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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Chesterfield County

Paul M. Burch, Circuit Court Judge

NOAH C. MUMFORD,

RESPONDENT-PETITIONER,

V.

STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT

APPELLATE CASE NO. 2015-000544

SUPPLEMENTAL APPENDIX

DAVID ALEXANDER
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ATTORNEYS FOR RESPONDENT

INDEX

INDEX i

TRIAL TRANSCRIPT (dated July 31, 2014; pages 106-109) 1

INDICTMENT 5

PLANTIFF'S EXHIBIT 1A 7

PLANTIFF'S EXHIBIT 2 10

PLANTIFF'S EXHIBIT 3 11

ORDER OF DISMISSAL 12

ORDER GRANTING POST-CONVICTION RELIEF 34

1 just testified he had never seen them before. I don't know
2 how he can authenticate them.
3 MR. SWERLING: Well, Judge, the Cross Examination was
4 that -- and Mr. Knox testified that he had statements of
5 witnesses in the case.
6 What I'm introducing these for is to show the Court
7 these are not extensive statements at all, but are brief
8 statements. These are the statements of witnesses, the only
9 statements in the case.
10 THE COURT: I'll allow them to go in.
11 (Statements of Mr. Sellers and Mr. Harold admitted in
12 evidence as Applicant's Exhibits 2 and 3 over objection)
13 BY MR. SWERLING:
14 Q. Mr. Mumford, I'll again come back to you. Is there
15 anything else you would like to say in your post-conviction
16 hearing?
17 A. . .
18 MR. THOMAS: Objection, Your Honor. That's outside
19 the scope of Cross Examination.
20 MR. SWERLING: I would ask the Court to give us a lit-
21 tle latitude.
22 THE COURT: You can answer.
23 A. I would just like to say that he didn't represent me.
24 That goes without saying.
25 Q. Thank you. You can come down.

1 THE COURT: You may step down from the stand.
2 (Witness excused from the state)
3 THE COURT: Mr. Swerling, you may call your next wit-
4 ness.
5 MR. SWERLING: Thank you, your Honor.
6 We would call Ervin Smith at this time.
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1 ERVIN SMITH, being duly
2 sworn, testified as follows:
3 CLERK: Please have a seat and state your full
4 name for the record.
5 WITNESS: Ervin Smith.
6 DIRECT EXAMINATION
7 BY MR. SWERLING:
8 Q. Mr. Smith, where do you live?
9 A. (Inaudible)
10 Q. Do you know Noah Mumford?
11 A. Yes, I do.
12 Q. Do you know Mr. Funderburk?
13 A. Yes, I do.
14 Q. And most of the other names that I've mentioned
15 here in Court today?
16 A. Yes, sir, I do.
17 Q. You were not present the night of the shooting.
18 Correct?
19 A. No, I wasn't.
20 Q. Did Noah talk to you -- did you have a conversa-
21 tion with Noah about testifying about your relation-
22 ship with Mr. Funderburk?
23 A. Yes.
24 Q. Did you tell him you would be willing to testify?
25 A. Yes.

E. SMITH ON DIRECT

1 Q. Have you actually had problems with Mr. Funderburk
2 in the past?
3 A. . .
4 MR. THOMAS: Objection.
5 BY MR. SWERLING:
6 Q. Have you ever worked together?
7 A. Yes.
8 Q. Was that before or after this incident happened?
9 A. Before that.
10 Q. And did he have an altercation with some others?
11 A. Yes.
12 Q. What would bring on those kinds of altercations
13 with Mr. Funderburk?
14 A. I don't know.
15 Q. Was he someone who had a short fuse and would get
16 into a fight?
17 A. Yes.
18 Q. Did that happen with you and him?
19 A. Yes.
20 Q. And you were prepared to come to Court and tell
21 that to a jury?
22 A. Yes.
23 Q. And about your interactions with him?
24 A. Yes.
25 Q. Did you ever get to talk with Mr. Knox?

WITNESSES

Corp Daniel Scott

Chesterfield County Sheriff

Law Enforcement Case #: 10-4780

583

WAIVER OF PRESENTMENT

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

Defendant

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

Defendant

ARREST WARRANT NUMBER
K672038

ARRESTED ON: 2010-12-24

ACTION OF GRAND JURY

True Bill

Grand Jury Foreperson

2-8-2011

Date

VERDICT

Petit Jury Foreperson

Date

DOCKET NUMBER:
2011-GS-13-0096

The State of South Carolina

County of Chesterfield

COURT OF GENERAL SESSIONS

Term:
February 2011

THE STATE

vs.

Noah Mumford

INDICTMENT FOR

Murder/Attempted murder Penalty statutes 16-03-0029; Felony

§16-03-0029

CDR Code: 3410

2011 FEB 9 PM 4 35
CL... CHESTERFIELD COUNTY, S.C.

William B. Rogers, Jr., Solicitor

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	
COUNTY OF CHESTERFIELD	)	Murder/Attempted murder Penalty statutes 16-03-0029; Felony

§16-03-0029

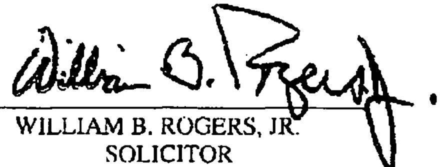
At a Court of General Sessions, convened on February 7, 2011, the Grand Jurors of Chesterfield County present upon their oath:

ATTEMPTED MURDER

CDR: 3410, 16-3-29

That Noah Mumford did in Chesterfield, on or about December 23, 2010, with specific intent to kill, attempted to kill [redacted], with malice aforethought, either expressed or implied, in violation of Section 16-3-29 of S.C. Code of Laws, 1976, as amended.

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



WILLIAM B. ROGERS, JR.
SOLICITOR

DEFENDANT'S REQUESTED INSTRUCTION NUMBER: _____

A person can be acting lawfully even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting.

2014 AUG 5 AM 10 41
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

Stat v. Burris, 513 S.E.2d 104 (1999) at 262.

DEFENDANT'S REQUESTED INSTRUCTION NUMBER: _____

RELATIVE SIZES, AGES, AND WEIGHTS

In determining whether defendant had a right to use force in self-defense, the relative sizes, ages, and weight of the alleged aggressor or aggressors and the defendant may be relevant to the apparent or actual need for force in self-defense and to the amount of force needed.

2014 AUG 5 AM 10 41
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978).

DEFENDANT'S REQUESTED INSTRUCTION NO. ________

In considering self-defense I charge you that a defendant has a right to judge the conduct of the deceased more harshly that otherwise because of the deceased's drug or alcohol consumption.

2014 AUG 5 AM 10 41
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

State v. Day, 535 S.E.2d 431 (Sup. Ct. 2000).

10

VOLUNTARY STATEMENT

DATE 12/23/10 PLACE Chesterfield General Hospital TIME STARTED 1940 P M.

I, the undersigned, Antonio Sellers, am ___ years of age, having been born on ___, at ___

I now live at ___

I have been duly warned and advised by J. A Campbell, a person who has identified himself as Duty Sheriff, that I do not have to make any statement at all, nor answer any questions or do anything that might tend to go against me or incriminate me in any manner, and that any statement I make, can and will be used against me on the trial or trials for the offense or offenses concerning which the following statement herein made. I was also warned and advised of my right to the advice and presence of a lawyer of my own choice before or at any time during my questioning or statement I make, and if I am not able to hire a lawyer I may request and have a lawyer appointed for me, by the proper authority, without cost or charge to me.

I do not want to talk to a lawyer, and I hereby knowingly and purposely waive my right to the advice and presence of a lawyer before and during any questioning or at any time or while I voluntarily make the following statement to the aforesaid person, knowing that anything I say can and will be used against me in court or courts of law.

I declare that the following voluntary statement is made to the aforesaid person of my own free will without promise of hope or reward, without fear or threat of physical harm, without coercion, favor or offer of favor, without leniency or offer of leniency, by any person or persons whomsoever.

A.S Noal M. Paul in Todd's yard talking about a race. Paul ask Him how Much Money did he want to bet. Noal started calling Paul a broke M.F, Momma's A.S boy. Paul told him to get out of his face with that shit. Noal keep on talking trash, he got in Paul face + then Paul swing on him. Noal Pull out the gun and shot about five or six times, and got in his car and left. A.S.

A.S

A.S

PLAINTIFF'S EXHIBIT 2

PENGAD 800-631-6989

2014 AUG 5 AM 10 41
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

A.S.

I have read each page of this statement consisting of ___ page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 1954 P M on the 23 day of December 2010

WITNESS: [signature]

WITNESS: Cpl. [signature] Wallace

[signature]
Signature of person giving voluntary statement

VOLUNTARY STATEMENT

DATE 12/23/10 PLACE Chesterfield [illegible] TIME STARTED 2010 P M.

I, the undersigned, Todd Harrell, am __ years of age, having been born on ______

I now live at ______

I have been duly warned and advised by Deputy Joe Campbell, a person who has identified himself as Deputy Sheriff Chesterfield Co, that I do not have to make any statement at all, nor answer any questions or do anything that might tend to go against me or incriminate me in any manner, and that any statement I make, can and will be used against me on the trial or trials for the offense or offenses concerning which the following statement herein made. I was also warned and advised of my right to the advice and presence of a lawyer of my own choice before or at any time during my questioning or statement I make, and if I am not able to hire a lawyer I may request and have a lawyer appointed for me, by the proper authority, without cost or charge to me.

I do not want to talk to a lawyer, and I hereby knowingly and purposely waive my right to the advice and presence of a lawyer before and during any questioning or at any time or while I voluntarily make the following statement to the aforesaid person, knowing that anything I say can and will be used against me in court or courts of law.

I declare that the following voluntary statement is made to the aforesaid person of my own free will without promise of hope or reward, without fear or threat of physical harm, without coercion, favor or offer of favor, without leniency or offer of leniency, by any person or persons whomsoever.

Everyone was outside talking about racing motorcycles, Nowa mumford drove up got out start talking to Everyone, Paul and Nowa started talking back and forth calling each other names, Paul threw bottle and Nowa then they both started wrestling, Nowa took a step back and shot at paul about four or five times going towards him as he is shooting after shots fired Nowa got in his car and left.

T. H

PLAINTIFF'S EXHIBIT 3

2011 AUG 5 AM 10 40
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

I have read each page of this statement consisting of ____ page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 2005 P M on the 23rd day of December, 2010

WITNESS: [signature]

WITNESS: [signature]

[signature] Todd Harrell
Signature of person giving voluntary statement

STATE OF SOUTH CAROLINA COUNTY OF CHESTERFIELD	))	IN THE COURT OF COMMON PLEAS FOR THE FOURTH JUDICIAL CIRCUIT
Noah C. Mumford, #348375, Applicant, v. State of South Carolina, Respondent.	))))))))))	Case No. 2013-CP-13-97 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 28, 2013. Respondent made a timely Return on or about May 16, 2013. The Court convened an evidentiary hearing into the matter on July 31, 2014, at the Dillon County Courthouse. Applicant was present at the hearing and represented by Jack B. Swerling, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

The following individuals testified at the evidentiary hearing: Applicant; trial counsel Larry W. Knox; Irvin Smith; Michael Jenkins; Steven Teal; Corey Williams; Sherry Mumford; Joyce Cranford; and Frank Cranford. The Court had before it a copy of the trial transcript, the records of the Chesterfield County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief and amendments, the return, and the exhibits introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. In February 2011, the Chesterfield County Grand Jury indicted Applicant for attempted murder (2011-GS-13-96). Larry W. Knox, Esquire

("trial counsel"), represented Applicant. On October 24, 2011, Applicant proceeded to trial before the Honorable Thomas A. Russo and a jury. On October 26, 2011, the jury found Applicant guilty of the lesser included offense of assault and battery of a high and aggravated nature ("ABHAN"). Judge Russo sentenced Applicant to ten (10) years imprisonment.

Applicant filed a timely notice of appeal, but voluntarily withdrew the appeal. The Court of Appeals dismissed Applicant's appeal by order dated July 24, 2012. The remittitur was returned to the circuit court on September 19, 2014.

II. ALLEGATIONS

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

1. "The defendant alleges that he received ineffective assistance of trial counsel."
    a. "The defendant alleges that trial counsel failed to adequately investigate the case."
    b. "The defendant alleges that trial counsel failed to interview the state's witnesses."
    c. "The defendant alleges that trial counsel failed to call to trial several witnesses for the defense."
    d. "The defendant alleges that trial counsel failed to adequately investigate the injuries of the alleged victim in this case."
    e. "The defendant alleges that trial counsel failed to effectively cross-examine several of the witnesses called by the state during the trial of this case."
    f. "The defendant alleges that trial counsel failed to adequately investigate the scene of the alleged offense."
    g. "The defendant alleges that trial counsel failed to have a preliminary hearing."
    h. "The defendant alleges that trial counsel failed to submit jury instructions relating to the facts of the case."
    i. "The defendant alleges that the South Carolina Legislature passed what is known as the 'Protection of Persons and Property Act' effective June 9, 2006. The Act provides immunity from prosecution pursuant to section 16-11-450 of the S.C. Code of Laws (1976 amended)."
    j. "The defendant alleges that the South Carolina Supreme Court handed down the opinion in State v. Duncan, 709 S.E.2d 662 (May 9, 2011) which held that the defendant was entitled to immunity under the Act."
        i. "The defendant alleges that trial counsel failed to request a

pretrial determination of immunity pursuant to the above-referenced statute and case law."

ii. "The defendant alleges that trial counsel failed to request jury instructions that would have been applicable under the Act and case aforementioned."

On May 13, 2013, Applicant filed an amended Application reciting the same grounds for relief. At the evidentiary hearing, Applicant proceeded on the grounds outlined in his application and amended applications. Applicant also orally amended his application to include the following allegations:

k. "The defendant alleges that several witnesses observed the victim talking to a juror and counsel failed to investigate the matter or inform the Court."

l. "The defendant alleges that counsel asked several questions of defendant's witnesses which were improper and undermined their credibility."

m. "The defendant alleges that counsel failed to investigate or present evidence as to the effect of the defendant's PTSD, and injury to his shoulder and left ear from service related injuries."

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A. Summary of Testimony

Trial counsel testified he was retained in January 2011, and met with Applicant several times. He recalled speaking with Applicant and developing a theory of self-defense based on a verbal and physical altercation with the victim. He recalled presenting two (2) witnesses in Applicant's case other than Applicant. The first, Steven Teal, testified the victim was the initial and continual aggressor. Trial counsel testified he did not interview Teal until the day of trial. He recalled he did not interview Teal

sooner because Applicant did not provide Teal's contact information. Trial counsel testified Teal stated he had a prior vehicular homicide conviction that was not older than ten (10) years. However, Teal testified on direct that his conviction was thirty-five (35) years ago. Regardless, trial counsel testified he wanted Teal to testify about the prior conviction to show the jury he was credible. He also wanted Teal to testify to his prior drug use to show he was not drinking or on drugs at the time of the incident.

Trial counsel recalled interviewing the second witness, Frank Cranford, in September 2011. Trial counsel candidly admitted he did not hire an investigator, but recalled speaking with the witnesses he could locate from the materials Applicant gave him. He also admitted to not interviewing the law enforcement officers who testified, but recalled reviewing the police reports they prepared. Trial counsel testified discovery was provided piecemeal, but the State provided everything before trial with the exception of the victim's hospital records. He testified he reviewed the discovery materials with Applicant, but did not provide copies. Trial counsel testified the discovery included a taped interview with Applicant where he admitted to shooting the victim, but claimed he acted in self-defense. Trial counsel testified he never visited the crime scene, but discussed it thoroughly with Applicant. He testified he did not feel the need to visit the scene because the only fact in dispute was whether the victim was attacking Applicant when Applicant shot him. For that same reason, trial counsel did not feel the need to attempt to reconstruct the crime scene. He testified there was limited forensic evidence in the discovery, and the State's case relied heavily on eye-witness testimony. Trial counsel testified he reviewed the witness statements prior to trial, and he was not surprised by any of the testimony at trial.

Trial counsel testified Applicant did not give him any names of people who could testify to the victim's violent character. He testified Applicant never gave him the names of Irvin Smith and Michael Jenkins. Trial counsel did not have the victim's medical records until the day of trial. However, he

testified the records were not introduced at trial and were not relevant to the defense theory. He testified he did not further investigate because the case boiled down to whether the jury believed Applicant's version of events or the victim's version. Trial counsel was aware of Applicant's service related injuries, and argued to the jury that those injuries were part of the reason he feared for his life. Trial counsel testified Applicant never informed him of any post-traumatic stress disorder ("PTSD") diagnosis.

Trial counsel testified he did not request a preliminary hearing because he did not feel it was necessary. He testified he did not think he needed a preliminary hearing to get more information about the facts of the case. Trial counsel testified the facts were very simple: the victim claimed he was walking away from Applicant when Applicant shot him, and Applicant claimed the victim was walking towards him. He also testified he did not request a castle doctrine hearing because he did not think one was available based on the facts of the case. Trial counsel candidly admitted Applicant was entitled to a castle doctrine hearing, but testified he did not need one because he had all the information he needed to be prepared to try the case. Trial counsel also testified Applicant led him to believe he had a permit to carry a weapon, and did not learn Applicant did not have a permit until trial.

Trial counsel admitted he did not ask for jury charges on the disparity in size between Applicant and the victim or about the victim's alcohol intake. Trial counsel recalled the trial judge deciding to charge the jury on the lesser included offense of ABHAN. He admitted he did not request a lesser included offense of first degree assault and battery. Trial counsel testified he did not request a lesser-included offense because his strategy was to show Applicant acted in self-defense. Trial counsel testified he did not want a conviction on a lesser included offense.

Trial counsel recalled there being an issue with a member of the victim's family speaking with a

member of the jury venire. Trial counsel testified he may have raised the issue with the trial judge, but did not ask for anything to be put on the record about it. He also testified he did not recall if the potential juror was actually seated on the jury.

Applicant testified he met with trial counsel six (6) to eight (8) times. He averred he only discussed money at these meetings. Applicant testified he never reviewed the State's evidence, and never discussed self-defense. However, Applicant further testified he informed trial counsel of his service related injuries and his head injury. Applicant further testified he told trial counsel to go to the scene and take pictures and make diagrams. He believed these items were important to demonstrate the victim was the aggressor. Applicant alleged the victim's testimony was inconsistent on whether he was shot in the front or back of the leg, and pictures and diagrams would have been helpful.

Applicant testified trial counsel told him a preliminary hearing was unnecessary. Applicant stated he would have requested a preliminary hearing if he had known it would have allowed him to preview the evidence against him. Applicant testified trial counsel should have interviewed the investigating officers. He also testified he took Teal and Frank Cranford to trial counsel's office, and would have taken other witnesses if trial counsel had asked him. Applicant testified he was surprised trial counsel asked Teal about his prior conviction, and believes the question harmed Teal's credibility. Applicant further testified he wanted trial counsel to call the other witnesses that were at the scene. He also testified he believed trial counsel should have called witnesses to testify to the victim's reputation for violence. He alleged he gave trial counsel the names of Smith and Jenkins and offered to bring them to his office to interview them. Applicant testified he would have requested a castle doctrine hearing if trial counsel had discussed one with him.

Applicant recalled informing trial counsel a member of the victim's family was seen speaking

with a member of the jury, but trial counsel did nothing about it. He testified trial counsel never discussed with him his right to testify. He further testified they did not discuss the jury instructions. Applicant testified they never discussed submitting a lesser included offense to the jury, and that he did not want a jury charge on ABHAN. Applicant recalled testifying at trial. He recalled telling the jury about his version of events. Applicant testified the victim threw a bottle at him and they fought until Applicant shot the victim.

Smith testified he knows both Applicant and the victim. He was not present at the shooting, but spoke to Applicant about testifying at his trial. Smith testified he had a prior altercation with the victim. He testified he spoke to trial counsel once, on an unrelated matter, but did not call or visit trial counsel to discuss Applicant's case.

Jenkins testified he once had a physical altercation with the victim while at work. He believed Applicant called him about testifying, but he did not call or visit trial counsel to discuss Applicant's case.

Teal testified he was at the scene, but did not know anyone there other than Applicant. He recalled meeting with trial counsel, but denied telling trial counsel his vehicular homicide conviction was within the past ten (10) years. He testified trial counsel told him he would be asked about the conviction and his prior drug use when he testified. Teal also testified an individual named Griggs was the person seen speaking with the victim's family.

Corey Williams testified he was present at the shooting and would have testified on Applicant's behalf if called at trial. Williams testified the victim and Applicant began fighting after a verbal exchange. Williams testified the fight began after the victim threw a beer bottle at Applicant. He testified Applicant got away from the victim, then pulled out a gun and began shooting at the ground.

Williams testified the victim did not have a bottle in his hand when Applicant began shooting.

Sherri Mumford, Applicant's sister, testified she was present at Applicant's trial. She recalled observing the victim and his father talking to jurors during a recess. She testified the jurors were a black female and a white male with red hair. Joyce Cranford, Applicant's mother, testified she saw the victim's father speaking with a white male juror with white hair during trial. Frank Cranford testified he saw the victim's father speaking to a white male juror with white hair during trial. He also recalled meeting with trial counsel prior to trial and discussing his testimony, including his prior convictions.

B. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id.

Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

1. Trial Counsel's Pre-Trial Investigation

Applicant alleges trial counsel was ineffective for failing to adequately investigate his case. Specifically, Applicant alleges trial counsel's ineffectiveness is premised upon his failure to interview the State's witnesses; to investigate the victim's injuries; to investigate the scene of the offense; and to investigate Applicant's PTSD and service related injuries. The Court finds Applicant's failed to meet his burden of proving trial counsel was ineffective in these regards. Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Although trial counsel candidly admitted he did perform many of the tasks Applicant alleges should have been performed, the Court finds Applicant failed to demonstrate how he was prejudiced by trial counsel's failures in these regards. See Strickland, 466 U.S. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies ... [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice[.]").

Regarding Applicant's allegation trial counsel failed to interview the State's witnesses, the Court finds Applicant failed to demonstrate how interviewing the State's witnesses would have changed the result of his trial. Trial counsel received all the witness statements prior to trial and thoroughly reviewed

them. He was not surprised by any of the testimony at trial. Such an investigation was reasonable under the circumstances. Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011) (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)). To the extent the testimony at trial differed from the statements, trial counsel thoroughly cross-examined the witnesses on these inconsistencies. Applicant has not shown how a pre-trial interview of these witnesses would have helped him more thoroughly cross-examine them.

The Court also finds Applicant failed to demonstrate trial counsel's failure to investigate the victim's injuries would have yielded any helpful evidence. The victim's testimony was consistent that he was shot from behind, and the extent of his injuries was clarified in his rebuttal testimony. The Court finds credible trial counsel's testimony he did not think the victim's medical records were relevant to the facts at issue in this case. Regardless, the Court cannot determine the value of these records because Applicant failed to produce them at the evidentiary hearing. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) ("Since the contents of these documents were never revealed at the PCR hearing, Defendant has failed to present any evidence of probative value demonstrating how the failure to obtain the unproduced statements or acquire the other documents in a more timely fashion prejudiced the defense." (citations omitted)).

The Court further finds Applicant failed to demonstrate a further investigation of the crime scene would have assisted in his defense. Regarding this allegation, the Court finds trial counsel's testimony credible, and Applicant's not credible. There was no debate about the location of either of the parties when Applicant began shooting. Rather, the ultimate question was whether the victim was attacking or retreating when shot. The Court agrees with trial counsel's assessment that the best evidence of the events was the testimony of the witnesses. Thus, he articulated a valid strategy for foregoing a crime

scene reconstruction. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Applicant has also not presented any evidence, other than his testimony, to show what further information would have been discovered had trial counsel procured photographs and diagrams of the crime scene. Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial." (citations omitted)). Accordingly, the Court finds Applicant was not prejudiced by trial counsel's failure to further investigate the crime scene.

Finally, the Court finds Applicant has not demonstrated trial counsel should have further investigated Applicant's service related injuries. Here, the Court finds trial counsel's testimony credible, and Applicant's not credible. Trial counsel was fully aware of Applicant's service related injuries. However, the Court cannot discern how these injuries are relevant to the facts of this case. There is no evidence these injuries inhibited Applicant's ability to understand the danger allegedly posed by the victim or his ability to avoid the danger. Trial counsel was also aware of Applicant's prior head injury. Trial counsel used the head injury to explain Applicant's reaction to having a bottle thrown at him and his belief the bottle could pose a risk of harm. To the extent they were helpful in the case, trial counsel utilized Applicant's service related injuries to his advantage.

On the other hand, Applicant never informed trial counsel of his PTSD diagnosis. Because trial counsel was not aware of this diagnosis, he was under no duty to further investigate its relevance to the crime. C.f. Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992) (trial counsel may rely on his

own perceptions as well as communications with client and client's family in determining competency issues).

Regardless, the only value of the PTSD diagnosis would be to explain Applicant's mental state at the time of the shooting. It would not have provided a complete defense to Applicant's actions because it would not impede his ability to distinguish right from wrong. State v. South, 310 S.C. 504, 508, 427 S.E.2d 666, 669 (1993) (under the M'Naughten test, a defendant is not criminally responsible "if, at the time of the offense, he lacked the capacity to distinguish moral or legal right from wrong" (citing S.C.Code Ann. § 17–24–10 (Supp.1989); Davenport v. State, 301 S.C. 39, 389 S.E.2d 649 (1990))). Here, Applicant's statement to investigators, his testimony at trial, and his testimony at the evidentiary hearing indicate he fully understood his actions the day of the shooting. Thus, information about his PTSD would not have exculpated him from responsibility for his actions. See, e.g., State v. Angel, 330 N.C. 85, 93, 408 S.E.2d 724, 728-29 (1991) ("Though defendant presented evidence that he may have suffered from post-traumatic stress disorder and that he may have 'dissociated' at the time of the killing, this evidence was met by plenary, credible evidence by the State in rebuttal."). Instead, the information merely would have served as mitigation evidence. However, the jury clearly found Applicant had no intent to kill the victim when it convicted him of the lesser included offense of ABHAN. Therefore, the Court finds a further investigation into Applicant's prior injuries would not have affected the outcome of his trial.

2. Pre-Trial Hearings

Applicant further alleges trial counsel was ineffective in failing to request a preliminary hearing and in failing to request a hearing pursuant to the Protection of Persons and Property Act.[1] The Court

[1] S.C. Code Ann. § 16-11-450(A).

finds Applicant failed to meet his burden of proving trial counsel ineffective in failing to request either of these hearings.

Initially, the Court notes Applicant does not have a constitutional right to a preliminary hearing. State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982) (citing State v. McClure, 277 S.C. 432, 289 S.E.2d 158 (1982)). Additionally, Applicant's indictment by the grand jury established probable cause and mooted his entitlement to a preliminary hearing. McClure, 277 S.C. at 434, 289 S.E.2d at 160 (citing U.S. v. Werbrouck, 589 F.2d 273 (7th Cir. 1978)). Because Applicant was not entitled to a preliminary hearing, trial counsel was not ineffective in failing to request one. Furthermore, the Court finds credible trial counsel's testimony he did not feel a preliminary hearing was necessary to develop the facts of the case. Stokes, 308 S.C. at 548, 419 S.E.2d at 779. There were few facts in dispute in this case, and trial counsel was familiar with the evidence in the case. Therefore, Applicant has not demonstrated what further evidence would have been discovered had a preliminary hearing been held.

The Court further finds Applicant has not demonstrated he was prejudiced by the lack of a hearing pursuant to the Protection of Persons and Property Act ("the Act"). Generally, the Act provides for a pre-trial determination of a defendant's immunity from prosecution. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). Trial counsel candidly admitted Applicant was entitled to an immunity hearing under the Act. However, mere entitlement to such a hearing does not automatically render trial counsel's performance deficient in failing to request one. Trial counsel testified he did not request an immunity hearing because, in part, he did not believe it was necessary to develop the facts of the case. The Court finds this rationale can be a valid strategic decision under the facts of this case. Stokes, 308 S.C. at 548, 419 S.E.2d at 779.

Regardless, Applicant has not shown he was prejudiced by trial counsel's failure to request an immunity hearing. At an immunity hearing, a defendant must prove he was acting in self-defense by preponderance of the evidence. Duncan, 392 S.C. at 411, 709 S.E.2d at 665. The Court finds the record before it does not show Applicant would have been successful in meeting such a burden. The evidence in this case consisted entirely of competing testimony from the various witnesses. Furthermore, the facts, even including the testimony presented at the evidentiary hearing, do not indicate Applicant was more likely than not acting in self-defense. Therefore, this case "presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution." State v. Curry, 406 S.C. 364, 372, 752 S.E.2d 263, 267 (2013). Accordingly, the Court finds Applicant has not shown he would have been granted immunity from prosecution had trial counsel requested a hearing under the Act.

3. Trial Counsel's Performance at Trial

Applicant alleges trial counsel's performance at trial was deficient in that he asked improper questions of his own witness; failed to call further witnesses on Applicant's behalf; failed to cross-examine the State's witnesses; failed to submit jury instructions; and failed to inform the Court the victim's father spoke to a juror. The Court finds Applicant failed to meet his burden of proving trial counsel was ineffective in any of these regards.

Applicant has failed to demonstrate trial counsel was ineffective for asking Teal questions about his prior record and drug use. The Court finds credible trial counsel's testimony Teal indicated the vehicular homicide conviction was less than ten (10) years old. Correspondingly, the Court finds not credible Teal's testimony on this issue. Trial counsel could not have anticipated Teal would provide incorrect information about his prior record. Although this conviction was likely not admissible under

Rule 609(b), SCRE, trial counsel was entitled to act on the misleading information given by Teal. Cf. Rodriguez v. State, 74 S.W.3d 563, 568 (Tex. App. 2002) ("Moreover, we opt not to fault trial counsel for the intentional withholding of vital information by his client." (citations omitted)). Therefore, trial counsel wisely asked Teal about his prior conviction to preempt the State from effectively impeaching him with the conviction. The Court finds trial counsel articulated a valid strategy of putting Teal's record before the jury to add credibility to his testimony. Stokes, 308 S.C. at 548, 419 S.E.2d at 779. The Court also finds trial counsel articulated a valid strategy regarding Teal's drug use. Id. The Court finds credible trial counsel's testimony he wanted to demonstrate Teal was not drinking or on drugs the night of the shooting, thereby showing his memory of events was more reliable that the witnesses who had been drinking.

Regardless, the Court further finds Applicant has not shown he was prejudiced by trial counsel eliciting this testimony from Teal. Teal's conviction was several years old and dissimilar to Applicant's charges. The State did not use Teal's conviction to challenge his credibility in cross-examination or closing argument. Thus, the Court finds the introduction of the prior conviction was not so harmful to Teal's credibility as to prejudice Applicant. Furthermore, the introduction of the drug use was not mentioned in the State's cross-examination or closing arguments. In light of the evidence several persons at the scene were consuming alcohol that day, Teal's admission he was sober may have actually bolstered his account of events leading up to the shooting. Accordingly, the testimony trial counsel elicited about Teal's prior conviction and drug use did not likely contribute to the verdict in this case.

The Court also finds Applicant has not demonstrated trial counsel was ineffective for failing to call Smith, Jenkins, and Williams as defense witnesses. The Court finds credible trial counsel's testimony Applicant never told gave him the names of Smith or Jenkins as potential witnesses, and finds

Applicant's testimony on this issue to be not credible. Because Applicant did not provide these leads to trial counsel, the Court finds trial counsel was not deficient in failing to call them as witnesses. Rodriguez, 74 S.W.3d at 568.

Regardless, Smith and Jenkins testimony was likely not admissible at trial. Both individuals testified at the evidentiary hearing to prior incidents of violence by the victim. However, both also testified they were not social acquaintances with Applicant or the victim. Rule 404(a)(2) allows testimony about "pertinent trait of character of the victim[,]" but not testimony about specific instances of conduct. See Rule 405, SCRE ("In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion."); see also United States v. Bautista, 145 F.3d 1140, 1152 (10th Cir. 1998) ("Here, Bautista sought to introduce Martinez's testimony that Carrillo made a pass at him and Whitt's testimony that Martinez told her about the incident. This testimony, however, shows specific conduct of the victim rather than reputation or opinion concerning the character of the victim."). Because Smith and Jenkins provided testimony at the evidentiary hearing about specific conduct of the victim, and not about his reputation, Applicant has not shown their testimony would have been admitted at trial if trial counsel had called them as witnesses.

Furthermore, the Court finds the result of the trial would not have been different had Smith or Jenkins testified. The fact the victim was the initial aggressor in the incident was not disputed at trial. The victim even admitted in his testimony that he started the fight. Thus, evidence the victim had a short temper and was aggressive was cumulative to the information provided at trial. Edwards, 392 S.C. at 459, 710 S.E.2d at 66 ("[W]here evidence produced during PCR proceedings is cumulative to or

does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward." (citations omitted)).

The Court further finds Applicant was not prejudiced by trial counsel's failure to call Williams as a witness. Williams' testimony at the evidentiary hearing was largely cumulative to the testimony provided at trial. Id. Furthermore, the testimony at the evidentiary hearing indicates Williams' testimony actually would have been harmful to Applicant's case. Williams' description of the shooting involves Applicant engaging in a verbal altercation with the victim. The victim then threw a beer bottle at Applicant, and a fight ensued. However, Williams testified Applicant was able to disengage himself from the fight. It was once Applicant had escaped the victim's grasp that he pulled out his gun and began firing. This testimony established Applicant had an opportunity to retreat from the fight, but chose to draw a weapon and fire it. Therefore, Williams' testimony indicates Applicant was not acting in self-defense when he pulled the gun and fired. Specifically, Applicant could not have entertained a reasonable fear of danger where the victim was not armed with the beer bottle and was not engaged with him. Curry, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4 (valid claim of self-defense based upon a belief of imminent danger requires "a reasonably prudent man of ordinary firmness and courage would have entertained the same belief" (citing State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984))). Because Williams' testimony does not further Applicant's theory of self-defense, the Court finds Applicant has not shown he was prejudiced by trial counsel's failure to call Williams as a witness.

The Court finds Applicant has not demonstrated trial counsel ineffective for failing to more thoroughly cross-examine the State's witnesses. The record indicates trial counsel thoroughly cross-examined witnesses on their prior statements and their criminal records. Trial counsel impeached several eye-witnesses on the fact their trial testimony included a statement by Applicant after the

shooting that was not previously disclosed to investigators. Trial counsel got the victim to admit he was the initial aggressor and Applicant was defending himself. Trial counsel further got the investigating officer to testify to Applicant's cooperation and contrition. In light of trial counsel's thorough cross-examination of the witnesses, the Court finds Applicant has not shown either a deficiency or prejudice from trial counsel's performance. See Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997) (court will not "speculate whether a 'better' cross examination would have helped" a defendant's case).

The Court finds Applicant failed to demonstrate he was prejudiced by trial counsel's failure to submit jury instructions on self-defense and lesser included offenses. Applicant has not shown he was prejudiced by the lack of jury charges on the disparity in size between Applicant and the victim or about the victim's alcohol intake. The trial judge gave a through charge on self-defense. His charge begins with a recitation of the model charges promulgated by the South Carolina Supreme Court in State v. Davis, 282 S.C. 45, 317 S.E.2d 452, 453 (1984). He also charged the jury on Applicant's right to act on appearances and that words, accompanied by hostile acts, could establish self-defense. State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 331 (1989). In light of the trial judge's through charge, Applicant has not shown he was prejudiced by trial counsel's failure to request additional instructions on self-defense. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) ("'In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.' 'A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.' A jury charge which is substantially correct and covers the law does not require reversal." (citing State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003); State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996))).

The Court further finds trial counsel was not ineffective in failing to request a charge on the lesser included offense of first degree assault and battery. The Court finds credible trial counsel's testimony his strategy was to get the jury to acquit on the indicted charge, not convict on a lesser included. Because trial counsel argued Applicant's actions were completely justified, he had no reason to ask the jury to consider a lesser degree of culpability. Accordingly, the Court finds trial counsel articulated a valid strategy for not requesting a first degree assault and battery charge. Abney v. State, 408 S.C. 41, 46, 757 S.E.2d 544, 547 (Ct. App. 2014), reh'g denied (Apr. 24, 2014) (failing to ask for a jury charge on a lesser included offense is a valid trial strategy); see also State v. Walker, 605 S.E.2d 647, 654 (N.C. Ct. App. 2004), overruled on other grounds, 695 S.E.2d 750 (N.C. 2006) ("The record indicates defendants' counsel were employing an 'all or nothing' strategy[.] ... The fact that it failed does not mean that defendants were deprived of effective assistance of counsel."). Therefore, trial counsel was not deficient for not requesting a lesser included offense.

Regardless, Applicant was not prejudiced by the lack of a first degree assault and battery charge in this case. Although first degree assault and battery is a lesser included offense of ABHAN, S.C. Code Ann. § 16-3-600(C)(3), a judge can only charge the jury on offenses which are supported by the facts of the case. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006) (citations omitted). Here, the facts support a charge on ABHAN based on Applicant's use of a firearm. State v. Dennis, 402 S.C. 627, 638, 742 S.E.2d 21, 27 (Ct. App. 2013) ("Under the common law, ABHAN 'requires an unlawful act of violent injury accompanied by circumstances of aggravation,' which may include 'the use of a deadly weapon, the infliction of serious bodily injury, [or] the intent to commit a felony.'" (citing State v. Coleman, 342 S.C. 172, 536 S.E.2d 387 (Ct. App. 2000))). However, there is no evidence from which the jury could have convicted Applicant of the lesser included offense of first

degree assault and battery. The evidence is clear Applicant inflicted great bodily harm on the victim by shooting him. S.C. Code Ann. § 16-3-600(A)(1) (defining great bodily injury). His plea of self-defense and the supporting evidence may reduce the attempted murder to ABHAN. Dennis, 402 S.C. at 638, 742 S.E.2d at 27 ("'An ABHAN charge is appropriate when the evidence demonstrates the defendant lacked the requisite intent to kill.'" (citing Coleman, 342 S.C. 172, 536 S.E.2d 387)). However, there is no evidence to reduce it further to a first degree assault and battery because the victim was actually injured. See State v. Middleton, 407 S.C. 312, 316, 755 S.E.2d 432, 435 (2014), reh'g denied (Apr. 2, 2014) (distinguishing the two subsections of the first degree assault and battery statute where subsection (a) requires an injury to the victim and subsection (b) does not require an injury to the victim). Because Applicant actually inflicted great bodily harm on the victim, he was not entitled to a charge on first degree assault and battery. Accordingly, Applicant was not prejudiced by trial counsel's failure to request a charge on the lesser included offense.

Finally, the Court finds Applicant failed to meet his burden to show trial counsel ineffective in failing to bring to the court's attention an allegation the victim's father was interacting with a juror during trial. The Court notes the testimony regarding this allegation was wholly inconsistent among witnesses. Trial counsel testified the juror he recalled being alerted about was not actually on Applicant's jury. Teal testified the juror's name was Griggs, but the record indicates nobody by that name was seated on Applicant's jury. Applicant's sister testified the victim's father was speaking to a black female and a white male with red hair. The only consistent testimony came from Mr. and Mrs. Cranford, who indicated a white male with white hair was speaking to the jury. In light of the other inconsistencies in the testimony about this juror, the Court finds the testimony of Mr. and Mrs. Cranford not credible. Furthermore, neither the victim's father nor the alleged juror testified at the evidentiary

hearing. Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, without a witness's testimony, "any finding of prejudice is merely speculative"). The Court also finds credible trial counsel's testimony that he brought the issue to the attention of the trial judge, and no further action was necessary. Ultimately, the Court has no evidence any alleged exchange between the victim's father and a juror prejudiced Applicant's right to a fair and impartial jury.

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes 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.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this _________ day of _______________________, 2014.

____
THE HONORABLE PAUL M. BURCH
Resident Judge
Fourth Judicial Circuit

____________________, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTERFIELD)

IN THE COURT OF COMMON PLEAS

NOAH C. MUMFORD, #348375)
Applicant,)
)
v.)
)
THE STATE OF SOUTH CAROLINA,)
Respondent.)
)

ORDER GRANTING POST-CONVICTION RELIEF

This matter came before the Court by way of an Amended Application for Post-Conviction Relief filed May 13, 2013. The State made its Return on May 16, 2013. An Evidentiary Hearing was convened on July 31, 2014. The Applicant was present and was represented by Jack B. Swerling of the Richland County Bar. The State was represented by Joshua L. Thomas and Megan E. Harrigan of the Attorney General's office.

I.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Chesterfield County Clerk of Court's Order of Commitment. The Applicant was indicted by the Chesterfield County Grand Jury for Attempted Murder (2011-GS-13-0096). The Applicant was represented by Larry W. Knox, of the Chesterfield County Bar. The Applicant proceeded to trial on October 24, 2011, and on October 26, 2011, the Applicant was found guilty of the lesser included offense of Assault and Battery of a High and Aggravated Nature. He was sentenced to ten (10) years by the Honorable Thomas A. Russo. A Notice of Appeal was timely filed on the Applicant's behalf, but was subsequently abandoned in order for the Applicant to file an Application for Post-Conviction Relief.

II.

ALLEGATIONS RAISED

In his Amended Application for Post-Conviction Relief, the Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. The defendant alleges that trial counsel failed to adequately investigate the case.

2. The defendant alleges that trial counsel failed to interview the state's witnesses.

3. The defendant alleges that trial counsel failed to call to trial several witnesses for the defense.

4. The defendant alleges that trial counsel failed to adequately investigate the injuries of the alleged victim in the case.

5. The defendant alleges that trial counsel failed to effectively cross-examine several of the witnesses called by the state during the trial of this case.

6. The defendant alleges that trial counsel failed to adequately investigate the scene of the alleged offense.

7. The defendant alleges that trial counsel failed to have a preliminary hearing.

8. The defendant alleges that trial counsel failed to submit jury instructions relating to the facts of the case.

9. The defendant alleges that the South Carolina Legislature passed what is known as the "Protection of Persons and Property Act" effective June 9, 2006. The Act provides immunity from prosecution pursuant to section 16-11-450 of the S.C. Code of Laws (1976 amended).

10. The defendant alleges that the South Carolina Supreme Court handed down the opinion in ***State v. Duncan***, 709 S.E.2d 662 (May 9, 2011) which held that the defendant was entitled to immunity under the Act.

    (I) The defendant alleges that trial counsel failed to request a pretrial determination of immunity pursuant to the above-referenced statute and case law.

(ii) The defendant alleges that trial counsel failed to request jury instructions that would have been applicable under the Act and case aforementioned.

On July 29, 2014, the Applicant, by letter to Joshua L. Thomas, added three additional grounds to the Application and the Court will consider these grounds as amendments to the original Application for Post-Conviction Relief:

11. The defendant alleges that several witnesses observed the victim talking to a juror and counsel failed to investigate the matter or inform the Court.

12. The defendant alleges that counsel asked several questions of defendant's witnesses which were improper and undermined their credibility.

13. The defendant alleges that counsel failed to investigate or present evidence as to the effect of the defendant's PTSD, and injury to his shoulder and left ear from service related injuries.

At the Post-Conviction hearing the Applicant added the following additional ground which the Court will consider as an amendment to the original Application for Post-Conviction Relief: ***Simpson v. Moore***, 627 S.E.2d 701, 708 (2006), Rule 15(b) SCRCP.

14. The defendant alleges that trial counsel was ineffective for failing to object to portions of Corporal Daniel Scott's testimony.

III.

STANDARD OF REVIEW

This Application for Post-Conviction Relief raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. ***Bell v. State***, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that trial counsel: 1) failed to provide him with reasonable

professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters, and 2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. ***Strickland v. Washington***, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omission, there is a reasonable probability that the result at trial would have been different. ***Id.***; ***Judge v. State***, 321 S.C. 554, 471 S.E.2d 146 (1996); ***Johnson v. State***, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. ***Ard v. Catoe***, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

Where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of counsel. ***Roseboro v. State***, 317 S.C. 292, 454 S.E.2d 312 (1995); ***Stokes v. State***, 308 S.C. 546, 419 S.E.2d 778 (1992). However, counsel may not explain away errors and omission which acted to prejudice his client's ability to receive a fair trial by simply labeling them matters of trial strategy or tactics. In the case of ***Ingle v. State***, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the South Carolina Supreme Court found that:

> Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

IV.

EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing held in this case on July 31, 2014, the Applicant presented his own testimony as well as testimony from Shari Mumford, Joyce

Quick, Steven Teal, Frank Cranford, Corey Williams, Ervin Smith and Mike Jenkins. The Respondent presented the testimony of trial counsel Larry W. Knox. In addition to the testimony presented, this Court has before it a transcript of the trial. What follows below are relevant facts from the trial and evidentiary hearing as well as findings of fact and rulings of law made by this Court in accordance with the Uniform Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10, *et. seq.* (1995).

On the facts of this case, the Court finds that the combined errors and omissions of trial counsel were such that the Applicant was deprived of a fair trial. Specifically, this Court finds a reasonable probability that but for counsel's errors and omission, the outcome of the trial would have been different. For that reason, this Court finds that trial counsel failed to provide the Applicant reasonable, professional assistance of counsel

V.

THE RELEVANT TRIAL TESTIMONY

Paul Funderburk, who was the injured party in the case, testified on behalf of the State. On December 23, 2010, he was at Todd Harrell's house along with the Applicant, Todd Harrell, Amos Nivens, Corey Williams and Antonio Sellers. The Applicant and Todd Harrell were going to race motorcycles at some time, but not that night. Mr. Funderburk and the Applicant exchanged words and Mr. Funderburk swung a beer bottle at the Applicant which he testified did not hit Applicant. Tr., p. 65, l. 1. He swung at him again with his hand. Tr., p. 79, ll. 23-25. They grabbed each other and wrestled for a couple of seconds and he pushed the Applicant away from him. Tr., p. 65, ll. 1-7. Mr. Funderburk then testified that he took a couple of steps back and turned to walk off when the Applicant started shooting. Tr., p. 66, ll. 8-10. He testified further that he was shot four times, one

wound under the right butt cheek, one wound in the left kneecap, and two wounds in the lower right ankle. Tr., p. 67, ll. 5-10. Mr. Funderburk agreed that he was much bigger (he testified that he was 6' 2" and about 240 pounds), Tr., p. 102, ll. 6-10, than the Applicant. Tr., p. 81, ll. 16-17, and that he intended to hit the Applicant with the beer bottle, Tr., p. 100, l. 5.

Todd Harrell testified for the State. In addition to the people that Mr. Funderburk noted were present, Mr. Harrell stated that Frank Cranford and another individual he did not know were also present. Tr., p. 109, l. 12. He testified that Mr. Funderburk and the Applicant got into a heated discussion, Tr., p. 108, ll. 14-16, that involved name calling. Tr., p. 110, l. 3. Mr. Funderburk and the Applicant were about four feet apart, Tr., p. 110, l. 25, when Mr. Funderburk swung the beer bottle at the Applicant, the bottle did not hit the Applicant, but fell to the ground. The bottle did not shatter, Tr., p. 124, ll. 17-18, Tr., p. 110, ll. 14-16. As Mer. Funderburk swung the bottle, he approached the Applicant. Tr., p. 126, ll. 4-5, and 9-10. They began to tussle for a few seconds and Mr. Funderburk, then broke loose, Tr., p. 111, ll. 6-8. According to Mr. Harrell, both gentlemen were backing up, Tr., p. 112, ll. 13-15, when the Applicant pulled a gun out. Tr., p. 112, ll. 6-8. The Applicant approached Mr. Funderburk and began shooting, with the first shot going off as the Applicant pointed to the ground. Tr., p. 120, ll. 8-13. Mr. Harrell stated that Mr. Funderburk was turning away. Tr., p. 130, ll. 4-5. In all, a total of five shots were fired. Tr., p. 113, l. 16.

Antonio Sellers testified for the State. He was present at the incident scene. He stated that the Applicant and Mr. Funderburk were talking "trash" to each other and the Applicant said several derogatory things about Mr. Funderburk's family, Tr., p. 141. Mr.

Funderburk said that after he finished his beer he would deal with Applicant. Tr., p. 151, ll. 13-25, Tr., p. 141, ll. 17-20. Mr. Sellers took that to mean something was going to happen, Tr., p. 152, ll. 4-5.

Mr. Sellers said Mr. Funderburk took a step toward the Applicant and he stepped between them and the next thing he knew Mr. Funderburk swung the bottle toward the Applicant and it hit the ground. Tr., p. 141, l. 21, Tr., p. 152, l. 16. The bottle came over Mr. Sellers, Tr., p. 152, l. 17, and hit the ground and did not break. Tr., p. 162, l. 15. At one point during his testimony he said the bottle was thrown at the Applicant, Tr., p. 164, l. 13.

Mr. Sellers testified that Mr. Funderburk and the Applicant grabbed each other, backed off and looked at each other. Tr., p. 142, ll. 1-2. At that point, the Applicant pulled a gun and started firing as Mr. Funderburk went to turn. Tr., p. 142, ll. 2-6. The Applicant fired four or five shots, Tr., p. 142, l. 15, which hit Mr. Funderburk in the legs. According to Mr. Sellers, both the Applicant and Mr. Funderburk were wrong in their actions, Tr., p.1 42, l. 7.

Dana Wallace testified for the State. Corporal Wallace has been employed by the Sheriff's Department for nine years. He was one of the officers who received the call on the night of the incident and he proceeded to the hospital. He and Deputy Joe Campbell took statements from Todd Harrell, Antonio Sellers, Amos Nivens, and Corey Williams. Tr., p. 178, ll. 2-3.

He and Deputy Campbell went to the scene. It was dark. Tr., p. 175, l. 7. At the scene, they recovered .22 shell casings along with a beer bottle. Tr., p. 169, ll. 204. They turned the evidence over to John James, who did not testify in the case. According to Corporal Wallace, they took no measurements at the scene, and he was not sure if they

marked any of the evidence at the scene or took photos. Tr., p. 176, ll. 3-13. At the conclusion of his testimony, Deputy Joe Campbell was released and did not testify.

Corporal Daniel Scott testified for the State. He is employed by the Chesterfield County Sheriff's Department. On the day of the incident he received a call and proceeded to the hospital. Tr., p. 180, l. 24. Because he knew the Applicant, he called him and asked him to meet, Tr., p. 181, l. 25. The Applicant gave Corporal Scott the gun that was used.

Corporal Scott recorded a video of the Applicant's statement. According to Corporal Scott, the Applicant said that there had been some words between him and Mr. Funderburk and Mr. Funderburk said that as soon as I finish drinking this beer, I'm going to hit you with the bottle. Tr., p. 184, ll. 13-15. The Applicant then said Mr. Funderburk swung at him, Tr., p. 184, ll. 16-17 with the bottle. The Applicant stated that he had a metal plate in his head and wasn't going to allow Mr. Funderburk to hit him in the head. Tr., p. 190, ll. 14-15. The Applicant stated he reached for the gun and fired it in self-defense. Tr., p. 185, ll. 17-18, Tr., p. 184, ll. 16-17. According to the Applicant, he "blanked" out and was trying to shoot at the ground then he said foot. He also said that when he "blanked out," he lost focus and vision. Tr., p. 185, l. 4, Tr., p. 185, l. 15, Tr., p. 192, l. 9.

Corporal Scott also testified that the Applicant was small and Mr. Funderburk was big. Tr., p. 187, ll. 1-2, and that the Applicant was permitted to carry a pistol. Tr., p. 191, l. 11.

Corporal Scott then testified without objection, that he and the Applicant had the same military training and that they were taught that if one shoots someone in the femoral artery, the person can "bleed out," which could kill the person shot. Tr., p. 188, ll. 9-10, Tr.

188, ll. 17-20. On cross-examination Corporal Scott admitted that had the Applicant wanted to kill Mr. Funderburk, he had the training to do so. Tr., p. 194, ll. 13-15.

Steven Teal was called as a witness for the Applicant. He was a crucial witness because he was there at the time of the argument and the shooting. Trial counsel brought out the fact that his own witness had a thirty-five (35) year old conviction for vehicular homicide and DUI and served a four (4) year sentence back when he was eighteen (18) years old. Tr., p. 209, ll. 10-24. He is 53 years old now and was 18 at the time of the offense. Then trial counsel continued to impeach his own witness by asking if he used illegal drugs to which he answered yes. Tr., p. 210, ll. 24-25. Counsel then asked how long ago the witness last used illegal drugs and the witness answered five (5) years ago. Tr., p. 211, ll. 1-7. Mr. Teal was present at Mr. Harrell's home. Mr. Funderburk and the Applicant were arguing. He saw Mr. Funderburk hit the Applicant with a bottle of beer. Tr., p. 215, ll. 18-19. He was three (3) feet from the Applicant when that happened. According to Mr. Teal, Mr. Funderburk came down across the top of the Applicant's head and on his shoulder and the Applicant went down, Tr., p. 256, l. 18, and when the Applicant went down Mr. Funderburk was on top of him, Tr., p. 216, ll. 19-20. When the Applicant was going down, Mr. Funderburk went off and started "whooping up" on the Applicant. Tr., p. 218, ll. 14-18.

Mr. Teal then heard shots as Applicant was down on his knee or about to hit the ground. Tr., p. 219, ll. 2-3. He said the shots were coming from the middle of them. Tr., p. 219, ll. 10-11, and then Mr. Funderburk jumped up and ran off, Tr., p. 219, l. 15, and came back, Tr., p. 219, l. 17. Trial counsel again asked Mr. Teal if he had been convicted of vehicular homicide. Tr., p. 220, ll. 4-5.

The defense then called Frank Cranford who was also present at the scene of the incident at Todd Harrell's house. He, Mr. Teal and the Applicant rode over there together. According to Mr. Cranford, Mr. Funderburk started talking "junk" to the Applicant and they had a few words. Tr., p. 235, ll. 3-5. When they were fussing back and forth, Mr. Funderburk said "We'll see about all that when I finish drinking this beer." Tr., p. 235, ll. 15-16 and Tr., p. 236, ll. 8-9.

At some point Mr. Funderburk swung the beer bottle at the Applicant. Tr., p. 236, ll. 16-18. The beer bottle hit the Applicant on the right shoulder. Tr., p. 236, ll. 19-22. Mr. Funderburk then came in between them and charged the Applicant. Tr., p. 237, ll. 7-8. After he swung the bottle, he went back after the Applicant again. Tr., p. 237, ll. 15-16. Tony grabbed Mr. Cranford, and the Applicant "spent" around and he then saw the gunshot. Tr., p. 237, ll. 16-21. After Tony pulled him away was when he observed Mr. Funderburk hit the Applicant. Tr., p. 238, ll. 16-18. He did not see who did the shooting, but heard it. Tr., p. 238, ll. 19-25. He testified that the bullet hit the ground, Tr., p. 239, ll. 4-6. He then looked at and saw the Applicant shooting at the ground, and Mr. Funderburk came back at him and he shot again, Tr., p. 239, ll. 12-15.

Noah Mumford testified on his own behalf. He served seven (7) years in the military and went to Iraq. Tr., p. 258, ll. 16-17. He was honorably discharged. Tr., p. 259, ll. 20-21. On December 23, 2010, he went to Todd Harrell's house with his friends.

The Applicant said that when Mr. Funderburk got out of his truck, he started talking "junk," and the Applicant fired "junk" back. Tr., p. 267, ll. 5-6. The Applicant described the language as very vulgar. Tr., p. 267, ll. 21-22. The Applicant had his pistol with him and it

was legally purchased, Tr., p. 268, l. 23-24. While he took training with the pistol, he did not have the money to send in for a license. Tr., p. 269, ll. 14-16.

The words they exchanged with each other eventually led Mr. Funderburk to say "When I get through drinking this beer, I'm going to hit you in the head." Tr., p. 270, ll. 2-4. The Applicant said to his friend Todd that Mr. Funderburk was acting crazy and he was going to go. Tr., p. 270, ll. 4-6. Mr. Funderburk said he would hit him with the bottle in the head. Tr., p. 270, ll. 22-25.

The Applicant said he was prepared to leave and Mr. Funderburk came out with the bottle and hit him. Tr., p. 271, ll. 2-10. Mr. Funderburk came around Tony to hit him with the bottle, Tr., p. 271, ll. 15-18. The Applicant was struck with the bottle, went down and came up with the pistol, Tr., p. 272, ll. 3-13. The Applicant fired into the ground with the pistol, Tr., p. 272, l. 15. After firing two shots in the ground, Mr. Funderburk came back at him and he felt like he was not going to stop. Tr., p. 272, ll. 18-21.

The Applicant described that he had a previous head injury and he was afraid he would end up in a coma. Tr., p. 272-273, ll. 25-1. The Applicant stated he went down and Mr. Funderburk tried to hit him in the face. Tr., p. 173, ll. 3-8. The Applicant said he fired the gun, but Mr. Funderburk came back at him. Tr., p. 273 and he shot down again, tr., p. 273, ll. 15-17, but the bullet ricocheted and hit Mr. Funderburk. He stated he did not intend on shooting him. Tr., p. 273, ll. 15-17. He just wanted him to stop and not hurt him. Tr., p. 273, l. 19.

The Applicant testified that he cooperated fully with law enforcement. He went down to the sheriff's office, brought the gun and gave a video statement. Tr., p. 276, ll. 1-25.

Trial counsel also had the Applicant describe what he meant by "blanking out." He said he was dazed. Tr., p. 278, ll. 16-23. The Applicant testified he shot Mr. Funderburk to protect himself, but if he had wanted to kill him he certainly could have. Tr., p. 280, ll. 13-15. He stated there was no other way to repel the attack – Mr. Funderburk was 200 pounds or something and he was 170 pounds. Tr., p. 290, ll. 17-18.

On cross-examination the Applicant testified that he did not have a permit to carry a concealed weapon. Tr., p. 286, ll. 7-9. He also testified that the bottle hit him in the shoulder, Tr., p. 286, l. 24. As for blacking out, he said he was receiving help. Tr., p. 288, l. 16.

The Court charged the jury. Trial counsel offered no objection to the charge nor did he submit any proposed instructions. The Court charged the jury on Attempted Murder, Tr., p. 351, l. 17. The Court also charged, without objection, the law of Assault and Battery of a High and Aggravated Nature. Tr., p. 353, l. 10. The Court also instructed the jury on the law of self-defense, Tr., p. 354, l. 2. The jury found the Applicant guilty of Assault and Battery of a High and Aggravated Nature. Tr., p. 366, l. 23.

VI.

RELEVANT TESTIMONY FROM THE EVIDENTIARY HEARING ON THE PCR APPLICATION

Mike Jenkins was called by the Applicant. He testified that he knew both Mr. Funderburk and the Applicant and he worked with Mr. Funderburk. He had an altercation with Mr. Funderburk at work because he closed the door of a truck and the radio went off. Mr. Funderburk got upset and pushed him down. He also testified that he had heard of other altercations Mr. Funderburk had been involved in. He was advised by the Applicant that he

might be needed at trial, but he was never contacted by Mr. Knox or subpoenaed for trial. He did not know the Applicant to get into any trouble.

Ervin Smith was called to testify on behalf of the Applicant. He knew both Mr. Funderburk and the Applicant from Chesterfield County. Although he was not present at the incident, he was aware that Mr. Funderburk had gotten into altercations with other people. He described Mr. Funderburk as having a short fuse and the least little thing would set him off. He himself had an altercation with Mr. Funderburk. Mr. Smith was prepared to tell the jury about his interaction with Mr. Funderburk if he had been called as a witness during the trial. He testified that he was never contacted by Mr. Knox or subpoenaed for trial. Mr. Smith also testified that the Applicant was just an ordinary person and to his knowledge had not been in any fights.

Corey Williams testified for the Applicant. Mr. Williams is a resident of Cheraw and he was present at the altercation between the Applicant and Mr. Funderburk. He stated that he would have been willing to testify on behalf of the Applicant at his trial, but he was never interviewed by Mr. Knox or subpoenaed for the trial. He testified that both the Applicant and Mr. Funderburk were "talking trash" to each other and Mr. Funderburk hit the Applicant with a bottle. Mr. Funderburk then grabbed the Applicant and they tussled. The Applicant got loose and shot at the ground. According to Mr. Williams, if the Applicant had not shot, the fight would have continued. He also testified that Mr. Funderburk was facing the Applicant and still being aggressive at the time of the shooting.

Steven Teal testified at the PCR hearing and also at the Applicant's trial. Mr. Teal said that he never said to Mr. Knox, as claimed by Mr. Knox, that his prior crime was less than ten (10) years ago. Furthermore, he was surprised that Mr. Knox brought out anything

about his prior drug use. Mr. Teal said that Mr. Knox told him he was going to bring out the information about his drug use and prior conviction because even if he did not, the state would question him about it. Mr. Teal also testified that he saw Mr. Funderburk's father talking to one of the jurors that was seated in the trial. He described the juror as a white man, short and stocky with grey hair. Mr. Teal was not interviewed by Mr. Knox until the day of the trial, and he told him what he saw at the altercation. He told the Applicant what he saw regarding Mr. Funderburk's father and was present when the Applicant told Mr. Knox about it. He believed that the trial could have ended in a mistrial, but it did not, and he did not know what Mr. Knox did with the information.

Frank Cranford also testified at the hearing and at Applicant's trial. Mr. Cranford observed a white haired juror talking to Funderburk's father and he told the Applicant about it. He did not know what happened with the information.

Sherri Mumford, the Applicant's sister and Joyce Quick, the Applicant's mother, also testified at the PCR hearing. Ms. Mumford saw Mr. Funderburk's father talking to two jurors, a black man and a white man with grey hair. She testified she told Mr. Knox and the Applicant and Mr. Knox said he would take care of it. Ms. Quick said she saw Mr. Funderburk's father talking to a white hair, male juror and told Applicant about it.

Noah Mumford testified that he is currently at Wateree River Correctional Institution and was sentenced to 10 years. He went to prison on October 28, 2011.

Prior to the incident, Mr. Mumford was a Spec 4 in the military working as a mechanic in Iraq. He received a medical discharge from the army for PTSD, tinnitus, and a left shoulder injury. Mr. Mumford testified that he discussed his service related injuries with

Mr. Knox including the fact that he was more susceptible to being injured because of the plate in his head. However, Mr. Knox never brought this fact out at trial.

Mr. Mumford knew of Mr. Knox prior to the incident. To prepare for the trial he met with Mr. Knox six to eight times. Mr. Mumford testified that he did not know the process of a criminal trial and fully depended on Mr. Knox.

Mr. Mumford stated that he never received any Rule 5 materials. He did not know that he had a right to it. Further, Mr. Mumford never saw the victim's hospital records until Mr. Swerling showed him the records. Mr. Mumford testified that he did not know that he could get expert testimony regarding the entry/exit wounds of the victim.

Mr. Mumford stated that he did not have a preliminary hearing because Mr. Knox said he did not need one and Mumford relied on his advice. Mr. Mumford stated that he know understands that a preliminary hearing would give him a preview of the states evidence. Mr. Mumford further testified that he feels that all of the police officers should have been interviewed, but no effort was ever made to do so. Mr. Knox never talked to Daniel Scott about the video statement he made. Mr. Knox received no information regarding the crime scene and very little investigation was done by the police.

Regarding the witnesses, Mr. Mumford did not understand why Corey Williams and Amos Nivens were not testifying as they were both at the scene of the incident. The two men were not interviewed by Mr. Knox, so he did not know what they would say.

As for Steven Teal and Frank Cranford, Mr. Mumford testified that he provided Mr. Knox with their names, and even brought Mr. Cranford to Knox's office so that he could interview him prior to the trial. Mr. Mumford felt as though Mr. Teal's credibility was ruined after Knox asked him about his prior convictions and drug use. Mr. Mumford also stated that

he felt Mr. Knox could have elicited better answers on cross examination of the state's witnesses if he had interviewed them prior to the trial.

Mr. Mumford was working for Marlboro EOC prior to the trial. This incident was his first offense. Mr. Mumford stated Paul Funderburk had a tendency for violence and provided Mr. Knox with a list of names of other people who had altercations with Mr. Funderburk. Mr. Mr. Mumford stated that Mr. Knox did not seem interested in interviewing these people.

Mr. Mumford said the location of the bottle and shell casings would show he was attacked. There was no question Mr. Funderburk struck Mr. Mumford first with the bottle. Mr. Mumford asked for photos but Mr. Knox never took any photos of the crime scene. Mr. Knox also never asked Mr. Mumford to come off the stand to show the jury what happened. In fact, Mr. Mumford stated that Mr. Knox did not effectively explain his injuries to the jury.

Mr. Mumford testified that he told Mr. Knox about Paul Funderburk, Sr. talking to the jury. He was unaware what Mr. Knox did about it, but said that nothing was done in open court about the issue.

Mr. Mumford also stated that Mr. Knox failed to discuss the legal issues with him, failed to explain the burden of proof, his right to testify or not testify, jury instructions, the castle doctrine, the charge instructions on Attempted Murder and ABHAN, and the lesser included charge of Assault and Battery in the First Degree. Mr. Knox did not explain that Assault and Battery in the First Degree carried a lower minimum sentence as well as being a parole eligible offense. Mr. Mumford testified that he was uncomfortable that Mr. Knox did not know what he was doing. He felt as though he was not represented properly and his due process was violated.

Larry W. Knox was called as witness for the Respondent. His testimony is summarized as follows:

Mr. Knox acknowledged that he was told about Mr. Funderburk's father talking to a juror. He testified that he believed he told the judge about it in chambers, but cannot recall exactly what happened and doesn't now why the issue was not put on the record or why an inquiry was not made.

He also testified that he believed the juror in question was an alternate and since he was not taking part in the deliberations, it did not matter.

Mr. Knox testified that he did ask Mr. Teal about his conviction for vehicular homicide and claimed that Mr. Teal told him that the conviction was less than ten (10) years old, but he did not investigate the date of the offense. He also claimed that he brought out the conviction to show the jury that Mr. Teal had nothing to hide. Mr. Knox claimed that impeaching Mr. Teal's credibility did not hurt the Applicant's case because Mr. Teal was not the individual on trial.

Mr. Knox also admitted that he asked Mr. Teal about his prior drug use. He testified that he asked Mr. Teal about his drug use "to clear the air," and show that Mr. Teal had nothing to hid or lie about and to show that Mr. Teal had a high veracity and that Mr. Teal was not under the influence of drugs. In summary, he did not feel he impeached his own witness and that this all was his "trial strategy." It should be pointed out here that at the trial, Mr. Teal's record was discussed outside of the jury's presence and the Solicitor acknowledged that Mr. Teal's convictions were not admissible because they were beyond the ten (10) year limit. Tr., pp. 204-205, ll. 25-1.

Mr. Knox testified that he knew the Applicant was getting disability but did not know why and he did not pursue any of these medical or physical problems because he did not think it had any bearing on the case. The Applicant recalled events clearly and he did not believe it would effect his fear or apprehension. Mr. Knox recalled that someone at trial said the Applicant had a serious head injury and that he was not aware that the Applicant had PTSD or that the Applicant had Tinnitus. He also testified he was not aware of the fact that the Applicant had a plate in his head and would blank out at times.

As for investigation, Mr. Knox admitted that he did not interview Mr. Teal until the day of trial even though he was retained months before. Mr. Knox did not interview Todd Harrell, Antonio Sellers, Dana Wallace, Daniel Scott, Cory Williams, Amos Nivens, Joe Campbell or John James. These were individuals who either had some role in the case as law enforcement officers or who were witnesses at the scene of the shooting . He also admitted that the Applicant had given him a list of witnesses but that the Applicant did not give him any contact information for them. When asked, Mr. Knox could not provide any documentation to show he made any effort to contact these or any witnesses. Mr. Knox claimed that he did not have a budget to hire an investigator from the fees obtained. He stated that he probably did not leave the office on one occasion to investigate the case on his own.

Mr. Knox testified that his investigation consisted of reading the police reports, the GSR report, interviewing Frank Cranford and the Applicant and watching his video. He did not receive a copy of the hospital records until after the trial started. It was also brought out that he never visited the crime scene with or without the Applicant, took no pictures of the crime scene, and took no measurements of the crime scene. Mr. Knox issued no subpoenas

for the trial. Mr. Knox testified that he did not ask any law enforcement officer who testified at trial why they failed to take crime scene photos, measurements or diagrams because he did not believe it was important.

When questioned about whether he knew Mr. Funderburk had a reputation for getting into fights, Mr. Knox admitted he was told that by the Applicant. He stated he did not know the names Ervin Smith or Mike Jenkins who both testified at the PCR hearing. Mr. Knox testified that he did not believe witnesses who would say Mr. Funderburk had a propensity for violence would be good because it did not fit his trial strategy. According to Mr. Knox, he felt Steven Teal was his best witness because he stated Mr. Funderburk was the aggressor in the situation.

Mr. Knox knew Corey Williams and Amos Nivens were also at the scene of the altercation and did not know why they were not testifying. Of course, he never interviewed them to determine what they would say. Corey Williams testified at the PCR hearing as outlined above.

Mr. Knox was also questioned about Mr. Funderburk's injuries and the hospital records. In response to a question as to why he did not seek to obtain Mr. Funderburk's medical records from the hospital, Mr. Knox stated – what would I need the records for? (This was a case where the Applicant raised the self-defense and the entrance and exit of the bullets was important in determining whether Mr. Funderburk was heading towards the Applicant or away from the Applicant). Mr. Knox received the hospital records from the state after the trial started. He never moved to compel their disclosure by the State or subpoenaed them from the hospital. Mr. Funderburk had testified that one of his wounds was in the left kneecap, Tr., p. 67, 11. 5-10, which would have indicated Mr. Funderburk

was facing the Applicant when he was shot and not running away. Mr. Knox admitted that he failed to elaborate on this frontal shot issue and failed to argue that issue before the jury.

Mr. Knox was questioned about his failure to request a preliminary hearing. He testified he did not think it would aide his defense. Even though it would have been an opportunity to examine one or more police officers regarding the investigation, he did not think it was necessary.

Consistent with this line of questioning was Mr. Knox's testimony regarding S.C. Code § 16-11-450, *et. seq.*, otherwise know as the "Protection of Persons and Property Act," or the "Castle Doctrine." Mr. Knox testified that he did not believe the Castle Doctrine was applicable to this case and therefore he did not request one or discuss the Castle Doctrine with the Applicant. Mr. Knox testified that he did not feel he gave away anything by not having a Castle Doctrine hearing. Even though he conceded a Castle Doctrine hearing would give him more information about the case, he felt he had all the information he needed.

Mr. Knox was questioned regarding the submission of jury instructions. He did not submit any jury instructions. He did not submit any jury charge that a person can be acting lawfully even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. He did not submit any jury instructions regarding the size disparity between the Applicant and Mr. Funderburk on the issue of self-defense. He did not submit any jury instructions regarding alcohol even though Mr. Funderburk was drinking at the time of the incident.

When the Court decided to submit the lesser included offense of Assault and Battery of a High and Aggravated Nature to the jury, Mr. Knox did not request that the Court instruct the jury on the additional lesser included offense of Assault and Battery First degree.

Mr. Knox testified that he did not feel it was a mistake to not request a lesser included charge of Assault and Battery First Degree because he felt the Applicant was going to be acquitted. In fact, he testified that he intentionally did not ask for the lesser included charge, even though it was parole eligible. He did not discuss the giving or asking for lesser included charges with the Applicant because he felt he only needed to discuss them if he felt the Applicant was going to be found guilty.

Mr. Knox testified that he never provided the Applicant with a copy of the discovery in the case although he let him review the discovery in his office. He stated that the Applicant never asked for a copy of the discovery.

Mr. Knox also testified that in hindsight he should have objected to the solicitor's questioning of Daniel Scott regarding the training the Applicant would have received in the military and that the Applicant would have known that shooting someone in the femoral artery would cause a person to "bleed out" and die.

VII

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Application for Post-Conviction Relief raises several allegations of ineffective assistance of trial counsel. This Court finds that the errors and omissions of trial counsel require reversal of the Applicant's conviction and sentence. The allegations will be addressed below:

A. THE DEFENDANT ALLEGES THAT COUNSEL ASKED SEVERAL QUESTIONS OF DEFENDANT'S WITNESSES WHICH WERE IMPROPER AND UNDERMINED THEIR CREDIBILITY. (#12)

The Applicant alleges that trial counsel was ineffective for asking several question of Applicant's witnesses which were improper and undermined their credibility. The Court agrees with the Applicant and finds that the Applicant has met his burden on this allegation.

Applicant's defense was that he shot Mr. Funderburk in self-defense. The State presented the testimony of Mr. Funderburk and two eyewitnesses and the Applicant presented his testimony and the testimony of two eyewitnesses. One of the key witnesses presented by the Applicant was Steven Teal. If believed by the jury, Mr. Teal's testimony clearly supported the Applicant that he fired his weapon in self-defense. His credibility was extremely important to the Applicant's claim of self-defense. Even Mr. Knox stated Mr. Teal was his most important witness.

On direct examination by trial counsel, Mr. Teal was asked about a thirty-five (35) year old conviction for vehicular homicide for which he served four (4) years in prison and he was also asked about his drug use which he stopped five (5) years before the incident.

Mr. Knox testified that Mr. Teal had told him his conviction was less than ten (10) years old (which the Court does not find credible), and he brought it out to show the Applicant had nothing to hide. As to the drug use, he testified that he wanted to clear the air and show that Mr. Teal had "high veracity." Mr. Teal testified that he never said his conviction was less than ten (10) years old and he was surprised when Mr. Knox asked him about his drug use.

Rule 609 of the South Carolina Rules of Evidence governs the admissibility of a prior conviction. Under Rule 609(b), a prior conviction is not admissible if a period of more than ten (10) years has elapsed since the date of conviction or of the release of the witnesses from confinement, unless the probative value of the conviction supported by specific facts and

circumstances substantially outweighs its prejudicial effect. The Rule also requires that the proponent gives the adverse party sufficient adverse notice of intent to use such evidence. The conviction was clearly not admissible. In fact, the Solicitor conceded that the conviction was not admissible prior to the testimony of Mr. Teal. Tr., pp. 204-205, ll. 51-1. Mr. Knox had to know the conviction was inadmissible. It is also clear that evidence of Mr. Teal's drug use five (5) years prior to the incident would not have been admissible if the State had attempted to admit such evidence.

The questions by the Applicant's own counsel clearly attacked and undermined Mr. Teal's credibility before the jury. Mr. Knox stated that this was his "trial strategy," but offered no valid or objective reason for the utilization of this strategy and the Court can find no logical or valid reason for the exercise of this strategy under the facts of this case. This issue alone undermines this Court's confidence in the outcome of the trial, and the Court finds that there is a reasonable probability that but for trial counsel's error and omission, the result of the trial would have been different. The Applicant would be entitled to a new trial on this issue alone.

B. THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO SUBMIT JURY INSTRUCTIONS RELATING TO THE FACTS OF THE CASE. (#8)

The Applicant alleges that trial counsel was ineffective in failing to submit jury instructions relating to the facts of this case and in failing to adequately inform the Applicant of the issues relating to the instructions on lesser included offenses. The Court agrees with the Applicant and finds that the Applicant has met his burden on this allegation. The Applicant was charged with Attempted Murder. Without objection from Mr. Knox, the Court instructed the jury on the lesser included offense of Assault and Battery of a High and

Aggravated Nature. The Applicant was convicted of that offense and sentenced to ten (10) years. Mr. Knox never discussed with the Applicant whether or not he should object to the Court giving a lesser included offense charge to the jury, nor did he discuss with the Applicant whether to request the lesser included charge of Assault and Battery First Degree. According to Mr. Knox, he did not feel it was a mistake to not request the lesser included charge because he felt the Applicant was going to be acquitted. He believed that it was only necessary to discuss lesser included offenses if he felt that the Applicant was going to be found guilty. Mr. Knox testified that he intentionally did not ask for a lesser included charge. The Applicant testified that Mr. Knox never explained the lesser included charges to him so he was not aware of the implications of a charge to the jury on Assault and Battery of a High and Aggravated Nature or Assault and Battery First Degree. Without having Mr. Knox explain the two lesser included charges and the implications of both, the Applicant could not make an informed decision as to whether to object to or request an instruction on the lesser included offenses. Attempted Murder is a felony and upon conviction, a defendant must be imprisoned for not more than thirty (30) years and the sentence may not be suspended or probation granted. (Section 16-3-29 of the S. C. Code of Laws). Assault and Battery of a High and Aggravated Nature is a felony and a defendant must be imprisoned for not more than twenty (20) years (Section 16-3-600(B)(1) of the S.C. Code of Laws). Assault and Battery of a High and Aggravated Nature is classified as a violent and serious offense and a defendant is not eligible for parole. Assault and Battery in the first degree is a felony and upon conviction, a defendant must be imprisoned for not more than ten (10) years. Assault and Battery First Degree is a lesser included offense of Assault and Battery of a High and Aggravated Nature and Attempted Murder; however, it is a parole eligible offense.

The Court is of the opinion that the Applicant has shown there is a reasonable probability that but for counsel's errors and omissions, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case.

C. THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO CALL TO TRIAL SEVERAL WITNESSES FOR THE DEFENSE. (#3)

Trial counsel virtually conducted no investigation in this case. The Applicant alleges that trial counsel was ineffective in failing to interview and call as witnesses: Ervin Smith and Mike Jenkins. The Court agrees with the Applicant and finds that the Applicant has met his burden on this allegation.

This was a case where the Applicant raised the issue of self-defense. Issues regarding Mr. Funderburk's propensity for violence were relevant. The Applicant testified he gave Mr. Knox the names of several people who had previous altercations with Mr. Funderburk. Although Mr. Knox denied hearing these two names, he did admit that the Applicant told him that Mr. Funderburk had a reputation as a bully. According to Mr. Knox, he didn't think witnesses stating that Mr. Funderburk was a bully would be good because they did not fit his trial strategy. Both Mr. Smith and Mr. Jenkins testified at the PCR hearing about prior altercations they had with Mr. Funderburk and his propensity and reputation for bullying people. This testimony would be crucial to an individual asserting self-defense and Mr. Knox was ineffective for failing to follow up and investigate this testimony and present these witnesses. Under South Carolina law, a deceased's reputation for violence is clearly admissible, ***State v. Hill***, 123 S.E. 817 (S.C. 1924), and the fact that Mr. Funderburk did not die does not change the law in this regard.

As to Mr. Knox's claim that this did not fit his trial strategy, the Court finds that Mr. Knox did not articulate a valid reason for employing this strategy and the Court finds that Mr. Knox's course of action was not reasonable. In fact, the Court cannot find any valid trial strategy that would justify not pursuing the investigation of this issue or in not calling these witnesses.

Mr. Knox also did not call as a witness Corey Williams who testified at the PCR hearing. Corey Williams was at the scene of the fight and the shooting. Mr. Williams stated that he was never interviewed by Mr. Knox. Mr. Williams stated that he would have testified that had the Applicant not shot Mr. Funderburk when he did, the fighting would have continued and that Mr. Funderburk was still being aggressive and facing the Applicant when the shots were fired. Mr. Knox should have interviewed Mr. Williams and called him as a witness and he provided ineffective assistance of counsel in failing to do so.

The Court is therefore of the opinion that the Applicant has shown there is a reasonable probability that but for counsel's errors and omissions, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case.

D. THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO HAVE A PRELIMINARY HEARING. (#7)

THE DEFENDANT ALLEGES THAT THE SOUTH CAROLINA LEGISLATURE PASSED WHAT IS KNOWN AS THE "PROTECTION OF PERSONS AND PROPERTY ACT" EFFECTIVE JUNE 9, 2006. THE ACT PROVIDES IMMUNITY FROM PROSECUTION PURSUANT TO SECTION 16-11-450 OF THE S.C. CODE OF LAWS (1976 AMENDED). (#9)

THE DEFENDANT ALLEGES THAT THE SOUTH CAROLINA SUPREME COURT HANDED DOWN THE OPINION IN *STATE V. DUNCAN*, 709 S.E.2D 662 (MAY 9, 2011) WHICH HELD THAT THE

DEFENDANT WAS ENTITLED TO IMMUNITY UNDER THE ACT. #10

(I) **THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO REQUEST A PRETRIAL DETERMINATION OF IMMUNITY PURSUANT TO THE ABOVE-REFERENCED STATUTE AND CASE LAW.**

(II) **THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO REQUEST JURY INSTRUCTIONS THAT WOULD HAVE BEEN APPLICABLE UNDER THE ACT AND CASE AFOREMENTIONED.**

The Applicant alleges that trial counsel was ineffective in failing to request a preliminary hearing and in failing to request a pretrial hearing to determine if he was immune from prosecution pursuant to § 16-11-450 of the S.C. Code of Laws (1976 amended), and ***State v. Duncan***, 709 S.E.2d 662 (S.C. 2011). For the reasons stated below the Court is of the opinion that the Applicant has met his burden on these allegations.

Trial counsel virtually conducted no investigation in this case. He failed to interview any of the law enforcement officers involved in the investigation of the case, and he failed to interview any of the State's lay witnesses in the case. There does not appear to be any photographs of the scene, or testimony as to the location of the spent shells, nor does there appear to be any measurements taken or diagrams of the scene of the incident.

A criminal defendant is entitled to a preliminary hearing and is entitled to counsel at a preliminary hearing, as it has been held to be a critical stage in a criminal proceeding. ***Coleman v. Alabama***, 399 U.S. 1 (1970). The purpose of the preliminary hearing is to determine probable cause and usually involves the testimony of a law enforcement officer who was involved in the investigation of the case. Mr. Knox did not request a preliminary hearing because he did not think it would aide in his defense, nor did he think it was

necessary. Mr. Knox also testified that the Applicant did not want a preliminary hearing, although the Applicant testified that he did not know the benefit of a preliminary hearing and took the advice of Mr. Knox that he did not need one.

According to the Applicant, Mr. Knox never explained to him his right to a pretrial determination of immunity pursuant to the Protection of Persons and Property Act effective June 9, 2006. S. C. Code of Laws, § 16-11-410, *et. seq.*, and ***State v. Duncan***, 709 S.E.2d 662 (S.C. 2011).

The Applicant's trial took place in October of 2011, after the passage of the Act and after ***Duncan***, supra was decided. Section16-11-440 (c) states that "a person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . 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...."

Mr. Knox testified that he did not discuss holding a Castle Doctrine hearing with the Applicant. In fact, Mr. Knox was under the mistaken belief that the Castle Doctrine did not apply. He also testified that he did not feel that he gave away anything by not having a Castle Doctrine hearing. Even though a Castle Doctrine hearing would give him the opportunity to examine the State's case, he felt that he had all the information he needed.

The Court is deeply concerned that Mr. Knox, an individual who handles criminal cases, and who defended the Applicant in an Attempted Murder charge, was not even aware that the Applicant was entitled to a hearing under the statute. The fact that a defendant is entitled to a hearing under the statute is elementary and the Court can find no valid reason for not affording the Applicant the opportunity for a pretrial determination of immunity. The

Applicant was not aware of his right to the hearing under the statute and because Mr. Knox did not know it was applicable, he did not discuss with the Applicant his right to such a hearing. At the very least, the Applicant was entitled to be informed not only of his right to have a pretrial determination of immunity under the statute. Furthermore he was not adequately informed of the desirability of having a preliminary hearing and so in both situations, he was not afforded an opportunity to make an informed decision as to whether to have a preliminary hearing or an immunity hearing pursuant to § 16-11-410, *et. seq.*, of the South Carolina Code of Laws, as amended 1976.

The Court is of the opinion that the Applicant has shown that Mr. Knox's performance was deficient and he has shown that but for counsel's errors and omissions, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case.

E. THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE CASE. (#1)

THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO INTERVIEW THE STATE'S WITNESSES. (#2)

THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO EFFECTIVELY CROSS-EXAMINE SEVERAL OF THE WITNESSES CALLED BY THE STATE DURING THE TRIAL OF THIS CASE. (#5)

THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE SCENE OF THE ALLEGED OFFENSE. (#6)

These three allegations essentially taken together all have to do with the Applicant's belief that Mr. Knox was ineffective as his counsel due to his failure to investigate his case.

The Court agrees with the Applicant and finds that the Applicant has met his burden on the allegations.

Other than interviewing Frank Cranford a month before the trial and Steven Teal the day of the trial, Mr. Knox performed no investigation at all.

Mr. Knox did not secure the hospital records until after the trial started when the State provided them under Rule 5 of the Rules of Criminal Procedure. He made no attempt to secure them prior to that time by way of subpoena or by a Motion to Compel their production.

Mr. Knox did not attempt to interview the other people present at the incident including Todd Harrell, Antonio Sellers, Corey Williams, and Amos Nivens. It is inconceivable to the Court that counsel made no effort to interview these eyewitnesses.

Mr. Knox made no effort to interview any of the law enforcement officers involved in this case including Dana Wallace, Joe Campbell or John James. It is inconceivable to the Court that counsel made no effort to interview these individuals who processed the scene, gathered the evidence, interviewed witnesses, and took a statement from the Applicant.

Mr. Knox made no effort to investigate the crime scene. He did not visit the crime scene by himself or with the Applicant to get a sense of the area where the incident occurred. Mr. Knox made no effort to determine where the shell casings were, where the beer bottle was or where the cars were parked at the time of the incident. Mr. Knox took no photographs and did not prepare a diagram of the crime scene. The only information Mr. Knox had about how the incident happened was what the Applicant told him or what he learned from any statements. He never had the Applicant demonstrate at the scene how the events unfolded.

The Applicant testified he asked Mr. Knox to take pictures of the scene, but he did not do so. Mr. Knox stated that he read the officers statements and they confirmed what the Applicant told him. He felt a description of the scene was enough for his representation. He stated he did not take pictures of the scene because he never went to the scene of the incident and did not think it was important for the jury to see photos or diagrams of the scene. In effect, the jury was left with only an oral description of what happened at Mr. Harrell's house and they were not provided with any aide whatsoever to further describe or illustrate the incident.

It is inconceivable to the Court how trial counsel could effectively cross-examine Mr. Harrell, Mr. Sellers, Corporal Wallace or Deputy Campbell without interviewing them or the others at the scene or who were involved on behalf of law enforcement. The Court has already addressed in this Order Mr. Knox's failure to interview and call as witnesses Corey Williams, Ervin Smith or Mike Jenkins.

Mr. Knox did not adequately investigate this case to the standard expected of a lawyer handling criminal cases. The Court is of the opinion that the Applicant has shown that there is a reasonable probability that but for counsel's errors and omissions that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case.

F. THE DEFENDANT ALLEGES THAT TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE INJURIES OF THE ALLEGED VICTIM IN THE CASE. (#4)

The Applicant alleges that trial counsel was ineffective in failing to adequately investigate the injuries of the alleged victim. The Court agrees with the Applicant and finds that the Applicant has met his burden on this allegation.

This is a case where the Applicant was asserting that he acted in self-defense and that he did not intend to kill Mr. Funderburk. The location of the wounds to Mr. Funderburk would be important in determining whether Mr. Funderburk was approaching the Applicant (as maintained by the Applicant), or whether he was walking away (as maintained by Mr. Funderburk).

Initially, Mr. Funderburk testified that one of the wounds was an entry wound in the left kneecap, Tr., p. 67, ll. 8-9. The State was allowed to recall Mr. Funderburk on the issue of his wounds at which time he testified he was shot in the back of the left knee and the exit was the left kneecap. Obviously this was a major discrepancy and had Mr. Knox investigated the injuries a clearer determination could have been made as to whether the injury to the left kneecap was an entrance or an exit wound.

The failure of Mr. Knox to properly investigate the nature of the wounds is consistent with Mr. Knox's failure to investigate other aspects of this case. The Court notes the fact that Mr. Knox failed to even argue before the jury that Mr. Funderburk had originally said there was an entry wound to the left kneecap.

The Court is of the opinion that the Applicant has shown that there is a reasonable probability but for counsel's errors or omissions that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case.

G. THE DEFENDANT ALLEGES THAT SEVERAL WITNESSES OBSERVED THE VICTIM TALKING TO A JUROR AND COUNSEL FAILED TO INVESTIGATE THE MATTER OR INFORM THE COURT. (#11)

The Applicant alleges that trial counsel was ineffective in that several witnesses observed the victim talking to a juror and he failed to investigate the matter or inform the Court. The Court agrees with the Applicant and finds that the Applicant has met his burden on this allegation.

At the hearing, Sherri Mumford testified that she witnessed Mr. Funderburk's father talking to two of the jurors during a recess in the trial. One was a black female and the other was a white male with grey hair. She further testified she told Mr. Knox about it and he said he would take care of it. Joyce Quick testified she saw Mr. Funderburk's father talking to a white haired male juror and that she told the Applicant. Steven Teal testified that he saw a short, stocky, gray haired man from the jury talking to Mr. Funderburk's father. He stated he was present when Mr. Knox was told about it. Frank Cranford testified he observed victim's father talking to a juror with white hair and he informed the Applicant. The Applicant testified that he mentioned this to Mr. Knox and Mr. Knox stated they were talking about horses.

Mr. Knox stated that he believes he told the judge in chambers about these observations, but could not recall exactly what happened and does not know why this was not put on the record or why an inquiry was not made.

It appears to the Court that several witnesses observed Mr. Funderburk or his father speaking to one or more jurors, and it appears Mr. Knox acknowledges that he was told this. What is troubling to the Court is that Mr. Knox believes he told the Trial Judge, but nothing appears on the record in the case. Surely, were the Trial Judge made aware of this incident, an inquiry would have been made on the record or certainly trial counsel would have been under an obligation to make sure the matter was looked into and a record made for appeal.

Based on the lack of any evidence in the trial record, the Court is of the opinion that the Trial Judge was never informed of these facts. The Court accepts as an oral amendment to the Application for Post-Conviction Relief that trial counsel failed to inform the Court of this issue or it he did so, he failed to take sufficient action to preserve this issue for appeal. This amendment is based on evidence brought forward at the PCR hearing.

The Court is of the opinion that the Applicant has shown there is a reasonable probability that but for counsel's errors or omissions, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.

H. THE DEFENDANT ALLEGES THAT COUNSEL FAILED TO INVESTIGATE OR PRESENT EVIDENCE AS TO THE EFFECT OF THE DEFENDANT'S PTSD, AND INJURY TO HIS SHOULDER AND LEFT EAR FROM SERVICE RELATED INJURIES. (#13)

The Applicant alleges that trial counsel was ineffective in failing to investigate or present evidence as to the effort of the Applicant's PTSD and an injury to his shoulder and left ear from service related injuries.

Corporal Daniel Scott testified that when he took a statement from the Applicant, the Applicant stated he "blanked out" and was trying to shoot at the ground. The Applicant also stated that when he "blanked out" he lost focus and vision. Tr., p. 272-273, ll. 25-1. He testified that "blanking out" meant he was dazed.

The Applicant also testified at trial that he was afraid of getting hit in the head because of a previous head injury and he was afraid he would end up in a coma.

At the PCR hearing, Mr. Knox testified he was not aware that Applicant had PTSD or Tinnitus. Mr. Knox stated that knew the Applicant was getting disability but did not know

why. He stated that he did not pursue the Applicant's medical or physical problems because he did not think it had any bearing on the case. The Applicant recalled events clearly and he did not believe it would affect his fear or apprehension.

The Court believes that Mr. Knox should have investigated why the Applicant was on disability, why he would "blank out" and why he was afraid of getting hit in the head . The Court is of the opinion that Counsel should have investigated how the Applicant's medical and physical condition could conceivably effect his claim of self-defense.

The Court is also of the opinion that the Applicant has shown that there is a reasonable probability that but for counsel's errors or omissions, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case.

I. THE DEFENDANT ALLEGES THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO PORTIONS OF CORPORAL DANIEL SCOTT'S TESTIMONY. (#14)

The Applicant alleges that trial counsel was ineffective in failing to object to the Corporal Daniel Scott testifying that he and the Applicant had the same military training and that they were taught that if one shoots someone in the femoral artery, the person can bleed out which would kill the person who was shot. Tr., p. 188, ll. 9-10, ll. 17-20. This testimony was clearly not admissible. The witness was never qualified as an expert to render such an opinion, and the witness should not have been allowed to testify essentially what the Applicant would have known from his military training. This testimony certainly was prejudicial and allowed the jury to speculate that the injury was more serious than it was and could have killed Mr. Funderburk.

The Court is of the opinion that the Applicant has shown that there is a reasonable probability that but for counsel's errors or omissions that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case.

J.

The Court finds that there are multiple issues that are raised by the Applicant and they demonstrate that the Applicant received ineffective assistance of counsel. These issues are noted and discussed above. The Court also finds that even if no one issue demonstrates actual prejudice, (which the Court has found multiple issues that demonstrate actual prejudice), an Applicant may be relieved of showing actual prejudice, if counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary. ***Frett v. State***, 378 S.E.2d 249 (1988); ***Green v. State***, 569 S.E.2d 318 (2002).

In the ***Green*** case, *supra.*, the Court noted that the question of whether cumulative errors, which by themselves are not prejudicial, would warrant the granting of post-conviction relief was an unsettled question in South Carolina, but the Court said:

> "While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors. Multiple errors do not exist in this case to form any cumulative prejudicial effect." At p. 324.

Here the Court is of the opinion and so finds that there are multiple errors and they form a cumulative prejudicial effect to warrant the granting of post-conviction relief. See, also, ***State v. Peterson***, 335 S.E.2d 800 (1985), and ***State v. Freeman***, 459 S.E.2d 867 (Ct. App. 1995).

VIII

CONCLUSION

The Application for Post-Conviction Relief is hereby granted. The Applicant's conviction and sentence for Assault and Battery of a High and Aggravated Nature is vacated, and the Applicant's case is remanded to the Chesterfield County Court of General Sessions for a new trial.

PAUL M. BURCH, PRESIDING JUDGE
FOURTH JUDICIAL CIRCUIT

September 30, 2014