appellate counsels were
15 deficient on these grounds. And further, even if
16 this court would find trial or appellate counsel
17 deficient on a ground or multiple ground phrase, we
18 would argue that none of the, none of the
19 deficiencies that were raised today would have
20 prejudiced Mr. Moore or change the results of that
21 proceeding for the appellate conclusion. And so
22 because of that, we would request you deny relief in
23 this case. Thank you.

24 THE COURT: All right. Ms. Marto, do you have any
25 objections to submitting proposed orders as well?

1 MS. MARTO: No, Your Honor.

2 THE COURT: All right. Okay. All right. All
3 right. With that said the matter will be taken under
4 advisement. I'll wait the exhibits and also await
5 for the proposed orders. If I need anything further
6 I'll contact counsel. All right.

7 MS. MARTO: Thank you, Your Honor.

8 MR. PHILLIPS: As far as -- sorry, Your Honor. A
9 housekeeping matter, as far as the proposed orders,
10 do you have a specific time period?

11 THE COURT: No, sir. You tell me.

12 MR. PHILLIPS: Right now given, just being candid
13 with, Your Honor, I've had now four different PCR
14 hearings here in the last few weeks, everything is
15 getting scheduled on my general sessions and
16 magistrate court where as, you know, Your Honor,
17 everything's kind pulled wide open right now, so I'd
18 request as much leniency as possible on a deadline.
19 I want to make sure I provide Mr. Moore with a
20 thoroughal proposing order.

21 THE COURT: It's your case, you tell me. So you
22 know what you're up against and what you got going on
23 and so I'm flexible.

24 MR. PHILLIPS: If Your Honor would give us 60 days
25 and if something comes up a trial or two get

1 scheduled, I can then notify Your Honor.

2 THE COURT: All right. And I'll make a note of 60
3 days. And then if you need anything in the interim,
4 but do get those exhibits to me.

5 MR. PHILLIPS: I will get them to you tonight,
6 Your Honor.

7 THE COURT: All right. No hurry on that, Mr.
8 Phillips. I mean, since we gonna have some time.
9 But some time this week.

10 MR. PHILLIPS: Yes, Your Honor.

11 THE COURT: Okay. All right. All right. Mr.
12 Moore, good luck to you, sir. All adjourn the
13 hearing at this time.

14 MR. PHILLIPS: Thank you.

15 THE COURT: All right. Thank you.

16 MS. MARTO: Thank you, Your Honor.

17 (CONCLUSION OF HEARING HELD ON MARCH 14, 2023)

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CERTIFICATE

I, the undersigned, Lisa S. Carter, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Fourth Circuit for Darlington County, South Carolina, on the 14th day of March, 2022. The hearing was held through WebEx.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

Lisa S. Carter

Lisa Carter

Circuit Court Reporter

July 25, 2023

STATE OF SOUTH CAROLINA)
COUNTY OF CHESTERFIELD)
) IN THE COURT OF COMMON PLEAS
) FOR THE FOURTH JUDICIAL CIRCUIT

Gary Moore, #367744,
Applicant,

Case No.: 2020-CP-13-090

v.

ORDER OF DISMISSAL

State of South Carolina,
Respondent.

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

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

Procedural History

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

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

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

Summary of Relevant Facts

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

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attack him.¹ (R. 273-77).

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

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

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

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

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

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

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

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

Page 4 of 42

ne footage was admitted
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Current Action Before this Court

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

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

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

- vi. “Trial Counsel failed to request a jury instruction regarding specific intent to kill pursuant to *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017).”
- vii. “Trial Counsel failed to object to the Trial Court’s confusing jury instructions regarding intent where the charged offense required the specific intent to kill, yet where the instruction included language of far lower, “general intent” standards such as recklessness and criminal negligence. *See e.g., State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017).”
- viii. “Trial Counsel failed to investigate and obtain any medical records or photographs for diagnosis and treatment of Applicant’s injuries by either the detention center of Applicant’s personal physician where the Applicant indicated at his immunity hearing that he was seen by both where testifying about injuries he received at the hands of his attacker, and where the State elicited testimony to the contrary from an officer during Applicant’s trial. *See Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).”
- ix. “Trial Counsel failed to use the Incident Report dated 04/2014 during either the immunity hearing or the trial where Applicant was attacked not only by the ‘victim’ Wallace in the present case but also by several other assailants in concert with Wallace at this time, and where Applicant believed the third party pulling him from behind while he fought with Wallace in the present case was likewise working in concert with Wallace to attack him when showing Applicant’s response to the attack was reasonable.”
- x. “Trial Counsel failed to object during the immunity hearing when the State elicited legal opinion testimony from a lay witness striking at the heart of the ultimate issue of self-defense by asking, “. . . at any time did you do anything that would cause [Applicant] to use deadly force against you?”
- xi. “Trial Counsel failed to object during the immunity hearing when the State elicited legal opinion testimony from a lay witness striking at the heart of the ultimate issue of self-defense by asking if Applicant was involved in ‘what we call mutual combat?’”
- xii. “Trial Counsel failed to move to sequester any of the witnesses for either immunity hearing or trial where the State repeatedly referred to prior

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witness testimony when questioning later witnesses.”

- xiii. “Trial Counsel failed to obtain either the audio recording from Applicant’s civil summary court proceeding in 2014 against Wallace, or the booking report from Wallace being ordered to jail by the Magistrate Judge for attempting to assault Applicant at the hearing where Wallace denied details of the incident at Applicant’s present trial, and where the deputy denied details of the incident at Applicant’s present trial, and where the deputy denied any knowledge of the incident at the present trial as well.”
- xiv. “Trial Counsel failed to quash the jury pursuant to Batson where the State utilized four (4) of its five (5) statutory strikes to strike white males from the petit jury.”
- xv. “Trial Counsel failed to object to Rules 701 and 702, SCRE, or *Ford v. Watson*, to medical opinion testimony by the EMS technician regarding medical signs and appearances of shock, as well as whether certain wounds were consistent with those needing advanced life support where the State never offered the witness as an expert in the field, no *voir dire* of the witness was performed, and the trial judge made no findings qualifying the witness as an expert required under his gatekeeping role.”
- xvi. “Trial Counsel failed to object under Rules 701 and 702, SCRE, and *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) to opinion testimony of Sgt. Hutchinson regarding crime scene reconstruction where the State gave leading questions suggesting specifically where in McCormick’s Grocery the fight started based upon location of blood on the floor.”
- xvii. “Trial Counsel failed to object as both leading and giving opinion testimony on an ultimate issue in fact when Sgt. Hutchinson was asked, ‘In looking at the case as a whole, who was the victim in this case?’ to which he answered, ‘In my opinion, would be Mr. Wallace.’”
- xviii. “Trial Counsel failed to object under Rule 701 and 702 to Inv. Tim Perry’s testimony on redirect examination when the State elicited opinion testimony on whether person in a given scenario would be deemed a ‘victim,’ where the facts were similar to the present case, where Inv. Perry was not qualified as an expert witness, and where the opinion testimony touched on the ultimate issue in the case.”
- xix. “Trial Counsel failed to object under hearsay and the Sixth Amendment Confrontation Clause during the immunity hearing where the State obtained testimony from a deputy as to what an EMS technician allegedly said about Wallace’s medical condition and subsequent airlift to a hospital in Charlotte, and where the deputy had no first-hand knowledge of either.”

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

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142 (1991).”

- a. “Appellate Counsel’s acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:”
 - i. “Appellate Counsel failed to file a Petition for Rehearing in the Court of Appeals to preserve Applicant’s ability to file a Petition for Writ of Certiorari to the Court of Appeals in the South Carolina Supreme Court on the issues of whether the Trial Court erred in finding Applicant was not entitled to immunity from prosecution under the Protection of Persons and Property Act, whether the Trial Court erred by failing to grant Applicant’s motion for a direct verdict, and whether the Trial Court erred in his response to a jury question.”
 - ii. “In the event Trial Counsel properly preserved the issue of whether the Trial Court applied the incorrect evidentiary standard on a misunderstanding and misapplication of *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) in his closing statement to the Trial Counsel at the immunity hearing, Appellate Counsel failed to raise and argue the issue of the Trial Court applying an incorrect evidentiary standard, rather than making findings of fact and law based upon the preponderance of the evidence standard as required by law. *See, e.g., State v. Cervantes-Pavon*, 426 S.C. 442, 827 S.E.2d 564 (2019).”
 - iii. “In the event Trial Counsel properly preserved the issue of whether the Trial Court failed to make full and complete findings of fact and conclusions of law for the elements of self-defense as applied under a claim pursuant to the Protection of Persons and Property Act at the immunity hearing, Appellate Counsel failed to raise and argue this issue of the Trial Counsel’s failure to make full and complete findings of fact and conclusions of law for the elements of self-defense.”

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

Summary of the Testimony

Appellate Counsel Testimony

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

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

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

Applicant Testimony

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

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

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

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

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

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

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

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

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

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

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

Trial Counsel Testimony

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

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

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

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

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

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

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

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changed the length of the video.

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

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

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

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

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

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

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

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

Prosecutor Testimony

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

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

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

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

Findings of Fact and Conclusions of Law

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

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

Ineffective Assistance of Counsel

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

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

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

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

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

Failure to Investigate

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

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

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

Victim's Prior Statements

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

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

911 Audio

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

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

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

Pictures of Knife

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

Video Recordings

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

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

Victim's Bill of Rights

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

Violation of Victim's Bill of Rights

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

Incorrect Evidentiary Standard

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

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

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

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

(R. 380).

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

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Failure to Object to Immunity Hearing Findings

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

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

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

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

Failure to Request Lesser-Included Instructions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Medical Records/Photographs

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

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

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

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

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Failure to Use 04/2014 Incident Report

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

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

Failure to Object to Legal Opinion Re: Deadly Force

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

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

Failure to Object to Legal Opinion Re: Mutual Combat

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

Move to Sequester

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

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

Failure to Obtain Audio Recording from Prior Civil Action

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

Batson Motion

Applicant alleges Counsel was ineffective for failing "to quash the jury pursuant to Batson where the State utilized four (4) of its five (5) statutory strikes to strike white males from the petit jury." "The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). "The purposes of *Batson* and its progeny are to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venire person's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." *State v. Haigler*, 334 S.C. 623, 628-29, 515 S.E.2d 815, 818 (2000).

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

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

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

514 U.S. at 767.

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

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

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

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

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

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

Failure to Object to Medical Opinion Testimony

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

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

into shock.

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

Failure to Object to Opinion Testimony re: Crime Scene Reconstruction

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

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

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

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

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

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

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

Failure to Object to Victim's Medical Condition

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

Ineffective Assistance of Appellate Counsel

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

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

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

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

Petition for Rehearing

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

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

Evidentiary Standard Given at Immunity Hearing

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

Self-Defense Findings

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

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

Conclusion

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

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

IT IS THEREFORE ORDERED:

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

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

MICHAEL S. HOLT
Presiding Judge
Fourth Judicial Circuit

Prisoner, South Carolina.

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THE STATE OF SOUTH CAROLINA)

COUNTY OF CHESTERFIELD)

Gary Moore,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

FOURTH JUDICIAL CIRCUIT

Case No.: 2020-CP-13-090

MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59(E), SCRPCAUG -3 A 9:17
Christy E. Gaddy
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.**TO: The Honorable Michael S. Holt**

The Applicant, by and through the undersigned Counsel, moves this Court to alter or amend the Order of Dismissal filed in the above-captioned case on July 18, 2022, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Rule 59(e), SCRE; U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14. In support of this motion, Applicant submits the following arguments and does not abandon or waive any previous arguments or issues raised in the prior pleadings, proposed orders, and evidentiary hearing in this PCR action:

- (1) Applicant incorporates by reference the issues and arguments raised in Applicant's Proposed Order Granting Applicant Post-Conviction Relief as if fully set forth verbatim into this motion. See (Attachment A).
- (2) Respectfully, although the Court allowed the parties to submit Proposed Orders, the procedure followed by this Court denied Applicant an opportunity to have the PCR tolling issue adjudicated by an independent judicial officer in violation of the separation of powers doctrine. See S.C. Art. I, § 8. Specifically, the Court did not provide the State with any basis for denying Applicant's claims other than

delegating the responsibility of drafting a proposed order of dismissal to the parties. The Court adopted the State's adversarial proposed Order of Dismissal despite that this independent judicial function cannot be delegated to an executive agency without providing specific instructions and rationale for omitting findings of fact and/or denying each claim. *See generally Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) (holding, "Pursuant to S.C. Code Ann. § 17-27-80 . . . , the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented.").

- (3) The Order of Dismissal fails to properly address that Trial Counsel was ineffective in failing to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense for the following reasons:
 - (a) Failure to interview any of the potential witnesses from the incident in this case or the prior incidents with Mr. Wallace.
 - (b) Failure to obtain the incident reports from the prior incidents with Mr. Wallace and statements made Mr. Wallace of his intent to injure and kill Applicant. For example, Trial Counsel failed to obtain either the audio recording from Applicant's summary court proceeding in 2014 against Mr. Wallace. Officer Hutchinson testified that he had never seen Mr. Wallace before and denied knowing anything about his conduct at the prior hearing in Magistrate Court (despite the prior testimony from Mr. Wallace indicating Officer Hutchinson was present when he was removed from the courtroom). (Immunity Ruling Transcript, pages 98 and 103).

where Applicant was attacked not only by the "victim" Wallace in the present case but also by several other assailants in concert with Wallace at that time, and where Applicant believed the third party pulling him from behind while he fought with Wallace in the present case was likewise working in concert with Wallace to attack him when showing Applicant's response to the attack was reasonable.

- (8) The Order of Dismissal fails to properly address that Trial Counsel failed to object during the immunity hearing when the State elicited legal opinion testimony from a lay witness striking at the heart of the ultimate issue of self-defense by asking, "... at anytime did you do anything that would cause [Applicant] to use deadly force against you?"
- (9) The Order of Dismissal fails to properly address that Trial Counsel failed to object during the immunity hearing when the State elicited legal opinion testimony from a lay witness striking at the heart of the ultimate issue of self-defense by asking if Applicant was involved in "what we call mutual combat?"
- (10) The Order of Dismissal fails to properly address that Trial Counsel failed to object to the Trial Court's application of an incorrect evidentiary standard based upon a misunderstanding and misapplication of *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) as advanced by the State, rather than making findings of fact and conclusions of law based upon the preponderance of the evidence standard as required by law.
- (11) The Order of Dismissal fails to properly address that Trial Counsel failed to object to the Trial Court's failure to make full and complete findings of fact and conclusions of law for the elements of self-defense as applied under a claim

pursuant to the Protection of Persons and Property Act.

- (12) The Order of Dismissal fails to properly address that Trial Counsel failed to object pursuant to Rules 701 and 702, SCRE, or *Ford v. Watson*, to medical opinion testimony by the EMS technician regarding medical signs and appearances of shock, as well as whether certain wounds were consistent with those needing advanced life support where the State never offered the witness as an expert in any field, no *voir dire* of the witness was performed, and the trial judge made no findings qualifying the witness as an expert required under his gatekeeping role.
- (13) The Order of Dismissal fails to properly address that Trial Counsel failed to object under Rules 701 and 702, SCRE, and *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) to opinion testimony of Sgt. Hutchinson regarding crime scene reconstruction where the State gave leading questions suggesting specifically where in McCormick's Grocery the fight started based upon location of blood on the floor.
- (14) The Order of Dismissal fails to properly address that Trial Counsel failed to object as both leading and giving opinion testimony on an ultimate issue in fact when Sgt. Hutchinson was asked, "In looking at the case as a whole, who was the victim in this case?" to which he answered, "In my opinion, would be Mr. Wallace."
- (15) The Order of Dismissal fails to properly address that Trial counsel failed to object under Rules 701 and 702 to Investigator Tim Perry's testimony on redirect examination when the State elicited opinion testimony on whether a person in a given scenario would be deemed a "victim," where the facts were similar to the present case, where Inv. Perry was not qualified as an expert witness, and where

the opinion testimony touched on the ultimate issue in the case.

- (16) The Order of Dismissal fails to properly address that Trial Counsel failed to request a jury instruction regarding specific intent to kill pursuant to *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017).
- (17) The Order of Dismissal fails to properly address that Trial Counsel failed to object to prohibit jury instructions regarding implied intent and malice.
- (18) The Order of Dismissal fails to properly address that Trial Counsel failed to object to the Trial Court's confusing jury instructions regarding intent where the charged offense required the specific intent to kill, yet where the instruction included language of far lower, "general intent" standards such as recklessness and criminal negligence.

Based on the testimony and evidence presented at the evidentiary hearing, Applicant has established constitutional violations and deprivations that would require post-conviction relief. Specifically, Trial Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. See *Strickland*, 466 U.S. at 687-88. Trial Counsel's deficient performance also prejudiced Applicant because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). Accordingly, Trial Counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14.

Therefore, this Court should reconsider its Order of Dismissal, withdraw that order, enter an Order Granting Applicant Post-Conviction Relief.

CONCLUSION

Based on the foregoing reasons, the undersigned Counsel respectfully requests this Court reconsider the Order of Dismissal, withdraw that order, enter an Order Granting Applicant Post-Conviction Relief allowing him to receive a new trial.

IT IS SO MOVED.

Respectfully submitted,

s/ Dayne Phillips


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ATTORNEY FOR THE APPLICANT

July 28, 2022

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Christy E. Gaddy
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

ATTACHMENT

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CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHESTERFIELD	)	FOURTH JUDICIAL CIRCUIT
	)	
Gary Moore,	)	Case No.: 2020-CP-13-090
	)	
Applicant,	)	
	)	
v.	)	ORDER GRANTING APPLICANT
	)	POST-CONVICTION RELIEF
State of South Carolina,	)	
	)	
Respondent.	)	

This matter comes before the Court on Gary Moore's ("Applicant") application for Post-Conviction Relief (PCR). Applicant appeared before the Court on March 14, 2022, for a virtual hearing via WebEx on the above-captioned PCR action. Dayne Phillips represent Applicant, and Assistant Attorney General Chelsey Marto represented Respondent. Trial Counsel Larry Knox, Appellate Counsel Tricia Blancette, Prosecutor Mary Thomas Johnson-Lee, and Applicant testified at the evidentiary hearing.

At the close of evidence and hearing arguments from counsel, the PCR Court requested that the parties submit proposed orders for his review and consideration. After reviewing the proposed orders submitted by the parties and weighing the evidence presented at the hearing, this Court grants Applicant's PCR application requesting a new trial based on ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

PROCEDURAL HISTORY

On December 1, 2015, the Chesterfield County Grand Jury indicted Applicant for Attempted Murder (2015-GS-13-0398).

On February 17–18, 2016, Applicant appeared before the Honorable Roger E. Henderson for an immunity hearing¹ pursuant to Section 16-11-440 of the South Carolina Code of Laws (Protection of Persons and Property Act). Judge Henderson ultimately denied Applicant's motion for immunity from prosecution under the Act.

On April 5–6, 2016, Applicant proceeded to trial before the Honorable Paul M. Burch and a jury. Larry Knox represented Applicant, and Solicitors Mary Thomas-Lee and Kenard Redmond prosecuted the case on behalf of the State. The jury returned a verdict of guilty. The Trial Court subsequently sentenced Applicant to eighteen (18) years imprisonment on April 11, 2016.

On June 26, 2019, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. *State v. Moore*, 2019-UP-234 (S.C. Ct. App. filed June 26, 2019). Tricia Blanchette represented Applicant, and Assistant Attorney General Mark Farthing represented the State on Direct Appeal.

On June 27, 2020, Applicant filed his PCR application, alleging ineffective assistance of counsel. The Respondent filed its Return on January 4, 2021. Applicant subsequently filed an amended PCR application on August 20, 2021, alleging:

Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. See S.C. Code § 17-27-20(A)(1), (4), and (6). Specifically, Trial Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984).

Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and

¹ *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011).

Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. Specifically, Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991).

Specifically, Applicant alleged the following acts or omissions of ineffective assistance of Trial Counsel:

- (1) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. See *Wiggins v. Smith*, 539 U.S. 510 (2003).
 - a. Counsel's failure to investigate and present the Victim's prior statements that he wanted to injure / kill Applicant.
 - b. Counsel's failure to investigate and present the 911 audio recording to discredit the credibility of the State's witnesses and arguments.
 - c. Counsel's failure to investigate and present pictures of the knife in comparison to the bodycamera video recording to discredit the credibility of the State's witnesses and arguments.
 - d. Counsel's failure to investigate whether the video recordings admitted at trial had been altered.
- (2) Counsel's failure to investigate and present Applicant's rights under the South Carolina Victim's Bill of Rights as a prior victim. Trial Counsel failed to present and argue that the State violated of the S.C. Victim's Bill of Rights when Applicant was a victim of a prior incident with the Victim.
- (3) Trial Counsel failed to object to the Trial Court's application of an incorrect evidentiary standard based upon a misunderstanding and misapplication of *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) as advanced by the State, rather than making findings of fact and conclusions of law based upon the preponderance of the evidence standard as required by law. See, e.g., *State v. Cervantes-Pavon*, 426 S.C. 442, 827 S.E.2d 564 (2019).
- (4) Trial Counsel failed to object to the Trial Court's failure to make full and complete findings of fact and conclusions of law for the elements of self-

defense as applied under a claim pursuant to the Protection of Persons and Property Act.

- (5) Trial Counsel's "trial strategy," which he conveyed to the Trial Court and Applicant during trial, to not seek jury instructions for the lesser-included offenses of Assault and Battery of a High and Aggravated Nature, and especially First Degree Assault and Battery, was objectively unreasonable given the facts and circumstances of the case. See *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness"); *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges.").
- (6) Trial Counsel failed to request a jury instruction regarding specific intent to kill pursuant to *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017).
- (7) Trial Counsel failed to object to the Trial Court's confusing jury instructions regarding intent where the charged offense required the specific intent to kill, yet where the instruction included language of far lower, "general intent" standards such as recklessness and criminal negligence. See, e.g., *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017).
- (8) Trial Counsel failed to investigate and obtain any medical records or photographs for diagnosis and treatment of Applicant's injuries by either the detention center or Applicant's personal physician where the Applicant indicated at his immunity hearing that he was seen by both when testifying about injuries he received at the hands of his attacker, and where the State elicited testimony to the contrary from an officer during Applicant's trial. See *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).
- (9) Trial counsel failed to use the Incident Report dated 04/2014 during either the immunity hearing or the trial where Applicant was attacked not only by the "victim" Wallace in the present case but also by several other assailants in concert with Wallace at that time, and where Applicant believed the third party pulling him from behind while he fought with Wallace in the present case was likewise working in concert with Wallace to attack him when showing Applicant's response to the attack was reasonable.
- (10) Trial Counsel failed to object during the immunity hearing when the State elicited legal opinion testimony from a lay witness striking at the heart of the

ultimate issue of self-defense by asking, "... at anytime did you do anything that would cause [Applicant] to use deadly force against you?

- (11) Trial Counsel failed to object during the immunity hearing when the State elicited legal opinion testimony from a lay witness striking at the heart of the ultimate issue of self-defense by asking if Applicant was involved in "what we call mutual combat?
- (12) Trial Counsel failed to move to sequester any of the witnesses for either the immunity hearing or trial where the State repeatedly referred to prior witness testimony when questioning later witnesses.
- (13) Trial Counsel failed to obtain either the audio recording from Applicant's civil summary court proceeding in 2014 against Wallace, or the booking report from Wallace being ordered to jail by the Magistrate Judge for attempting to assault Applicant at that hearing where Wallace denied details of the incident at Applicant's present trial, and where the deputy denied any knowledge of the incident at the present trial as well.
- (14) Trial Counsel failed to quash the jury pursuant to Baston where the State utilized four (4) of its five (5) statutory strikes to strike white males from the petit jury.
- (15) Trial Counsel failed to object pursuant to Rules 701 and 702, SCRE, or *Ford v. Watson*, to medical opinion testimony by the EMS technician regarding medical signs and appearances of shock, as well as whether certain wounds were consistent with those needing advanced life support where the State never offered the witness as an expert in any field, no *voir dire* of the witness was performed, and the trial judge made no findings qualifying the witness as an expert required under his gatekeeping role.
- (16) Trial Counsel failed to object under Rules 701 and 702, SCRE, and *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) to opinion testimony of Sgt. Hutchinson regarding crime scene reconstruction where the State gave leading questions suggesting specifically where in McCormick's Grocery the fight started based upon location of blood on the floor.
- (17) Trial Counsel failed to object as both leading and giving opinion testimony on an ultimate issue in fact when Sgt. Hutchinson was asked, "In looking at the case as a whole, who was the victim in this case?" to which he answered, "In my opinion, would be Mr. Wallace."
- (18) Trial counsel failed to object under Rules 701 and 702 to Inv. Tim Perry's testimony on redirect examination when the State elicited opinion testimony on whether a person in a given scenario would be deemed a "victim," where the facts were similar to the present case, where Inv. Perry was not qualified

as an expert witness, and where the opinion testimony touched on the ultimate issue in the case.

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

Furthermore, Applicant also alleged the following acts or omissions of ineffective assistance of Appellate Counsel:

- (1) Appellate Counsel failed to file a Petition for Rehearing in the Court of Appeals to preserve Applicant's ability to file a Petition for Writ of Certiorari to the Court of Appeals in the South Carolina Supreme Court on the issues of whether the Trial Court erred in finding Applicant was not entitled to immunity from prosecution under the Protection of Persons and Property Act, whether the Trial Court erred by failing to grant Applicant's motion for a direct verdict, and whether the Trial Court erred in his response to a jury question.
- (2) In the event Trial Counsel properly preserved the issue of whether the Trial Court applied the incorrect evidentiary standard on a misunderstanding and misapplication of *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) in his closing statement to the Trial Court at the immunity hearing, Appellate Council failed to raise and argue this issue of the Trial Court applying an incorrect evidentiary standard, rather than making findings of fact and law based upon the preponderance of the evidence standard as required by law. See, e.g., *State v. Cervantes-Pavon*, 426 S.C. 442, 827 S.E.2d 564 (2019).
- (3) In the event Trial Counsel properly preserved the issue of whether the Trial Court failed to make full and complete findings of facts and conclusions of law for the elements of self-defense as applied under a claim pursuant to the Protection of Persons and Property Act at the immunity hearing, Appellate Counsel failed to raise and argue this issue of the Trial Court's failure to make full and complete findings of fact and conclusions of law for the elements of self-defense.

EVIDENTIARY HEARING

Trial Counsel Larry Knox, Appellate Counsel Tricia Blancette, Prosecutor Mary Thomas Johnson-Lee, and Applicant testified via WebEx at the evidentiary hearing. Applicant presented the following exhibits that were admitted into evidence *without*

objection: (1) Incident Report dated April 6, 2014; (2) Incident Report dated April 17, 2014; (3) 911 audio recording dated July 14, 2015; (4) Medical Records dated July 20, 2015; (5) Victim's Bill of Rights for Applicant; (6) Photographs taken by the police during their interrogation; (7) Body-Worn-Camera video recording for Officer Hutchinson; (8) Screenshot from the BWC recording; (9) Zoomed-in picture of screenshot from the BWC recording; (10) Pageland Magistrate Disposition Sheet; (11) 911 Audio recording dated July 14, 2015; and (12) Body-Worn-Camera video recording of witness Steven Hooks being questioned after the incident.

Applicant Gary Moore

Applicant Gary Moore testified that he met with his attorney only one time in-person and spoke to him several times on the phone in preparation for trial. Applicant explained that Trial Counsel reviewed some of the discovery (including three videos) with him prior to trial. Applicant acknowledged that he went to Texas after the immunity hearing and returned prior to trial.

Applicant testified that he was previously attacked and threatened by Charles Wallace. Applicant also stated that Trial Counsel never discussed the 911 audio recordings with him prior to trial. Applicant noted that he informed Trial Counsel about being treated by a doctor for his injuries after the incident with Mr. Wallace and that he had received a Victim's Bill of Right's form for a previous incident with Mr. Wallace. Applicant further explained that he never saw the BWC video recording prior to trial and maintains that it proves his knife was clean when it was provided to Officer Hutchinson.

Applicant also addressed the prior incidents with Mr. Wallace at the Pageland Magistrate Court and when Mr. Wallace chased him with a stick threatening to severely

injure him. Specifically, Applicant testified that Mr. Wallace attempted to attack him during a prior court proceeding, was detained in the courtroom, and charged with a separate crime. Applicant further maintained that the video recordings presented by the State at trial were altered. Notably, Applicant testified that Trial Counsel did not prepare him for the immunity hearing.

Trial Counsel Larry Knox

Trial Counsel Larry Knox testified at the hearing that he met with Applicant for four-to-five hours to discuss the case. Trial Counsel maintained that Applicant “disappeared” after the immunity hearing. Trial Counsel admitted that he did not speak with any of the witnesses or police officers that were present during the incident in this case or two prior incidents where Mr. Wallace attempted to attack and threaten Applicant. Trial Counsel also admitted that he called the Magistrate’s Court and confirmed the existence of the previous incident between Applicant and Mr. Wallace (Counsel was informed that there was “bad blood” but couldn’t recall anything else – despite Counsel’s testimony during cross-examination that the Magistrate Judge said the prior incident was a “circus”). Trial Counsel further acknowledged that he was aware of the prior incident reports and 911 audio recordings.

Trial Counsel ultimately had no explanation for failing to require Applicant’s presence of Judge Henderson’s verbal ruling for the immunity hearing. Trial Counsel admitted that Applicant told him about his medical records but could not recall whether he requested that information. Trial Counsel also admitted that he knew about Applicant being listed as a victim of a prior attack by Mr. Wallace (i.e., victim’s bill of rights form) and believed it was not relevant to the incident in this case. Notably, Trial Counsel further

acknowledged that there was a difference between the video recordings he reviewed and what was presented by the State at trial.

On cross-examination, Trial Counsel maintained that the initial meeting with Applicant occurred after he had received the discovery. Trial Counsel also claimed that the 911 audio recordings and screenshots of the knife did not add any value to the Applicant's defense. Trial Counsel also believed that the following question by the Prosecutor to Mr. Wallace was not objectionable: "[A]t anytime did you do anything that would [Applicant] to use deadly force against you?"

Appellate Counsel Tricia Blanchette

Appellate Counsel Tricia Blanchette testified at the hearing about her review of the case file, assessment of the issues preserved for appellate review, and discussion with private investigator Pete Skidmore. Specifically, Ms. Blanchette testified that she decided not to file a Petition for Rehearing of the Court of Appeals' opinion based on her conversation with Applicant and the record on appeal (regarding the issue of whether the Trial Court erred in finding Applicant was not entitled to immunity from prosecution under the Protection of Persons and Property Act). Ms. Blanchette maintained that Applicant did not want to file a Petition for Rehearing and further explained that she raised the issues she thought had the best chance of winning on appeal.

Ms. Blanchette testified that she did not believe the issue of whether the Trial Court applied the incorrect evidentiary standard on a misunderstanding and misapplication of *State v. Curry*, 406 S.C. 364, 371 S.E.2d 263, 266 (2013) was properly preserved based on Judge Henderson's one page ruling denying immunity. In support of her belief that the issue was not preserved for appellate review, Ms. Blanchette testified that she looked

for additional transcripts and found that no additional arguments or rulings were made on the issues related to whether Applicant was entitled to immunity.

Prosecutor Mary Johnson-Lee

Prosecutor Mary Thomas Johnson-Lee testified at the hearing regarding the allegation of a *Batson* issue. She maintained that there was no evidence of a *Batson* issue and provided testimony regarding juror numbers 107, 127, 146, and 71. Prosecutor Johnson-Lee also noted that the surveillance camera video recording could not be downloaded, were not altered, and were disclosed to Trial Counsel in discovery. She indicated that she did not withhold any evidence and has an open-file policy. Notably, Prosecutor admitted that Mr. Wallace had previously attempted to attack Applicant with a stick and threatened to seriously injure Applicant.

LAW

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, an Applicant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims). "First, an [Applicant] must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 118, 386 S.E.2d at 625 (internal

citations omitted). Therefore, an Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result” when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

In a PCR action, “[t]he burden of proof is on the [Applicant] to prove his allegations by a preponderance of the evidence.” *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Strategic “[d]ecisions made [by counsel] in ignorance of relevant, available information cannot be characterized as strategic.” *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). “Ordinarily, the existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Notably, “for the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability . . . the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses, assessed their credibility, and weighed the testimony accordingly based on the evidence and facts of the case. This Court has also reviewed the Clerk of Court records regarding Applicant’s convictions and sentences, the trial transcript, the applications for post-conviction relief, and the legal arguments made by the lawyers.

Therefore, the relevant findings of fact and conclusions of law are set forth below as required by Section 17-27-80 of the South Carolina Code of Laws.

This Court finds that Trial Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. See *Strickland*, 466 U.S. at 687-88. This Court also finds that Trial Counsel's deficient performance prejudiced Applicant because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). Therefore, this Court has concluded that Trial Counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

Ineffective Assistance of Trial Counsel

- (1) ***Applicant alleges Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense.***

The United States Supreme Court has held, "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; See *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). "In assessing the reasonableness of an attorney's investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Notably, this Court has held, "A criminal defense attorney has

the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).

Furthermore, “while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (quoting *Ard*, 372 S.C. at 331-32, 642 S.E.2d at 597) (emphasis added). This Court has also found it “was not objectively reasonable given the defense theory of the case” for counsel not to call witnesses who would have “added significantly to the credibility of [Applicant’s] case”. *Lounds*, 380 S.C. at 462, 670 S.E.2d at 650. *See generally Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994) (finding ineffective assistance of counsel when there is a reasonable probability the result would have been different had counsel introduced relevant and favorable evidence at trial).

This Court finds that Trial Counsel was ineffective in failing to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant’s defense for the following reasons:

- (a) Failure to interview any of the potential witnesses from the incident in this case or the prior incidents with Mr. Wallace.
- (b) Failure to obtain the incident reports from the prior incidents with Mr. Wallace and statements made Mr. Wallace of his intent to injure and kill Applicant. For example, Trial Counsel failed to obtain either the audio recording from

Applicant's summary court proceeding in 2014 against Mr. Wallace. Officer Hutchinson testified that he had never seen Mr. Wallace before and denied knowing anything about his conduct at the prior hearing in Magistrate Court (despite the prior testimony from Mr. Wallace indicating Officer Hutchinson was present when he was removed from the courtroom). (Immunity Ruling Transcript, pages 98 and 103).

- (c) Failure to obtain the 911 audio recordings to discredit the credibility of the State's witnesses at trial.
 - (d) Failure to obtain Applicant's medical records from the detention center or his personal physician to prove the injuries he sustained during the incident with Mr. Wallace and discredit the credibility of the State's witnesses during the immunity hearing and trial.
 - (e) Failure to investigate whether the video recordings admitted at trial had been altered.
- (2) ***Trial Counsel failed to admit into evidence and argue that the State violated the Victim's Bill of Rights when Applicant was a victim of a prior incident with Mr. Wallace.***

This Court finds that Trial Counsel was ineffective in failing to admit into evidence and argue that the State violated the Victim's Bill of Rights when Applicant was a victim of a prior incident with Mr. Wallace. See *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness"); *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does

not automatically immunize an attorney's performance from sixth amendment challenges.").

- (3) ***Trial Counsel failed to move for sequestration of the witnesses for either the immunity hearing or trial where the State repeatedly referred to prior witness testimony when questioning later witnesses.***

This Court finds that Trial Counsel was ineffective in failing to move for sequestration of the witnesses. See Rule 615, SCRE. Trial Counsel provided deficient performance by failing to provide a valid trial strategy for not moving for sequestration. Counsel's deficient performance prejudiced Applicant because the credibility of the State's witnesses was the critical issue for the jury's determination of whether the State could satisfy its burden of proof. See *Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313 (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness"); *Solem*, 801 F.2d at 1051 (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges.").

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

This Court finds that Trial Counsel was ineffective in failing to object to inadmissible hearsay testimony in violation of Applicant's Sixth Amendment right under the Confrontation Clause. See U.S. Const. amends. VI; Rule 801(d)(1)(D).

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

This Court finds that Trial Counsel was ineffective in failing to present this evidence to the jury. Counsel's deficient performance prejudiced Applicant because the credibility of the State's key witness and alleged victim, Charles Wallace, was the critical issue for the jury's determination of whether the State could satisfy its burden of proof. See *Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313

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

This Court finds that Trial Counsel was ineffective in failing to object to the Prosecutor's improper question and for failing to move to strike the subsequent testimony. Counsel's deficient performance prejudiced Applicant because the State was solicited an answer that calls for an improper legal opinion, especially one that strikes at the heart of the defense. (Immunity Ruling Transcript, page 61).

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

This Court finds that Trial Counsel was ineffective in failing to object to the Prosecutor's improper question and for failing to move to strike the subsequent testimony. Counsel's deficient performance prejudiced Applicant because the State was solicited an answer that calls for an improper legal opinion. (Immunity Ruling Transcript, page 65).

- (8) ***Trial Counsel failed to object to the Trial Court's application of an incorrect evidentiary standard based upon a misunderstanding and misapplication of State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) as advanced by the State, rather than making findings of fact and conclusions of law based upon the preponderance of the evidence standard as required by law.***

This Court finds that Trial Counsel was ineffective in failing to object to State's incorrect arguments and the Trial Court's misapplication of the legal standard. Specifically, the State's argument was that the correct evidentiary standard for the Court to apply during the immunity hearing under *State v. Curry*² was similar to a summary judgment standard and reasonableness standard. (Immunity Ruling Transcript, pages 116 – 120). Judge Henderson indicated that his ruling on February 18, 2016, denying immunity relied upon, and was indeed tainted by, the Solicitor's incorrect legal standard:

Because of the way I had viewed the evidence, I certainly find that this is a matter that should be submitted to the jury. And as pointed out by the solicitor yesterday this is a quintessential jury question based on my view of the evidence."

(Immunity Ruling Transcript, page 4, lines 17-21).

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

This Court finds that Trial Counsel was ineffective in failing to properly object to the Trial Court's denial of immunity for error preservation. See *State v. Cervantes Pavon*, 426, S.C. 442, 452 n. 4, 827 S.E.2d 564, 569 n. 4 (2019) ("While the Act does not require a written order upon an immunity determination, specific findings of fact and conclusions of law are critical to reviewing courts, particularly given the gravity of the circumstances these cases necessarily involve."); *State v. Andrews*, 427 S.C. 178, 181,

² *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) .

830 S.E.2d 12, 13 (2019) (explaining “the relevant inquiry is not merely whether there is a conflict in the evidence but, rather, whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence”).

Counsel’s deficient performance prejudiced Applicant because Counsel failed to argue and have the Court address the following the issues:

- i. How Wallace started the fight.
- ii. What Applicant was thinking when initially attacked.
- iii. How Applicant was choked from behind by another person unknown to him at the time of the incident.
- iv. The timing of Applicant’s knife being drawn.
- v. Applicant’s perception of being attacked by multiple assailants given his prior interactions with and threats by Charles Wallace.

See *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) (“[T]he trial court must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity. This includes all elements of self-defense, save the duty to retreat.”); *Id.* at 371, 752 S.E.2d at 266 (“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. This includes all elements of self-defense, save the duty to retreat.”); *Id.* at 372, 752 S.E.2d at 267 (“While the Act may be considered ‘offensive’ in the sense that the immunity operates as a bar to prosecution, such immunity is predicated on an accused demonstrating the [necessary] elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence.”); *Id.* at 371 n.4, 752 S.E.2d at 266 n.4 (specifying the second and third elements of self-defense that must be demonstrated for immunity

under the Act are as follows: "Second, 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. Third, 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." (quoting *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984));

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

This Court finds that Trial Counsel was ineffective in failing to object to improper opinion testimony. Specifically, the State improperly solicited improper opinion testimony about Mr. Wallace's wounds from EMS Technician Justin Treat who was not qualified as an expert witness pursuant to Rule 702, SCRE. (Trial Transcript, pages 118 and 120). See *State v. Ellis* (giving opinion testimony beyond the scope of expertise, wherein the witness was not qualified as an expert in the field of crime scene reconstruction).

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

This Court finds that Trial Counsel was ineffective in failing to object to improper opinion testimony. Specifically, Trial Counsel failed to object when the State asked

leading questions improperly suggesting the specific location of where in McCormick's Grocery store the fight started based upon the location of blood on the floor. (Trial Transcript, pages 100 and 101). See *State v. Ellis* (giving opinion testimony beyond the scope of expertise, wherein the witness was not qualified as an expert in the field of crime scene reconstruction).

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

This Court finds that Trial Counsel was ineffective in failing to object to improper leading question and opinion testimony. (Trial Transcript, pages 107, lines 15-17). See Rule 403, SCORE; *State v. Ellis* (giving opinion testimony beyond the scope of expertise, wherein the witness was not qualified as an expert in the field of crime scene reconstruction).

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

This Court finds that Trial Counsel was ineffective in failing to object to improper opinion testimony initially elicited on cross-examination by Counsel. See Rule 403, SCORE; *State v. Ellis* (giving opinion testimony beyond the scope of expertise, wherein the witness was not qualified as an expert in the field of crime scene reconstruction). Investigator Perry testified on redirect examination by the State to the ultimate issue at trial:

Q: Now, Mr. Knox also keeps questioning you about what makes a victim, what kind of conduct makes a victim and you referenced on approaching somebody maybe pushing them. And he said, that made the person a victim, and you said, "yes."

If I were to walk over here to my deputy solicitor and I do that to him, have I just committed a battery upon the deputy solicitor?

A: Technically, if that was an unwanted suggested that you did...

Q: Did he know I was going to do that?

A: No, he did not.

Q: So is that a battery?

A: Technically, yes.

Q: So, technically, to Mr. Knox's question, what I just did to the deputy solicitor made him a victim, didn't?

A: Yes.

Q: Now, does he then have the right to pull a knife out of his jacket and start stabbing me over my body?

A: No. I think that would have certainly been the overrated part.

Q: And that then created me to be the victim?

A: Yes. That would change the roles there.

(Trial Transcript, pages 141, lines 4-25).

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

This Court finds that Trial Counsel was ineffective in failing to request a jury instruction for specific intent to kill (versus general intent). Specifically, Trial Counsel testified that he had no strategic reason for failing to request a jury charge on specific intent to kill. See *State v. King*, 422 S.C. 47, 53–56, 810 S.E.2d 18, 21–22, 30 (2017) (holding attempted murder is a specific-intent crime, and affirming the court of appeals' reversal of the defendant's attempted murder conviction after the trial court instructed the jury that (1) attempted murder was a general-intent crime, and specific

intent to kill was not an element of attempted murder; (2) inferred malice may arise when the act is done with a deadly weapon; and (3) malice may be inferred from conduct showing a total disregard for human life).

(15) Trial Counsel failed to object to prohibit jury instructions regarding implied intent / malice.

This Court finds that Trial Counsel was ineffective in failing to object to the State's request for a jury charge on implied malice. See *King*, 422 S.C. at 64 n.5, 810 S.E.2d at 27 n.5 (explaining implied malice is "arguably inconsistent with a specific-intent crime. See *Keys v. State*, ... [104 Nev. 736], 766 P.2d 270, 273 ([Nev.] 1988) (stating 'one cannot attempt to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result' (citation and internal quotation marks omitted)). Moreover, if there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the crime would involve a lower level of intent and, thus, would fall within the lesser degrees of assault and battery offenses codified in section 16-3-600.").

(16) Trial Counsel failed to object to the Trial Court's confusing jury instructions regarding intent where the charged offense required the specific intent to kill, yet where the instruction included language of far lower, "general intent" standards such as recklessness and criminal negligence.

This Court finds that Trial Counsel was ineffective in failing to object to the Trial Court's instruction on a far lower, "general intent" standard. Specifically, the Trial Court included confusing instructions regarding intent: As to malice, the court included the following:

- (i) Malice does not necessarily mean an actual intent to kill. but intent may be established by inference in the same way as any other fact by taking into

consideration

- (ii) "Malice may be inferred...."

(Trial Transcript, page 218, lines 16–17; page 219, line 2).

As to the law regarding intent, the Court instructed the jury as follows:

- (i) "Now, as to the word intent, let me discuss that with you. In order to establish criminal liability, criminal intent is required. For example, the mental state required to be proven by the State for a particular crime might be purpose intent, knowledge, recklessness, or criminal negligence. Criminal intent must be proven by the State beyond a reasonable doubt. Criminal intent is also a matter that must be determined by the jury from the circumstances surrounding the situation." (Trial Transcript, page 219, lines 8–16).
- (ii) "So the law says that criminal intent may be inferred from the circumstances shown to have been existing or to have existed." (Trial Transcript page 219, lines 19–21).
- (iii) "It is not necessary to establish intent by direct and positive evidence but intent may be established by inference in the same way as any other fact by taking into consideration the acts of the parties and all the facts and circumstances of the case." (Trial Transcript page 219, line 23).
- (iv) Criminal intent may arise from action or failure to act. It may arise from negligence, recklessness, or indifferent to duty or to the consequences that is considered by the law to be the equivalent of criminal intent." (Trial Transcript page 220, lines 5–9).

No objection was made by Counsel. (Trial Transcript page 224).

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CONCLUSION

Based on the foregoing reasons, this Court finds and concludes Applicant has established constitutional violations and deprivations that would require post-conviction relief. This Court finds that Trial Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 687-88. This Court also finds that Trial Counsel's deficient performance prejudiced Applicant because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). This Court has concluded that Trial Counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6). Therefore, this PCR application must be granted and Applicant shall receive a new trial.

IT IS ORDERED that Applicant's application for PCR is hereby **GRANTED**.

IT IS SO ORDERED.

The Honorable Michael S. Holt
Presiding Judge, Second Judicial Circuit

_____, 2021

_____, South Carolina

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

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

PROCEDURAL HISTORY

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

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

CURRENT ACTION

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

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

- advanced by the State, rather than making findings of fact and conclusions of law based upon the preponderance of the evidence standard as required by law. *See e.g. State v. Cervantes-Pavon*, 426 S.C. 442, 827 S.E.2d 564 (2019)."
- iv. "Trial Counsel failed to object to the Trial Court's failure to make full and complete findings of fact and conclusions of law for the elements of self-defense as applied under a claim pursuant to the Protection of Persons and Property Act."
 - v. "Trial Counsel's 'trial strategy' which he conveyed to the Trial Court and Applicant during trial, to not seek jury instructions for the lesser-included offenses of Assault and Battery of a High and Aggravated Nature, and especially First Degree Assault and Battery, was objectively unreasonable given the facts and circumstances of the case. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding 'counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness.'): *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that 'labeling counsel's actions as 'trial strategy' does not automatically immunize an attorney's performance from sixth amendment challenges.')"
 - vi. "Trial Counsel failed to request a jury instruction regarding specific intent to kill pursuant to *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017)."
 - vii. "Trial Counsel failed to object to the Trial Court's confusing jury instructions regarding intent where the charged offense required the specific intent to kill, yet where the instruction included language of far lower, "general intent" standards such as recklessness and criminal negligence. *See e.g., State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017)."
 - viii. "Trial Counsel failed to investigate and obtain any medical records or photographs for diagnosis and treatment of Applicant's injuries by either the detention center of Applicant's personal physician where the Applicant indicated at his immunity hearing that he was seen by both where testifying about injuries he received at the hands of his attacker, and where the State elicited testimony to the contrary from an officer during Applicant's trial. *See Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46,

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

- ix. "Trial Counsel failed to use the Incident Report dated 04/2014 during either the immunity hearing or the trial where Applicant was attacked not only by the 'victim' Wallace in the present case but also by several other assailants in concert with Wallace at this time, and where Applicant believed the third party pulling him from behind while he fought with Wallace in the present case was likewise working in concert with Wallace to attack him when showing Applicant's response to the attack was reasonable."
- x. "Trial Counsel failed to object during the immunity hearing when the State elicited legal opinion testimony from a lay witness striking at the heart of the ultimate issue of self-defense by asking, ". . . at any time did you do anything that would cause [Applicant] to use deadly force against you?"
- xi. "Trial Counsel failed to object during the immunity hearing when the State elicited legal opinion testimony from a lay witness striking at the heart of the ultimate issue of self-defense by asking if Applicant was involved in 'what we call mutual combat?'"
- xii. "Trial Counsel failed to move to sequester any of the witnesses for either immunity hearing or trial where the State repeatedly referred to prior witness testimony when questioning later witnesses."
- xiii. "Trial Counsel failed to obtain either the audio recording from Applicant's civil summary court proceeding in 2014 against Wallace, or the booking report from Wallace being ordered to jail by the Magistrate Judge for attempting to assault Applicant at the hearing where Wallace denied details of the incident at Applicant's present trial, and where the deputy denied details of the incident at Applicant's present trial, and where the deputy denied any knowledge of the incident at the present trial as well."
- xiv. "Trial Counsel failed to quash the jury pursuant to Batson where the State utilized four (4) of its five (5) statutory strikes to strike white males from the petit jury."
- xv. "Trial Counsel failed to object to Rules 701 and 702, SCRE, or *Ford v. Watson*, to medical opinion testimony by the EMS technician regarding medical signs and appearances of shock, as well as whether certain wounds

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

- xvi. "Trial Counsel failed to object under Rules 701 and 702, SCRE, and *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) to opinion testimony of Sgt. Hutchinson regarding crime scene reconstruction where the State gave leading questions suggesting specifically where in McCormick's Grocery the fight started based upon location of blood on the floor."
- xvii. "Trial Counsel failed to object as both leading and giving opinion testimony on an ultimate issue in fact when Sgt. Hutchinson was asked, 'In looking at the case as a whole, who was the victim in this case?' to which he answered, 'In my opinion, would be Mr. Wallace.'"
- xviii. "Trial Counsel failed to object under Rule 701 and 702 to Inv. Tim Perry's testimony on redirect examination when the State elicited opinion testimony on whether person in a given scenario would be deemed a 'victim,' where the facts were similar to the present case, where Inv. Perry was not qualified as an expert witness, and where the opinion testimony touched on the ultimate issue in the case."
- xix. "Trial Counsel failed to object under hearsay and the Sixth Amendment Confrontation Clause during the immunity hearing where the State obtained testimony from a deputy as to what an EMS technician allegedly said about Wallace's medical condition and subsequent airlift to a hospital in Charlotte, and where the deputy had no first-hand knowledge of either."
- 2. "Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. Specifically, Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991)."
- a. "Appellate Counsel's acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:"
 - i. "Appellate Counsel failed to file a Petition for Rehearing

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

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

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

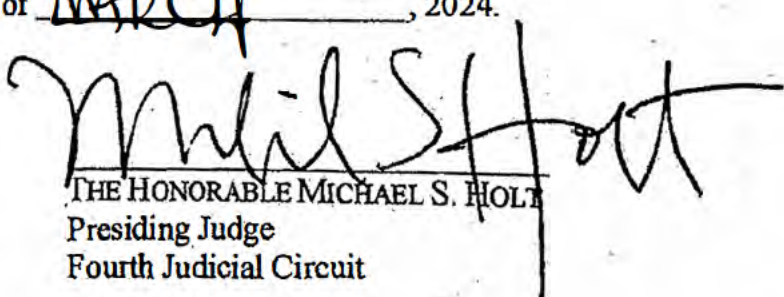
Thereafter, on August 3, 2022, Applicant filed his motion pursuant to Rule 59(e), SCRPC. On January 22, 2024, a hearing convened before Judge Holt to hear Applicant's motion pursuant to Rule 59(e), SCRPC.

APPLICANT'S MOTION TO ALTER OR AMEND

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

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

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


THE HONORABLE MICHAEL S. HOLT
Presiding Judge
Fourth Judicial Circuit

QUESTERFIELD South Carolina.

WITNESSES

Wayne Jordan

Chesterfield County Sheriff

Law Enforcement Case #: 15-2188



347

WAIVER OF PRESENTMENT

After being fully advised as to my legal rights, I
hereby waive presentment to the Grand Jury.

 Defendant

I hereby appear in my own proper person and
plead guilty to the within indictment or to:

 Defendant

ARREST WARRANT NUMBER
2015A1310300032

 ARRESTED ON: 2015-07-15

ACTION OF GRAND JURY

 True Bill
 Michael Beech

Grand Jury Foreperson

 Date

VERDICT

 Petit Jury Foreperson

 Date

DOCKET NUMBER:
2015-GS-13-0398
The State of South Carolina
County of Chesterfield

COURT OF GENERAL SESSIONS
Term:
DECEMBER 2015

THE STATE
vs.
Gary Moore

INDICTMENT FOR
ATTEMPTED MURDER

§16-03-0029

CDR Code: 3410

William B. Rogers, Jr., Solicitor

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTERFIELD)

INDICTMENT FOR

Attempted Murder

§16-03-0029

At a Court of General Sessions, convened on December 1, 2015, the Grand Jurors of Chesterfield County present upon their oath:

ATTEMPTED MURDER

CDR: 3410 16-3-29

That Gary Moore did in Chesterfield County, on or about July 14, 2015, with specific intent to kill, attempt to kill Charles Lynn Wallace with malice aforethought, either expressed or implied, to wit: defendant did, during a physical altercation with the victim, stab said victim with a knife four times, in violation of Section 16-3-29 of S.C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


WILLIAM B. ROGERS, JR.
SOLICITOR