LAW OFFICE OF

TARA DAWN SHURLING, PA

Attorney and Counselor at Law
3614 Landmark Drive
Suite A
Columbia, South Carolina 29204

(803) 738-8622
(Fax) (803) 738-1600

E-Mail: tdslaw@shurlinglaw.com

April 13, 2016

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330

RE: Tommy McKnight v. State of South Carolina; 2012-CP-28-1064

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal on behalf of the above-captioned Post-Conviction Relief client. I would appreciate your returning two (2) clocked copies to me in the envelope provided. Inasmuch as I was court-appointed in this matter, I will now be turning this file over to the Appellate Division of the South Carolina Commission on Indigent Defense for perfection of this appeal. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours,

Tara D. Shurling

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosures
cc Megan H. Jameson, Assistant Attorney General
Paula Murdock, South Carolina Office of Appellate Defense
Tommy McKnight, # 186784

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
APR 18 2016
S.C. SUPREME COURT

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
Diane S. Goodstein, Presiding Judge

2012-CP-28-1064

TOMMY MCKNIGHT, #186784 Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Petitioner in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned court-appointed counsel, giving notice of his appeal from the Order of Dismissal filed on March 16, 2016 denying his Post-Conviction Relief Application.

Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

ATTORNEY FOR PETITIONER

This 13th day of April, 2016.

Other Counsel of Record:

Megan H. Jameson, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
Diane S. Goodstein, Presiding Judge

2012-CP-28-1064

TOMMY MCKNIGHT, #186784 Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that one copy of the Petitioner's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Megan H. Jameson, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 13th day of April, 2016.

Tara Dawn Shurling
Attorney and Counsel at Law

SWORN TO BEFORE me this 13th day of April, 2016.

Suzanne Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012-CP-28-1064

Tommmy Mcknight	State of South Carolina
PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

2016 MAR 16 P 1:48
JUSTICE OF THE PEACE
CLERK OF COURT
KERSHAW COUNTY, S.C.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

MAR 17 2016

ATTESTED: True, Correct & Certified Copy of Original on File in this Court
Clerk of Court Kershaw County

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

This judgment was entered on **16th day of March, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **16th day of March, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

Tara Dawn Shurling 3614 Landmark Drive Suite A Columbia, SC 29204

ATTORNEY(S) FOR THE PLAINTIFF(S)

James Clayton Mitchell III PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Joyce McDonald

Court Reporter

Joyce McDonald - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF KERSHAW	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Tommy McKnight, #186784, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2012-CP-28-1064 **ORDER OF DISMISSAL**

This matter is before this Court by way of an application for post-conviction relief filed on November 19, 2012. Respondent made its Return on January 25, 2013, requesting an evidentiary hearing be held. Thereafter, Applicant, through his counsel Tara D. Shurling, filed an amended application on June 3, 2013, and a second amended application on June 14, 2013. A hearing on this application and its subsequent amendments was held on August 5 and 6, 2013, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. Respondent was represented by Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. After a thorough review of all testimony and evidence presented at the hearing, along with a review of the records from Applicant's trial and direct appeal, this Court finds that there are no constitutional depravations or other grounds on which to grant relief and is denying and dismissing this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined within the South Carolina Department of Corrections pursuant to orders of commitment from the Kershaw County Clerk of Court. During its June 2008 term, the Kershaw County Grand Jury indicted Applicant for murder (2008-GS-28-2183). Kershaw County Public Defender Cornelius J. Riley and Assistant Public Defender Jason D. Kirincich represented Applicant. On March 16-19, 2009, Applicant proceeded to a jury trial before the Honorable J. Ernest Kinard, Jr., where the jury convicted Applicant as indicted. Sentencing was deferred to allow Applicant's counsel to file post-trial motions. On April 28, 2009, all parties reconvened for a sentencing hearing and Judge Kinard sentenced Applicant to thirty years imprisonment.

Applicant appealed his conviction and an appeal was perfected on his behalf by Chief Appellate Defender Robert M. Dudek. Following the submission of an Anders[1] brief, the South Carolina Court of Appeals dismissed Applicant's appeal. State v. Tommy McKnight, 2012-UP-341 (Ct. App. filed June 6, 2012). The Remittitur was issued on June 25, 2012.

CURRENT POST-CONVICTION RELIEF ACTION

Thereafter, Applicant filed a *pro se* application for post-conviction relief on November 19, 2012, alleging he was being held in custody unlawfully based on the following allegations:

1. Ineffective assistance of counsel for the denial of fundamental due process and for counsel's failure to object and preserve for appellate review;
2. Prosecutorial misconduct and police brutality; and
3. Ineffective assistance of appellate counsel.

[1] Anders v. California, 386 U.S. 738 (1967).

Respondent made its Return on January 25, 2013, requesting an evidentiary hearing be held. Thereafter, Applicant, through his counsel Tara D. Shurling, filed an amended application on June 3, 2013, alleging the following:

> 1. Ineffective assistance of trial counsel for neglecting to preserve on the record an objection to a jury charge which instructed the jury that it could infer malice from the use of a deadly weapon when self-defense was raised;
> 2. Ineffective assistance of trial counsel for only objecting to the jury instruction on the inference of malice from a deadly weapon *in camera* rather than on the record, thereby failing to preserve the issue for appellate review;
> 3. Ineffective assistance of trial counsel for failing to object to portions of the State's closing argument in which the prosecutor argued matters not supported by evidence introduced at trial;
> 4. Ineffective assistance of trial counsel for failing to object to hearsay testimony accusing the Applicant of unrelated bad acts;
> 5. Ineffective assistance of trial counsel for failing to object to repeated reference in the State' closing argument that improperly emphasized inadmissible hearsay testimony from State's witness, Debra Joyner;
> 6. Ineffective assistance of trial counsel for failing to object to repeated leading by the State during its direct examination of State's witnesses;
> 7. Ineffective assistance of trial counsel for failing to emphasize to the jury that Applicant's right to act on appearance and the related facts that he was struck in the head with a beer bottle immediately prior to the victim's stabbing, that Applicant sustained a second wound to his chest, and that the victim and his friends (who outnumbered Applicant) were approaching Applicant from all sides.
> 8. Ineffective assistance of trial counsel for failing to object to a portion of the State's closing argument where the prosecutor erroneously stated that State's witness Debra Joyner testified on direct examination that the Applicant' first hit the victim with the bottle and that the State had brought this error out during its direct examination as opposed to the defense during cross examination;

9. Ineffective assistance of trial counsel for advising Applicant against testifying at trial without adequately advising him of the ramifications on his self-defense claim;

10. Ineffective assistance of trial counsel for failing to specifically object to the trial court's failure to recharge the entire jury instruction on self-defense in addition to the instructions recharged by the trial court following a jury question;

11. Ineffective assistance of trial counsel for failing to request a jury instruction clearly advising the jury that the defense of self-defense could be raised through facts and circumstances established by evidence introduced by either the State or defense;

12. Ineffective assistance of trial counsel for failing to request a jury instruction that any doubts concerning Applicant's degree of culpability were to be resolved in Applicant's favor;

13. Ineffective assistance of trial counsel for failing to request permission to treat DeeDee Drakeford as a hostile witness;

14. Ineffective assistance of trial counsel for failing to introduce testimony from Detective Lee Boan to impeach DeeDee Drakeford with her prior inconsistent statements to law enforcement;

15. Ineffective assistance of trial counsel for failing to question DeeDee Drakeford as to her two calls to Detective Lee Boan;

16. Ineffective assistance of trial counsel for failing to object to hearsay testimony relaying claims that the owner of the residence where the altercation took place had asked Applicant to leave when the homeowners did not testify at trial;

17. Ineffective assistance of trial counsel for failing to assert Applicant's right to a speedy trial;

18. Ineffective assistance of trial counsel for failing to object to Applicant being forced to appear in from the jury in ankle chains;

19. Ineffective assistance of trial counsel for failing to fully argue Applicant's right to act on appearance in the context of his self-defense claim and for failing to argue that all the evidence supported an appearance that he was in imminent danger when he acted in self-defense;

20. Ineffective assistance of trial counsel for failing to object to the trial court's statement that may have been construed by the jury as a judicial comment on the facts that was capitalized on by the State'

21. Ineffective assistance of trial counsel for failing to ensure that Applicant received a preliminary hearing prior to indictment;

22. Ineffective assistance of trial counsel for failing to request a jury charge instructing that any doubt as to whether Applicant was guilty of murder or manslaughter must be resolved in favor of the accused; and

23. Ineffective assistance of trial counsel for failing to object to the introduction of a box cutter on Applicant when arrested and testimony about the box cutter when there was no evidence connecting the knife to this incident.

Thereafter, Applicant filed a second amended application on June 14, 2013, alleging that trial counsel was ineffective for failing to object to hearsay testimony characterizing Applicant as "just an old drunk." At the evidentiary hearing, Applicant proceeded forward on the twenty-four allegations as set forth in his two amendments.

A hearing on this application and its subsequent amendments was held on August 5 and 6, 2013, at the Richland County Courthouse before this Court. Testimony was taken from trial counsels Riley and Kirincich. At the start of his testimony, trial counsel Riley revealed he had removed "attorney work product, notes" from his file. (PCR Tr. pp. 45, 71, 181). He testified he made the remainder of his file available for post-conviction relief counsel's review several times, including after Applicant had amended his application. (PCR Tr. pp. 45-46). Applicant made no protestation or other objection at this time. However, at the conclusion of the hearing, Applicant, through his counsel, moved for the Court to order trial counsel Riley to grant Applicant access to his notes and other attorney work-product. (PCR Tr. pp. 225-226, 231). The State objected based on Riley's previous contention the material was protected under attorney work product, there was no discovery motion in this case, and the motion was untimely. (PCR Tr. pp. 226-227).

After discussion with both parties, the Court requested both parties submit a brief memorandum of law on this issue. Following a review of the memorandum submitted, this Court denied Applicant's motion by written order filed September 11, 2015.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant presented testimony from trial counsels Kirincich and Riley. Kirincich, who was second chair, testified first at the evidentiary hearing. He testified he became involved in Applicant's case a week before trial at the request of lead counsel Riley. He testified he had been practicing law for approximately two years prior to Applicant's trial and had previously handled numerous other trials. He testified he first met with Applicant the Friday before trial and he looked through the discovery materials before trial. He testified he did not meet with Applicant additional times before trial. He testified he was not involved whatsoever in the investigation of this case and has no knowledge of any investigation completed by Riley or other attorneys from his office.

Kirincich testified the State's argument was essentially that Applicant brought a knife to a fist-fight and escalated the situation. He testified the trial court made a similar comment outside the presence of the jury that was then used by the State during its closing argument. He testified there was evidence Applicant was struck in the head with a beer bottle prior to Applicant stabbing him, but testimony varied as to exactly how Applicant was struck. He testified this was supported by pictures showing a knot on Applicant's head when he was taken to the hospital immediately after the stabbing. He testified Applicant also had another wound on his torso. He testified the altercation between Applicant and the victim initially began with Applicant making derogatory comments about the victim's dog.

Kirincich testified he was primarily responsible for handling jury instructions and that he used the Honorable Ralph King Anderson, Jr.'s widely-use book on criminal jury instructions to formulate his charge requests. He testified a bench conference was held during the trial to discuss jury charges, and in particular, whether to charge inferred malice from the use of a deadly weapon. He elaborated he argued to the trial court that an inferred malice charge was not appropriate in Applicant's case because he was asserting self-defense. He testified the prosecutor disagreed, citing to a recent case in Columbia where the defendant argued self-defense and an inferred malice charge was appropriately given. The trial court agreed with the State and instructed the jury on inferred malice. He testified although he objected to this charge during a bench conference, but acknowledged neither he nor Riley objected contemporaneously on the record. Kirincich testified Applicant's trial was months before the opinion in State v. Belcher, where the South Carolina Supreme Court held charges instructing the jury that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). He testified after the Belcher opinion came out, he and Riley discussed its possible applicability to Applicant's case with the prosecutors to see if it would have any impact on Applicant's case, but ultimately determined the Belcher decision was not retroactive. He testified Applicant's appeal was pending when Belcher was decided.

Kirincich testified he also asked for a specific self-defense charge that would tie the law of self-defense to the facts and evidence presented in Applicant's case. He testified the trial court declined to give this charge. He testified he also requested a jury instruction that self-defense is an affirmative defense, which if raised, shifts the burden to the State to disprove self-defense, but his particular request to charge was denied by the trial court. He did acknowledge the trial court

gave a similar jury instruction explaining if there is evidence of self-defense in the case, the State has to prove beyond a reasonable doubt the defendant did not act in self-defense and everyone is authorized to defend himself or herself from death or serious bodily injury.

Kirincich testified he handled a few witnesses on behalf of the defense, but lead counsel Riley was responsible for bulk of witnesses, including any expert witnesses. He testified he was responsible for the two defense witnesses, Eric Tisdale and Dina Horton, who testified Applicant had been a victim in a prior altercation. Kirincich testified he did not learn the identify of DeeDee Drakeford until March 17, 2009, after the jury had been selected.

Kirincich testified a written post-trial motion was filed requesting a new trial or directed verdict, citing Applicant was being assaulted without fault and did not bring on the difficulty, therefore entitling him to use force for his own protection pursuant to State v. Campbell, 111 S.C. 112, 96 S.E. 543 (1918). Kirincich testified the trial court denied this motion.

Applicant also called lead counsel Riley to testify. He testified he met with Applicant numerous times, including several times the week before trial to prepare the case. He testified he reviewed possible sentences with Applicant. Riley testified he reviewed all discovery materials with Applicant, including any witness statements.

Riley testified he did not file a speedy trial motion because he only represented Applicant for six months prior to trial and when he was appointed to represent Applicant in September 2008, he was already aware the case would be moving to trial in early 2009. He elaborated numerous other public defenders handled the case before it was assigned to him. He testified he was named acting Chief Public Defender for Kershaw County during 2007 and then later officially became Chief Public Defender for Kershaw County. He testified although he supervised all Assistant Public Defenders in his office as Chief Public Defender, he avoided

directly interfering with any of his attorney's representation of clients to avoid ethical problems. He also elaborated he had the utmost confidence in the "really good public defenders" in his office while he was Chief. He similarly testified he did not request a preliminary hearing because Applicant had already been indicted when he assumed representation. He further testified he believes the State had sufficient probable cause, so a preliminary hearing would not have had any impact on Applicant's case. Riley testified when he became Chief Public Defender, there was no internal mechanism for auditing what cases were being handled by the Kershaw County Public Defender's Office or the age of each case and the clerk's office could not provide information to him when he took over as Chief Public Defender. He testified he had to create a system to allow his office to keep track of such information from scratch and this was a primary focus when he became Chief Public Defender. He testified Applicant never requested he move for a speedy trial.

Riley testified the defense Applicant asserted at trial was self-defense. He testified that in their discussions, Applicant informed Riley that he had been attacked twice before and had a habit of carrying a weapon with him for self-defense. He testified on the night in question, Applicant had a "hunting knife with a very long blade" and this was used to fatally wound the victim. He testified it was his strategy throughout trial and he also argued self-defense during his closing argument. He testified he focused on Applicant being hit with a beer bottle and the victim and his friends surrounding Applicant immediately before the assault—including from behind the victim. He testified all testimony presented at the trial showed Applicant was significantly outnumbered by the victim and his friends. He testified he perceived the jury to be "very attentive" and it was "unmistakable throughout the trial that [Applicant] was outnumbered." (PCR Tr. p. 64-65). He testified he also stressed the noticeable age discrepancy

between Applicant and the victim during his closing argument. He also stressed to the jury that Applicant had been injured and had a knot on his head.

Riley testified Applicant did not have on handcuffs during trial, but was wearing ankle chains in accordance with Kershaw County policy that all inmates be restrained with ankle chains while in the courtroom. He testified the jury never saw Applicant in ankle chains. He testified he is certain the jury never saw the ankle chains because both counsel tables had long curtains hanging from the edge of the table to the floor, so the jury was unable to see the legs or ankles of anyone sitting at counsels' tables, including Applicant. He testified Applicant did not testify or otherwise enter the courtroom after the jury, so the jury never had an opportunity to view Applicant's ankle chains. Riley further testified he did not recall Applicant's ankle chains making any sort of noise or any other sound to alert the jury.

He testified he had no specific recollection as to his discussion with Applicant about his right to testify at trial. He testified he always advised his clients they have the right to testify and it is exclusively their right whether or not to testify. He testified he is confident he employed this standard strategy in Applicant's case. He elaborated he also advises clients his or her testimony is especially important when asserting self-defense. He testified Applicant did not have a significant prior record and he likely discussed whether he could be impeached on his prior record with Applicant. Riley testified he did not believe Applicant could have been impeached with his prior record due to the nature of the prior offenses and time lapse. He testified he also discusses courtroom demeanor with clients and how the jury will likely perceive the client. He testified based on his relationship with Applicant, he found Applicant to be very volatile and had trouble listening—a potential problem should he subject himself to cross examination by the State.

Riley testified there was an investigative report prepared by Officer Lee Boan referencing an informant "D.D." who provided information on the incident. According to this report, Riley testified D.D. told law enforcement the victim and several of his friends attacked Applicant. He testified there was another entry later in the day indicating Applicant and the victim got into the altercation because Applicant owed the victim money for drugs and wanted the victim to front him additional drugs. Riley testified based on this report, he requested in writing the Solicitor's office reveal D.D.'s identity. He testified he later discovered the informant was DeeDee Drakeford, whom he had previously discussed with Applicant. He testified he spoke with Drakeford before Applicant's trial in anticipation of calling her as a defense witness, which he ultimately did. Riley testified Drakeford testified a thrown beer bottle hit Applicant shortly before he stabbed the victim. He testified he did not ask Drakeford about her two prior conversations with law enforcement or attempt to impeach her with these prior statements. He testified he did not consider asking the trial court to declare Drakeford a hostile witness because she was a beneficial witness for the defense and was testifying favorably without any need to have her declared hostile.

He testified in addition to Drakeford, he also presented Eric Tisdale and Dina Horton as defense witnesses. He testified Tisdale and Horton were able to testify as to Applicant's prior assaults and provide an explanation or rationale for why Applicant was armed the evening of the altercation. He testified Tisdale was a law enforcement officer who had been involved in the prior attack on Applicant. Similarly, he testified Horton was the Camden Police Department victim's advocate who was involved in Applicant's prior attack.

Riley testified his overall approach to objecting during trial is to only do so when the conduct is egregious and he perhaps objects less frequently than other attorneys. He elaborated

this approach is based on a two-fold strategy. First, he testified objections tend to focus the jury's attention on the matter subject to the objection, having a detrimental impact on his client's case. Second, he testified based on his study of the psychology of juries, he is convinced it creates an impression that the attorney is trying to cover something up or hide the truth from the jury. However, he reiterated he does object when he believes necessary, including during closing arguments.

Riley testified he believes he and Kirincich discussed an anticipated objection to the inferred malice charge. He testified he does not specifically recall why he did not object on the record following Kirincich's bench conference regarding jury instructions, but opined it was likely because Kirincich was handling jury instruction issues and it "wasn't looming on [his] radar screen at that point." He elaborated Belcher had not been argued or decided at that time and the charge as given by the trial court was a correct statement of law at the time.

Riley testified the State argued during closing the quarrel between Applicant and the victim began over Applicant's disparaging comments about the victim's dog. He testified he did not object to this argument as it was based on testimony from State's witnesses Travis Johnson and Jasmine Floyd. He likewise testified the State's argument during closing that the homeowner's asked Applicant to leave was also supported by testimony from State's witnesses, including Debra Joyner. He testified the homeowners did not testify at trial and he does not know why he did not object to this testimony, but perhaps, it was to not draw attention to this testimony. However, he testified the victim, who was a guest of the homeowners, had also asked Applicant to leave several times to no avail. He also testified there was similar testimony from State's witnesses that Applicant had been asked to leave another home up the road for harassing guests and acknowledged none of those guests testified and therefore, he should have objected to

this testimony. Riley testified as a matter of practice, he tries to refrain from objecting during closing argument unless the argument is blatantly improper.

Riley testified Kirincich was primarily responsible for the jury instructions, although they did discuss the proposed charges submitted to the trial court. He testified several of the defense's requests to charge, including on the burdens of establishing self-defense, were denied by the trial court. He testified he is not sure why the defense's requests for charge were not made court's exhibits. He testified he thought the trial court's jury instruction appropriately covered the law, but acknowledged there were additional charges that could have been requested–but were not necessary.

Riley testified during deliberations, the jury sent a note indicating it needed clarification on the law of murder, voluntary manslaughter, and self-defense. He testified he could not recall the exact language of the note.

In response to the allegation that the trial court commented on the facts when he made a comment that State's witness Travis Johnson "didn't have a stopwatch," Riley testified the comment was of "piddling importance" and was immediately corrected by the trial court. Riley further testified he did think this was objectionable. He elaborated this did not amount to a judicial comment on the facts and the trial court instantly clarified or explained the comment, reducing any impact on Applicant. He testified he does not believe this comment nor the State's use of this comment during its argument prejudiced Applicant. Riley similarly testified he did not believe the comment that his client was a "drunk" was prejudicial to Applicant nor had any bearing on the outcome of the case.

He also testified it was improper for the State to introduce the box cutter found on Applicant when he was arrested and he should have objected. He acknowledged all the witnesses

testified consistently that Applicant used a knife to cut the victim and made no mention of a box cutter. However, he testified the knife that Applicant used to fatally wound the victim had a six or seven inch blade, so the box cutter was of little importance. Riley also testified he did not object to the comment made by Officer David Hagan that witnesses described the suspect as a drunk who frequented the area. He testified this comment was "a relatively tiny point in the overall trial that had negligible, if any, impact." He elaborated throughout the trial he was making tactical and strategic decisions and he did not feel that this minor comment was objectionable in light of the overall testimony presented. He testified there was evidence Applicant indicated he wanted to finish his beer. Riley also acknowledged the State presented evidence the victim had been drinking and cocaine was found in a vial underneath his body.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that

"counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result

is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

After careful review of the entire record, including the testimony and exhibits presented at the evidentiary hearing, and based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's rulings in regards to each of Applicant's specific allegations of ineffective assistance of counsel:

Allegations 1 and 2. *Trial counsel was ineffective for neglecting to preserve on the record an objection to a jury charge which instructed the jury that it could infer malice from the use of a deadly weapon when self-defense was raised, and for failing to only make the record during an in-camera hearing*

Applicant alleges counsel was deficient for neglecting to object to the trial court's inferred malice instruction on the record, thereby failing to preserve it for appellate review and resulting in prejudice. Applicant acknowledged Kirincich objected to this charge during an off-the-record bench conference, but asserts the issue was not properly preserved for appellate review. In support of this allegation, Applicant cites to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (S.C. 2009), decided by the South Carolina Supreme Court on October 12, 2009. Applicant concedes the Belcher opinion was decided after his trial, but argues his case was on appellate review when Belcher was decided and he therefore would have benefited from the decision.

In Belcher, the South Carolina Supreme Court announced that after "carefully scrutinize[ing] the historical antecedents to this permissive inference, we hold today that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify

the homicide." Id. at 600, 685 S.E.2d at 803-04. The Court recognized the Belcher ruling "represents a clear break from our modern precedent" approving of the jury charge on inference of malice from use of a deadly weapon, expressly overruling some twenty-six cases decided over the course of more than a hundred years, ranging in date from 1894 to 2006. Id. at 612, 685 S.E.2d at 810. The Court held "[b]ecause our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved." Id. at 612-13, 685 S.E.2d at 810. However, the Court expressly stated "[o]ur ruling, however, will not apply to convictions challenged on post-conviction relief." Id. at 613, 685 S.E.2d at 810.

This Court finds counsel was not ineffective for failing to preserve the issue for appellate review. Applicant proceeded to trial on March 16-19, 2009, six months before the Supreme Court issued its opinion in Belcher and three months before the oral argument was held before the Court. As the Court acknowledged in its opinion, Belcher "represent[ed] a clear break from our modern precedent." Id. at 612, 685 S.E.2d at 810. At the time of Applicant's trial, the jury instruction as given by the trial court was a correct statement of law and counsel cannot be deemed deficient for failing to preserve an objection on such a ground. As appellate courts have consistently recognized, trial counsels are not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial. See Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) (holding an attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction) (citing Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999)). While Kirincich's objection to the inferred malice charge was creative and forward-looking argument, this Court finds counsel was not deficient for neglecting

to preserve the argument for appellate review. This allegation is denied and dismissed with prejudice.

Allegations 3 and 5. Trial counsel was ineffective for failing to object to portions of the State's closing argument where the State argued maters not supported by evidence introduced at trial

Applicant alleges counsel was ineffective for failing to object to several portions of the State's closing argument that he asserts were improper. Specifically, Applicant alleges counsel should have objected to the following portions of the State's closing argument:

> -Trial tr. p. 338, lines 1-2., where he claims the State improperly argued that he ridiculed the victim's dog;
> -Trial tr. p. 425, lines 18-19, p. 442, line. 11, where he claims the State improperly argued that Debra Joyner testified that the Applicant was picking at the victim;
> -Trial tr. p. 400, II. 19-20, where he claims the State improperly argued that Debra Joyner testified that homeowner asked the Applicant to leave at one point and then he came back;
> -Trial tr. p. 421, II. 15-21, where he claims that the State inaccurately quotes Debra Joyner as testifying that the Applicant had been asked by the homeowner three times to leave that day; and
> -Trial tr. p. 441, 11. 5-7, where he claims the State inaccurately quotes Debra Joyner as testifying that the Applicant had been asked by the homeowner three times to leave that day.

This Court has reviewed the portions of the trial transcript as cited by Applicant, as well as the record in its entirety, and finds this allegation must be denied and dismissed as to each portion of the closing argument in question. Each section is discussed below.

The first section where Applicant alleges counsel should have objected is when the State argued: "There is [sic] at least two witnesses that are to the effect the Defendant was ridiculing the victim's dog that actually started the confrontation." (Trial tr. p. 337 line 25–p. 338 line 2).

As an initial matter, this Court notes this comment was ***not*** made before the jury, but rather, was made during the State's reply to Applicant's motion to dismiss, well before the State's closing argument to the jury and out of the jury's presence. Therefore, this allegation must be denied and dismissed as it lacks merit. Furthermore, this Court finds this argument is a reasonable inference to facts in the record and therefore was proper. See Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) ("The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." (quoting Von Dohlen v. State, 360 S.C. 598, 609-10, 602 S.E.2d 738, 744 (2004)); Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002) (holding a solicitor has a right, during closing arguments, to state his version of the testimony and to comment on the weight to be given such testimony).

The second section where Applicant alleges counsel should have objected is when the State argued: "And Ms. Debra stays, you know, like he was picking.") (Trial tr. p. 425, lines 18-19) and "He chose to pick and pick." (Trial tr. p. 442, line. 11). Applicant alleges the State erroneously claimed that Debra Joyner testified Applicant was picking at the victim despite a lack of testimony stating this in the record. However, after reviewing these two portions of the State's closing argument in conjunction with the record as a whole, this Court finds Applicant has failed to establish any deficiency of counsel, as these arguments made by the State are based on reasonable inferences from the record and were proper. See Brown, 383 S.C. at 515, 680 S.E.2d at 914; Humphries, 351 S.C. 362, 570 S.E.2d 160.

The third section where Applicant alleges counsel should have objected is when the State argued: "I believe Debra Joyner even testified that the homeowner actually told him to leave at one point, and then he came back." (Trial tr. p. 400 lines 19-21). Applicant alleges this

misconstrued Joyner's testimony and harmed his self-defense claim. However, after reviewing these two portions of the State's closing argument in conjunction with the record as a whole, this Court finds Applicant has failed to establish any deficiency of counsel, as these arguments made by the State are based on reasonable inferences from the record and were proper. See Brown, 383 S.C. at 515, 680 S.E.2d at 914; Humphries, 351 S.C. 362, 570 S.E.2d 160.

The fourth section where Applicant alleges counsel should have objected is when the State argued: "You heard Debra, and I am going to talk about it in a minute, say he had already been told three times by the homeowner that day to leave. No question on that. They didn't cross him one time on that and say, really? He had already been told by somebody up the street to leave. He is looking for trouble." (Trail Tr. p. 421, lines 15-21). Applicant alleges this argument inaccurately quotes Joyner as testifying that the Applicant had been asked by the homeowner three times to leave that day and the State erroneously argued that the Applicant had been told two or three times to leave and had been told up the street to leave. However, after reviewing these two portions of the State's closing argument in conjunction with the record as a whole, this Court finds Applicant has failed to establish any deficiency of counsel, as these arguments made by the State are based on reasonable inferences from the record and were proper. See Brown, 383 S.C. at 515, 680 S.E.2d at 914; Humphries, 351 S.C. 362, 570 S.E.2d 160.

The fifth section where Applicant alleges counsel should have objected is when the State argued: "He had been told to leave two or three times, been told to leave up the street. He is looking for trouble." (Trial tr. p. 441, lines 5-7). Applicant argues this also inaccurately quotes Joyner and misconstrues the testimony in the record. However, after reviewing these two portions of the State's closing argument in conjunction with the record as a whole, this Court finds Applicant has failed to establish any deficiency of counsel, as these arguments made by the

State are based on reasonable inferences from the record and were proper. See Brown, 383 S.C. at 515, 680 S.E.2d at 914; Humphries, 351 S.C. 362, 570 S.E.2d 160.

This Court finds all of the portions of the State's closing argument that Applicant alleges were objectionable were based on proper inferences to the record and therefore, counsel was not deficient for failing to object. Additionally, this Court finds Applicant has failed to satisfy his burden of establishing prejudice, as there is no reasonable likelihood the result of the proceedings would have been different absent counsel's failure to object. Therefore, this allegation must be denied and dismissed in its entirety.

Allegation 4. *Trial counsel was ineffective for failing to object to hearsay testimony accusing Applicant of unrelated prior bad acts*

Applicant alleges counsel was ineffective for failing to object to hearsay testimony accusing Applicant of bad acts, specifically testimony Applicant had been asked to leave a house up the street for causing trouble. The particular testimony in question is as follows: "He went up the road to a friend's house, to I guess one of his friend's houses, and he was starting up there, and his friend came down there and told us that he had to run him from his house because he was starting." (Trial tr. p. 218 line 25 – p. 219 line 4). Applicant alleges this testimony is improper hearsay and counsel should have objected. He further argues he was prejudiced by this testimony because it hampered his ability to raise a self-defense claim.

This Court finds Applicant is unable to show any requisite prejudice from this alleged deficiency and therefore, this allegation must be denied and dismissed with prejudice. Strickland, 466 U.S. 668 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed."). Here, Applicant is unable to show the result of his proceeding would have been different had counsel objected. The testimony of which Applicant complains is minor and did not directly relate to the events leading up the

confrontation between Applicant and the victim, therefore, was not crucial to his self-defense claim. This Court is confident it had no bearing on the outcome of Applicant's trial, and therefore, no prejudice can be shown. This allegation is denied and dismissed with prejudice.

Allegation 6. Trial counsel was ineffective for failing to object to repeated leading by the State of its witnesses during direct examination

Applicant alleges trial counsel was ineffective for failing to object to "repeated leading by the prosecution during direct examination of [a] state witness on crucial points." Specifically, Applicant cites to the following portion of the direct testimony of States witness Joyner:

Q. And had [Applicant] been told earlier by the homeowners or somebody?

A. Yeah, Dan told him to go ahead and leave.

(Trial Tr. p. 220 lines 5-7). When questioned regarding this allegation at the evidentiary hearing, Riley noted the State had already questioned Joyner about the homeowners asking Applicant to leave earlier in her testimony and this question was not revealing any new information. (PRC Tr. 130-32). He testified although the question was "somewhat leading," he did not object as the information had already been developed previously.

This Court finds Applicant is unable to show any requisite prejudice from this alleged deficiency and therefore, this allegation must be denied and dismissed with prejudice. Strickland, 466 U.S. 668 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed."). Here, Applicant is unable to show the result of his proceeding would have been different had counsel objected. The questioning Applicant refers to was a summary of information previously elicited from the witness and therefore, was not revealing any "crucial point" for the first time as Applicant complains. This Court is confident it had no bearing on the outcome of Applicant's trial, and therefore, no prejudice can be shown. This allegation is denied and dismissed with prejudice.

Allegations 7 & 19. Trial counsel was ineffective for failing to emphasize to the jury Applicant's right to act on appearances and the related facts

Applicant alleges counsel was ineffective for failing to emphasize to the jury that Applicant had the right to act on appearances and highlight the relevant facts supporting this claim, including he was struck in the head with a beer bottle immediately prior to the victim's stabbing, sustained a second wound to his chest, and the victim and his friends (who outnumbered Applicant) were approaching Applicant from all sides. In support of this allegation, Applicant cites to a portion of DeeDee Drakeford's testimony where she discusses the number of men with the victim and their position in relation to Applicant. (Trial Tr. p. 355).

After reviewing the closing argument, along with the record in its entirety, this Court finds Applicant has failed to satisfy his burden of establishing both deficiency and prejudice. This Court finds counsel sufficiently raised self-defense and Applicant's right to act on appearances throughout his closing argument, including that Applicant was struck with a beer bottle, approached from behind by the victim's friends, and outnumbered. (Trial Tr. p. 408-417). Therefore, counsel was not deficient. This allegation is denied and dismissed with prejudice.

Allegation 8. Trial counsel was ineffective for failing to object to a portion of the State's closing argument erroneously stating that it elicited an inconsistency in Joyner's testimony

Applicant alleges counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecutor erroneously stated Joyner had testified on direct examination that Applicant had first hit the victim with the bottle and the State brought out her inconsistency and corrected it, when in fact, it was counsel on cross-examination who elicited this inconsistency. This Court finds this allegation must be denied and dismissed, as Applicant has failed to carry his requisite burden of proof, as there is no reasonable likelihood the result of the proceeding would have been different absent counsel's alleged failure. The record reveals

counsel impeached Drakeford on her prior inconsistent statement to law enforcement. (Trial tr. p. 227-28). However, the State's argument it brought out this inconsistency rather than the defense is miniscule and of very little importance when compared to the testimony and record as a whole. This Court is confident it had no bearing on the outcome of Applicant's trial, and therefore, no prejudice can be shown. This allegation is denied and dismissed with prejudice.

Allegation 9. *Trial counsel was ineffective for advising Applicant against testifying at trial without adequately advising him what impact not testifying would likely have on his self-defense claim*

Applicant alleges counsel advised him not to testify and failing to advise him of the ramification this could have on his self-defense claim. Specifically, Applicant alleges the jury was unable to have a full picture of why he was in fear for his life and acted in self-defense without his testimony and it was therefore ineffective for counsel to advise him against testifying. This Court finds this allegation is without merit and must be denied and dismissed with prejudice.

At the evidentiary hearing, Riley testified he had no specific recollection as to his discussion with Applicant about his right to testify at trial, but he always advises his clients that they have the right to testify and it is exclusively their right whether or not to testify. He testified he is confident that he employed this standard strategy in Applicant's case. He elaborated he also advises clients his or her testimony is especially important when asserting self-defense. Applicant presented no testimony to rebut Riley's assertions. Furthermore, this Court finds Riley's testimony was credible. Therefore, there is nothing in the record to indicate counsel advised Applicant against testifying as alleged. This allegation must be denied and dismissed with prejudice.

Allegation 10. *Trial counsel was ineffective for failing to object to the trial court's failure to fully recharge the jury on self-defense in response to a jury question during deliberations*

Applicant alleges counsel was ineffective for failing to object and/or request the trial court fully recharge self-defense when the jury asked to be recharged.. See Trial Tr. p. 470-485. This Court finds Applicant has failed to meet his requisite burden of proof as to this allegation, as there is no reasonable likelihood the result of the proceeding would have been different absent counsel's alleged error. The record indicates the jury sent a note shortly after beginning its deliberations asking the trial court provide additional instructions on the charged offense and lesser included offenses. (Trial Tr. p. 470-485). The record reflects in response to this note, Kirincich requested additional jury instruction on self-defense, including inferences giving rise to self-defense. (Trial Tr. p. 471). The State objected to any additional instruction beyond the two charges specifically requested by the jury. (Tr. p. 472). Over the State's objection, the trial court recharged the jury on murder (including malice and reasonable doubt), voluntary manslaughter, involuntary manslaughter, and inferences being resolved in favor of the defendant, but did not recharge self-defense. However, the trial court fully charged self-defense to the jury less than two hours prior during its full just instruction. See Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003) (holding that South Carolina law dictates that jury instructions, when analyzed, must be considered in their entirety). There is no reasonable likelihood the trial court's decision to not recharge self-defense, and counsel's failure to object on this ground, had any effect on the outcome of Applicant's case. This allegation is denied and dismissed with prejudice.

Allegation 11. *Trial counsel was ineffective for failing to request a jury instruction advising that self-defense could be raised through all facts and circumstances presented*

Applicant alleges counsel was ineffective for failing to request a jury instruction advising the jury the defense of self-defense could be raised by the facts and circumstances established by evidence introduced by the State or the defense. After a review of the jury instruction as a whole,

as required by South Carolina law, this Court finds this allegation must be denied and dismissed with prejudice. See Todd, 355 S.C. 396, 585 S.E.2d 305 (holding that South Carolina law dictates that jury instructions, when analyzed, must be considered in their entirety). The instructions clearly informed the jury it could use any evidence presented when determining if Applicant acted in self-defense. See Trial Tr. p. 463 ("Jurors, you take ***all the facts presented during the case*** and decide whether the evidence convinces you that he acted in self-defense or not." (emphasis added)); p. 464 (" So you take ***all the admitted facts***." (emphasis added)). This allegation must be denied and dismissed with prejudice.

Allegations 12 & 22. Trial counsel was ineffective for failing to request a jury instruction advising that any doubts as to Applicant's culpability must be resolved in his favor

Similarly, Applicant alleges counsel was ineffective for failing to request a jury instruction advising the jury any doubts it had regarding Applicant's degree of culpability must be resolved in his favor, including when determining if Applicant was guilty of the lesser rather than the greater offense. After a review of the jury instruction as a whole, as required by South Carolina law, this Court finds this allegation must be denied and dismissed with prejudice. See Todd, 355 S.C. 396, 585 S.E.2d 305 (holding that South Carolina law dictates that jury instructions, when analyzed, must be considered in their entirety). The instructions (and recharge after the jury's note) clearly informed the jury Applicant was presumed innocent, the burden was on the State, and Applicant was entitled to every inference in his favor that could reasonable be drawn from the evidence. See Trial Tr. p. 481-482. This allegation must be denied and dismissed with prejudice.

Allegation 13. Trial counsel was ineffective for failing to move for Drakeford to be declared a hostile witness subject to cross-examination and impeachment

Applicant alleges counsel was ineffective for failing to move the court to declare Drakeford a hostile witness subject to cross-examination and impeachment. Trial counsel testified at the evidentiary hearing he did not move for her to be declared a hostile witness because she gave beneficial testimony for the defense and therefore such a motion was not needed. A review of Drakeford's testimony supports counsel's testimony that such a motion was not necessary, as counsel was able to glean beneficial information from Drakeford on direct examination. Therefore, counsel was not deficient and this allegation must be denied and dismissed with prejudice.

Allegations 14 & 15. Trial counsel was ineffective for failing to introduce testimony from Detective Lee Boan to impeach Drakeford with her prior inconsistent statements and two prior calls to law enforcement

Applicant alleges counsel was ineffective for failing to introduce testimony from Det. Boan to impeach Drakeford with prior inconsistent statements and two prior calls made to law enforcement. When questioned about Drakeford, Riley testified there was an investigative report prepared by Officer Lee Boan referencing an informant "D.D." who provided information on the incident. According to this report, Riley testified D.D. told law enforcement the victim and several of his friends attacked Applicant. He testified there was another entry later in the day indicating Applicant and the victim got into the altercation because Applicant owed the victim money for drugs and wanted the victim to front him additional drugs. Riley testified based on this report, he requested in writing the Solicitor's office reveal D.D.'s identity. He testified he later discovered the informant was DeeDee Drakeford, whom he had previously discussed with Applicant. He testified he spoke with Drakeford before Applicant's trial in anticipation of calling her as a defense witness, which he ultimately did. Riley testified Drakeford testified that a thrown beer bottle hit Applicant shortly before he stabbed the victim. He testified he did not ask

Drakeford about her two prior conversations with law enforcement or attempt to impeach her with these prior statements.

Based on Riley's recollection, Drakeford's prior statements to law enforcement implicated Applicant as a drug user and possible drug seller, it is reasonable for trial counsel to avoid questioning Drakeford on these prior statements. Therefore, counsel was not ineffective and these allegations must be denied and dismissed with prejudice.

Allegation 16. Trial counsel was ineffective for failing to object to hearsay testimony that Applicant had been asked to leave by the homeowners who did not testify

Applicant alleges counsel was ineffective for failing to object to hearsay testimony from State's witnesses relaying that the owners of the residence where the altercation took place had asked Applicant to leave when neither homeowner testified. See Trial Tr. p. 221 lines 2-5 ("And so he kept on coming back. So the owner of the house told him to leave. So he said, I'm not in your yard, I'm on the sidewalk, which he was. He was on the sidewalk.") Counsel testified that he was unsure why he did not object to this testimony.

This Court finds Applicant has failed to meet his burden of proof as to this allegation, as there is no reasonable likelihood Applicant would not have been convicted absent this alleged deficiency. The record in its entirety clearly establishes Applicant left and came back to the incident location several times and was getting into verbal altercations with members of the gathering, independent of any testimony concerning the homeowners asking him to leave. Therefore, any objection by counsel would not likely have had an impact on Applicant's trial. This allegation must be denied and dismissed with prejudice.

Allegations 17 & 21. *Trial counsel was ineffective for failing to move for a speedy trial or for a preliminary hearing*

Applicant alleges counsel was ineffective for failing to move for a speedy trial. The record indicated Applicant was taken into custody on September 23, 2005, was indicted on June 11, 2008, and was tried beginning on March 16, 2009. Riley testified he did not file a speedy trial motion because he only represented Applicant for six months prior to trial and when he was appointed to represent Applicant in September 2008, he was already aware that the case would be moving to trial in early 2009. He elaborated numerous other public defenders handled the case before it was assigned to him. He testified he was named acting Chief Public Defender for Kershaw County during 2007 and then later officially became Chief Public Defender for Kershaw County. He testified although he supervised all Assistant Public Defenders in his office as Chief Public Defender, he avoided directly interfering with any of his attorney's representation of clients to avoid ethical problems. He also elaborated he had the utmost confidence in the "really good public defenders" in his office while he was Chief. He similarly testified that he did not request a preliminary hearing because Applicant had already been indicted when he assumed representation. He further testified he believes the State had sufficient probable cause, so a preliminary hearing would not have had any impact on Applicant's case. Riley testified when he became Chief Public Defender, there was no internal mechanism for auditing what cases were being handled by the Kershaw County Public Defender's Office or the age of each case and the clerk's office could not provide that information to him when he took over as Chief Public Defender. He testified he had to create a system to allow his office to keep track of such information from scratch and that this was a primary focus when he became Chief Public Defender. He testified Applicant never requested he move for a speedy trial.

Based on the circumstances of this case, this Court finds counsel's performance was reasonable, as counsel testified Applicant was assigned a trial date shortly after he assumed

representation and Applicant never requested he file a motion for a speedy trial. See State v. Langford, 400 S.C. 421, 445, 735 S.E.2d 471, 484 (2012) (internal citations omitted) ("[F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."). These allegations must be denied and dismissed with prejudice.

Allegation. 18. *Trial counsel was ineffective for failing to object to Applicant being forced to appear before the jury in ankle chains*

Applicant alleges counsel was ineffective for failing to object to his presence before the jury in ankle chains. This Court finds this allegation must be denied and dismissed with prejudice, as Applicant has failed to satisfy his requisite burden of proof as to both deficiency and prejudice. Riley testified Applicant did not have on handcuffs during trial, but was wearing ankle chains in accordance with Kershaw County policy that all inmates be restrained with ankle chains while in the courtroom. He testified the jury never saw Applicant in ankle chains. He testified he is certain the jury never saw the ankle chains because both counsel tables had long curtains hanging from the edge of the table to the floor, so the jury was unable to see the legs or ankles of anyone sitting at counsels' tables, including Applicant. He testified Applicant did not testify or otherwise enter the courtroom after the jury, so the jury never had an opportunity to view Applicant's ankle chains. Riley further testified he did not recall Applicant's ankle chains making any sort of noise or any other sound to alert the jury. This Court finds counsel's performance as to this allegation was not deficient. Furthermore, as there is no evidence the jury was even aware Applicant was in ankle chains during the trial or what impact this had on his case, if any, this Court finds Applicant cannot establish any prejudice. This allegation is denied and dismissed with prejudice.

Allegation. 20. *Trial counsel was ineffective for failing to object to the trial court's comment on the facts*

Applicant alleges counsel was ineffective for failing to object to a statement by the trial court which the jury could have construed as a judicial comment on the facts and was subsequently used by the State. Specifically, Applicant alleges the following objectionable during the cross-examination of State's witness Travis Johnson:

> Q. And how long would you estimate the fight lasted?
>
> A. Four minutes.
>
> Q. No, no, I mean -you said it didn't start for two minutes.
>
> A. Like—see, you, you, you trying to—you trying to get in my head.
>
> Mr. Meadors. I would object. I think at one time he said start to finish was four minutes. Now he is going back and trying to—
>
> The Court: Well, he—
>
> A. Four minutes.
>
> The Court. He didn't have a stop watch. He is telling it like he thinks it is, I guess. Go ahead.
>
> A. The whole thing started from the beginning to the end in four minutes., from that first piece when the bottle got swing, from what he said about the dog till the bottle got swing, that is probably like two minutes, the other part like two minutes, so four minutes in time all together.
>
> Q. Okay. That is great. That is what I was driving at.
>
> The Court. Jurors, I'm not vouching for the witness at all, y'all understand that. But you know, three minutes, four minutes, five minutes. It is five years ago.

(Trial Tr. p. 164 line 22-p. 165 line 22). Later, the State asked witnesses questions focusing on their lack of a watch in relation to the exact time of the altercation. See Trial Tr. p. 192, 239. Applicant alleges the trial court's comments amount to judicial comments on behalf of the State, thereby causing him prejudice. When questioned at the evidentiary hearing, Riley testified the

trial court instantaneously clarified himself to the jury and he did not think an objection was necessary.

This Court finds Applicant has failed to establish any deficiency of counsel. As Riley testified, the trial court corrected itself almost immediately, thereby reducing any possible effect of the comment. This Court finds counsel performed reasonably in not objecting, as no objection was necessary, particularly in light of the court's additional clarifying comments. Furthermore, this Court finds Applicant has failed to establish any resulting prejudice, as it is not likely that this comment had any effect on the outcome of Applicant's trial. Therefore, this allegation is denied and dismissed with prejudice.

***Allegation. 23**. Trial counsel was ineffective for failing to object to the introduction of a box cutter that was not used during the altercation*

Applicant alleges counsel was ineffective for failing to object to the introduction of a box cutter found on Applicant when arrested and testimony about the box cutter because the box cutter was not alleged to be the weapon used to fatally wound the victim. Applicant alleges this was prejudicial to his case, causing the jury to believe he was armed with an unrelated weapon. This Court finds this allegation must be denied and dismissed, as there is not reasonable likelihood this had any impact on the outcome of his case. The record reveals the jury was informed Applicant had been attacked previously and typically armed himself for protection. In light of this testimony, it is highly unlikely that the introduction of a weapon found on Applicant when arrested had any impact on the jury when it was already aware Applicant was typically armed for personal protection. Therefore, this allegation must be denied and dismissed with prejudice. See Strickland, 466 U.S. 668 (holding that a court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as

a result of the alleged deficiencies, for if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed).

Allegation. 24. *Trial counsel was ineffective for failing to object to testimony that Applicant was an "old drunk"*

Applicant alleges counsel was ineffective for failing to object to testimony from State's witness David Hagan with the Camden Police Department that witness had described the suspect as "a drunk that hung around the area." (Trial Tr. p. 129). Applicant alleges this testimony was objectionable hearsay that improperly impugned his character without a chance to reply. This Court finds Applicant cannot establish any resulting prejudice from this alleged deficiency and therefore, this allegation must be denied and dismissed with prejudice. See Strickland, 466 U.S. 668 (holding that a court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies, for if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed). The record is replete with testimony Applicant and the victim, as well as bystanders, were drinking on the night of the altercation. It is unlikely the jury used this minor line of testimony to improperly convict Applicant in light of these references throughout the trial. Applicant has failed to establish prejudice and this allegation is denied.

CONCLUSION

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

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and

2. The Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 7 day of March, 2016.

DIANE S. GOODSTEIN
Presiding Judge
Fifth Judicial Circuit

, South Carolina

LAW OFFICE OF

TARA DAWN SHURLING, PA

Attorney and Counselor at Law
3614 Landmark Drive
Suite A
Columbia, South Carolina 29204

E-Mail: tdslaw@shurlinglaw.com

(803) 738-8622
(Fax) (803) 738-1600

April 13, 2016

Megan H. Jameson, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-

RE: Tommy McKnight, #186784 v. State of South Carolina; 2012-CP-28-1064.

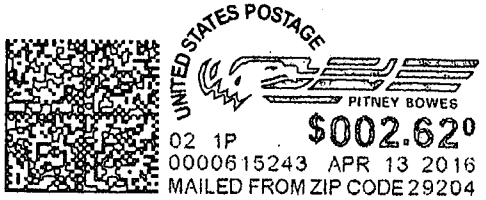
Dear Mrs. Jameson:

Enclosed please find for your records a copy of the Notice of Appeal that was filed in the above-captioned matter. I was court-appointed in this matter and will now forward this file to the Appellate Division of the South Carolina Commission on Indigent Defense in the next few days. Therefore, please direct any further questions to that office after this date. It was a pleasure working with you on this case. I remain,

Sincerely yours,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosure
cc: The Honorable Daniel E. Shearouse, Clerk, Supreme Court of South Carolina
Tommy McKnight, #186784



Law Office of
TARA DAWN SHURLING, PA
3614 LANDMARK DRIVE, SUITE A
COLUMBIA, SOUTH CAROLINA 29204

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330