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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Jessica A Salvini

Lower Court Case No.: 2022-CP-32-01641

Heirberone Foster, #353381,

Petitioner

vs.

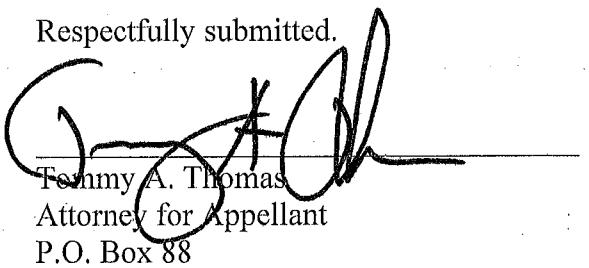
State of South Carolina,

Respondent.

NOTICE OF APPEAL

The Petitioner, Heirberone Foster, #353381, appeals the Order of Dismissal signed by the Honorable Jessica A. Salvini on May 5, 2026, and filed on February 24, 2026. On March 9, 2026, a Motion for Reconsideration was filed. On May 13, 2026, a Final Order Regarding Motion to Reconsider was signed by the Honorable Jessica A. Salvini and filed on May 19, 2026. Petitioner received a copy of the Final Order on May 28, 2026.

Respectfully submitted.



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June 9, 2026

FILED

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON 2026 FEB 24 AM 10:1	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Heirberone H. Foster, #353381, Applicant, v. State of South Carolina, Respondent.	CASE NO. 2022–CP–32–01641 **ORDER OF DISMISSAL WITH PREJUDICE**

LISA M. COMES
CLERK OF COURT
LEXINGTON, SC

Presiding Judge:	Hon. Jessica Ann Salvini
Applicant's Attorney:	Tommy A. Thomas, Esq.
Respondent's Attorney:	Sydney N. Willingham, Esq.
Plea Counsel:	Aimee J. Zmroczek, Esq.
Date of Hearing:	September 16, 2025
Court Reporter:	Trinita Brown, DCRP

This matter comes before the Court pursuant to an application for post-conviction relief ("PCR") filed by Heirberone H. Foster ("Applicant") on May 12, 2022. Respondent filed its Return, requesting that an evidentiary hearing be held on the allegations. On September 16, 2025, an evidentiary hearing was held at the Lexington County Courthouse before the Honorable Jessica Ann Salvini. Applicant was present and represented by Tommy A. Thomas, Esquire (PCR Counsel). Assistant Attorney General Sydney N. Willingham represented Respondent. In support of his claims, Applicant testified on his own behalf and presented testimony from Bradley Foster. Respondent presented testimony from Aimee J. Zmroczek, Esq. (Trial Counsel), and Assistant Solicitor Rhonda Patterson (Solicitor Patterson).

Following a thorough review of the record, along with the testimony and evidence presented at the 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

Applicant is presently confined in the South Carolina Department of Corrections. During its December 2016 term, the Lexington County Grand Jury indicted Applicant for murder (2016-GS-32-3022); possession of a weapon during a violent crime (2016-GS-32-3340); and possession of a firearm by a violent felon (2016-GS-32-3023). Upon information and belief, Applicant was initially represented by John D. Delgado, Esquire, as the Public Defender's Office was conflicted due to their representation of Applicant in another criminal matter. Applicant then hired Aimee J. Zmroczek, Esquire, and Ryan Schwartz, Esquire, to represent him at trial. Eleventh Circuit Assistant Solicitors Rhonda Patterson and Luke Pincelli prosecuted the case.

Applicant proceeded to a trial by jury on May 20-23, 2019, in Lexington County before the Honorable William P. Keesley. At the conclusion of the trial, Applicant was found guilty as indicted on all charges. He was sentenced to concurrent terms of 30 years for murder, five years for possession of a weapon during a violent crime, and six months for possession of a weapon by a violent felon.

Direct Appeal

On May 30, 2019, a notice of intent to appeal was filed on the Applicant's behalf by Aimee Zmroczek, Esq. Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, perfected Applicant's appeal by filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), and a petition to be relieved as counsel. The South Carolina Court of Appeals dismissed Applicant's appeal in an unpublished opinion and

granted counsel's motion to be relieved. State v. Foster, Op. No. 2021-UP-433 (S.C. Ct. App. filed Dec. 8, 2021). The Remittitur was returned on January 5, 2022.

SUMMARY OF FACTS GIVING RISE TO THE CONVICTION

On May 10, 2016, law enforcement was called to the home of Cathy and Applicant after receiving a call about a shooting incident in the Gaston area of Lexington County. (R. p. 285, line 4-10). Upon arrival, police declared an individual, later identified as Will Foster, deceased from an apparent gunshot wound. (R. p. 508, lines 4-18). Police located the suspect, Applicant, and detained him. (R. p. 236, lines 5-14). In the initial investigation, Crime Scene Investigator Keith Sprinkle concluded an incident had occurred between the Applicant and Will, which resulted in the Applicant shooting Will. (R. p. 508, lines 4-18).

Prior to the jury trial, a Stand Your Ground hearing (SYG hearing) was held, followed by a Jackson v. Denno hearing. During the SYG hearing, Applicant testified numerous times that the shooting was an accident and that he was only trying to scare Will and "make him stop" before he (Will) hurt somebody. (R. p. 117, lines 4-10; R. p. 128, lines 2-17; R. p. 115, lines 9-20). Applicant further testified during the hearing that when he pumped the shotgun, "it went off." (R. p. 14, lines 14-17). Judge Keesley found that defense counsel failed to establish the requisite elements for immunity from prosecution for murder. (R. p. 275, lines 11-13).

Following the SYG hearing, a State v. Denno hearing was held to determine the admissibility of the Applicant's statements to police regarding the incident. (R. p. 293, lines 19-23). During the hearing, Brandon Miller of the Lexington County Sheriff's Department and the Applicant testified. Sergeant Miller was one of the first officers to interact with the Applicant after he had been detained. (R. p. 285, lines 11-21). Judge Keesley found that the State met its burden

of proof and established that the Applicant had been properly advised of his rights and had voluntarily and intelligently waived them. (R. p. 298, lines 10-24).

Testimony was given by the Applicant's daughter, Haley Foster, who was present at the incident location on the day of the murder. (R. p. 324, lines 16-19). Haley Foster explained that prior to the shooting, Will and Applicant were arguing with each other. (R. p. 330, lines 3-7). During the argument, Will picked up the item in the photo marked State Exhibit 6 (Item). (R. p. 332, lines 14-20). Haley then began "tussling" with Will to prevent him from getting into an altercation with Applicant. (R. p. 335, lines 15-23). Haley and Will's girlfriend, Leann Cotton, pulled Will away from Applicant. (R. p. 224, lines 2-8). Shortly after getting the "item" away from Will, his girlfriend, Leann Cotton, and Haley began "[] talking, joking, and just standing there." (R. p. 227, lines 17-19). Haley stated that she believed the argument between Applicant and Will had ended. (R. p. 225, lines 13-17). Foster explained that Will, Leanne, and she were about to walk over to Leanne's house when Applicant walked outside with the shotgun. (R. p. 338, lines 10-24).

Additional testimony was given by Savanah Smith, a friend of Will's brother, Bradley Foster. (R. p. 353, lines 2-5). At the time of the incident, Savanah was staying at his aunt's house across the street from the incident location. (R. p. 353-54, lines 15-1). Savanah was looking through a window and witnessed Will's actions leading up to his murder. (R. p. 354, lines 13-16). Savanah explained that she heard people arguing and yelling from across the street. (R. p. 355, lines 16-23). From the window, she saw someone take away a 2x4-sized board out of Will's hands and throw it to the ground. (R. p. 356, lines 5-7). Savanah then saw the Applicant go inside for "several minutes" before returning outside with a shotgun, at which point he heard a gunshot. (R. p. 356, lines 12-18).

Testimony was given by Agent Suzanne Cromer of the South Carolina Law Enforcement Division, who was qualified as an expert in the field of firearms and firearms identification. (R. p. 568, lines 8-9). Agent Cromer's testimony explained that the weapon used, a Mossberg Model 500A pump-action shotgun, was tested multiple times for any defects in the firing mechanism. (R. p. 578). Specifically, she tested the firing and safety mechanisms and found them to be in working order and free of defects. (R. p. 574, lines 4-15; R. p. 579, 5-13; R. p. 580, lines 13-15). Agent Cromer admitted that she did not attempt to disassemble and inspect the weapon's internal workings because doing so could affect its function. (R. p. 579, lines 5-13). As to the physical condition of the weapon, Agent Cromer explained that it was in fair condition, meaning it functioned but had cosmetic imperfections. (R. p. 583, lines 18-24). In her report, Agent Cromer noted that the weapon's safety mechanism was difficult to engage. (R. p. 588-9, 23-3). She attributed this to the paint around the safety mechanism. (R. p. 588-9, 23-3).

Agent Cromer explained that the only way the weapon could be fired would involve pulling the trigger. (R. p. 581, lines 3-5). She tested the gun to see if it would fire without the user pulling the trigger, a concept known as a "slam fire," and the gun did not fire without pulling the trigger[1]. (R. p. 591-592, lines 24-3). Agent Cromer testified that it would be possible for a slam fire to occur because of faulty ammunition or a malfunction with the gun and firing pin, but such an occurrence would be dependent on the weapon. (R. p. 588, lines 9-21). She compared the shotgun shell found at the crime scene with shells gathered during testing and was unable to observe anything abnormal about the shotgun shell found at the crime scene. (R. p. 591, lines 8-18).

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[1] "[Slam Fire]: A condition in which the shotgun fires as the action closes. This may occur with the trigger pulled or not pulled. In an autoloading shotgun this condition will usually cause the shotgun to continue to fire in a full automatic mode where such a mode was not intended." U.S. Department of Justice, NIJ Standard-0113.00, National Institute of Justice: Technology Assessment Program, at 2 (1989).

Agent Cromer conducted further tests to see if the gun would fire without the trigger being pulled. Upon investigation, she discovered that the weapon used was subject to a recall and had a safety warning. (R. p. 577, lines 2-9). The recall indicated that the weapon could fire if the plastic portion behind the trigger guard were struck with a mallet. (R. p. 577, (lines 2-11). Agent Cromer testified that she tested the weapon by striking the receiver with a mallet several times to see whether it would fire, but it did not. (R. p. 577, lines 12-25).

CURRENT APPLICATION

In his *pro se* application for post-conviction relief, Applicant alleges he is entitled to relief based on the following (excerpted verbatim):

"Ineffective Assistance of Trial Counsel"

The Applicant, through PCR Counsel, filed a "Motion for Discovery" with the Clerk of Court's office on March 27, 2023. In that motion, the Applicant stated:

> Applicant alleges that he did not pull the trigger of the gun, that the gun was bumped and went off." He asserts that he has retained a forensic expert to inspect the weapon that was introduced into evidence as State's Exhibit 28. The weapon is currently held in the Lexington County Court of General Sessions.

An "Order for Discovery" was filed with the Clerk's office on October 7, 2024, permitting Applicant the ability to examine the Mossberg 500 shotgun firearm at the Lexington County Sheriff's Department.

On September 10, 2025, Applicant, through PCR counsel, amended his application to include the following allegations:

1) Failure to adequately present evidence and argument in the Stand Your Ground Hearing prior to the Applicant's Jury Trial.
2) Failure to adequately present and preserve issues for Appeal of the Stand Your Ground Hearing.
3) Failure to present the Applicant as a witness during his Jury Trial.
4) Failure to call the Pathologist who performed the autopsy on the victim to counter testimony that the victim was in the process of leaving with his back turned toward the Applicant at the time of the shooting.

5) Failure to move before the Court for a direct verdict for the State's failure to prove cause of death through the forensic pathologist.

On September 11, 2025, Applicant, through PCR counsel, amended his application a *second* time to include the following allegations:

6) Failure to introduce or present evidence of Notice of Trespass of real property regarding the victim Heirberone Will Foster.
7) Failure to move for a mistrial regarding a sleeping juror.
8) Failure to request a Direct Verdict for the State's failure to prove cause of death.
9) Failure to raise the issue of Defense of Habitation at the stand your ground hearing.

Applicant raised the following additional allegations at the evidentiary hearing:

10) Failure to call Bradley Foster as a witness at the Stand Your Ground Hearing.
11) Failure to object. (PCR Tr. pp. 53-54; 78).
12) "Failure to discover and present significant mitigating evidence in reference to curtilage." (PCR Tr. p. 79)
13) "For not motioning for mistrial and preserving the following issues: not applying the adversary process to the judge's knowledge of the legislature's intent, by the judges own admittance of not understanding, not knowing what the legislature meant, nor what they intended, and he didn't know what the legislations intended in a statute, by an unlawful act is occurring." (PCR Tr. p. 79)
14) Failure to properly ensure Applicant could see all portions of his jury trial. (PCR Tr. p. 63).

Applicant requested relief in the form of a "new trial."

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[2] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2) That the court was without jurisdiction to impose sentence;
3) That the sentence exceeds the maximum authorized by law;
4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

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

5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

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

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

"[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

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

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the

burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S.at 112.

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

whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

INITIAL FINDINGS

This Court finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant, she rendered adequate assistance and exercised reasonable

professional judgment in his representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Allegation 1: **Failure to adequately present evidence and argument in the Stand Your Ground Hearing prior to the Applicant's jury trial.**

Allegation 10: **Failure to call Bradley Foster as a witness at the Stand Your Ground Hearing.**

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to present evidence and argument in the SYG hearing prior to the Applicant's jury trial. This Court finds this allegation is without merit.

"No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland 466 U.S. at 688-89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Strickland therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

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); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546,

419 S.E.2d 778 (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." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

"The circuit court is in the best position to assess witness credibility and make the necessary findings of fact." State v. McCarty, 437 S.C. 355, 878 S.E.2d 902 (2022); see generally State v. Glenn, 429 S.C. 108, 838 S.E.2d 491 (2019) ("The circuit court is the fact-finder in immunity hearings, and we are reluctant to infer findings of fact which do not appear in the record.").

PCR Evidentiary Hearing

A "Motion and Order for Virtual Testimony" was signed by the Honorable Debra McCaslin and filed on September 15, 2025, to allow Bradley Foster to testify via WebEx.[3] Bradley testified he was present the day his brother, Will Foster, got shot. (PCR Tr. 10). Bradley testified that his brother had anger issues growing up and would try to take his anger out on him and his dad. (PCR Tr. 11-12). Bradley also testified to his brother's drinking and to his brother's allegedly tumultuous relationship with his prior girlfriend, Leanne Cotton. (PCR Tr. 11-14). Bradley testified that Will grabbed a two-by-four and approached Applicant with it. (PCR Tr. pp. 16-17). Bradley testified that his brother, Will, was still trying to attack Applicant right before the gun "went off." (PCR Tr. p. 18). Bradley testified that he did not attend Applicant's jury trial because Trial Counsel told him it wasn't that day and they didn't need him. (PCR Tr. p. 19). However, he would have been willing to testify at the trial. (PCR Tr. p. 20).

On cross-examination, Bradley testified that he was not present when law enforcement arrived on the scene. (PCR Tr. p. 22). Further, Bradley testified that he never gave any statements

[3] Mr. Foster is currently being held in the Lexington County jail for a federal offense.

to law enforcement about what happened that day. (PCR Tr. p. 22). On redirect, Bradley testified that he did not recall giving a statement to Trial Counsel. (PCR Tr. p. 23).

Trial Counsel testified that she recalled discussing potential witnesses with Applicant. (PCR Tr. p. 25). Trial Counsel testified that she had an incredibly difficult time getting family members to come and testify on Applicant's behalf. (PCR Tr. p. 25). Trial Counsel subpoenaed the witnesses she could find to testify. (PCR Tr. p. 26). Trial Counsel testified that she did not recall specifically speaking to Bradley Foster; however, she attempted to talk with everyone and spent significant time getting people into court and the office. (PCR Tr. p. 25). As far as Bradley Foster's presence on the day of trial—Trial Counsel testified she has no recollection that he was present in a courtroom and that she would not send a witness home, especially when she was trying to get witnesses to testify. (PCR Tr. p. 26). Further, Trial Counsel testified that she informed the entire family of the trial. (PCR Tr. p. 26).

Trial Counsel testified that her primary concern regarding the SYG Hearing was that Applicant maintained throughout the case that he never pulled the trigger. (PCR Tr. p. 27). Specifically, Trial Counsel testified that Applicant claimed that the gun went off, accidentally killing Will, which made the defense of stand your ground difficult because you must fire in self-defense to be granted immunity, and Applicant would never admit that he fired the gun. (PCR Tr. p. 27). Trial Counsel testified she also had difficulty at the SYG hearing with the records and prior bad acts of Applicant, as he was out on bond for domestic violence against his wife, but she had let him back into the home. (PCR Tr. p. 28). Trial Counsel testified that Applicant did not request that she present any additional witnesses, and she did not recall any discussions with him regarding the presentation of Bradley as a witness. (PCR Tr. p. 28). Trial Counsel testified that the first time

she learned Bradley was available and ready to testify was two days before the PCR evidentiary hearing. (PCR Tr. p. 28).

On cross-examination, Trial Counsel testified that she did not identify Bradley Foster as present but instead listed him as a potential witness. (PCR Tr. p. 38). However, she does not recall Bradley ever wanting to speak with her. (PCR Tr. p. 39).

Assistant Solicitor Rhonda Patterson testified that she reviewed the discovery in this case and found no document stating that Bradley was present at the scene. (PCR Tr. p. 82). She testified that none of the witnesses placed Bradley there, including his mother, sister, and Leanne Cotton. (PCR Tr. p. 82). Further, Solicitor Patterson testified that Bradley never made any statements to law enforcement or her office during the two years this case was pending before trial. (PCR Tr. p. 82).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra.* This Court finds that the record is clear that Trial Counsel made a commendable attempt to secure immunity for Applicant. In fact, a full hearing was held on the stand-your-ground defense, and Trial Counsel presented several witnesses. Immunity was denied not because of any fault of Trial Counsel, but because the facts presented at the hearing did not warrant immunity. Trial Counsel *credibly* testified about her strategy at the SYG hearing, with a primary concern being whether there was a self-defense claim being made by Applicant since he claimed the shooting was accidental.

Further, the record of the SYG hearing supports a finding that Trial Counsel presented evidence and made appropriate arguments based on trial strategy. Additionally, Applicant presented no competent evidence to substantiate his claim that Trial Counsel did not properly handle the SYG hearing. Thus, Applicant failed in his burden of proving deficiency or prejudice. See Glover, *supra.*

This Court further finds Bradley's testimony to be, at best, cumulative to the testimony presented at the SYG hearing. This Court does not find that Bradley's testimony would have changed the outcome of Applicant's proceedings. Thus, Applicant has failed to prove deficiency or prejudice.

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

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

Allegation 2: Failure to adequately present and preserve issues for the appeal of the Stand Your Ground hearing.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to adequately present and preserve issues for appeal of the SYG hearing. This Court finds this allegation is without merit.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Rivers, 411 S.C. 551, 553, 769 S.E.2d 263, 265 (Ct. App. 2015).

In order to preserve issues at trial for appellate review, the issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." Id. at 142, 587 S.E.2d at 694.

To show prejudice where counsel fails to preserve an issue, applicant must show the trial court would have sustained an objection, and the unpreserved issue would have been successful on appeal. Milledge v. State, 422 S.C. 366, 811 S.E.2d 796 (2018). A PCR court must view the trial court's ruling on an issue through the same lens applied on appeal, giving appropriate deference to the trial court's findings. Id. at 380, 811 S.E.2d at 804.

PCR Evidentiary Hearing

Trial Counsel testified that she anticipates with every trial what the issues will be and tries to preserve them. (PCR Tr. p. 29). Trial Counsel testified that she believes she preserved the issues she raised and made objections where she could. (PCR Tr. p. 29).

Findings

This Court finds that Applicant has failed to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* Applicant failed to present any credible evidence that there were any issues not adequately preserved for appeal. Trial Counsel *credibly* testified that it is her practice to anticipate what the issues will be prior to trial and to try to preserve them [for appeal]. Notably, Applicant did not provide this Court with what objections Trial Counsel should have made, or what issues Trial Counsel failed to preserve.

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

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

Allegation 3: Failure to present the Applicant as a witness during his Jury Trial.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to present him as a witness during his jury trial. This Court finds this allegation is without merit.

"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. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination . . . ." 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.

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). "In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's

case." Speaks v. State, 377 S.C. at 399, 660 S.E.2d at 514 (2008). Deficiency "is measured by an objective standard of reasonableness." Taylor, 404 S.C. at 359, 745 S.E.2d at 102.

To establish prejudice, an applicant must show that "but for counsel's error, there is a reasonable probability the result of the proceedings would have been different." Id. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland, 466 U.S. at 700. "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Weldon v. State, 436 S.C. 69, 81, 870 S.E.2d 183, 189 (Ct. App. 2021). 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); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (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. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010)). "[W]here trial counsel admits the testimony of a certain witness *may have made the difference in obtaining an acquittal*, the Court may find ineffective assistance." Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) (emphasis added).

Jury Trial

The following colloquy occurred with Applicant and the trial court regarding his right to testify:

THE COURT:	So your client does not intend to testify or does intend to testify?
MS. ZMROCZEK:	He does not.
THE COURT:	Mr. Foster, I have to go over some things with you. Would you raise your right hand?

(Whereupon, Heirbrane H. Foster was duly sworn by the Court.)

THE COURT: Thank you. You can have a seat. Mr. Watford, you understand that the defense is now given the opportunity to present evidence for the jury to consider?
THE DEFENDANT: Yes, sir.
THE COURT: What did I say, Watford? I apologize.
THE DEFENDANT: Yeah.
THE COURT: Foster. I apologize.
MR. SCHWARTZ: He understands, too, I think.
THE COURT: A senior moment. I apologize. Mr. Foster?
THE DEFENDANT: Yes, sir.
THE COURT: You understand we're at the stage of the trial where the defense can present evidence for the jury to consider?
THE DEFENDANT: Yes, sir.
THE COURT: In that regard, if you wish to testify you may testify. Do you understand that?
THE DEFENDANT: Yes, sir.
THE COURT: If you choose not to testify, I'm gonna tell the jury that they cannot hold your silence against you in any way at all. Do you understand that?
THE DEFENDANT: Yes, sir.
THE COURT: You have an absolute right not to testify. You have an absolute right to remain silent. Do you understand that?
THE DEFENDANT: Yes, sir.
THE COURT: So if you choose not to testify, I will tell the jury they cannot hold your silence against you, they're not to discuss it in their deliberations, it's not to enter their minds in making a decision of whether you're guilty or not guilty. Do you understand?
THE DEFENDANT: Yes, sir.
THE COURT: The decision about whether you testify or not is your decision to make and yours alone. Do you understand?
THE DEFENDANT: Yes, sir.
THE COURT: I expect that you might confer with family members, friends, anyone whose opinion you value on important decisions, your attorneys, but ultimately you're the person on trial and it's your decision to make. Do you understand?
THE DEFENDANT: Yes, sir.
THE COURT: Now if he testifies, would he have a record that would subject him to impeachment?
MS. ZMROCZEK: I believe that -- Your Honor, there were those -- the two CDVs that were from 2012, I believe.
THE COURT: CDV what?
MS. ZMROCZEK: HAN, high and aggravated in nature.
MS. PATTERSON: High and aggravated.

MS. ZMROCZEK: And it was a -- we had an issue about that, which we didn't raise previously, but just that it wasn't with this family -- it wasn't even with this family member, any member of this family, Your Honor. Your Honor, it was a completely unrelated paramour.

THE COURT: All right. Rule 609 reads that evidence that a witness has been convicted of a crime is not admissible where the accused is the witness unless the Court determines that the probative value of admitting that evidence outweighs its prejudicial effect to the accused in this situation. This is for crimes which are punishable by imprisonment in excess of a year and generally within ten years and that did not involve dishonesty or a false statement. Reviewing the matter, I'm unable to make a determination if the probative value of admitting that evidence would outweigh its prejudicial effect to the accused. What that means, Mr. Foster, is if you take the witness stand, I'm not gonna let the State ask you about those two CVS. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: The only way that would come in is if you open the door in some way. And your attorneys can discuss with you what opening the door means, but to give you an example of what's happened in cases over which I've presided, there have been situations where I've ruled that the State could not ask the defendant about certain crimes and then the defendant got on the stand and said I've never been in any trouble with the law, which was just a flat-out lie, they had several convictions, so they opened the door for the State to be able to ask about the convictions. Do you understand what I'm talking about?

THE DEFENDANT: Yes, sir.

THE COURT: That might not be the only way to open the door, but that's an example. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Has anybody exercised any type of undue influence to get you to decide to testify or not testify?

THE DEFENDANT: No, sir.

THE COURT: So whatever decision you make it's your decision and yours alone?

THE DEFENDANT: Yes, sir.

THE COURT: It's made of your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: Today are you under the influence of any type of substance that adversely affects your thinking?

THE DEFENDANT: No, sir.

THE COURT: Do you suffer from any physical or mental problems that

adversely affect your thinking today?

THE DEFENDANT: No, sir.

THE COURT: All right. Mr. Foster, I'm gonna make some findings right now. You can change your mind if you wish, it's up to you, but at this point I'm gonna make a finding that you understand you have a right to testify, you have a right not to testify. If you choose not to testify, I'm gonna tell the jury they cannot hold your silence against you in any way at all. You understand that the decision about whether you testify or not is yours and yours alone and that no one has forced you, threatened you, coerced you, exercised in type of undue influence over you to get you to testify or not testify. Do you understand my ruling about if you testify you're not going to be subjecting yourself to cross-examination about prior convictions for domestic violence?

THE DEFENDANT: Yes, sir.

THE COURT: So I find that you've made the decision freely, knowingly, voluntarily and intelligently as to whether you testify or not of your own free will and accord. Now whatever decision you've made at this point, as I mentioned a moment ago you could change your mind until such time as you might actually come up here and start testifying. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Okay.

. . . .

THE COURT: Ladies and gentlemen of the jury, please give me your intention. I need to give you an instruction related to the election of the Defendant not to testify. The fact that Mr. Foster elected not to testify is not a fact to be considered by you in any way in your deliberations and in your consideration on the question of whether he is guilty or not guilty. His decision not to testify must not be considered by you in any manner whatsoever against him. An accused has a constitutional right to remain silent and the assertion of that right cannot and must not be used in any way against him in your deliberations. Under your oath, you're to reach no inference and you're to draw no conclusion whatsoever from the fact that Mr. Foster elected not to testify. His decision not to testify should not be discussed by you in the jury room, it should not enter your minds in making your decision on the question of whether he is guilty or not guilty. The State has the entire burden of proof and an accused has no obligation to prove anything at all.

(ROA pp. 638–644; 695–696).

PCR Evidentiary Hearing

Trial Counsel testified that hours were spent preparing Applicant to testify. (PCR Tr. p. 29). Trial Counsel testified that the SYG hearing provided an opportunity to see how Applicant would testify on the stand. (PCR Tr. pp. 29-30). Trial Counsel testified that Applicant was combative and angry on the stand at the SYG hearing. (PCR Tr. pp. 30; 47). Further, Trial Counsel testified she believed it was a reasonable decision for Applicant not to testify at trial, but confirmed it was Applicant's decision to make. (PCR Tr. p. 31).

Applicant testified his decision not to testify was based on what Trial Counsel told him because he trusted her as a professional. (PCR Tr. p. 75).

Solicitor Patterson also testified that Applicant was combative at the SYG hearing and that she wanted him to testify before the jury so they could see his demeanor. (PCR Tr. p. 85). Further, Solicitor Patterson testified that Trial Counsel obtained a statement from Applicant over her objection, which she believed was effective because it allowed Applicant's testimony without subjecting it to cross-examination. (PCR Tr. p. 86).

Findings

This Court finds that Applicant has failed to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court finds Applicant's testimony on this matter *not credible*. Trial Counsel *credibly* testified that although she advised Applicant not to testify, she left the decision for him to make. Further, this Court finds that Trial Counsel's advice was based on Applicant's testimony at the SYG hearing. Trial Counsel *credibly* testified that Applicant did not present well, was combative, short-tempered, and, despite hours of

preparation, Trial Counsel did not believe that the jury would find Applicant credible.

Solicitor Patterson also *credibly* testified that she had hoped Applicant would take the stand and testify because she believed the jury would be able to observe his short temper. Trial Counsel had legitimate concerns that the jury would find that Applicant had a short temper and was quick to anger, which would have hurt his defense at trial. Additionally, the record shows that Applicant freely and voluntarily waived his right to testify after the trial court conducted a thorough colloquy.

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

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

Allegation 4: **Failure to call the Pathologist who performed the autopsy on the victim to counter testimony that the victim was in the process of leaving with his back turned toward the Applicant at the time of the shooting.**

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to call the Pathologist who performed the autopsy on the victim to counter testimony that the victim was in the process of leaving with his back turned toward the Applicant at the time of the shooting. This Court finds this allegation is without merit.

To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540

(1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis— and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. See, e.g., Smith v. State, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); Edwards v. State, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); Glover, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was not deficient by failing to call alibi witnesses when two witnesses who testified at PCR hearing did not establish the alibi).

PCR Evidentiary Hearing

Trial Counsel testified that in her opinion, pathologists usually do not assist the defense and therefore, she does not typically call them as a witness. (PCR Tr. p. 31). Further, Trial Counsel recalled most of the witnesses at trial testifying that the victim had his back turned or partially turned. (PCR Tr. p. 31). Trial Counsel testified she did not believe it would help the defense's case to call the pathologist. (PCR Tr. p. 31). On cross-examination, Trial Counsel testified that the

victim was shot in the back rather than the side and that the pathologist would not testify to any speculation. (PCR Tr. p. 45).

Solicitor Patterson testified that the State did not call the pathologist because everyone who was present at the scene who saw the shooting testified that the victim was dead instantly. (PCR Tr. p. 84). Further, the paramedic testified that the victim was dead and therefore, they did not believe it was necessary to call the pathologist. (PCR Tr. p. 84).

Findings

This Court finds that Applicant has failed to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra.* Applicant failed to provide the forensic pathologist to support his claim at the evidentiary hearing. Moreover, Applicant did not articulate what the forensic pathologist would testify to that would have aided his defense.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to establish that Trial Counsel was deficient in failing to call the Pathologist who performed the autopsy on the victim to counter testimony that the victim was in the process of leaving with his back turned toward the Applicant at the time of the shooting. It follows that Applicant cannot prove resulting prejudice.

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

Allegation 6: **Failure to introduce or present evidence of Notice of Trespass of real property regarding the victim Heirberone Will Foster.**

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to introduce or present evidence of Notice of Trespass of real property regarding the victim Heirberone Will Foster. This Court finds this allegation is without merit.

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); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such a strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

PCR Evidentiary Hearing

Trial Counsel testified Applicant had pending domestic violence charges that made the case difficult to navigate because of possible character evidence coming in had they decided to "open the door" by introducing evidence of the trespass order against the victim. (PCR Tr. p. 33). Trial Counsel testified it was a strategy not to pursue introducing the Notice of Trespass regarding the victim. (PCR Tr. p. 33). Trial Counsel again testified on cross-examination that it was a strategy not to do anything with the trespass order against the victim because of the risk of opening the door to other bad character evidence. (PCR Tr. p. 48).

Findings

This Court finds that Applicant has failed to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court additionally finds that

Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra.* This Court finds Trial Counsel's decision to leave the Notice of Trespass of real property regarding the victim out of evidence to be part of a trial strategy that falls within the scope of reasonable representation. Trial Counsel *credibly* testified that it was a strategy to leave the Notice of Trespass out of evidence to prevent opening the door to character evidence of Applicant that would potentially hurt his defense. Thus, Applicant failed in his burden of proving deficiency or prejudice. See Glover, *supra.*

It is essential to highlight that, prior to the shooting incident, the Applicant faced charges of Domestic Violence–1st Degree against his wife. At that time, he was released on bond, which explicitly prohibited him from returning to their residence. Consequently, the Applicant was in clear violation of a court order when he shot his son, being on property he was legally barred from entering. Moreover, addressing any trespass notice regarding the victim would have inevitably allowed this critical evidence to be introduced, significantly undermining his defense. Trial Counsel's strategy was sound and within the scope of reasonable representation.

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

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

Allegation 7: Failure to move for a mistrial regarding a sleeping juror.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing

to move for a mistrial regarding a sleeping juror. This Court finds this allegation is without merit.

A "defendant has a constitutional right to be tried by competent jurors," which "implies a tribunal both impartial and mentally competent to afford a hearing." Tanner v. United States, 483 U.S. 107, 134 (1987) (Marshall, J., dissenting) (citing Jordan v. Massachusetts, 225 U.S. 167, 32 (1912)). Consistent with these principles, "a juror who has not heard all the evidence in the case or the court's instructions as to the applicable principles of law is grossly unqualified to render a verdict." People v. Valerio, 141 A.D.2d 585, 529 N.Y.S.2d 350, 351 (1988).

Juror misconduct discovered post-trial is not properly considered as newly discovered evidence; instead, it is a separate basis for a new trial. McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013). Misconduct of a juror is "a fact to be determined by the trial judge from the circumstances" of each case. 23A C.J.S. Criminal Law § 1437 at 381; see also State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999) (trial court has broad discretion in assessing allegations of juror misconduct); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), cert. denied, 525 U.S. 107 (1999). The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence. See 23A C.J.S.Criminal Law § 1437 at 381. Indeed, the great majority of courts in other states considering the sleeping juror question have utilized this approach. See 59 A.L.R.5th at 42 (because harm to defendant does not automatically follow a determination that a juror was sleeping, most states require a defendant to show prejudice such as the juror "failed to follow some essential part of the proceedings"); People v. Bradford, 15 Cal.4th 1229, 65 Cal.Rptr.2d 145, 939 P.2d 259 (1997).

Jury Trial

THE COURT: Hold on, Mr. Sprinkle. Ladies and gentlemen of the jury, I'm gonna send you back to the jury room. You've got to keep your eyes open. Everybody needs to be able to stay awake and keep your eyes open, so if you need some caffeine or

something, tell the bailiff. Leave you notes. Don't discuss the case.

(ROA p. 521)

PCR Evidentiary Hearing

Trial Counsel testified she believed Judge Keesley did what he could to appropriately address the issue of the alleged sleeping juror. (PCR Tr. p. 33). Further, Trial Counsel testified that it is not her practice to move for a mistrial on these grounds. Trial Counsel testified she did not believe it would have affected the outcome of the trial. (PCR Tr. p. 34). Trial Counsel testified in her opinion that Judge Keesley would not grant a mistrial on the ground of a sleeping juror. (PCR Tr. p. 34). On cross-examination, Trial Counsel testified she did not think there was an issue after Judge Keesley addressed it on the record.

Findings

This Court finds that Applicant has failed to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court finds that Trial Counsel was not ineffective for deciding not to move for a mistrial based on an alleged sleeping juror. Applicant relies on Judge Keesley's statement on the record to support this allegation, but failed to provide any evidence at the evidentiary hearing of how a motion for mistrial on the basis of the alleged sleeping juror would have affected the outcome. Trial Counsel *credibly* testified that once Judge Keesley addressed the issue, the problem was resolved. Under these circumstances, Trial Counsel's decision was reasonable and well within the wide range of competent professional judgment. Thus, Applicant failed in his burden of proving deficiency or prejudice. See Glover, *supra.*

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

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

Allegation 8: Failure to request a Directed Verdict for the State's failure to prove the cause of death.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to request a Directed Verdict for the State's failure to prove cause of death. This Court finds this allegation is without merit.

When considering a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Larmand, 415 S.C. 23, 30, 780 S.E.2d 892, 895 (2015) (citing Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). The role of the trial court is only to determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). If there is any direct or circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). "In deciding motions for a directed verdict. . . the evidence and all reasonable inferences which may be drawn from it must be viewed in the light most favorable to the non-moving party. If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury." Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 611, 518 S.E.2d 591, 597 (1999).

"[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict . . . must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (citing State v. Fogle, 256 S.C. 149, 181 S.E.2d 483 (1971)). The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at 693, 104 S. Ct. at 2067. Where counsel articulates a valid strategic reason for his action or inaction, based on an objective standard of reasonableness, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1990); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

PCR Evidentiary Hearing

Trial Counsel testified she recalled the paramedic testifying as to the cause of death, and there was no question of how the victim died. (PCR Tr. p. 32).

Solicitor Patterson testified that every witness who was present at the scene and saw the shooting testified that the victim was dead instantly. (PCR Tr. p. 84). Solicitor Patterson testified that, because the paramedic testified that the victim was dead, the State did not believe it was necessary to call the pathologist. (PCR Tr. p. 84).

Findings

This Court finds that Applicant has failed to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court finds Trial Counsel was not ineffective for deciding not to move for a directed verdict based on the State's alleged failure to prove cause of death. Trial Counsel *credibly* testified that the paramedic testified to the victim's cause of death, and there was no question as to the cause of death. (PCR Tr. p. 32). Based on the record before this Court and the testimony provided, this Court finds that even if Trial Counsel had moved for a directed verdict as Applicant contends, the trial court would not have granted it.

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

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

Allegation 9: Failure to raise the issue of Defense of Habitation at the Stand Your Ground hearing.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to raise the issue of defense of habitation at the Stand Your Ground hearing. This Court finds this allegation is without merit.

Protection of Persons and Property Act[4] (the Act) provides the following:

[4] S.C. Code Ann. § 16-11-410 to -450.

A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
   1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
   2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

B) The presumption provided in subsection (A) does not apply if the person:
   1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder; . . . .

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

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

"[T]he legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act." State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). Thus, upon motion, the issue of immunity under the Act must be decided prior to trial. Id. A party seeking immunity under the Act must show entitlement to immunity by a preponderance of the evidence. Id. at 411, 709 S.E.2d at 665. Moreover, the Act is predicated on the absence of

aggression or fault on the defendant's part in bringing on the difficulty. State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), citing State v. Grantham, 224 S.C. 41, 45, 77 S.E.2d 291, 292 (1953). Notably, the Act is a procedural provision that "does not contain any substantive provisions of law"; thus, it "is not relevant to the work of a jury." State v. Marin, 404 S.C. 615, 625, 745 S.E.2d 148, 154 (Ct. App. 2013).

PCR Evidentiary Hearing

Trial Counsel testified that it was trial strategy not to raise the defense of habitation. (PCR Tr. p. 34). Trial Counsel testified that at the SYG hearing, the State emphasized that Applicant was not in a place he had the right to be at the time of the shooting, and she did not want that coming out in front of the jury. (PCR Tr. p. 34). Further, Trial Counsel testified that no one testified that the victim was making a forcible entry into the home. (PCR Tr. pp. 34-35). Trial Counsel testified that she did not believe it was a fruitful defense, as it could have opened the door to substantial bad-character evidence against Applicant. (PCR Tr. p. 35). On cross-examination, Trial Counsel again testified that there was no evidence to support the assertion that the victim entered the house. (PCR Tr. p. 43).

Findings

This Court finds that Applicant has failed to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court additionally finds that Applicant has failed to overcome his burden in proving that Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra.* This Court finds Trial Counsel's decision not to raise the issue of defense of habitation at the SYG hearing to be part of a trial strategy that falls within the scope of reasonable representation. Trial Counsel

credibly testified that it was a strategy not to use the defense of habitation at the SYG hearing. Thus, Applicant failed in his burden of proving deficiency or prejudice. See Glover, *supra.*

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

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

Allegation 11a: Failure to object to Judge Keesley's statement at the SYG hearing.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to object to Judge Keesley's statement at the SYG hearing. (PCR Tr. p. 78). This Court finds this 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 Vieux v. Pepe, 184 F.3d 59, 64 (1st Cir. 1999) (finding "counsel's performance was not deficient if he declined to pursue a futile tactic.") (applying Strickland, 466 U.S. at 688, 694 (explaining that, in order to succeed on a claim of ineffective assistance, defendant must demonstrate both deficient performance and cognizable prejudice)); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable

argument for exclusion of the evidence). Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3rd 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).

Trial

At the SYG hearing, the trial judge addressed the law and his findings as follows:

> First of all, the Defense of Persons and Property Act is a law which our Supreme Court has encouraged the legislature to revisit. It is a law which the courts have tried to interpret as best they can and -- and there are some issues that arise in trying to interpret it as to -- as to exactly what the legislature intended or what was meant. The law does have a preamble and states a purpose and included in that is that it's proper for law abiding citizens to protect themselves, their families and others from intruders.
>
> . . . .
>
> Now as to the unlawful and forcible act occurring, the Court find that the greater weight of the evidence establishes that basically the difficulty had resolved. It -- I'm not saying people were not upset and people were not angry, but the threat, if you will, was over. There -- there was no unlawful and forcible act taking place by the victim at the time that seems to be significant. The language that's troubling is has occurred. An unlawful and forcible act has occurred. I don't know what the legislature intended for that, but logically and in any real world setting if you're going to tie an act to self-defense law, you have to incorporate those principles and self-defense law establishes that once the difficulty has ended, once the threat is over, you don't get to jump back in and say well, he did this a while back. It's -- it's

> just not -- in my view it's not the purpose of the law just if -- it's not the purpose of the law to grant immunity from prosecution based on something that had occurred previously. There would have to be some nexus to a current existing threat.
>
> . . . .
>
> Mr. Foster may have an excellent defense to the charge of murder. He may well have an excellent defense that entitles him to a not guilty verdict or the lowest of the lesser included defenses. It's a tragic, tragic situation, but to sum it all up I'll say what I said at the beginning. I don't think this is a situation that the legislature intended to prevent the State from prosecuting. I think this is a situation where it's a prototypical jury case. There's a whole bunch of dispute about exactly what happened out there, there's a whole bunch of concurrence about what happened out there; who was drunk, who said what, when. But I think that the State is within its rights to prosecute the Defendant and he's not entitled to immunity.

(Trial Tr. pp. 267; 270, 276).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he believed Trial Counsel should have objected to Judge Keesley's statement at the SYG hearing. (PCR Tr. p. 78; l. 14-20).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance of counsel and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court finds there was no legal basis for an objection to Judge Keesley's statement during the SYG hearing. It is clear from the record that Judge Keesley was merely walking through the law as required and making the findings of fact required by the law.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonable, effective assistance under prevailing professional norms. Furthermore, Applicant has failed to

present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation 11b: Failure to object to the Solicitor's comments in closing.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to object to statements made by the Solicitor in closing. (PCR Tr. pp. 53-54). This Court finds this 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 Vieux v. Pepe, 184 F.3d 59, 64 (1st Cir. 1999) (finding "counsel's performance was not deficient if he declined to pursue a futile tactic.") (applying Strickland, 466 U.S. at 688, 694 (explaining that, in order to succeed on a claim of ineffective assistance, defendant must demonstrate both deficient performance and cognizable prejudice)); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney and will very seldom constitute objectively deficient

representation." United States v. Nguyen, 379 F. App'x 177, 181 (3rd 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).

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its contest should stay within the record and reasonable inferences to it." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) (finding the solicitor's misstatement of the law concerning parole considerations that were not cured by the judge's instructions were improper); See Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 698, 610 (2004) ("A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony.") "On appeal, the appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624-625 (1996).

"The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); See Randall, 356 S.C. at 643, 591 S.E.2d at 610-11) (finding the solicitor's analogy comparing the defendant to a "dirty cockroach" did not infect the trial to make the resulting conviction a denial of due process, noting the objected argument encompassed ten lines of the transcript and was repeated, but an isolated reference).

Trial

In closing, the Solicitor presented the following:

> We wanted to make sure that it couldn't have accidentally went off and that particular gun that he used could not have accidentally went off. No one saw him go under the car and begin working on it.
>
> . . . .
>
> Nobody said anything about them chasing each other around or threatening each other. They both were just cursing each other out. Both of them.
>
> . . . .
> And you know what doesn't add up that she talked about that it didn't add up? If he meant to scare him, if it was an accident or whatever, he didn't drop the gun when it went off.

(Trial Tr. pp. 742; 743, 744).

PCR Evidentiary Hearing

Solicitor Patterson testified she did not believe any of her statements during the closing argument were improper against Applicant. (PCR Tr. p. 84).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance of counsel and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court finds there was no legal basis for an objection to the Solicitor's closing argument. However, assuming *arguendo* that an objection should have been made, this Court finds that any error was cured by the jury instruction to only consider the evidence.

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

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

Allegation 12: Failure to discover and present significant mitigating evidence in reference to the curtilage.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to discover and present mitigating evidence in reference to the curtilage. (PCR Tr. p. 79). This Court finds this allegation is without merit.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). The applicant must further present evidence demonstrating how the discoverable matters or defenses would have resulted in a different outcome. Id. Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

PCR Evidentiary Hearing

Trial Counsel testified to her recollection of the State's evidence in this case, which was that Applicant had shot his son. (PCR Tr. pp. 27-28). Trial Counsel testified Applicant never would admit to the shooting and maintained it was an accident, which made the SYG hearing difficult to prevail on. (PCR Tr. pp. 27-28). Trial Counsel testified that another challenge was the records and prior bad acts of a lot of the witnesses, including Applicant. (PCR Tr. p. 28).

Trial Counsel testified it was a strategy not to bring in evidence of the notice of trespass against the victim, Will Foster, or use the defense of habitation, to prevent "opening the door" to character evidence against Applicant. (PCR Tr. p. 33; 34). Trial Counsel testified that at the SYG hearing, the State emphasized that Applicant was not in a place he had the right to be at the time of the shooting, and she did not want that coming out in front of the jury. (PCR Tr. p. 34). Further, Trial Counsel testified there was no one who testified that the victim was making a forcible entry into the home. (PCR Tr. pp. 34-35). On cross-examination, Trial Counsel again testified that there was no evidence to support the claim that the victim entered the house. (PCR Tr. p. 43).

On direct examination, Applicant testified that Trial Counsel failed to discover and present mitigating evidence in reference to the curtilage. (PCR Tr. p. 79).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* Applicant failed to present any competent evidence that he now claims Trial Counsel was constitutionally ineffective for failing to investigate mitigating evidence regarding the curtilage. This Court finds that this allegation was further addressed in the Findings section of Allegation 9, *supra.*

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

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

Allegation 13: Failure to motion for a mistrial and preserving issues at the SYG hearing.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to motion for a mistrial and preserving issues. (PCR Tr. p. 79). Applicant refers to the record to support his allegation. (ROA pp. 267; 270; 276; PCR TR. p. 80). This Court finds this allegation is without merit.

PCR Evidentiary Hearing

Applicant testified at the hearing that he believed Trial Counsel was ineffective for:

> "not motion[ing] for mistrial and preserving the following issues: not applying the adversary process to the judge's knowledge of the legislature's intent, by the judges own admittance of not understanding, not knowing what the legislature meant, nor what they intended, and he didn't know what the legislation intended in a statute by, an unlawful act is occurring."

(PCR Tr. p. 79).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* The record does not reflect any grounds for a motion for a mistrial arising from Judge Keesley's ruling at the pre-trial SYG hearing. (ROA pp. 267-276). As the record reflects no fruitful grounds for a mistrial at the *pre-trial* immunity hearing, there can be no Strickland error or prejudice in counsel's representation at this stage of Applicant's criminal proceedings. Further, the Court of Appeals previously addressed the statutory intent of S.C. Code § 16-11-440 and its application in this case; Applicant improperly reasserted the issue in his post-conviction proceedings.

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

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

Allegation 14: Failure to properly ensure Applicant could see all portions of his jury trial.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to ensure Applicant could see all portions of his jury trial. (PCR Tr. p. 63). This Court finds this allegation is without merit.

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). "In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." Speaks v. State, 377 S.C. at 399, 660 S.E.2d at 514 (2008). Deficiency "is measured by an objective standard of reasonableness." Taylor, 404 S.C. at 359, 745 S.E.2d at 102.

To establish prejudice, an applicant must show that "but for counsel's error, there is a reasonable probability the result of the proceedings would have been different." Id. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland, 466 U.S. at 700. "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of

counsel." Weldon v. State, 436 S.C. 69, 81, 870 S.E.2d 183, 189 (Ct. App. 2021). 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); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (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. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010)).

PCR Evidentiary Hearing

Applicant testified that he could not physically see the screen used for presenting evidence during his trial; Applicant testified he asked to be moved to no avail. (PCR Tr. p. 63).

Solicitor Patterson testified she did not recall any mention or complaint by Applicant that he was unable to see any of the evidence at trial. (PCR Tr. p. 85). Solicitor Patterson opined that Judge Keesley would have made sure that Applicant was able to view any evidence introduced. (PCR Tr. p. 85).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court finds Applicant's testimony on this matter not credible. This Court further finds Applicant failed to present any competent evidence that his alleged inability to see was due to any error of Trial Counsel or how it affected the outcome of his trial. Thus, Applicant failed in his burden of proving deficiency or prejudice. See Glover, *supra.*

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

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

|CONCLUSION & SIGNATURE PAGE FOLLOWS|

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.

JESSICA ANN SALVINI
Presiding Judge
Eleventh Judicial Circuit

2/18/2024
Greenville, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
Heirberone Foster, #353381, Plaintiff, vs. State of South Carolina, Defendants.	FINAL ORDER REGARDING MOTION TO RECONSIDER Case No.: 2022-CP-32-01641

FILED
2026 MAY 20
LISA
LEXINGTON

FILED
2026 MAY 19 AM 9:46

A motion to reconsider or to alter or amend has been filed with the Court on March 9, 2026, and was emailed to the Court on March 5, 2026. As previously explained to the parties, pursuant to Rule 59(f), SCRCP, the Court, in its discretion, may decide the motion based on briefs without oral argument. The Court indicated to the parties in the Initial Order Regarding Motion for Reconsideration that it would decide the issues on written submissions. Further, the Court informed the parties that written submissions were not required by the non-moving party, and that the moving party could rely upon its filings or supplement. The deadlines for filing written submissions regarding this motion have now passed.

After careful consideration of the able arguments and filings and review of the record, the Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or fact not appropriately considered.

Accordingly, the Motion for Reconsideration[1] is respectfully DENIED.

IT IS SO ORDERED.

5/13, 2026
Greenville, SC

Judge Jessica A. Salvini

[1] The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICAL CIRCUIT

HEIRBERONE H. FOSTER #353381 Applicant,

v.

STATE OF SOUTH CAROLINA, Respondent.

AFFIDAVIT OF SERVICE

The undersigned hereby certifies that a true copy of the filed Final Order Regarding Motion to Reconsider has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

Tommy A. Thomas, Esquire
PO Box 88
Irmo, SC 29063

This 27th day of May, 2026.

J. Helgerson
Legal Assistant Respondent

SWORN to before me this 27th day of May, 2026.

Notary Public for South Carolina.
My Commission Expires: 10/30/2033