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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

2016-CP-42-4349

Terrell A. Brown..... Appellant,
v.
The State, Respondent.

NOTICE OF APPEAL

Terrell A. Brown appeals the Honorable Eugene C. Griffith, Jr.'s Order of Dismissal filed April 21, 2025.

This twenty-fifth day of April, 2025.

s/Susannah Ross
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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
Terrell A. Brown, #341207)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS)
FOR THE SEVENTH JUDICIAL CIRCUIT)
CASE NO. 2016-CP-42-4549)

**ORDER OF DISMISSAL
WITH PREJUDICE**

Presiding Judge: Hon. Eugene C. Griffith, Jr.
Applicant's Attorney: Susannah C. Ross, Esq.
Respondent's Attorney: Suzanne Shaw, Esq.
Trial Counsel: Michael D. Brown, Esq.
Date of Hearing: November 13, 2019
Court Reporter: Julie A. Cendroski

This matter comes before the Court by way of Terrell A. Brown's (Applicant) application for post-conviction relief (PCR) filed on December 19, 2016. On May 22, 2017, Respondent, the State of South Carolina, filed its Return and Partial Motion to Dismiss based on the statute of limitations for Applicant's untimely PCR filing. On January 31, 2018, a hearing convened before the Honorable Grace G. Knie on Respondent's Motion to Dismiss to determine whether Applicant could pursue his PCR action despite having filed outside of the one-year statute of limitations. On May 9, 2018, Judge Knie denied Respondent's Motion to Dismiss. On August 7, 2018, Respondent filed an Amended Return. On September 11, 2018, Susannah Ross, Esquire (PCR Counsel), filed amendments to Applicant's PCR application.

On November 13, 2019, an evidentiary hearing convened at the Spartanburg County Courthouse before the Honorable Eugene C. Griffith Jr. Assistant Attorney General Jacob A. Isenburg represented Respondent. Applicant was present and represented by Susannah C. Ross, Esquire. At the hearing, Applicant proceeded with the claims in his original and amended

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applications. In support of these claims, Applicant testified on his own behalf and presented testimony from his sister Jasmine Brown and eyewitness Jamar Murray. Respondent presented testimony from Michael D. Brown, Esquire (Trial Counsel).

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

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During its October 2013 term, the Spartanburg County Grand Jury indicted Applicant for two counts of murder (2013-GS-42-4249, -4250). Subsequently, during its October 2014 term, the Spartanburg County Grand Jury indicted Applicant for unlawful carrying of a pistol (2014-GS-42-5071). Michael D. Brown, Esquire, of Rainey & Brown, LLC, represented Applicant. Assistant Deputy Solicitor Derrick B. Balsa of the Seventh Judicial Circuit Solicitor's Office prosecuted the case.

On March 16, 2013, Applicant's case proceeded with a stand your ground (SYG) and Jackson v. Denno¹ hearing before the Honorable J. Mark Hayes, II. Judge Hayes denied Applicant's Motion for Immunity under the provisions of S.C. Code Ann. § 16-11-450. Judge Hayes ruled that the State had met its burden regarding the Jackson v. Denno issue concerning Applicant's statement to the police officers and found that it was voluntary, not coerced, and not under undue duress.

¹378 U.S. 368, 12 L.Ed.2d 908 (1964).

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On March 17-19, 2013, Applicant proceeded to a jury trial before Judge Hayes. The jury found Applicant guilty of two counts of the lesser included offense of voluntary manslaughter and guilty as indicted of unlawful carrying of a pistol. On March 19, 2015, Judge Hayes sentenced Applicant to thirty years' imprisonment, suspended upon the service of fifteen years' imprisonment to be followed by five years' probation for each count of voluntary manslaughter, and one years' imprisonment for unlawful carrying of a pistol, sentences to run concurrently.

Applicant did not appeal his convictions and sentences.

CURRENT ACTION BEFORE THIS COURT

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

1. Ineffective Assistance of Counsel
 - a. "Counsel failed to immediately or directly, to appeal the trial judge's pre-trial ruling where the court denied Applicant under the Protect Person or Property Act. See White v. State, 208 S.E.2d at 39."
 - b. "Applicant was not aware counsel did not appeal, until instructions left family member to check on the status of the requested appeal."

On September 11, 2018, Applicant, through PCR Counsel, amended his PCR application raising the following allegations:

2. "Failure to argue SC Code Section 16-11-450(c) effectively; (p. 186)."
3. "Failure to object leading or point out the mischaracterization of testimony of by the Solicitor when he asked a witness "You said Mr. Brown shot him while he was on the ground" and continued to question "two shots to Quinn on the ground" when she had just testified that the Applicant shot Quinn Yeargin three times once, then two more times as he fell back on the car; (pp. 319, 1. 5, 320, 1. 5, 321, 1. 11)."
4. "Failure to argue 404 SCRE allows the jury to know victim was just released from prison for shooting at car because it is not to argue conformity therewith but the state of mind of the defendant at time of shooting and that limitations on questions

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as to specific instances of the victim shooting at someone denied the defendant a full and fair cross; (pp. 328, 1. 4, (pp. 334-337, p. 576, 1.22, p. 591, 1.4)"

5. "Failing to challenge search warrant, bring up jurisdictional issues and argue SCRE 403 and 404 that the probative value of bringing up an unrelated gun and marijuana in a Greenville hotel room was outweighed by the prejudicial effect and constituted impermissible evidence of other crimes. (pp. 383-5), pp. 402-3)."
6. "Failure to object to testimony regarding flight extending to banter regarding roads being closed during the search that blocked traffic ruining citizen's morning commute, (p. 400-1) and."
7. "Failure to argue the defendant had a right to carry a gun on Kelly Acres because he was an invitee of his sister; (p. 533-5)."
8. "Failure to argue defendant's testimony that he heard the victim and "Fredo" talking to each other about shooting this or that was not hearsay because it was not offered or the truth of the matter asserted but was to the state of mind of the defendants who argued he shot in self-defense (p. 632, 1. 12)."
9. "Failed to call witness Nicholas Rhodes."
10. "Failed to request jury charges including one that a defendant may continue to shoot in self-defense as long as he reasonably believes it is necessary to use deadly force. State v. Marin, 745 S.E.2d 148, 404 S.C. 615 (S.C. App. 2013)."

At the evidentiary hearing, Applicant raised the following additional allegations not previously included in his amendment as follows:

11. Failure to object to officer's talking about having to deploy a canine dog because they were worried Applicant had a gun.
12. Failure to prepare Applicant to testify.
13. Failure to object to Solicitor's mischaracterization of evidence in closing.

Applicant seeks relief in the form of "reverse and remand for new trial, based on counsel's ineffective assistance ineffectiveness, which caused Applicant to be unlawfully detained and convicted."

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Before this Court are the Spartanburg County Clerk of Court records regarding the subject convictions and sentences, the Applicant's records from the South Carolina Department of Corrections, the Applicant's trial transcript, and the records of the current PCR action.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act² (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

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

² S.C. Code Ann. §§ 17-27-10 to -160.

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question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986).

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(1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

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

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substantial, not just conceivable." Richter, 562 U.S.at 112.

Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

INITIAL FINDINGS

This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant that he rendered adequate assistance and exercised reasonable professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689, 104 S.Ct. 2052; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). See, e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle

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is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS

Allegation 1(a): Failure to Appeal the Pre-Trial Ruling Denying Applicant's Motion for Immunity Under the Protection of Persons and Property Act

Applicant alleges Trial Counsel was constitutionally ineffective for failing to appeal the trial court's pre-trial ruling denying his motion for immunity under the Protection of Person and Property Act (the Act). This Court finds this allegation to be without merit because it fails as a matter of law.

An immediate appeal may be filed on the following:

1. Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
2. An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
3. A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
4. An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330.

In State v. Isaac, the Court held that "an order granting a request for immunity under the Act is immediately appealable because it is a final order in that case." 405 S.C. 177, 182, 747 S.E.2d 677, 679 (2013). "However, an order denying a request for immunity is not a final order."

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in the case." Id. "An order denying a request for immunity under the Act does not fall within any category of orders which are immediately appealable under [S.C. Code Ann. §] 14-3-330." Id. at 181, 747 S.E.2d at 679.

Accordingly, Applicant's claim that Trial Counsel was constitutionally ineffective fails as a matter of law because the denial of immunity was not immediately appealable. This Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1(b): Trial Counsel Failed to File a Direct Appeal

Applicant alleges Trial Counsel was constitutionally ineffective for failing to file a direct appeal. This Court finds allegations are without merit.

In White v. State, 263 S.C. 110, 119, 108 S.E.2d 35, 39 (1974), the South Carolina Supreme Court held that, even though a post-conviction relief court may find that an applicant did not voluntarily and intelligently abandon his right to a direct appeal, the PCR court does not have jurisdiction to grant a belated appeal. However, when an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal has been perfected. Id. at 119, 108 S.E.2d at 39-40.

Counsel has a constitutionally imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470 (2000). When counsel has consulted with the defendant regarding the right to appeal, "Counsel performs in a professionally unreasonable manner only by

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failing to follow the defendant's express instructions with respect to an appeal." Id. at 478 (underlining added). In order to establish that he was prejudiced by counsel's failure to file an appeal, an applicant must show he would have appealed absent counsel's deficient performance. See Id. at 484. "Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver." Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981).

Evidentiary Hearing

On direct examination, Applicant testified, "Somebody told [him] that you get like 10 days after your trial, a condition to file for direct appeal." (PCR Tr. p. 13). Applicant testified he spoke to his Trial Counsel about wanting to appeal if he lost the hearing. (PCR Tr. p. 13). Applicant testified when he heard about the ten-day window to appeal and was unable to reach Trial Counsel, he "thought it was over with for [him] as far as appeals." (PCR Tr. p. 13). Applicant testified, "[he] and [Trial Counsel] spoke before [his] trial, during [his] trial, and after [his] trial about the direct appeal." (PCR Tr. p. 26). Applicant testified he "never waived [his] rights" nor stopped fighting for his case. (PCR Tr. p. 26).

On cross-examination, Applicant testified that he asked Trial Counsel, "Are you still going to appeal if [he] loses and [Trial Counsel] said yeah." (PCR Tr. p. 41). Applicant testified he brought it up again after trial when he was leaving the courtroom and asked Trial Counsel how to appeal again, and Trial Counsel told him he would speak to his family. (PCR Tr. p. 41).

On direct examination, Trial Counsel testified, "We discussed what an appeal will be, but the only time I recall we talked in detail about appeals was during the course of trial itself." (PCR Tr. p. 64). Trial counsel testified that at trial, Applicant was facing two counts of murder; during breaks, Applicant would mention, "If I lose, are we gonna appeal, are we gonna appeal, if I lose,

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if I lose?" (PCR Tr. p. 64). Trial Counsel testified that Applicant was clearly concerned and brought it up a number of times. (PCR Tr. p. 64). Trial Counsel testified when Applicant was sentenced to fifteen years, "At that point, I don't recall us having continued conversations about any appeal at that moment." (PCR Tr. p. 65). Trial Counsel testified, "...it wasn't life, it wasn't 30 years, it was 15 years. No one wants to go to prison, but obviously 15 years is completely different than him facing at that point the manslaughter of 30 years." (PCR Tr. p. 65). Trial Counsel testified he was under the impression Applicant and his family did not want to mess with the sentence imposed. (PCR Tr. p. 65).

On cross-examination, Trial Counsel testified that he did not recall confirming whether Applicant wanted to proceed with an appeal. (PCR Tr. p. 82). However, Trial Counsel testified, "not after the acquittal on the two murder charges...we were hoping that the involuntary manslaughter would apply, at least for one of the charges." (PCR Tr. p. 82).

Findings

This Court finds Trial Counsel's credible testimony that he discussed the appeal process with Applicant in detail during trial but did not recall continued discussions about any appeal when Applicant was convicted of two counts of the lesser-included offense of manslaughter and sentenced to fifteen (15) years imprisonment. Trial Counsel testified that he was under the impression that Applicant and his family did not want to appeal the sentence imposed based on the conviction of the lesser-included charges, considering he received a significantly reduced sentence compared to a sentence for murder. Trial Counsel had no inclination that the Applicant or family wished to pursue an appeal.

This Court finds under the totality of the circumstances, that Applicant has failed to prove a reasonable person would have wanted to appeal. While this Court notes Applicant's interest in

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an appeal during trial, Trial Counsel's credible testimony on this matter is persuasive that Applicant no longer had an interest in an appeal.

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

Allegation 2: Trial Counsel Failed to Argue SC Code § 16-11-440(C) Effectively³

Applicant alleges Trial Counsel was constitutionally ineffective for failing to argue S.C. Code Ann. § 16-11-440(C) effectively. This Court finds this allegation is without merit.

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

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

S.C. Code Ann. § 16-11-440(C). "A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard[.]" State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (citing State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011)).

³ In the amended application, Applicant lists S.C. Code § 16-11-450(c). However, this Court finds this is a scrivener's error, and the correct code is §§ 16-11-440(C) and 16-11-450 and will address this allegation as such.

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Where a defendant seeks treatment under § 16-11-440(C), it is not enough for a defendant to establish that he was "not engaged in an unlawful activity" and was in a "place where he has a right to be." Rather, "[c]onsistent 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" save the duty to retreat. Id., 406 S.C. at 371, 752 S.E.2d at 266 (emphasis added). Notwithstanding the Act or other provisions of law, in order to establish self-defense, the defendant must show (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997).

That a defendant was engaged in unlawful activity at the time of the incident does not in-and-of-itself defeat a claim for immunity. Rather, where a defendant was engaged in unlawful activity at the time of the incident, the trial court must consider whether the unlawful activity was the proximate cause of the incident. A person who is otherwise acting lawfully is not deprived of the right to self-defense by merely incidental illegality. State v. Glenn, 429 S.C. 108, 120-21, 838 S.E.2d 491, 497-98 (2019) (citing State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999)); State v. Goodson, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1994)).

Relevant Stand Your Ground (SYG) Hearing Testimony⁴

On cross-examination, DeAdrian Morton (Morton) testified that he and Applicant were hanging out smoking marijuana. (Trial Tr. p. 29). Morton testified that he did not have permission to be at the Kelly Acres complex and also did not know he needed permission. (Trial Tr. p. 29).⁵

⁴ SYG hearing was held on March 16, 2013, before the Honorable J. Mark Hayes, III.

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On cross-examination, Jamar Murray (Murray) testified that he was hanging out in the Kelly Acres neighborhood on the night that the shooting occurred. (Trial Tr. pp. 58-60). Murray testified that the Kelly Acres neighborhood had two main roads and identified one of the roads as Woody Court. (Trial Tr. p. 59). Murray testified that the shooting happened in the Woody Court area of the neighborhood. (Trial Tr. p. 59). Murray testified that Woody Court was an area in which people would routinely hang out. (Trial Tr. p. 61). Murray testified that he and Applicant were hanging out in Woody Court when the shooting occurred. (Trial Tr. pp. 60-62). Murray testified to his knowledge that Applicant's sister lived in the Kelly Acres neighborhood. (Trial Tr. p. 60). Murray testified that he was unaware of the exact location of Applicant's sister's apartment within the Kelly Acres neighborhood, but knew that she did not live in Woody Court. (Trial Tr. p. 60).

During direct examination, Applicant's sister, Jasmine C. Brown (Jasmine), testified that she lived in Kelly Acres. Jasmine testified that Applicant had permission to visit her, and management never told her she could not have visitors walking around the neighborhood. (Trial Tr. pp. 82-83). Jasmine testified that Applicant would sometimes stay with her, and she never told him he could not come over. (Trial Tr. pp. 84-85).

On cross-examination, Jasmine testified that she lived in Aurelia Court within Kelly Acres. (Trial Tr. p. 85). Jasmine testified that on the night of the shooting, she left and stayed gone the entire night, and Applicant was not staying at her residence. (Trial Tr. p. 88). Jasmine testified that she and Applicant left her residence, and she locked the door. (Trial Tr. p. 88). Jasmine repeated that Applicant was not staying at her residence the night of the shooting. (Trial Tr. pp. 88-89).

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On cross-examination, Spartanburg County Deputy Lorin Williams testified that a bullet from the left shoulder and a bullet from the back were extracted from the victim.⁵ (Trial Tr. p. 104).

On direct examination, Applicant testified that he shot victim as victim advanced towards him. (Trial Tr. p. 113). Applicant testified that victim pointed a gun at him several times, and he felt it was a real threat. (Trial Tr. pp. 118-119). Applicant testified that his sister allowed him to come over and never told him he could not walk around. (Trial Tr. p. 120). Applicant testified that he perceived the victim as a credible threat. (Trial Tr. p. 123).

On direct examination, Debbie Marshall, the manager of Kelly Acres, testified that Applicant did not have permission to stay at Kelly Acres. (Trial Tr. p. 137).

On direct examination, Summer Bayne (Bayne) testified that she was present when the shooting began and only saw Applicant with a gun. (Trial Tr. p. 157). Bayne testified that she heard multiple gunshots but only saw Applicant with a gun. (Trial Tr. p. 158; 161).

On cross-examination, Bayne testified that Victim was known to pull guns on people. (Trial Tr. p. 162).

On redirect examination, Bayne testified that she was unaware of any issues between Victim and Applicant. (Trial Tr. p. 165). Bayne testified that Victim did not approach Applicant in an angry fashion but wanted to know why Applicant had not talked to him since he got out of prison. (Trial Tr. p. 166).

The SYG court found the following:

All right. On the, on the first series of motions, to invoke the provisions of South Carolina 16-11-450 and to do so to prevent prosecution of these cases, the immunity that's offered by that section, I believe the Legislature has been quite clear that persons

⁵ Quinn Yeargin (Victim) was the victim in this case.

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can not be prosecuted for offenses when a defendant asserts that statute and meets their burden of proof by preponderance of the evidence to establish the provisions of the statute. Part of the statute does provide that the person had to lawfully be at an area where he had a right to be. We've got two different victims in this case. I think that — the fact that they had a policy in effect that said you can't be out there, the fact that it was in the lease about the conduct, I do not believe that the defense has met its burden of establishing, by preponderance of the evidence, the necessary elements to make this statute applicable. So, I don't feel like I have to — I note that there's gonna be a big difference in the facts of the case. There's gonna be testimony about, about one of, one of the deceased had a gun. There also will be testimony that a particular deceased didn't have a gun. So, I don't -- I'm not addressing that — those issues. My understanding is that, you know, if the defense still desires, they can still put up the defense of self-defense, and have, have me properly charge a jury on those elements. So, I understand that there's gonna be a factual dispute in this case on the other elements that relate to self-defense.

(Trial Tr. pp. 186-187).

Relevant Evidentiary Hearing Testimony

On direct examination, Applicant testified he would come and go from his sister's apartment whenever he wanted. (PCR Tr. p. 11). Applicant testified the trial judge determined Applicant did not have a right to be at the apartment complex and denied his SYG motion. (PCR Tr. p. 11). Applicant testified earlier that evening, Officer Misty had been to the complex and told them to keep the noise down. (PCR Tr. p. 12). Applicant testified he was not charged for breaking the law or told to leave. (PCR Tr. p. 12).

On cross-examination, Applicant testified he told Trial Counsel his defense was self-defense. (PCR Tr. p. 28). Applicant testified he agreed with Trial Counsel that he would pursue an SYG hearing before Applicant's trial since a "gun was pulled out on [him] and pointed at [him]." (PCR Tr. p. 30). Applicant testified he did not discuss the invitee issue with Trial Counsel but did discuss a gun was pulled on him, and he stood his ground. (PCR Tr. p. 30). Applicant testified he and Trial Counsel discussed Applicant was at his sister's house. (PCR Tr. p. 30). Applicant

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testified he was not an overnight guest. (PCR Tr. p. 31). Applicant testified he was "housesitting" for his sister. (PCR Tr. p. 32). However, when the incident occurred, Applicant testified, that he was not inside the house, and nobody was watching the house. (PCR Tr. p. 32).

On direct examination, Trial Counsel testified he proceeded with the SYG hearing based on his investigation and discussion with Woodruff's Chief of Police and what he heard about Applicant being on the scene. (PCR Tr. p. 61). Trial Counsel testified he knew a female officer had stopped by that day and there was an impression that "this is where they go out and hang and chill or smoke and that stuff." (PCR Tr. p. 61). Trial Counsel testified in spite of his defense strategy concerning one of the decedent's types of character "that would give us our strongest opportunity" to present at the SYG hearing. (PCR Tr. p. 61).

Trial Counsel testified that some of the issues he found with the SYG hearing were Applicant "being on the sites, the sister's apartment, Applicant staying there sometimes and living with his girlfriend at different times, and Applicant coming back and forth." (PCR Tr. p. 61). Trial Counsel testified there was a "no loitering" sign that could also be an issue. (PCR Tr. p. 61). Trial Counsel testified at a minimum he was trying to show Applicant was an invitee because it was his sister's apartment, and she could allow whoever to come stay over. (PCR Tr. pp. 62-63). Trial Counsel testified the apartment complex had a policy regarding overnight guests. (PCR Tr. p. 62). Trial Counsel testified as he recalled Applicant frequently stayed at his sister's apartment and other times with his girlfriend. (PCR Tr. p. 62). Trial Counsel testified as he understood it during this time period Applicant was living with his sister. (PCR Tr. p. 62).

Findings

This Court finds Applicant has failed to prove Trial Counsel was deficient or failed to render reasonably effective assistance under prevailing professional norms at the SYG hearing.

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Contrary to the Applicant's testimony, Trial Counsel articulated a reasonable strategy in trying to show Applicant was considered an invitee and had a right to be on the premises. Trial Counsel testified Applicant was clearly an invitee because Applicant stayed with his sister, and Applicant's sister lived on the premises and was on the lease. (PCR Tr. p. 63). Trial Counsel testified Applicant's sister could decide who entered her apartment. (PCR Tr. p. 63).

Notably, this Court cannot ignore the testimony of Applicant's sister, Jasmine, during the SYG hearing. Jasmine testified that Applicant was not staying with her and was not spending the night on the night of the shooting. Jasmine testified that she and Applicant left her residence simultaneously, and she locked her door and did not return for the remainder of the night. This directly contradicts Applicant's testimony at the evidentiary hearing, where he testified that he was "housesitting" for his sister. Accordingly, this Court agrees with Judge Hayes' decision to deny Applicant's request for immunity. Judge Hayes correctly found that the defense had not met its burden of establishing the necessary elements to invoke the protections as outlined in the Act by a preponderance of evidence. (See Trial Tr. pp. 186-187).

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



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- Allegation 3:** Failure to object to leading or point out the mischaracterization of testimony by the Solicitor when he asked a witness "You said Mr. Brown shot him while he was on the ground" and continued to question "two shots to Quinn on the ground" when she had just testified that the Applicant shot Quinn Yeargin three times once, then two more times as he fell back on the car. (pp. 319, 1. 5, 320, 1. 5, 321, 1. 11).
- Allegation 12:** Failure to object to Solicitor mischaracterizing evidence in closing.

Applicant alleges Trial Counsel was constitutionally ineffective for failing "to object to leading or point out the mischaracterization of testimony by the Solicitor when he asked a witness, "You said Mr. Brown shot him while he was on the ground" and continued to question "two shots to Quinn on the ground" when she had just testified that the Applicant shot Quinn Yeargin three times once, then two more times as he fell back on the car." Also, Applicant avers Trial Counsel was constitutionally ineffective for failing to object to the same line of mischaracterization in closing. This Court finds these allegations are without merit.

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

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than

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sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess." (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness").

Moreover, when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); see Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel).

Evidentiary Hearing

On direct examination, Applicant testified Trial Counsel failed to object to leading or the mischaracterization of Bayne's testimony. (PCR Tr. p. 16). Applicant testified having the solicitor mischaracterize the testimony and say that [Applicant] was shooting someone when they were on the ground "definitely" hurt his chances of claiming self-defense. (PCR Tr. p. 16).

On direct examination, Trial Counsel testified he did not recall his failure to object in particular but did recall the evidence submitted for the jury's consideration. (PCR Tr. p. 65). Trial Counsel testified he recalled what Applicant had to say, what other people testified during trial, the nature of the autopsy, and the doctor's testimony. (PCR Tr. p. 66). Trial Counsel testified "[he] didn't think any of that could have shown or proven that [Applicant] was standing over someone shooting." (PCR Tr. p. 66).

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Trial Counsel testified that at trial you get a sense of how the jury can perceive what is occurring at trial, and you may not object just because. (PCR Tr. p. 67). Trial Counsel testified when something is said from this stand to a jury, the jury has a chance to hear it. (PCR Tr. p. 66).

On cross-examination, the following colloquy occurred with Trial Counsel:

Q. All right. And one other question. I'd refer you to page -- this goes back to the argument that I was talking about. The witness, the solicitor kept on trying to characterize her testimony that Mr. Brown was shooting the victim while he was on the ground and continuing to shoot and that you didn't object to this. Did you -- also, you didn't object on Page 706 of the State's closing argument where he states on line 22, there's actually evidence, if you believe he actually stood over and shot him. And there is a strike.

...

Q. You didn't object in that closing argument, did you?

A. No. And I think the results may not have gone in the direction that the State was trying to show that Terrell just killed someone in cold blood as a murderer. There was mitigating factors that I could have shown that it was some form of manslaughter, as I discussed with him.

Q. And the testimony -- in his closing, what he was saying was based on testimony that did not reflect the facts of the case, that the victim was shot while he was on the ground, correct?

A. We would have argued it. I mean, clearly one person had a different take. Everyone else that was out there, again, it would have gone, in our opinion, to the credibility that was trying to be elicited at that point, but there was nothing from everyone else that would have shown that Terrell would have stood over someone.

Q. Okay. And that one witness, talking about standing over, her initial testimony was not stood over. It only became stood over after the solicitor continually characterized his questions ---

A. And that goes to, again, the style of the manner of the questioning and the mannerisms, the body language. Clearly the way that the prosecutor was trying to, to elicit that to the jury. And I think the jury saw beyond that.

(PCR Tr. pp. 83-86).

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This Court finds Applicant has failed to show Trial Counsel was deficient in these allegations. Trial Counsel articulated a reasonable strategy in deciding not to object to what the Solicitor was attempting to characterize from Bayne's testimony to the jury regarding whether Victim was on the ground when Applicant shot him. Specifically, Trial Counsel felt that the jurors were not buying what the Solicitor was saying, and it went more to the credibility of the witnesses. The record before this Court provides those multiple eyewitnesses testified, and none of the others testified that Applicant was standing over Victim shooting him. Further, this Court finds that had the jury believed the Solicitor's characterization of Bayne's testimony, then Applicant would have been found guilty of murder and not voluntary manslaughter.

Further, Applicant has merely speculated as to how Trial Counsel's alleged deficiency prejudiced him. This Court finds Applicant has failed to show how he was prejudiced by the Solicitor's characterization of Bayne's testimony. Consequently, speculation cannot satisfy Applicant's burden of proving prejudice. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

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

Allegation 4: Failure to argue 404 SCRE allows the jury to know victim was just released from prison for shooting at car because it is not to argue conformity therewith but the state of mind of the defendant at time of shooting and that limitations on questions as to specific instances of the victim shooting at someone denied the defendant a full and fair cross; (pp. 328, 1. 4, (pp. 334-337, p. 576, 1.22, p. 591, 1.4).

Applicant alleges Trial Counsel was constitutionally ineffective for failing "to argue 404 SCRE allows the jury to know victim was just released from prison for shooting at car because it

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is not to argue conformity therewith but the state of mind of the defendant at time of shooting and that limitations on questions as to specific instances of the victim shooting at someone denied the defendant a full and fair cross." This Court finds these allegations are without merit.

Rule 404, SCRE, provides the following:

- a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
 - 1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
 - 2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
 - 3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.
- b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

"In the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm." State v. Day, 341 S.C. 410, 419-420, 535 S.E.2d 431, 436 (2000) (citing State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996)); State v. Amburgey, 206 S.C. 426, 34 S.E.2d 779 (1945).

"Whether a specific instance of conduct by the deceased is closely connected in point of time or occasion to the homicide so as to be admissible is in the trial judge's discretion and will not be



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disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused." Id. (citing State v. Peak, 134 S.C. 329, 133 S.E. 31 (1926)).

At the evidentiary hearing on direct examination, Applicant testified it hurt his case that the jury did not know Victim had just been released from prison for shooting at somebody. (PCR Tr. p. 17). PCR Counsel asked Applicant, "Now, do you think that hurt your case, that the jury didn't know that the victim, who you shot, actually had just gotten out of prison for shooting at somebody, and you knew that when you -- it went to your state of mind at the time, correct?" Applicant replied, "Yeah. Yeah, I think it hurt my case." (PCR Tr. p. 17). Applicant testified that he guessed it made the jury not think his mind was in a self-defense "mode or something" (PCR Tr. pp. 19-20).

On cross-examination, Trial Counsel testified that "in the course of what was occurring," he did not think to object to evidence of Victim's prior bad acts as being admissible because it went to the state of mind of Applicant because the jury heard it repeatedly. (PCR Tr. pp. 82-83).

First, this Court finds Applicant failed to overcome "the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). This Court finds the trial court was correct in sustaining the objection as the probative value was very limited and more prejudicial in that it could confuse the jurors. Further, this Court finds the trial court sustaining the objection was correct because there was no direct connection between the shooting and Applicant.

Next, in addressing the claim that Trial Counsel should have argued this evidence went to Applicant's state of mind, this Court finds it is wholly without merit. This Court finds no basis for any assertion that Victim shooting at a vehicle not connected to Applicant over a year prior to the

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incident produced a reasonable apprehension of great bodily harm to Applicant. See Day supra. Thus, even if Trial Counsel had argued as Applicant contends, it is not likely the trial court would have reversed its ruling and overruled the objection.

Additionally, this Court finds Applicant has failed to meet his burden proving Trial Counsel's alleged deficiency prejudiced him. Whether the evidence Applicant contends should have been more readily presented would have changed the outcome of Applicant's trial is mere speculation in light of the breadth of the trial record. Consequently, speculation cannot satisfy Applicant's burden of proving prejudice. See Clark v. State; 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

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

- Allegation 5:** Failure to challenge the search warrant, bring up jurisdictional issues, and argue SCRE 403 and 404 that the probative value of bringing up an unrelated gun and marijuana in a Greenville hotel room was outweighed by the prejudicial effect and constituted impermissible evidence of other crimes.
- Allegation 11:** Failure to object to officer's talking about having to deploy a canine dog because they were worried Applicant had a gun.

Applicant alleges Trial Counsel was constitutionally ineffective for failing "to challenge search warrant, bring up jurisdictional issues, and argue SCRE 403 and 404 that the probative value of bringing up an unrelated gun and marijuana in a Greenville hotel room was outweighed by the prejudicial effect and constituted impermissible evidence of other crimes." Also, Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to the officer's testimony about having to deploy a police canine because they were worried Applicant had a gun. This Court



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finds these allegations are without merit.

Contrary to Applicant's assertion in this allegation, the following occurred at trial:

Mr. Brown: Your Honor, I understand this is Mr. Balsa's contention on trying to elicit from this particular witness the location of my client outside of Spartanburg County. I think the additional information that my understanding to be correct would be sought in terms of his actual location in the county of Greenville as well as information as relates to items that could have been recovered. I don't know if that would be deemed in terms of a continuous set of activities associated with the alleged acts that occurred in Kelly Acres but I don't, I don't understand the probative value of merely presenting to the jury that my client was out of the County of Spartanburg, and, at some point, was in Greenville County and whatever activities were alleged to be associated with that will be a value for a jury to hear. I think it would be substantive if there was information that, at some point, he made his way to the Sheriff's Office and an interview was conducted. But to go into activities as relates to Greenville County, I don't see the value in that in terms of that being presented to the jury.

Solicitor Balsa: Your Honor, the defendant clearly fled the scene, we have information that he fled into Greenville County. And when he was going to be apprehended, he fled from officers in Greenville County and it took a manhunt to locate him. That certainly goes to a consciousness of guilt. The jury can infer that that's the purpose of this, this witness and subsequent witnesses coming up.

The Court: Well, are you going to be — am I going to hear testimony that he engaged in criminal activity or just that, that the defendant engaged in flight?

Solicitor Balsa: Your Honor, we did intend to introduce a pistol that was recovered from the hotel room we believe was attributed to the defendant. That pistol was sent down, it was a 9-millimeter and it was sent down to SLED in conjunction with the other items of evidence to be compared with the 9-millimeter shell casing at the scene. It did not

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match, but to present the full picture to the jury, we felt that that was important so they could —

The Court: Give me that again.

Solicitor Balsa: —have the full picture.

The Court: is that — is — but it's the pistol that was referred in Greenville, that's not the pistol that the state is contending is the basis for the unlawful carrying of a pistol charge?

Solicitor Balsa: No, sir, that, that pistol — the pistol of the unlawful carrying is a revolver which was recovered from a pond that the defendant showed the police---

The Court: All right.

Solicitor Balsa: ---he threw it. That's actually also in Greenville county as well.

The Court: Okay. I'm going to not sustain the, the objection to the testimony. I think it goes more — I mean you can attack the testimony, attack the credibility of it, and attack the weight to which the jury would want to consider that testimony. But I — I'm going to allow it. Now, in regards to the pistol, you can -- I'm gonna allow you to bring it up but I don't want to hear anything much more about it other than just the basic stuff because I, I think that might — got into too much about that pistol might lead to the confusion of the jury on a pistol because I've yet to hear any information about — yet presented to the jury about what the basis of the unlawful carrying of the pistol charge is.

(Trial Tr. pp. 383-385).

Evidentiary Hearing

On direct examination at the evidentiary hearing, Applicant testified that Trial Counsel did not challenge the search warrant or bring up jurisdictional issues and argue the prejudice was great for bringing in an unrelated gun and marijuana. (PCR Tr. p. 21). Applicant testified that there was no objection to the testimony that roads were shut down and that they deployed a police canine because they were concerned Applicant had a gun. (PCR Tr. pp. 21-22).



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On direct examination, Trial Counsel testified that he did not recall the search warrant being an issue at the time. (PCR Tr. p. 72). Trial Counsel testified Applicant provided to law enforcement prior to counsel being involved where the gun used in the murder was located. (PCR Tr. p. 72). Trial counsel testified in terms of the second gun found, they "moved beyond that." (PCR Tr. p. 72). Trial counsel testified that their focus was Applicant being caught with a gun, bolstering Applicant's testimony, and determining what to do with family threatening his life. (PCR Tr. p. 72).

Trial counsel testified Applicant was not on the run from doing something wrong. (PCR Tr. p. 72). Trial counsel testified Application was "merely" trying to protect his life and get away from his family to avoid putting them in danger. (PCR Tr. p. 73). However, Trial counsel testified Applicant's sister received threatening phone calls. (PCR Tr. 73). Trial counsel testified Applicant was in a position as a "fugitive" trying to survive and avoid being killed in light of getting away from the scene. (PCR Tr. p. 73).

Trial counsel testified that when he objected to the evidence found in hotel room, he made the court aware of that mindset. (PCR Tr. p. 73). Trial counsel testified in light of his objection placed on the record, there was nothing else he could have made the Court aware relating to the nature of that evidence at trial. (PCR Tr. 73).

On cross-examination, Trial Counsel testified as to the unrelated gun and marijuana found in the hotel room; if he were to exclude evidence, that would be based on a showing Applicant was not in Greenville at all. (PCR Tr. p. 78). As to its prejudicial effect, Trial Counsel testified that it could have been argued. (PR TR. p. 78). However, Trial Counsel testified it was a "judgment call and trial strategy" that he and Applicant had discussed. (PCR Tr. p. 78). Trial counsel testified their defense in relation to the shooting, him being found in Greenville and; under

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the circumstances, centered on the fact he was in a position where he feared for his life. (PCR Tr. p. 78).

Findings

The Court finds Trial Counsel's credible testimony in not challenging the search warrant that was the basis for evidence found in the hotel room. Trial counsel credibly testified prior to counsel having been appointed Applicant revealed the whereabouts of the gun used at the incident to law enforcement. Trial counsel credibly testified he did not recall the search warrant being an issue to challenge. Trial counsel credibly testified he objected to the nature of the evidence, and the objection was placed on the record. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996). Contrary to Applicant's allegation, Trial Counsel argued against the admittance of evidence found in the hotel room.

Subject matter is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. Pierce v. State 338 S.C. 139, 526 S.E.2d 222 (2000). The criminal courts have subject matter jurisdiction to hear criminal matters. As to jurisdiction, there is no jurisdictional issue. Trial counsel credibly testified the search warrant was not an issue thereby Applicant's jurisdiction allegation is unsound.

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



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Allegation 6: Failure to object to testimony regarding flight extending to banter regarding roads being closed during the search that blocked traffic, ruining citizen's morning commute (p. 400-1).

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to testimony regarding flight extending to banter regarding roads being closed during the search that blocked traffic, ruining citizen's morning commute (p. 400-1). This Court finds this allegation is without merit.

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

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

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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

Moreover, when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); see Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel).

Evidentiary Hearing

At the evidentiary hearing on direct examination Applicant testified that there was no objection to the officers talking about how they had to close the roads and inconvenienced people because of Applicant's actions. (PCR Tr. p. 21). Applicant testified, "To be honest, like when I left the scene [he] was still being shot, so [he] wanted to stay in Woodruff." (PCR Tr. p. 21).

On direct examination, Trial Counsel testified he did not object to testimony regarding flight extending to roads as a defense strategy, "It looks like, again, it was in the course of trial and stylistic." (PR Tr. p. 74). Trial Counsel testified the way law enforcement treated Applicant, in essence, showed "They were quick to judge, quick to label as yet again another young black male with a gun that took lives." (PCR Tr. p. 74).⁶ Trial counsel testified law enforcement testified "This and that" but "Did you get into the fact you released a dog and you let the dog bite him? Did you determine the matter in which you arrested, what you said to him?" (PCR Tr. p. 74).

Findings

Applicant could not have been prejudiced by Trial Counsel's failure to object because such objections – could not have and would not have had any impact on the outcome of Applicant's trial

⁶ At the evidentiary hearing, the trial court stated on the record Trial Counsel did not object so that he could get into the fact that maybe the police overreacted, as opposed to anything else. He wanted the good and bad of it. It was a stretch in that he was trying to let them run with it to create sympathy, perhaps. (PCR Tr. p. 75).

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in light of the overwhelming evidence presented at trial. Trial counsel credibly testified his failure to object was tactical in lieu of what was occurring at trial and what he believed would benefit his client.

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

Allegations 1(C), (E), (K) and (M): Failure to argue.

Applicant alleges Trial Counsel was ineffective for failure to argue specifically as outlined in items 1C, 1E, 1K, and 1M. This Court finds those allegations are without merit.

Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

Allegation 7: Failure to argue [Applicant] had a right to carry a gun on Kelly Acres because he was an invitee of his sister.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to argue that

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Applicant had a right to carry a gun on Kelly Acres property because he was an invitee of his sister. This Court finds this allegation is without merit.

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

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

S.C. Code Ann. § 16-11-440(C). "A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard[.] "State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (citing State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011)).

Where a defendant seeks treatment under § 16-11-440(C), it is not enough for a defendant to establish that he was "not engaged in an unlawful activity" and was in a "place where he has a right to be." Rather, "[c]onsistent 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" save the duty to retreat. Id., 406 S.C. at 371, 752 S.E.2d at 266 (emphasis added). Notwithstanding the Act or other provisions of law, in order to establish self-defense, the defendant must show (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would

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have entertained the same belief; and (4) he had no other probable means of avoiding the danger. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997).

That a defendant was engaged in unlawful activity at the time of the incident does not in and of itself defeat a claim for immunity. Rather, where a defendant was engaged in unlawful activity at the time of the incident, the trial court must consider whether the unlawful activity was the proximate cause of the incident. A person who is otherwise acting lawfully is not deprived of the right to self-defense by merely incidental illegality. State v. Glenn, 429 S.C. 108, 120-21, 838 S.E.2d 491, 497-98 (2019) (citing State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999)); State v. Goodson, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1994)).

Evidentiary Hearing

At the evidentiary hearing on direct examination, Applicant testified that Trial Counsel failed to argue Applicant had the right to carry a gun on Kelly Acres as an invitee of his sister. (PCR Tr. p. 22). Applicant testified he did not discuss an invitee issue with his Trial Counsel for his SYG hearing. (PCR Tr. p. 30).

On cross-examination, Applicant testified that if he were considered an invitee then it would not be considered loitering. (PCR Tr. p. 31). Applicant testified the landlord testified there was a requirement of signing in to be considered an overnight guest. (PCR Tr. p. 31). However, Applicant testified he was not an overnight guest. (PCR Tr. p. 31). Applicant testified he had a gun with him for no reason when he walked down the street to meet the rest of the group. (PCR Tr. p. 33). Applicant testified that being a convicted felon does not mean he cannot defend his life. (PCR Tr. p. 37).

On direct examination, Trial Counsel testified that, at a minimum, their defense was to show that Applicant had a right to be in the apartment based on his sister being on the lease and

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living there. (PCR Tr. p. 63). Trial counsel testified that the Applicant was "clearly an invitee." (PCR Tr. p. 63).

On cross-examination, Trial Counsel testified that the defense's position was that the Applicant had a right to be there and didn't know about everyone else. (PCR Tr. p. 79). Trial Counsel testified the pre-trial court found Applicant was not engaged in lawful activity and loitering. (PCR Tr. p. 81). Trial counsel testified Applicant was found loitering based upon the signs posted on the property. (PCR Tr. p. 81).

Findings

The Court finds Trial Counsel's credible testimony indicates Trial Counsel argued at a minimum Defendant's right to be on the property. However, the pre-trial court ruled Applicant was loitering and not engaged in lawful activity. Applicant possessed a firearm in a public place on Kelly Acres. Applicant was in violation of SC Code §16-23-20 (Trial Tr. p. 534). At trial, Applicant was charged with the unlawful carry of a pistol charge and sentenced to one year imprisonment. (Trial Tr. p. 745). There was no evidence indicating Applicant had a right to be on the premises and carry a firearm on Kelly Acres. On the contrary, Applicant admits he was not an overnight guest, and simply housesitting his sister's apartment which by itself does not change his status to invitee.

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

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Allegation 1M. Failure to argue Defendant's testimony that he heard the victim and Fredo talking to each other about the shooting this or that was not hearsay because it was not offered for the truth of the matter asserted but was to the state of the defendant's who argued he shot in self-defense.

At the evidentiary hearing on direct examination, Applicant testified that he heard "Fredo" talking to victim, and he was saying something to victim prior to solicitor making an objection. (PCR Tr. p. 23). Applicant testified it sounded like something about shooting, because "right after that, that's when [victim] approached me and pulled a gun out." (PCR Tr. p. 23). Applicant testified victim and Fredo were talking to each other about the shooting. (PCR Tr. p. 23). Applicant testified Trial Counsel did not argue that victim and Fredo discussing the shooting went to the Applicant's state of mind in reacting and shooting back. (PCR Tr. p. 23).

On direct examination, Trial Counsel testified that Fredo was a third person on the scene "being a person that was the catalyst of a lot of this." (PCR Tr. p. 71). Trial counsel testified "yes" when asked if Fredo was an instigator.

On cross examination, Trial Counsel testified "not that I recall" when asked if he argued the prior conversation between Applicant and Fredo would support Applicant's state of mind. (PCR Tr. p. 77). Trial counsel testified "in the course of trial, it's not always [his] position, and have been successful with this, to not make it seem like you're trying to hide something, but then it had been brought out a few times that the victim had a gun and based on the previous situation." (PCR Tr. p. 77).

Findings

The Court finds Trial Counsel's credible testimony indicates Trial Counsel had a valid strategy to not necessarily argue about the conversation between victim and Fredo. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for

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employing certain strategy, such conduct will not be deemed ineffective assistance of counsel"). Trial counsel credibly testified at trial it had been brought out several times that victim had a gun and had been released from prison in relation to an unrelated shooting incident that took place prior to incident. Here, Applicant failed to present any testimony or evidence on how additional preparation would have changed the outcome of the SYG hearing and at trial had Trial Counsel made the argument of the conversation between victim and Fredo. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial.). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

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

Allegation L. Failure to request jury charges including one that a defendant may continue to shoot in self-defense as long as he reasonably believes it is necessary to use deadly force. State v. Marin, 745 S.E.2d 148, 404 S.C. 615 (S.C. App. 2013).

Applicant alleges Trial Counsel was constitutionally ineffective for failing to request jury charges including one that a defendant may continue to shoot in self-defense as long as he reasonably believes is necessary. This Court finds allegation is without merit.

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Evidentiary Hearing

At the evidentiary hearing on direct examination, Applicant testified that he cannot remember whether his Trial Counsel handed over a list of jury instruction requests at trial. (PCR Tr. p. 25).⁷

On direct examination, as to a failure to request a jury charge based upon State v. Marin and whether Trial Counsel knew about the caselaw at the time of trial, Trial Counsel testified "[he] did not recall looking at that case...but looked at a number of cases in regard to an alleged position of self-defense." (PCR Tr. p. 75). Trial counsel testified part of the defense strategy was to seek immunity upon Applicant's stand your ground motion and pursue a self-defense theory at trial, which he clearly pointed out throughout the course of trial. (PCR Tr. p. 75).

On cross examination, Trial Counsel testified he did not specifically hand in any written requests for specific jury instructions. (PCR Tr. p. 76). Trial counsel testified they had already discussed the charges. (PCR Tr. p. 76). However, Trial Counsel testified that the trial record beginning on p. 723 accurately reflects the whole issue about jury instructions. (PCR Tr. p. 76).

On redirect, Trial Counsel testified that when a judge rules on an objection without giving a chance to offer anything in rebuttal, you "Clearly not" respond with a rebuttal. (PCR Tr. p. 86). Trial counsel testified he has been argumentative with a judge in a serious trial, and it is "not a good position to be in when you're trying to defend someone." (PCR Tr. p. 87).

Findings

The Court finds Trial Counsel made reasonable efforts and performance in his representation of Applicant. It is generally accepted that Trial Counsel cannot be held ineffective

⁷ The trial record wholly refuted Applicant's allegations in that the trial court provided jury instructions for self-defense and no objection was preserved by either party. (Trial Tr. pp. 722-728).

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for failing to anticipate every possible event or outcome. Reasonable efforts and performance are all that is required of Trial Counsel. Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). Even if Trial Counsel did not provide written jury instructions, the trial court provided jury instructions on self-defense and no objections were made at trial by either side. The trial record wholly refuted Applicant's allegations concerning Trial Counsel's failure to request jury charges for self-defense.

Specifically, there were no jury instructions based on State v. Marin. However, the PCR record reflects that case came after Applicant's trial and Trial Counsel would have had no indication that this was going to be the law when he was proceeding with jury instructions at trial. (PCR Tr. p. 92). Applicant has not been prejudiced, nor was Trial Counsel ineffective for not adopting that case at Applicant's trial.

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

Allegation N. Failed to call witness Nicholas Rhodes.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to call witness, Nicholas Rhodes. This Court finds allegation is deemed abandoned.

Prejudice from Trial Counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). In order to show prejudice from the failure to contact an allegedly favorable witness, a PCR applicant must present the testimony of that witness at the PCR hearing. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). The applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

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The PCR record reflects Applicant failed to provide any testimony, nor did Applicant call Nicholas Rhodes to testify at the evidentiary hearing. Applicant failed to show prejudice from the failure to contact said witness, and to present what favorable information would have changed the outcome of trial. Applicant's mere speculation is insufficient and cannot by itself satisfy the burden of showing prejudice. Therefore, this Court interprets this allegation as deemed abandoned.

ALLEGATIONS RAISED AT THE EVIDENTIARY HEARING

Allegation: **Failure to object to officer's talking about having to deploy a canine dog because they were worried Applicant had a gun.**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to officer's talking about having to deploy a canine dog because they were worried Applicant had a gun. This Court finds allegation is without merit.

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

Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance.

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of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

Evidentiary Hearing

At the evidentiary hearing on direct examination, Applicant testified that Trial Counsel made no objection to officer's talking about having to deploy a dog because they were worried Applicant had a gun. (PCR Tr. p. 22).

On direct examination, Trial Counsel testified that law enforcement stated "We had to block the roads. We did this and that. But did you go into the fact that you released a dog and you let the dog bite him?" Trial counsel testified it was a "stylistic" decision not to object. Essentially, Trial Counsel's strategy was to include the good and bad of law enforcement's handling of Applicant's arrest.

On cross examination, Trial Counsel testified that he did not recall and that may have been law enforcement's testimony in regard to the dog, but his defense strategy was to show Applicant's state of mind. (PCR Tr. p. 77).

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Findings

This Court finds Applicant has failed to show how he was prejudiced by Trial Counsel's failure to object to officer's talking about deploying a dog. Consequently, speculation cannot satisfy Applicant's burden of proving prejudice. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice). Applicant could not have been prejudiced by Trial Counsel's failure to object because such objection – could not have and would not have had any impact on the outcome of Applicant's trial in light overwhelming evidence presented at trial. Trial counsel testified it was part of his defense strategy not to object and had discussed with Application. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

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

Allegation Failure to prepare Applicant to testify.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to prepare Applicant to testify. This Court finds allegation is without merit.

A criminal defendant has the right to testify and the right to zealous representation by a lawyer. United States v. Scott, 909 F.2d 488 (11th Cir. 1990). Moreover, the right to testify "does not extend to testifying falsely." Nix v. Whiteside, 475 U.S. 157, 173, 106 S.Ct. 988, 997, 89 L.Ed.2d 123 (1986). While no specific inquiry must occur on the record, the decision to testify or not to testify is ultimately up to the defendant. "The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events.

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[However], if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations." Id. "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id.

To establish counsel failed to adequately prepare for trial, applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768. Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). When claims of ineffective assistance of counsel are based on lack of preparation time, an applicant challenging his conviction must show specific prejudice resulting from counsel's lack of time to prepare. Cronic, infra; U. S. v. LaRoache, 896 F.2d 815 (4th Cir. 1990).

Evidentiary Hearing

At the evidentiary hearing, on direct examination Applicant testified as far as preparation for trial and preparing his testimony, Trial Counsel came to see him a couple of times in the county jail. (PCR Tr. p. 22). Applicant testified he had told Trial Counsel his willingness to testify. (PCR Tr. p. 22). Applicant testified he does not think he and Trial Counsel practiced. (PCR Tr. p. 22).

On direct examination, Trial Counsel testified that for the time Applicant was charged, he visited Applicant at the county jail maybe a month or less. (PCR Tr. p. 59). Trial Counsel testified Applicant knew why Victim was in jail. (PCR Tr. p. 71). Trial counsel testified it was his trial strategy to discuss and bring it up during closing arguments. (PCR Tr. p. 71). Trial counsel

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testified throughout their questioning of several witnesses, they had the opportunity to try and get into the fact that victim had a past. (PCR Tr. p. 66).

Trial counsel testified it was their defense strategy Applicant was in a position that he was fearful for his life. (PCR Tr. p. 78). Trial counsel testified that when something is said from the stand, the jury has a chance to hear it. (PCR Tr. p. 66). Trial Counsel testified Applicant had stated he had prior incidents with victim previously and when he took the stand "... didn't come out and [he] didn't want to force it." (PCR Tr. 71). Trial counsel testified when Applicant was on the stand "he hit me upside the head with a bottle, again, the jury is watching." (PCR Tr. p. 68). Trial counsel testified "[he] didn't want to make it seem like...trying to elicit something or cause [Applicant] to say something." (PCR Tr. p. 69).

Findings

This Court finds Applicant has failed to show how he was prejudiced from Trial Counsel's lack of preparing him to testify at trial and how it would have changed the outcome of the case. The Court strongly presumes Trial Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Counsel is obligated to exercise reasonable judgement and not force or coerce Applicant what to say.

Applicant willingly testified. While Applicant took the stand, Applicant failed to bring up certain discussions he had with Trial Counsel that presumably might have supported his self-defense case concerning his past relationship with victim. Applicant has failed to show how Trial Counsel's conduct undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)). Trial counsel **credibly** testified he met with Applicant and discussed the case. Trial counsel **credibly** testified as to his defense strategy and the fact he reviewed a number

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of cases to best present the position of self-defense at trial. Initially, Applicant was facing two counts of murder and at trial was convicted for two counts of the lesser offense of manslaughter. There is no indication Trial Counsel failed to render adequate assistance.

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

[CONCLUSION PAGE FOLLOWS]

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CONCLUSION

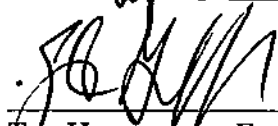
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED with PREJUDICE.**

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.


IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 16 day of April, ~~2024~~ ²⁰²⁵.



THE HONORABLE Eugene C. Griffith, Jr.
Presiding Judge
Seventh Judicial Circuit

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