LAW OFFICE OF

TRICIA A. BLANCHETTE

June 28, 2019

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

RE: Andrew E. Torrence v. State

Dear Sir:

Attached for filing, please find a Notice of Appeal and Certificate of Service for the above referenced case. I have been retained to represent Mr. Torrence on his PCR appeal.

Thank you for your assistance with this matter. Please contact me if any additional information is needed.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Lexington County Clerk of Court
Taylor Z. Smith, Assistant Attorney General
Andrew E. Torrence

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUN 28 2019
S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Walton J. McLeod, IV, Circuit Court Judge

Case No.: 2015-CP-32-01993

Andrew E. Torrence, Petitioner,

vs.

State of South Carolina Respondent.

NOTICE OF APPEAL

Andrew E. Torrence, Petitioner, appeals the Order of Dismissal by the Honorable Walton J. McLeod, IV, issued and filed on April 22, 2019. Petitioner also appeals the Order Denying Applicant's Motion Pursuant to Rule 59 (a) & (e), SCRCP, by the Honorable Walton J. McLeod, IV, issued and filed on May 31, 2019. Petitioner, through counsel, received notice of the entry of the latter Order on June 5, 2019.

Respectfully submitted,

Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Petitioner

June 28, 2019

THE STATE OF SOUTH CAROLINA
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Andrew E. Torrence, Petitioner,

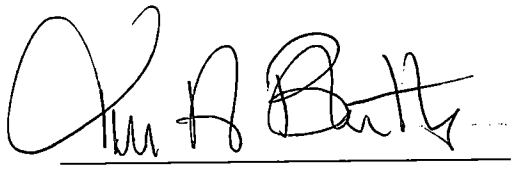
vs.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I served this 28th day of June 2019 a Notice of Appeal, with a copy of the underlying Orders, to Taylor Z. Smith, of the Attorney General's Office, via hand delivery to the Office of the Attorney General addressed as follows:

Office of the Attorney General
Att: Taylor Z. Smith, Assistant Attorney General
1000 Assembly Street, 5th Floor
Columbia, SC 29201



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Petitioner

June 28, 2019

FILED

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON 2019 MAY 31 PM 3:40	)	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
Andrew E. Torrence, Jr., #346350, Applicant, v. State of South Carolina, Respondent.	)	2015-CP-32-01993 **ORDER DENYING APPLICANT'S MOTION PURSUANT TO RULE 59(a) & (e), SCRCP**

This matter comes before the court by way of Applicant's Motion Pursuant to Rule 59(a) and (e), SCRCP, to alter or amend its order of dismissal denying the application for post-conviction relief.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. In August 2010, a Lexington County grand jury indicted Applicant for murder. (2010-GS-32-2318). During its May 2011 term, the grand jury indicted Applicant for two weapons charges, possession of a weapon during the commission of a violent crime and carrying a pistol or firearm into a business selling alcoholic liquors, beers, or wines for on-premises consumption. (2011-GS-32-1440, -1444). On May 31, 2011, Applicant proceeded to a jury trial before Judge R. Knox McMahon. Wayne H. Floyd represented Applicant. Deputy Solicitor D. Shawn Graham prosecuted the case. The jury convicted Applicant on June 3, 2011, on the weapons charges and of the lesser-included offense of voluntary manslaughter. Judge McMahon sentenced Applicant to concurrent terms of twenty-five years for voluntary manslaughter and five years for each of the weapons charges.[1]

[1] Judge McMahon later amended Applicant's sentence for carrying a firearm into a business selling alcohol for on-premises consumption from five years to three years.

Blake A. Hewitt represented Applicant on direct appeal. The South Carolina Court of Appeals issued an unpublished opinion affirming Applicant's convictions and sentences. *State v. Torrence*, Op. No. 2013-UP-152 (S.C. Ct. App. Filed April 10, 2013). Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari. By written order dated November 7, 2014, the Supreme Court denied Applicant's petition. The remittitur was issued on November 17, 2014.

Current Post-Conviction Relief Action

On June 1, 2015, Applicant filed an application for post-conviction relief. Applicant, through counsel, filed a first amended application on July 13, 2017. Applicant, through counsel, filed a second amended application on October 26, 2018, raising numerous additional grounds, sufficiently enumerated in the Order of Dismissal and Applicant's motion. An evidentiary hearing was convened November 5-6, 2018, at the Lexington County Courthouse where Applicant proceeded on the claims raised in his second amendment to the application. Applicant was present at the hearing and represented by Tricia A. Blanchette. Respondent was represented by Kelly Oppenheimer and Sherrie Butterbaugh, both of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant presented the testimony of Tora L. Brawley, Ph.D., Donna Schwartz Maddox, M.D., trial counsel Floyd, Peter G. Skidmore, appellate counsel Hewitt, and his mother Brenda Torrence. Respondent presented the testimony of Deputy Solicitor Graham.

Following the hearing, this court requested proposed orders from both parties. After reviewing the proposed orders, all testimony, and other evidence presented at the hearing, along with records provided from previous proceedings, this court found there were no constitutional depravations or other grounds on which to grant relief and denied and dismissed this application

with prejudice. This court signed a written order on April 22, 2019. Applicant subsequently filed a Motion pursuant to Rule 59(a) and (e), SCRCP, to alter or amend the judgment dated May 6, 2019, along with a proposed order. Respondent submitted a response on May 28, 2019, along with a proposed order.

Applicant's Motion to Alter or Amend is Denied

After careful review of the motion and response, this court declines to alter or amend its order. This court reasons that Applicant's request for reconsideration is more properly addressed through the appellate process, not a motion to alter or amend pursuant to Rule 59(e), SCRCP. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e), SCRCP, motion is to preserve issues raised to but not ruled upon by the trial court); *see also, Simmons v. South Carolina*, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016) (providing that "counsel has an obligation to review the order and file a Rule 59(e), SCRCP[] motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by [S.C. Code Ann. §] 17-27-80".).

Furthermore, this court finds that its Order of Dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 and Rule 52(a), SCRCP. The Order of Dismissal also sufficiently sets forth the reasons for those findings as required by S.C. Code Ann. § 17-27-80 and Rule 52(a), SCRCP. Having carefully reviewed the entire record in this matter, this court finds no basis for altering or amending is prior ruling.[2] Therefore, this court hereby denies Applicant's Motion in its entirety, and affirms the previous Order of Dismissal.

If Applicant desires appellate review of this Order and the Order of Dismissal, a notice of

[2] The court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction relief file because oral argument will not aid the court in reaching its decision. *See* Rule 59(f), SCRCP.

appeal must be filed and served within thirty days of the service of this Order. Applicant is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of the appeal has been timely filed.

AND, IT IS SO ORDERED this 31 day of MAY, 2019.

WALTON J. MCLEOD, IV
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina

FILED
2019 APR 22 PM 3:04
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Andrew E. Torrence, Jr., #346350, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2015-CP-32-01993 **ORDER OF DISMISSAL**

This matter comes before this court by way of an application for post-conviction relief filed June 1, 2015, by Andrew E. Torrence, Jr. (Applicant). The State of South Carolina (Respondent) made its return on July 12, 2017, requesting an evidentiary hearing be held. Thereafter, on July 13, 2017, and October 26, 2018, through his counsel, Applicant filed two amendments to the application for post-conviction relief. An evidentiary hearing into the matter was convened on November 5-6, 2018, at the Lexington County Courthouse. Applicant was present at the hearing and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Assistant Attorneys General Kelly Oppenheimer and Sherrie Butterbaugh, both of the South Carolina Attorney General's Office.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, as well as substantive proposed orders from both parties, this court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

PROCEDURAL HISTORY

The records before this court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County

Clerk of Court. During its August 2010 term, the Lexington County Grand Jury indicted Applicant for murder (2010-GS-32-02318). Thereafter, during its May 2011 term, the Grand Jury indicted Applicant for possession of a weapon during the commission of a violent crime (2011-GS-32-01440) and carrying a pistol or firearm onto the premises of a business selling alcoholic liquors, beers, or wines for on-premises consumption (2011-GS-32-01444). Wayne H. Floyd, Esquire represented Applicant. Deputy Solicitor D. Shawn Graham, of the Eleventh Circuit Solicitor's Office, prosecuted the case. On May 31-June 3, 2011, Applicant proceeded to a jury trial before the Honorable R. Knox McMahon. The jury convicted Applicant on the weapons charges and of the lesser-included offense of voluntary manslaughter. Judge McMahon sentenced Applicant to twenty-five years for voluntary manslaughter and five years for each of the weapons charges. The sentences were to be served concurrently.

On June 8, 2011, Applicant moved for a new trial and reconsideration of his sentences. By written order dated June 15, 2011, Judge McMahon denied the motion for a new trial and motion for reconsideration of the voluntary manslaughter sentence. Judge McMahon did, however, amend Applicant's sentence for possession of a firearm on the premises of a business selling alcoholic liquors, beers, or wines for on-premises consumption from five years to three years.

Applicant filed a timely notice of appeal, and Blake A. Hewitt, Esquire, perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issue: "Whether [Applicant] was entitled to a charge on involuntary manslaughter when he admitted intentionally firing his weapon, but other circumstances indicated that he did not intend to inflict serious injury or death?" Following briefing and oral argument, the South Carolina Court of Appeals issued an unpublished opinion affirming Applicant's convictions and sentences. *State v.*

Torrence, Op. No. 2013-UP-152 (S.C. Ct. App. Filed April 10, 2013). Applicant subsequently petitioned for rehearing, which was denied by written order on May 8, 2013.

Applicant then petitioned the South Carolina Supreme Court for a writ of certiorari to review the South Carolina Court of Appeals' decision. By written order dated November 7, 2014, the South Carolina Supreme Court denied Applicant's petition for writ of certiorari. The Remittitur was issued on November 17, 2014.

CURRENT APPLICATION

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

1. Ineffective assistance of trial counsel; [and]
    a. Failure to properly prepare Applicant prior to trial; [and]
    b. Failure to call witnesses and utilize evidence.
2. Ineffective assistance of appellate counsel.
    a. Failure to raise all meritorious issués on appeal

In his first amendment to the application for post-conviction relief, filed on or about July 13, 2017, Applicant raises the following allegations:

1. Ineffective assistance of trial counsel regarding Applicant's mental health;
    a. Trial counsel was ineffective for failing to properly utilize mental health experts prior to and during trial;
    b. Trial counsel was ineffective for failing to develop a mental health defense and/or utilize experts in mitigation in a plea; [and]
    c. Trial counsel was ineffective for utilizing Applicant as a witness at trial without a mental health expert.
2. Trial counsel was ineffective for failing to prepare and investigate prior to trial. Specifically, but not limited to:
    a. Trial counsel was ineffective for failing to obtain the incident report and/or video surveillance from Applicant's place of employment to refute and/or impeach the State's witnesses regarding Applicant's whereabouts during the hours prior to the shooting at issue; [and]

b. Alternatively, prosecutorial misconduct if said report was available or known to the prosecution and not turned over to the defense.

3. Ineffective assistance of counsel for the handling of the defense prior to and during trial;
    a. Trial counsel was ineffective for failing to question and/or obtain additional video footage from the scene;
    b. Trial counsel was ineffective for failing to properly prepare to utilize the in car video at trial;
    c. Trial counsel was ineffective for failing to fully cross-examine the State's witnesses at trial;
    d. Trial counsel was ineffective for failing to address the matter of bias at trial; [and]
    e. Trial counsel was ineffective for failing to obtain an accident and involuntary manslaughter jury charge.
4. Trial counsel was ineffective for failing to properly address the issues of docket manipulation and the use of Applicant's prior conviction at trial; [and]
5. Appellate counsel was ineffective for, but not limited to, the following:
    a. Failing to raise all meritorious issues on appeal.
        i. The trial court's denial of the defense's request to question Mr. Narang about the aggressive nature of the victim. Transcript p. 201;
        ii. Trial counsel's arguments regarding the issues of docket manipulation and the use of Applicant's prior conviction. Transcript pp. 451-64;
        iii. The trial court's denial of the directed verdict motion. Transcript p. 408-10;
        iv. Trial court's denial of the admission of the in car video. Transcript pp. 440-43, 460, 584-86;
        v. Trial court's refusal to charge accident. Transcript pp. 616-617; [and]
        vi. Trial counsel's objection to the State's closing argument. Transcript pp. 678.

In his second amendment to the application for post-conviction relief, filed on or about October 26, 2018, Applicant raised the following grounds:

1. Ineffective assistance of trial counsel regarding Applicant's mental health;
    a. Trial counsel was ineffective for failing to properly utilize mental health experts prior to and during trial;
    b. Trial counsel was ineffective for failing to develop a mental health defense and/or utilize experts in

mitigation in a plea and/or trial; [and]

c. Trial counsel was ineffective for utilizing Applicant as a witness at trial without a mental health expert.

2. Trial counsel was ineffective for failing to prepare and investigate prior to trial. Specifically, but not limited to:
   a. Trial counsel was ineffective for failing to obtain the incident report and/or video surveillance from Applicant's place of employment to refute and/or impeach the State's witnesses regarding Applicant's whereabouts during the hours prior to the shooting at issue; [and]
   b. Alternatively, prosecutorial misconduct if said report was available or known to the prosecution and not turned over to the defense.
3. Ineffective assistance of counsel for the handling of the defense prior to and during trial;
   a. Trial counsel was ineffective for failing to question and/or obtain additional video footage from the scene;
   b. Trial counsel was ineffective for failing to properly prepare to utilize the in car video at trial;
   c. Trial counsel was ineffective for failing to fully cross-examine the State's witnesses at trial;
   d. Trial counsel was ineffective for failing to address the matter of bias at trial;
   e. Trial counsel was ineffective for failing to ensure that the court gave a curative instruction following his objection to the State's closing argument. Transcript p. 678, 680-82. Additionally, ineffective assistance for not making an objection to the Solicitor's characterization of the victim as a "hero." Transcript p. 579, 678 [and]
   f. Trial counsel was ineffective regarding the court's charge, for the following but not limited to:
      i. For failing to obtain an accident and involuntary manslaughter charge;
      ii. For failing to object to the contemptuous language charge;
      iii. For failing to request a more detailed charge on citizen's arrest; and
      iv. For failing to request a jury charge on the difference between "acting lawfully" and being "lawfully armed in self-defense."
4. Trial counsel was ineffective for failing to properly address the issues of docket manipulation and the use of Applicant's prior conviction at trial; [and]
5. Appellate counsel was ineffective for, but not limited to, the

following:

a. Failing to raise all meritorious issues on appeal.
   i. The trial court's denial of the defense's request to question Mr. Narang about the aggressive nature of the victim. Transcript p. 201;
   ii. Trial counsel's arguments regarding the issues of docket manipulation and the use of Applicant's prior conviction. Transcript pp. 451-64;
   iii. The trial court's denial of the directed verdict motion. Transcript p. 408-10;
   iv. Trial court's denial of the admission of the in car video. Transcript pp. 440-43, 460, 584-86;
   v. Trial court's refusal to charge accident. Transcript pp. 616-617; [and]
   vi. Trial counsel's motions and arguments regarding prosecutorial misconduct.

At the hearing, Applicant proceeded forward on the claims of ineffective assistance of counsel raised in his second amendment to the application for post-conviction relief.

STATEMENT OF FACTS ADDUCED AT TRIAL

In the early morning hours of September 28, 2008, Applicant shot Zach Chaplin. Approximately six weeks later, Chaplin died as a result of the gunshot wounds. Tr. pp. 126, 137-40.

At trial, Applicant's former employer, Tonya Mozenko, testified for the State. Mozenko hired Applicant as a part-time security guard. Tr. pp. 162-63. Applicant wanted to be an armed guard; however, Mozenko's company did not have any armed positions available. Tr. p. 168. On several occasions, Applicant told Mozenko he wanted to be a police officer. Tr. p. 169. Eventually, Mozenko had to fire Applicant because Applicant could not do the job. Tr. p. 164.

A few hours before Applicant shot Chaplin, Applicant had a conversation with Mozenko and her friend, Stephen Smith, at Shaggy's Bar. Applicant told Mozenko and Smith he tried to buy Donna Muszynski a drink earlier that night, and he was upset Muszynski gave all of her

attention to Chaplin. Tr. pp. 174, 216-17. Applicant called Chaplin a "wolverine" and a "faggot." Tr. pp. 177, 216, 366. However, Chaplin did not respond. Tr. p. 175. Applicant repeatedly said: "I should go to my truck and get my gun and shoot him." Tr. pp. 177-78, 217. Sick and tired of Applicant's comments, Mozenko and Smith left the bar and went home. Tr. p. 178.

At trial, Lee Buchanan testified Applicant repeatedly called him gay. Tr. pp. 367-68. Buchanan told Applicant to leave him alone. Tr. p. 265. Applicant asked Buchanan if he wanted Applicant "to kiss his ass." Tr. p. 265. Throughout the night, Applicant made comments to Buchanan about Buchanan's sexuality. Tr. p. 266.

Eventually, Applicant and Chaplin got into a physical altercation. Tr. p. 268. Buchanan tried to stop the fight. Tr. pp. 268-69, 287-88, 314, 355, 480. After the fight was over, Buchanan helped Applicant find his glasses. Tr. p. 269. Thereafter, Buchanan told Applicant, "[l]et's all go home. It's over and done with." Tr. p. 269. Buchanan escorted Applicant out of the bar. Tr. p. 270, 301. After Applicant left, everyone settled down. Tr. p. 314.

However, a few minutes later, Applicant knocked on the bar door and asked to come inside. Tr. p. 270. Applicant reentered the bar with a gun in his hand. Tr. p. 271. Applicant told Buchanan, "this has nothing to do with you, this doesn't involve you . . . ." Tr. p. 271. Buchanan could not escape. Tr. p. 272. At that point, Chaplin threw a barstool at Applicant. Tr. p. 277. Buchanan heard two gun shots, which sounded like "bam (pause) bam." Tr. p. 272. Another witness testified the gun shots were approximately twenty seconds apart. Tr. p. 302.

In his defense, Applicant testified at trial. Applicant admitted he called Buchanan "gay." Tr. p. 477. Applicant claimed when he went to apologize to Buchanan, Chaplin assaulted Applicant. Tr. p. 480. After the fight was over, Applicant continued to make comments. Tr. p.

481.

Thereafter, Applicant went to his truck and grabbed his gun. Tr. pp. 481-84. According to Applicant, he went back into the bar in order to detain Chaplin and Buchanan for the earlier assault. Tr. p. 482-83. Applicant ordered Buchanan to put his hands on the bar. Tr. p. 485. While Applicant searched Buchanan for weapons, Chaplin threw a barstool at Applicant. Tr. pp. 485-86. Applicant went into a defensive position. Tr. p. 486. According to Applicant, when Chaplin came towards Applicant, he got scared and shot Chaplin twice. Tr. pp. 486-90. Applicant admitted to intentionally pulling the trigger twice. Tr. pp. 497, 546. One bullet struck Chaplin in the right arm, and the other bullet struck Chaplin behind the right ear. Tr. p. 129-33.

According to Dr. Janice Edwards Ross, Chaplin was either in a bent over position or on the ground when Applicant fired the second shot. Tr. p. 136. The bullet that struck Chaplin behind his right ear injured his spinal cord and paralyzed him from the chest down. Tr. p. 137. On November 12, 2008, Chaplin died from complications of his paralysis. Tr. pp. 126, 137-40.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant presented the testimony of Tora L. Brawley, Ph.D., Donna Schwartz Maddox, M.D., Wayne H. Floyd, Esquire (Counsel), Peter G. Skidmore, Blake A. Hewitt, Esquire (Appellate Counsel), and Brenda Torrence. Respondent presented the testimony of Deputy Solicitor Graham. This court also had before it a copy of Applicant's trial transcript; the records of the Lexington County Clerk of Court; Applicant's appellate records; the record on appeal; Applicant's records from the South Carolina Department of Corrections; a copy of the motions hearing transcript taken April 16, 2018, before Judge William A. McKinnon; and the records from this current post-conviction relief action.

Dr. Brawley's Testimony

During the evidentiary hearing, Dr. Tora Brawley testified as an expert licensed in forensic neuropsychology. She was asked to evaluate the cognitive functioning of Applicant. She testified that during the clinical interview, Applicant stated he was under remote neuro-monitoring, which was affecting his concentration and memory, causing irritability, paranoia, and weight gain. Dr. Brawley testified she administered many psychological tests to measure areas of brain functioning, the results of which were the following: low average range IQ of 86, a decline in overall intellectual functioning, severe impairment of verbal learning, delayed recall, inability to copy a complex figure, low verbal fluency, and severe impairment of mental tracking. She further testified almost all of the examinations given placed Applicant in the first percentile, with the exception of a few areas of assessment being in the sixth through ninth percentiles. She testified she tested the effort Applicant was putting into the tests and determined the test results were valid, because he was not exaggerating or malingering. Dr. Brawley concluded Applicant had moderate to severe deficits in cognitive domains, suggestive of brain organicity, implying there may be areas of brain damage or the brain may not be working like it should. Furthermore, Dr. Brawley recommended a full neurological evaluation for Applicant. After conveying the test results to Dr. Maddox, who ordered the test, Dr. Brawley testified she conducted another malingering test the morning of the hearing and determined Applicant did not show signs of malingering that morning. Dr. Brawley testified it was highly likely Applicant had the deficits at the time of the crime because of several prior concussions and spinal meningitis, which would have impacted brain function.

During cross-examination, Dr. Brawley admitted she cannot say to a reasonable degree of medical certainty Applicant exhibited these deficits at the time of the crime, nor could she testify the concussions and the meningitis definitely contributed to the deficits. Dr. Brawley further

testified there was no baseline for Applicant's functioning; however, certain areas of functioning are considered crystallized and hold through early dementia or head injuries. Dr. Brawley further explained the administration of tests to look at different areas of the brain, verbal fluency, motor skills, and manual dexterity. She testified she was asked to conduct the testing well after the trial, but it is highly unusual to see a decline in functioning after being in prison because of the structured environment. Dr. Brawley indicated Applicant's IQ is high enough to know the difference between right and wrong, know the difference between the truth and a lie, and have the ability to make decisions for himself. She further testified Applicant understood what he was being asked resulting from his average working memory and verbal comprehension. Further cross-examination of Dr. Brawley showed Applicant was an armed security guard prior to the incident and had to undergo extensive SLED training. Dr. Brawley did not know if Applicant's level of functioning would have allowed him to complete the training, and she was not aware of any behavior Applicant exhibited during incarceration.

Dr. Maddox's Testimony

Applicant subsequently called Dr. Donna Maddox, an expert in forensic psychiatry. Dr. Maddox initially examined Applicant in 2010, at the Lexington County Detention Center pursuant to a request from Counsel. Dr. Maddox testified she spoke with Applicant's mother about his prior history of being diagnosed with meningitis, having lumbar punctures, and being involved in a hit and run with a moving vehicle. Dr. Maddox further testified that she recommended Applicant for further neuropsychological testing by Dr. Brawley. Dr. Maddox did not present any records from the 2010 evaluation because the records have been misplaced. Dr. Maddox testified that she did not testify at Applicant's trial because she was unaware of the trial until a later phone inquiry from Applicant's mother. She stated that if had she known about the

proceedings, she would have been involved to give her findings when needed.

During her testimony, Dr. Maddox explained the evidence from the case she reviewed including witness statements, surveillance videos, prior neurology clinic notes, emergency department records, emails between attorneys, 911 calls, results from Dr. Brawley's testing, and medical records from SCDC. Dr. Maddox then testified Applicant was adopted, so she was not able to look at any familial history, but he had a significant alcohol abuse problem. She further testified while confined in SCDC, Applicant became psychotic but was not treated because the psychologist determined Applicant was malingering. Dr. Maddox testified she had communications with Appellate Counsel's firm and gave them her file but did not hear from anyone until she was contacted to evaluate Applicant for the post-conviction relief hearing.

Dr. Maddox testified her findings of the most recent evaluation show Applicant has delusions and believes remote neuro-monitoring is implanted in his brain, possibly by his mother to stop the alcohol abuse. She further testified that at first, Applicant was benevolent about the device, but now he does not want it and believes the government may be involved. Dr. Maddox explained Applicant hears up to twenty voices in his head, which make him agitated and affect his ability to function. She further explained Applicant does not believe Chaplin or his father are dead. Dr. Maddox then testified to the mental status examination: his clean hygiene, rapid rate of speech, jumping from one topic to another and coming back to certain topics, and his disbelief that he is mentally ill. Dr. Maddox testified she is concerned with the conditions Applicant is currently living in after being able to observe him five different times, and she believes that her testimony of numerous impairments affecting his brain would have been a mitigating factor in his case. She also testified on how alcohol mixed with the underlying issues would have exacerbated his impulsive behavior. She testified she would not make a determination about his

competency to stand trial because she was not able to evaluate him prior to the trial, but if all of the facts would have been like they are today, she would have been most concerned about Applicant not thinking Chaplin was dead. She was more concerned with Applicant's ability to testify and still had a question about his ability to testify during the post-conviction relief hearing because delusions cause the inability to tell the difference between the truth and a lie. Dr. Maddox testified she would diagnose Applicant with unspecified schizophrenia, psychotic spectrum disorder, a major neurocognitive impairment, and alcohol abuse disorder. She further testified she did not believe he was malingering the symptoms. Dr. Maddox explained the delusions, voices, and hallucinations all could have affected his ability to know the difference between truth and a lie.

During cross-examination, Dr. Maddox testified she was not familiar with and did not administer an MMPI-2 test or a SIMS test. She further testified it is not strange for the voices to have conversations like the person is not there, and the voices can be good things. Dr. Maddox further testified she performed the initial evaluation before the trial, but the report was never completed because the neuropsychological testing was not done; however, after the first evaluation, she did not have any concerns about Applicant's competency. She explained that if she had concerns about Applicant's competency or mental health, she would have raised those concerns to Counsel, which she did not do. She further explained her opinions at the evidentiary hearing were not her opinions when she first evaluated Applicant, and her current opinions are in hindsight. Dr. Maddox testified to the symptoms of schizophrenia and how individuals are still able to function and may not appear in distress. Dr. Maddox further stated there was a time when Applicant was not complying with the prescribed treatment but requested an evaluation, and symptoms can become exaggerated without taking the medicine. She testified the cooling

off period when Applicant sat in the car and grabbed a gun before going back into the bar was both impulsive and not impulsive. Dr. Maddox explained Applicant exhibited poor judgment to retrieve the gun, but once Applicant came back into the bar, he was impulsive when firing.

During redirect examination, Dr. Maddox testified she needed the neuropsychological testing completed in order to diagnose Applicant to issue opinions and findings. She further testified Applicant was not compliant with his medication, but she had some issues with the medications he was receiving because he exhibited psychotic symptoms and was receiving antidepressants and antianxiety medications.

During re-cross examination, Dr. Maddox testified it is common for malingering patients to report exaggerated symptoms to one doctor and report nothing to another doctor in a very short time frame. She further testified scores on malingering tests can change from day to day.

Counsel's Testimony

Applicant then presented the testimony of Counsel. Counsel testified Applicant's mother retained him for the case. He further testified he remembered a conversation with Dr. Maddox after she evaluated him at the Detention Center, but he does not remember a report or further recommendations regarding treatment. Counsel recalled not utilizing the services of Dr. Maddox because she was unable to provide useful information at trial, particularly as to the issues of guilt or innocence and competency. He explained he discussed a mental health defense with Applicant but did not feel confident to raise it during trial. Counsel testified he did not discuss how Applicant's Zoloft affected him and did not use an expert to explore how Applicant could have been impacted by a traumatic event or how this could affect his ability to make decisions. He further testified he did not observe any abnormal behavior from Applicant during the trial.

Counsel also testified Applicant was offered a plea to voluntary manslaughter. He further

testified the State tried to manipulate the docket to prejudice Applicant, by calling the assault and battery case to trial before the murder case, should Applicant not accept the State's plea offer. Counsel believed the State wanted to call the cases in this manner so that Applicant would have a prior record before the murder trial. He further testified he objected to the docket manipulation but that motion and the motion for a continuance were denied.

Counsel further testified he performed the usual preparation for trial by looking at the evidence, going to the scene, and talking to potential witnesses. Counsel did not hire an investigator and did not recall the number of times he met with Applicant. He testified he only used the footage from Shaggy's bar provided to him and did not ask for additional footage. He further testified Tonya Mozenko's and Stephen Smith's testimony was very damaging because the defense was Applicant was effectuating a citizen's arrest, and the testimony of Mozenko and Smith provided a motive to counteract the defense. He explained the timeline stated by the witnesses and the timeline stated by Applicant did not match up, but he did not attempt to get video surveillance to support Applicant's statement that he was not at State Street Pub when Mozenko and Smith said he was. Counsel also testified he did not attempt to get any reports of incidents that took place at Applicant's job that night, and he was shown a report from the night listing Applicant as a supplement person during the time he was alleged to have been at the bar with the State's witnesses. Counsel explained the report would have been extremely important in the defense, but the State did not provide it to him in discovery[1].

He testified he moved for a mistrial and a dismissal on the grounds of prosecutorial misconduct, but the trial court ruled it was a credibility issue and was going to give a curative instruction. He further testified he did not believe the trial court gave a proper curative

[1] According to Deputy Solicitor Shawn Graham, the State did not possess this incident report and the State did not use this incident report during Applicant's trial.

instruction because the solicitor was implying Applicant faked his employment records and drank on the job.

He further testified that the footage of Applicant from the patrol car would have been helpful in the defense to show remorse and to show Applicant did not confess to the crime. He testified, however, that he withdrew his motion to admit the video into evidence because the trial court ruled the video could only be admitted without the audio.

Counsel testified that an involuntary manslaughter instruction would have been valuable to the defense because the defense argued citizen's arrest and accident, and the State would have to prove the homicide was not accidental beyond a reasonable doubt.

During cross-examination, he testified he spoke with Applicant at length about his trial and did not have any indication to believe Applicant did not understand what was happening. He explained Applicant did not exhibit any odd behavior. He further testified he spoke with Dr. Maddox, who never raised any concerns to him about Applicant's competency. He further testified he could not have raised a defense based on Applicant's mental health. He explained that after his conversation with Dr. Maddox, he realized he could not call her as witness as to the issue of guilt or innocence. Counsel testified Applicant did not want to plead to murder or voluntary manslaughter; thus, mitigation in a plea from Dr. Maddox was not necessary. He explained his witness lists always have more people than he intends to call during trial, and just because Dr. Maddox's name appeared on the witness list does not definitively mean he planned on calling her as witness.

He further testified the footage from the scene was adequate enough to show the actual interchange with the gun. He testified he attempted to contradict testimony from the State's witnesses through cross-examination and the introduction of documentary evidence, including

Applicant's timesheet from his place of employment. He explained he attempted to suggest on cross-examination of Mozenko and Smith they were lying about Applicant's whereabouts prior to Shaggy's. He further explained the incident report introduced into evidence at the evidentiary hearing did not state how long Applicant was at Rush's during the incident nor that Applicant remained at Rush's during the entire incident. Counsel provided that Applicant's manager at Rush's testified at trial she did not smell any alcohol on Applicant that night. He further testified the statements given by Mozenko and Smith were used to conclude malice for murder, but Applicant was convicted of voluntary manslaughter.

He also testified there was undisputed evidence Applicant went to Shaggy's, got into a fight with Chaplin, left the bar for a period of time, shot Chaplin twice with a gun, and admitted to intentionally shooting Chaplin. He further testified some people could construe Applicant's derogatory language as contemptuous, and all of Applicant's statements that he was going to go to his truck, grab his gun, and shoot Chaplin were made at Shaggy's. He testified there was ample testimony to the inappropriate language Applicant was using that night. He also explained the "Jekyll and Hyde" comment made at trial was a reference to Applicant's drinking. Counsel testified his reasoning in attempting to introduce the in-car video was in order to show remorse for the health of the victim, but the trial court ruled it was self-serving hearsay. He explained he did not want to show the video without the audio because, without the audio, the video did not help his defense.

Counsel testified he typically does not have defendants testify because they will get confused during cross-examination, but Applicant was adamant he wanted to tell his side of the story. He also testified he interpreted the traumatic event statement made by Applicant simply as a reaction to the incident and that statement did not raise any red flags to him about Applicant's

mental health. Counsel also testified that the trial court severely limited the amount of information that could come out at trial about Applicant's prior charge.

He also testified he made an objection during the solicitor's closing statement and later articulated his objection on the record. He explained the trial court stated that when taking the argument as a whole, the statement by the solicitor was not made to inflame the passions of the jury. Counsel further explained the trial court did, in fact, give a curative instruction that the jury could not base their decision on passion, emotion, or any consideration not connected to the case. Counsel testified he requested charges on involuntary manslaughter and accident, but the trial court did not give those charges to the jury. He explained Applicant's admission he fired the gun intentionally played a part in the trial court's refusal to charge involuntary manslaughter and accident. He further explained Applicant was not acting lawfully by bringing a loaded gun into a crowded bar. Counsel also testified he followed the appeal, where the South Carolina Court of Appeals ruled there was no evidence warranting a charge on involuntary manslaughter. He testified the jury was given an extensive jury charge on citizen's arrest and self-defense.

On redirect examination, Counsel testified there was due process and constitutional separation of powers concerns regarding the docket manipulation. He further testified it would have been useful to have more video footage. He testified the incident report from Applicant's work would have aided in his defense because the security guard likely would not leave a scene when there is an ongoing incident, and if he did, the manager would have noticed. Counsel did not recall who was used to mitigate the conduct, but he knew it was not an expert. He testified he believed the jury asked about the involuntary manslaughter charge because they did not think there was enough evidence for a voluntary manslaughter conviction, but they did not want Applicant to go free. He testified he believed there was enough evidence to support an accident

charge.

During re-cross examination, Counsel testified he did not see a need for a mental health expert. He testified it was possible Applicant left during his shift at work because the manager does not keep tabs on the security guards. He further testified Applicant was cooperative with law enforcement, and he was able to make that point through examination of witnesses, although the in-car video would have been useful to show remorse. He recalled Applicant testifying he was unaware if Chaplin touched the weapon. He also testified the jury was given the ability to convict Applicant of assault and battery of a high and aggravated nature.

Peter Skidmore's Testimony

Applicant next called Peter Skidmore, a private investigator retained by Applicant's mother. Skidmore testified the majority of his work is working with murder cases for the defense. In preparation, Skidmore testified he watched the video from the bar, identified the parties in the video, and discussed his reservations with review of the video, including the lack of a time/date stamp and the lack of prior footage to the incident. He testified he would have encouraged Counsel to obtain more video footage regarding the incident and would have asked the bar if there was another camera to see a different angle. Skidmore further testified the SLED agent narrated the video during the trial, but nobody addressed the video from the defense. He testified there would have been issues he could have raised to the defense regarding actions taken in the video, specifically about the potential drug use of Chaplin.

He further testified the in-car video would have corroborated the defense in trying to make a citizen's arrest and his attempt to contact law enforcement earlier. He testified the behavior exhibited by Applicant showed a lack of malice and concern for Chaplin.

Skidmore testified that when he met with Applicant, he was emphatic about not being at

State Street Pub when Mozenko and Smith testified he was because he was taking care of an incident at work. He testified that when he attempted to get the reports from this incident, a letter from the Sheriff's Department stated there were no incident reports. He further testified that after further investigation, a subpoena was issued and the reports were received. He testified if he had been retained around the same time as Counsel, he would have gone about the same process he did prior to the post-conviction relief hearing to interview witnesses and obtain reports. Skidmore testified he would not have relied on the solicitor's reports, as Counsel did, because an independent investigation allows one to be prepared to impeach the State's witnesses. He also testified when he met with Applicant, he was concerned with his mental health and would not have been comfortable working on the case without mental health experts.

During cross-examination, Skidmore testified he has only helped the State in a case once or twice in his twenty-five years of experience. He explained the majority of his work is for the defense, and he works with post-conviction relief counsel frequently. He further explained post-conviction relief counsel frequently calls him to investigate and testify in her post-conviction relief cases. He did not have the qualifications to testify to someone's mental health diagnosis. He testified that during the trial, Donna Muszynski testified she did not do cocaine with Chaplin, and although he did not have the additional footage from the bar, Skidmore believes the angle would have given more information. Skidmore testified there should have been at least an hour of footage viewed before the footage obtained in order to see Applicant drink the remaining beers and interact with the State's witnesses. He further testified Applicant could not escape the bar because he was allegedly being assaulted at the time he shot Chaplin and had been drinking in excess. Skidmore admitted he did not have video evidence from either Applicant's place of work or Shaggy's. He also admitted he did not have the 911 tapes.

During redirect examination, Skidmore testified he would have done parts of Applicant's cross-examination differently as it seemed Applicant was unprepared. He testified he would have pushed Muszynski regarding the cocaine in her purse due to the self-serving motive she had. Skidmore's biggest concern was with the lack of Counsel's independent investigation of the matter.

Appellate Counsel's Testimony

Applicant next called Appellate Counsel, who handled Applicant's direct appeal. He testified that his main focus was the transcript because it was a direct appeal. Appellate Counsel testified his representation began about a month after the notice of appeal. He testified during his many meetings with Applicant, at times he believed interactions were difficult because sometimes Applicant was not completely with it. Appellate Counsel testified during the initial visit, he was informed Dr. Maddox had been consulted but did not testify.

When asked specifically about the incident report, which placed Applicant at a different location during the time Mozenko and Smith claimed Applicant was at State Street Pub, Appellate Counsel testified it would have been helpful to poke holes in the credibility of the witnesses, but he was not sure if it rose to the level of a material consequence.

Appellate Counsel also testified he did not raise the docket manipulation argument during appeal because the case law was still unsettled, and he believed there were strong issues with what he raised on appeal. Appellate Counsel testified he did not raise an issue on appeal for an accident defense because he believed the most favorable outcome to Applicant, based on the record and his research, would have been trying to get a new trial based on involuntary manslaughter. He further testified there was not sufficient evidence in the record to present an accident defense on appeal because it was briefly mentioned during trial and would seem

contradictory to allege self-defense and accident. Appellate Counsel testified he did not raise the denial of the directed verdict motion on appeal because there was a scintilla of evidence presented. He further testified he did not raise the issue of the denial of the admission of the in-car video because evidence issues are an abuse of discretion standard. He also testified he did not raise prosecutorial misconduct issues because a curative instruction was given. Appellate Counsel testified to the complicated nature of the citizen's arrest charge and how the jury should have received more information between the difference of a lawful and unlawful act.

During cross-examination, Appellate Counsel explained his process of handling an appeal and the limitations on issues he can raise. He testified he starts with the motions made at the end of the trial and then works his way through the transcript chronologically. He further testified he tried to mark direct appeal issues and post-conviction relief issues, which he flagged in hindsight. He testified mental health was not an issue he could raise on direct appeal, because there was nothing in the record that would have led him to believe there were any mental health issues. He also testified in a jury trial, the jury makes credibility findings, and appellate judges do not make credibility findings.

Appellate Counsel testified he raised the involuntary manslaughter issue on appeal because, in his professional judgment, it was his strongest argument. Appellate Counsel testified he did not raise the issue of Chaplin's prior aggression on appeal because the prior violence would have had to be directed towards Applicant. He explained he did not think about that issue in any detail. He further testified he did not raise the docket manipulation issue because this case was before the *Langford*[2] case; and although the issue was being litigated, it was not getting a lot of traction. He also testified he did not raise the directed verdict issue because there was some evidence of murder. Appellate Counsel testified he did not raise an issue about the in-car video,

[2] *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012).

because it would not have had any bearing on his involuntary manslaughter argument. He further testified somebody intentionally pulling the trigger of a gun twice would not qualify as an accident under the law in South Carolina. He explained it would have been very difficult to argue accident in this case. He also testified issues as to prosecutorial misconduct did not seem to be stronger than the involuntary manslaughter issue he raised.

He testified that he raised what he believed was the strongest issue on appeal. He further testified that the South Carolina Court of Appeals found there was no evidence Applicant did not intentionally fire his weapon, so he was not entitled to a charge on involuntary manslaughter. Appellate Counsel further testified after the opinion was filed, he filed for a rehearing and a petition for certiorari, both of which were denied.

During redirect examination, Appellate Counsel testified to the motion for a new trial not mentioning the error for accident, although there was a catchall paragraph at the end which would include any other motions made during trial. He testified again to his ability to only argue issues raised in the transcript, but he tried to flag other issues for post-conviction relief.

Brenda Torrence's Testimony

Applicant next called Brenda Torrence, Applicant's mother. Ms. Torrence testified Applicant lived with her at the time of the incident, and she received a call the morning after from the police department when Applicant asked her to get an attorney. Ms. Torrence testified that she called Counsel, and he agreed to represent Applicant. She further testified she informed Counsel about the mental health problems Applicant experienced and was willing to pay for an examination. Ms. Torrence testified a doctor went to the detention center to examine Applicant, and Ms. Torrence paid the retainer for the evaluation. She further testified after speaking with Dr. Maddox about the evaluation, she knew Dr. Maddox was anticipating to testify at trial and

she believed the mental health issues would be addressed. Ms. Torrence testified she would have paid any fees necessary to get additional testing or get the expert to testify at trial. Ms. Torrence testified she called Dr. Maddox after the trial to see why she was not there and understood that Dr. Maddox did not know the trial took place. She also testified to Applicant's prior mental health treatment as a child and her concerns watching him throughout the trial, particularly on the stand. Ms. Torrence testified she gave the information about Dr. Maddox to Appellate Counsel before the appeal.

She testified Counsel was the only attorney she knew and she believed he needed more help with the case. Ms. Torrence testified she spoke with Mozenko before trial at the request of Applicant, and she raised these concerns to Counsel after Applicant told her Mozenko was lying. She further testified there was no follow up from Counsel after she gave him information from Applicant regarding investigation possibilities.

During cross-examination, Ms. Torrence testified she actively communicated with Counsel, to the point he said she was wearing his team out. She testified Counsel repeatedly told her he was "ok," and she trusted his decision as Applicant's attorney. She further testified she relayed information to Counsel about Rush's, and Counsel obtained Applicant's timesheet and introduced it at the trial. She also testified when she spoke with Mozenko, Mozenko was consistent in her story.

She testified she made Dr. Maddox aware of everything concerning Applicant, and she was very involved in his case. She explained she would have made Dr. Maddox aware of any prior treatment. She further testified prior to this incident, Applicant was merely diagnosed with attention deficit disorder or attention hyperactive deficit disorder. She also testified Applicant drank heavily. None of Applicant's prior medical records were available at the evidentiary

hearing.

During redirect examination, she testified the prior treatment Applicant went through was to see psychologists at the recommendation of a pediatrician. Ms. Torrence further testified Mozenko used to be Applicant's employer, and she called the witness because Applicant had asked her to. After Ms. Torrence's testimony, Applicant rested his case.

Deputy Solicitor Graham's Testimony

Respondent then called Deputy Solicitor Shawn Graham, who was assigned to prosecute Applicant's trial. Deputy Solicitor Graham went through the facts and evidence from the trial, including the altercation that occurred between Chaplin and Applicant prior to the shooting. The evidence to support the murder charge was the murder warrant, the prior threats from the bar, expressed malice, a cooling off period, and the second shot after Chaplin was on the ground. Deputy Solicitor Graham testified about the unsupported statement Applicant called 911 after the incident and his attempt to obtain more surveillance footage. Deputy Solicitor Graham testified about Muszynski not being charged with cocaine as a decision by the police after she gave her statement. Deputy Solicitor Graham testified there was no evidence of an accident, which was further supported by Applicant's testimony. He testified the evidence which supported a conviction was the videotape of the altercation, the absence from the bar when Applicant went to retrieve his gun, the choice of Applicant to bring the gun instead of handcuffs or pepper spray, and being under the heat of passion from the prior altercation. He further testified Chaplin throwing the chair could indicate provocation, but the second shot to the neck was the unlawful killing.

Deputy Solicitor Graham testified he called the subsequent assault and battery charge to trial first because he felt that incident would be ignored if he called the homicide case first. He

explained he also wanted a conviction to impeach Applicant with if he testified.

He further testified he did not argue against the citizen's arrest charge because if there were any justification for self-defense, he would rather lose at trial than lose on appeal. Deputy Solicitor Graham testified to the many options of charges the jury had to choose from, including murder and voluntary manslaughter for the killing, four types of assault and battery if the jury believed there was a causation issue, and the defenses of self-defense and citizen's arrest.

During cross-examination, Deputy Solicitor Graham testified that this case, like every other case, is about credibility and not about character. He testified to his motion to exclude drug use for the purpose of it not being relevant, as Chaplin stated in his hospital records he used cocaine the night before the incident. He further testified to having no intention of charging Muszynski because he could not grant immunity if she was not charged by law enforcement. Deputy Solicitor Graham testified he withdrew the objection to the drug possession based on strategy. He clarified that Muszynski testified during trial to having immunity in exchange for her testimony, but she could have misunderstood the term "prosecutorial immunity." He further testified that all witnesses he put on the stand were important and after his conversation with Muszynski, she understood she would not be charged with drug possession.

In response to the questions regarding the testimony of Mozenko and Smith seeing Applicant prior to the shooting, Deputy Solicitor Graham testified their testimony went to the timeline of the whole story and how Applicant behaved during the course of the evening. He testified the incident report potentially was exculpatory evidence, but he did not have it to turn over to Counsel. Further, he testified there were no surveillance cameras at Rush's, but he turned over a letter to Counsel summarizing the meeting he had with the Rush's manager. Deputy Solicitor Graham testified he called the Rush's manager after Applicant testified because

the manager did not see Applicant at work and would have been able to speak to Applicant's ability to leave and come back. He further testified the comments about lying during the closing argument were not directed at Applicant but could have been applied to any of the witnesses.

Deputy Solicitor Graham testified he wanted the prior conviction in order to impeach Applicant's credibility if he testified, and he usually has the defense counsel confirm a trial date or has the judge set a trial date if nobody can agree. At the close of cross-examination, Deputy Solicitor Graham testified he believed Applicant committed murder because of the malice, even though the jury convicted him of voluntary manslaughter.

During redirect examination, Deputy Solicitor Graham testified Mozenko and Smith were important for the murder charge in order to show malice, but they were not helpful for voluntary manslaughter because they were not present during the shooting. He further testified there were an abundance of witnesses who testified to Applicant's behavior at the bar where the shooting happened.

During re-cross examination, Deputy Solicitor Graham testified the direct statements Applicant made and his actions during the course of the evening supported malice. He further testified to his closing argument and his colloquy supporting the murder charge, not voluntary manslaughter. He testified there was no legal provocation resulting in a heat of passion

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 evidentiary hearing, closely pass upon their credibility, and weigh their testimony accordingly. The court has also reviewed substantive and detailed proposed orders from both parties. Set forth below are the relevant findings of facts and

conclusions of law as required pursuant to S.C. Code Ann. §17-27-80.

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 441, 334 S.E.2d 813, 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, an 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. 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.

After careful review based on the standard discussed above, this court finds Applicant has failed to carry his burden in this action. Below are this court's findings in regards to each of

Applicant's allegations of ineffective assistance of counsel.

Counsel's alleged failure to properly utilize mental health experts prior to and during trial and alleged failure to develop a mental health defense

Applicant alleges Counsel was ineffective for failing to utilize mental health experts prior to and during trial. In support of this allegation, Applicant presented the testimony of Dr. Brawley and Dr. Maddox. Dr. Brawley testified Applicant has moderate to severe deficits in several cognitive domains, suggestive of brain organicity. She testified, however, she cannot state Applicant was suffering from these deficits at the time of these crimes to a reasonable degree of medical certainty. She further testified although Applicant has an IQ of 86, which is in the low average range, Applicant would still be able to distinguish between right and wrong, know the difference between a truth and a lie, and be capable of making decisions for himself. Dr. Maddox testified she first examined Applicant in 2010, before his trial, and he did not exhibit any signs of psychosis. She explained at that time, she did not note any strange behavior on the part of Applicant, nor was there any evidence of psychosis. She further explained there was no prior history of psychosis in Applicant in 2010. She testified that if she had concerns about Applicant's competency or mental status in 2010, she would have reported those concerns to Counsel, which she did not do because she did not have any concerns at the time. Indeed, Dr. Maddox testified Applicant did not begin exhibiting symptoms until 2016, well after Applicant's trial. Additionally, Dr. Maddox testified, in her opinion, Applicant's intoxication during the commission of these crimes precluded a guilty but mentally ill defense. Because there were no indications Applicant was suffering from any mental health problems prior to and leading up to his trial and because Dr. Maddox never raised any concerns to Counsel about Applicant's mental health, Counsel had no reason to believe he needed to use a mental health expert at trial, nor did

Counsel have a reason to explore a mental health defense.

Furthermore, Counsel testified he did not utilize Dr. Maddox further after her initial evaluation of Applicant because he did not believe, based on their conversations, Dr. Maddox could provide anything useful at trial on the issue of guilt or innocence. He explained Dr. Maddox did not note any evidence of psychosis, nor were there any defenses to the act itself available at the time. "[N]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 689. Furthermore, "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Although the court reasons that the above strategy is concerning with the benefit of hindsight, the court finds that Counsel employed a valid trial strategy in not utilizing Dr. Maddox, or any other mental health expert, particularly in light of the fact Dr. Maddox could not provide any beneficial information on the issue of guilt or innocence. Accordingly, this court finds Applicant has failed to establish Counsel was deficient.

Similarly, this court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. "A defendant is insane if, 'at the time of the commission of the act constituting the offense, [he or she], as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.'" *State v. Senter*, 396 S.C. 547, 552, 722 S.E.2d 233, 236

(Ct. App. 2011) (quoting S.C. Code Ann. § 17-24-10(A) (2003)) (brackets in original). "[T]he key to insanity is 'the power [of the defendant] to distinguish right from wrong in the act itself, to recognize the act complained of is either morally or legally wrong.'" *State v. Wilson*, 306 S.C. 498, 506, 413 S.E.2d 19, 23 (1992) (quoting *State v. McIntosh*, 39 S.C. 97, 17 S.E. 446 (1893)) (brackets in original). Here, Dr. Brawley testified that Applicant currently has an IQ of 86, but his premorbid level of IQ was 111, which is suggestive of a decline in overall intellectual functioning. Even with the lowered IQ of 86, however, Dr. Brawley testified a person with an IQ of 86 can understand the difference between right and wrong. Furthermore, Dr. Brawley could not testify to a reasonable degree of medical certainty that Applicant suffered from these neuropsychological deficits at the time of the commission of these crimes. Because Applicant currently has the capacity to distinguish between moral or legal right and moral or legal wrong, even with the decline in functioning, and because there is no indication Applicant was suffering from these deficits to a reasonable degree of medical certainty at the time of the commission of these crimes, Applicant cannot establish he was legally insane at the time of these offenses.

Moreover, "a defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he [or she] had the capacity to distinguish right from wrong or to recognize his [or her] act as being wrong . . . but because of mental disease or defect he [or she] lacked sufficient capacity to conform his [or her] conduct to the requirements of the law." S.C. Code Ann. § 17-24-20(A) (2014). A person may be mentally ill, but not legally insane. *State v. Curry*, 410 S.C. 46, 53, 762 S.E.2d 721, 725 (Ct. App. 2014) (citing *State v. Hornsby*, 326 S.C. 121, 130, 484 S.E.2d 869, 874 (1997)). "'[V]oluntary intoxication, *where it has not produced permanent insanity*, is never an excuse for or a defense to [a] crime.'" *State v. Hartfield*, 300 S.C. 469, 473, 388 S.E.2d 802, 804 (1990) (quoting *State v. Vaughn*, 268 S.C. 119, 232 S.E.2d

328, 330 (1977)) (emphasis in original). Here, neither Dr. Brawley nor Dr. Maddox testified that Applicant's current mental health problems were the result of voluntary intoxication. Indeed, Dr. Maddox testified because Applicant was intoxicated the night he committed these crimes, a verdict of guilty but mentally ill was precluded. Because there is no indication Applicant's intoxication on the night of these crimes resulted in permanent insanity, particularly at the time of the trial, his voluntary intoxication was not a defense to these crimes and he was not entitled to present a defense of insanity or attempt to obtain a verdict of guilty but mentally ill. *See id.* (holding when a defendant has presented evidence that his use of drugs caused permanent and irreversible brain damage, which manifests itself in a mental illness, the defendant is entitled to present the defense of insanity or to attempt to obtain a verdict of guilty but mentally ill). Based on all of the foregoing, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to utilize mental health experts in mitigation

Applicant alleges Counsel was ineffective for failing to utilize mental health experts in mitigation at a plea or at trial. As an initial matter, this court finds Counsel testified that Applicant did not want to take the State's offer to have him plead to voluntary manslaughter, so any allegations Counsel was ineffective for failing to present mitigation in the form of mental health experts at a plea is without merit.

"*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). Here, Applicant, his mother and father, his pastor, his aunt, and his life-long friend were all given ample opportunity to address the court prior to sentencing. *See* Tr. pp. 732-43. Each of these individuals highlighted Applicant's good moral

character and reputation. Furthermore, Counsel was able to highlight these attributes in Applicant as well. *See* Tr. p. 742. Additionally, as aforementioned, Counsel had no reason to consult with a mental health expert for sentencing, as Applicant exhibited no signs of psychosis prior to or during his trial. Given the mitigation presented prior to sentencing was extensive and Counsel had no reason to believe a mental health expert was necessary, this court finds Applicant has failed to establish sufficient deficiency on the part of Counsel.

This court further finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Applicant was convicted of voluntary manslaughter, an offense for which a convicted defendant "must be imprisoned not more than thirty years or less than two years." S.C. Code Ann. § 16-3-50. Applicant was sentenced to twenty-five years, which is well within the proscribed sentencing range. In addition, Applicant could have faced two consecutive sentences carrying up to five years each on the two weapons charges rather than the concurrent five years he received. Moreover, as aforementioned, Applicant did not exhibit any evidence of psychosis prior to or during his trial. Accordingly, there is no indication the trial court would have reduced its twenty-five year sentence for voluntary manslaughter, particularly in light of the fact Dr. Maddox would not have been able to present any evidence Applicant was suffering from symptoms of psychosis or other mental disease or defect at that time. This allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to utilize Applicant as a witness at trial without a mental health expert

Applicant alleges Counsel was ineffective for failing to utilize a mental health expert during Applicant's testimony at trial. Dr. Maddox testified she had no concerns regarding Applicant's competency prior to trial; and if she had had any concerns regarding Applicant's

competency, she would have informed Counsel, which she did not do because she had no concerns. She further testified Applicant did not report hearing any voices at the time she evaluated him prior to trial. Indeed, it is only since the trial Applicant alleges he heard voices while he was testifying. Moreover, Counsel testified he had no reason to believe Applicant did not understand the conversations Counsel had with him and the explanations about the case Counsel gave. Counsel further testified he did not notice any confusion on the part of Applicant while he was testifying at trial. Applicant's mother merely stated Applicant laid his head down during cross-examination, not that he was exhibiting any signs of hearing or talking to voices in his head. Indeed, Applicant's own statements at trial during the colloquy with the trial court indicate he understood what was going on at the trial and did not suffer from any physical or mental problem that would affect his thinking. Tr. pp. 456-57. Given the fact Dr. Maddox did not have any concerns regarding Applicant's competency and Applicant did not exhibit any particularly strange behavior or confusion on the stand (according to Counsel), other than what is typical of a criminal defendant on cross-examination, this court finds Applicant has failed to establish any deficiency on the part of Counsel.

Similarly, this court finds Applicant has failed to establish any resulting prejudice from the alleged deficiency. A criminal defendant has a constitutional right to testify on his or her own behalf. *Rock v. Arkansas*, 483 U.S. 44 (1987). "It is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Id.* at 51 (quoting *Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975)). Indeed, "'[e]very criminal defendant is privileged to testify in his [or her] own defense, or refuse to do so.'" *Id.* at 53 (quoting *Harris v. New York*, 401 U.S. 222, 230 (1971)). The decision on whether or not the defendant will testify ultimately rests with the defendant alone. *Jones v. Barnes*, 463 U.S. 745 (1983). Here, after being advised of his

constitutional rights, Applicant told the trial court he wanted to testify. Tr. pp. 455-57, 459. Counsel also testified at the evidentiary hearing Applicant wanted to tell his side of the story, so Applicant chose to testify. It was Applicant's decision, alone, to choose to testify in his own defense. Moreover, Applicant has failed to establish what benefit would have been realized from the aid of a mental health expert during Applicant's testimony, particularly in light of the fact Applicant exhibited no symptoms of psychosis prior to and during his trial. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to investigate Applicant's place of employment

Applicant alleges Counsel was ineffective for failing to investigate prior to trial. Specifically, Applicant contends Counsel was ineffective for failing to obtain the incident report[3] and/or video surveillance from Applicant's place of employment to refute or impeach the State's witnesses regarding Applicant's whereabouts during the hours prior to the commission of these crimes. "Counsel's concern is the faithful representation of the interest of his [or her] client and such representation frequently involves highly practical considerations as well as specialized knowledge of the law." *Tollett v. Henderson*, 411 U.S. 258, 267-68 (1973). "'Although counsel should conduct a reasonable investigation into potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client.'" *Tucker v. Ozmint*, 350 F.3d 433, 442 (4th Cir. 2003) (quoting *Green v. French*, 143 F.3d 865, 892 (4th Cir. 1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691; *Wiggins*, 539 U.S. at 521-22. Moreover, "failure to conduct an independent investigation does not constitute

[3] A copy of the incident report from Rush's, located at Broad River Road, on September 27, 2008, was introduced into evidence as Applicant's Exhibit #1. Respondent stipulated to the introduction of this document.

ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 181, 810 S.E.2d 836, 839 (2018) (citing *Moorehead v. State,* 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

At trial, Tonya Mozenko testified she met up with a friend, Stephen Smith, on September 27, 2008, at State Street Pub around midnight. Tr. pp. 165-66, 182, 190, 192. She testified as soon as they got into the bar, she saw Applicant. As they sat down, Applicant sat down with them to talk. Tr. pp. 167-68. She testified that Applicant was already intoxicated when Mozenko and Smith arrived, and he continued to consume alcohol and to take shots while she and Smith were at State Street Pub. Tr. pp. 169, 185. As Applicant became more intoxicated, Applicant became inappropriate, so Mozenko and Smith left to go to another bar. Tr. p. 169. Smith testified similarly. *See* Tr. pp. 213-15, 219. Applicant, however, alleged he was working at Rush's on September 27, 2008, and he clocked in at 9:00 p.m. and did not clock out until 1:50 a.m. Tr. pp. 472-73, 501. Applicant alleged he never left Rush's that night, and he did not arrive at State Street Pub until about 2:25 or 3:00 a.m. Tr. pp. 474, 503. He testified, however, he did see Mozenko and Smith in the early morning hours of September 27, 2008, at State Street Pub. Tr. pp. 523-24. In support of Applicant's argument, Counsel introduced Applicant's time sheet from Rush's at trial. *See* Tr. p. 473. Counsel also was able to cross-examine the Rush's manager as to whether or not she noticed any alcohol on Applicant when he signed out of work that evening, to which she responded she could not recall but if she had, she would have reported it. Tr. p. 609.

At the evidentiary hearing, Counsel testified in order to corroborate Applicant's story he was at Rush's until 1:50 a.m., Counsel obtained the timesheets from Rush's and reviewed the

summary of the solicitor's meeting with the manager at Rush's. Counsel testified he attempted to prove Applicant was not at State Street Pub when Mozenko and Smith said he was through means other than the aforementioned incident report, including the time sheets, cross-examination, and the testimony of the Rush's manager. He explained at the time, he thought those means were sufficient.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Indeed, the United States Supreme Court has cautioned against the distorting effects of hindsight:

> After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the court of that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.

Harrington v. Richter, 562 U.S. 86, 109-10 (2011). Although Counsel did not uncover this specific incident report at the time of trial, he attempted to prove Applicant was not at State Street Pub at the time alleged through various other means. Counsel is not required to uncover every single scrap of evidence that might be beneficial, and it is all too convenient now, after an adverse verdict, for Counsel to ask if a different strategy at trial might have been more advantageous. Based on the foregoing, this court finds Applicant has failed to establish any deficiency on the part of Counsel.

This court further finds Applicant has failed to establish sufficient prejudice resulting from this alleged deficiency. With respect to surveillance video from Rush's on the night of

September 27, 2008, Applicant is unable to provide this court with these alleged videotapes, leaving this court only to speculate as to what they may have shown on the night of this incident. In fact, Deputy Solicitor Shawn Graham testified that there were no cameras at Rush's and, consequently, no videos. At trial, Applicant alleged the surveillance video at Rush's would have shown he did not leave work between the hours of 9:00 p.m. and 1:50 a.m. Tr. p. 503. Applicant's assertions as to what these alleged videotapes showed, if they existed, without more, do not give rise to the level of proof required for Applicant to meet his burden. *See Porter*, 368 S.C. at 385-86, 629 S.E.2d at 357 ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result."). *See also Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) (holding a post-conviction relief applicant cannot establish prejudice from counsel's deficiency when he neither produces a favorable witness at the evidentiary hearing nor offers that testimony in some other manner consistent with the rules of evidence and merely speculates as to what that witness's testimony would have been).

With respect to the incident report, the report merely indicates Applicant was at Rush's at some time between 11:44 p.m. and 12:42 a.m. It does not indicate he remained at Rush's during the duration of that incident. Indeed, Applicant testified at trial it is about a fifteen minute drive from Rush's to State Street Pub. Tr. p. 521. Therefore, it is entirely conceivable Applicant could have been at Rush's at some point during the incident and left. Even assuming Applicant was at Rush's during the entirety of this incident, there is no question Applicant went to Shaggy's during the early morning hours of September 27, 2008, and that he was intoxicated. There is also no question Applicant and Chaplin got into a fight at the bar, after which Applicant went to his truck, sat there for some time, then returned to Shaggy's with a gun. Furthermore, Applicant

intentionally fired his weapon twice at Chaplin, as Chaplin charged him. Applicant's whereabouts in the time leading up to these crimes have little to no bearing on Applicant's actions during the commission of these crimes. Furthermore, Mozenko's and Smith's testimony was offered at trial to prove malice. However, the jury convicted Applicant of voluntary manslaughter, an offense for which malice is not an element. Accordingly, there is no indication the result of the proceeding would have been different even if Counsel introduced the incident report. This allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to question and/or obtain additional video footage from the scene

Applicant further alleges Counsel was ineffective for failing to question and/or obtain additional video footage from Shaggy's bar. Specifically, Applicant contends Counsel should have obtained additional footage from the bar, not only showing a different angle but also showing the entire time Applicant was at the bar. Counsel testified in his investigation, he visited the crime scene, and there was nothing at the scene that drew his attention that he did not pick up on the video. He further testified the footage from the scene was adequate enough to show the actual interchange with the gun. Counsel, however, failed to testify as to what he was missing from the video footage provided or what benefit would have been realized from additional footage. Furthermore, Deputy Solicitor Graham testified the other camera at Shaggy's did not show anything of significance; and the video introduced into evidence at trial was the best footage they had. Based on the foregoing, this court finds Counsel's conduct was reasonable under the circumstances.

Similarly, this court finds Applicant has failed to establish any resulting prejudice form this alleged deficiency. Applicant's assertions as to what these alleged videotapes showed,

without more, do not give rise to the level of proof required for Applicant to meet his burden. *See Porter*, 368 S.C. at 385-86, 629 S.E.2d at 357 ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result."). *See also Bannister*, 333 S.C. at 303-04, 509 S.E.2d at 809-10 (holding a post-conviction relief applicant cannot establish prejudice from counsel's deficiency when he [or she] neither produces a favorable witness at the evidentiary hearing nor offers that testimony in some other manner consistent with the rules of evidence and merely speculates as to what that witness's testimony would have been).

Here, Skidmore testified extensively at the evidentiary hearing about what the additional footage would have shown. However, Applicant failed to provide this court with any additional footage from Shaggy's on the evening of September 27, 2008. Indeed, the video introduced into evidence at trial showed the entire altercation between Chaplin, Buchanan, and Applicant and also showed Applicant leaving the bar for some time and returning with a gun. Furthermore, the video at trial shows Chaplin charging at Applicant, and Applicant shooting Chaplin twice. Because Skidmore can merely speculate as to what the additional video would have shown, Applicant did not produce additional video footage from the crime scene, and the video provided and introduced into evidence showed the entire altercation between Applicant and Chaplin, this court finds Applicant failed to show sufficient prejudice resulting from Counsel's alleged deficiency. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to properly prepare to utilize the in car video at trial

Applicant alleges Counsel was ineffective for failing to properly prepare to utilize the in-car video at trial. Specifically, Applicant contends Counsel was ineffective for failing to

properly argue for this video's admission where it purports to show he had remorse for Chaplin immediately following the shooting. "[N]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 689. Furthermore, "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. Where counsel articulates a valid strategic reason for his [or her] action or inaction, counsel's performance should not be found ineffective. *Underwood*, 309 S.C. at 562, 425 S.E.2d at 22; *Stokes*, 308 S.C. at 548, 419 S.E.2d at 779.

At trial, Counsel attempted to offer the in-car video into evidence, as it showed Applicant's demeanor and state of mind at the time of the commission of the crimes. Tr. pp. 438-39. The trial court ruled the video could be played without audio, due to Applicant's self-serving statements made in the video. *See* Tr. pp. 439-43, 586-87. After the court's ruling Counsel decided to withdraw offering the video. Tr. p. 589. At the evidentiary hearing, Counsel explained he attempted to introduce the video in order to show Applicant had remorse for Chaplin immediately after shooting him. He further explained in the video, Applicant expressed concern for Chaplin, although most of the time he sat there quietly. Counsel testified he did not want to show the video without the audio, because, without the audio, the video did not show anything to support his case. Based on the foregoing, this court's finds Counsel employed a valid trial strategy in choosing not to offer the video into evidence when the audio could not be played for the jury. Because Counsel's decisions were based on a valid trial strategy, this court finds Applicant has failed to show any deficiency on the part of Counsel.

Similarly, this court finds Applicant has failed to establish any resulting prejudice from

the alleged deficiency. Evidence is relevant is it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Rule 401, SCRE. Evidence that is not relevant is inadmissible. Rule 402, SCRE. Here, Applicant's defense was that he was effectuating a citizen's arrest at the time he shot Chaplin. Whether or not he expressed concern for Chaplin shortly after the shooting has no relevance on whether or not Applicant was effectuating a lawful citizen's arrest. As a result, the evidence was not relevant; and therefore, not admissible.

Moreover, "'hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. The video at issue here contains two statements by Applicant, in which he expressed remorse or concern for Chaplin. Other than those two statements made, the remainder of the video shows Applicant calmly and quietly sitting in the back of the patrol car. Applicant contends the in-car video should have been admitted at trial to show he expressed remorse for Chaplin shortly after the shooting; however, such statements would merely be offered to prove the truth of the matter asserted therein. Furthermore, Applicant's statements do not fall within any hearsay exception, which would allow the court to admit them into evidence. Based on all of the foregoing, this court finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to fully cross-examine the State's witnesses at trial

Applicant alleges Counsel was ineffective for failing to fully cross-examine the State's witnesses at trial. This court finds this allegation is without merit. The record before this court indicates Counsel cross-examined each and every witness the State presented at trial. Moreover, Applicant has not identified what benefit would have been realized from additional cross-

examination by Counsel. Accordingly, this court finds Applicant can establish neither that Counsel was deficient nor that he suffered any resulting prejudice from the alleged deficiency. This court further finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to address the matter of bias at trial

Applicant alleges Counsel was ineffective for failing to address the matter of judicial bias at trial. At the evidentiary hearing, Applicant withdrew this allegation. Therefore, this court finds the allegation is withdrawn with prejudice.

Counsel's alleged failure to ensure the court gave a curative instruction following his objection to the State's closing argument

Applicant alleges Counsel was ineffective for failing to ensure the trial court gave a curative instruction following his objection to the solicitor's closing argument. Specifically, Applicant contends Counsel was ineffective for failing to ensure a curative instruction was given after his objection to Deputy Solicitor Graham's closing argument. *See* Tr. pp. 678, 680-82. "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004) (citing *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). Furthermore, a closing argument should stay within the content of the record and the reasonable inferences to be drawn therefrom and must not be intended to arise the passions or prejudices of the jury. *Id.* at 609-10, 602 S.E.2d at 744 (citing *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); *Copeland*, 321 S.C. at 324, 468 S.E.2d at 624). Even if improper comments are made, they do not require reversal if they are not prejudicial to the defendant. *Brown v. State*, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009) (quoting *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)). "The relevant question is whether the solicitor's comments so infected the trial with

unfairness as to make the resulting conviction a denial of due process." *Id.* (internal quotation omitted).

Here, Counsel objected when Deputy Solicitor Graham stated: "If you believe [Applicant] is only guilty of assault and battery of a high and aggravated nature, then find him not guilty and let him have his gun back." Tr. pp. 677-78. The trial court sustained Counsel's objection. Tr. p. 678. Thereafter, Counsel articulated his objection to the closing argument outside of the presence of the jury. *See* Tr. pp. 680-81. The trial court specifically found the comments did not interject anything into the trial which would cause Applicant not to receive a fair trial, nor was it delivered in order to inflame the passions or prejudices of the jury. *See* Tr. pp. 681-82. In particular, the comments were made at the end of the closing argument, and Deputy Solicitor Graham did not harp on them. Furthermore, the trial court specifically instructed the jury he sustained Counsel's objection. Additionally, in its charge to the jury, the trial court specifically instructed the jury they could not "be governed by sympathy or prejudice or passion or emotion or any other arbitrary factors that are not in evidence in this particular time." Tr. pp. 709-10. In fact, the trial court thoroughly charged the jury they were only to consider the competent evidence—that which was presented through the witness stand and any exhibits made part of the record. *See* Tr. pp. 687. Based on the foregoing, it is clear the jury was explicitly given instructions not to consider any argument made during the trial, nor to base their verdict on any passion or prejudices. Furthermore, there is no indication the jury's verdict was based on any bias, passion, prejudice, or emotion. Accordingly, this court finds Applicant has failed to establish any resulting prejudice from the alleged deficiency. This court further finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to references the victim was a "hero"

Applicant alleges Counsel was ineffective for failing to object to Deputy Solicitor Graham's characterization of Chaplin as a hero. *See* Tr. pp. 579, 678. "A witness may be cross-examined on any matter relevant to any issue in the case." Rule 611(b), SCRE. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. All relevant evidence is admissible. Rule 402, SCRE. At trial, Applicant alleged he was effectuating a citizen's arrest at the time of the shooting. He further alleged he shot in self-defense after Chaplin, who had previously attacked him that night, threw a barstool at him and rushed towards him. In response, Deputy Solicitor Graham highlighted the fact Applicant chose to come back into the bar with a gun, after having being previously escorted out. Furthermore, he rationalized Chaplin's reaction to Applicant bringing a gun back into the bar by highlighting the fact it was a normal response to the circumstances. Deputy Solicitor Graham's questions were to cast doubt on Applicant's contention he was effectuating a citizen's arrest and shot in self-defense. Accordingly, there is nothing objectionable about the characterization of Chaplin as a hero.

Moreover, a closing argument should stay within the content of the record and the reasonable inferences to be drawn therefrom and must not be intended to arise the passions or prejudices of the jury. *Von Dohlen*, 360 S.C. at 609-10, 602 S.E.2d at 744 (citing *Simmons*, 331 S.C. at 338, 503 S.E.2d at 166; *Copeland*, 321 S.C. at 324, 468 S.E.2d at 624). In his closing argument, Deputy Solicitor Graham again highlighted the fact Chaplin was a hero for attempting to stop Applicant, when Applicant returned to the bar with a gun. He further highlighted the fact Chaplin had a right, as a citizen, to resist an unlawful or illegal arrest. Deputy Solicitor

Graham's comments about Chaplin and the actions he took at Shaggy's bar on September 28, 2008, were all reasonable inferences from the testimony presented at trial. Therefore, there was nothing to which Counsel must have objected. Based on all the foregoing, this court finds Applicant has failed to establish any deficiency on the part of Counsel.

This court further finds Applicant has failed to establish any resulting prejudice from the alleged deficiency.

> "Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions."

State v. Mouzon, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). Even if the comments made by the solicitor were improper, "[c]onduct that would otherwise be improper may be excused under the 'invited reply' doctrine if the prosecutor's conduct was an appropriate response to statements or arguments made by the defense." *Vaughn*, 362 S.C. at 169, 607 S.E.2d at 75. When the door has been opened to such comments, the comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Furthermore, upon review of such comments, "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Id.* at 647. As aforementioned, Applicant contended he was effectuating a citizen's arrest and shot Chaplin in self-defense after Chaplin decided to charge Applicant. The comments made by the State at trial were designed to directly refute Applicant's theory of the

case. Therefore, the comments made during trial and closing were merely an invited response from Applicant—that Applicant chose to enter a bar, where he had already gotten into an altercation with Chaplin, and Applicant escalated the situation by choosing to bring a gun into the bar. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to obtain a charge on accident

Applicant further alleges Counsel was ineffective for failing to obtain a jury charge on accident. Counsel requested a charge on accident, explaining he did not believe Applicant intended to kill anyone and the killing was unintentional. Tr. p. 616. Counsel further explained Applicant believed he was acting lawfully in order to effectuate a citizen's arrest. Tr. p. 616. He also stated Applicant did not point his gun at anyone "until he perceived that there was a threat of the weapon being taken from him." Tr. p. 616. Despite Counsel's assertion, the trial court denied Counsel's request to charge accident, finding it was not appropriate under the facts of the case. Tr. p. 616, 617. Because Counsel did, in fact, attempt to obtain a charge on accident, this court finds Applicant has failed to establish Counsel was deficient.

Similarly, this court finds Applicant has failed to establish any resulting prejudice from the alleged deficiency. "'The law to be charged must be determined from the evidence presented at trial.'" *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (quoting *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). "For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of a weapon." *State v. Burriss*, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999) (citing *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994)). If a defendant alleges he or she armed himself in self-defense while also alleging the actual shooting was accidental, "this combination of events can 'place the shooting in the context

of self-defense.'" *Id.* at 260, 513 S.E.2d at 106. Indeed, "homicide is excusable on the ground of accident when it appears that the defendant was acting lawfully in self defense and the victim was shot by accident through the unintentional discharge of a gun." *Goodson*, 312 S.C. at 280-81, 440 S.E.2d at 372. A person can be acting lawfully if he was entitled to arm himself or herself in self-defense at the time of the shooting. *Burriss*, 334 S.C. at 262, 513 S.E.2d at 108. To establish self-defense, the defendant must show: (1) he or she was without fault in bringing on the difficulty; (2) he or she must have actually believed he or she was in imminent danger of losing his or her life or sustaining serious bodily injury, or he or she actually was in such imminent danger; (3) if he or she believed he was in imminent danger, a reasonably prudent person of ordinary firmness and courage would have entertained the same belief, or, if the defendant were actually in imminent danger, the circumstances would warrant the reasonably prudent person to strike the fatal blow to save himself or herself from serious bodily harm or death; and (4) he or she had no other probable means of avoiding the danger. *Goodson*, 312 S.C. at 280, 440 S.E.2d at 371 (citing *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)).

Here, Applicant admitted he pulled the trigger of the gun twice intentionally. Tr. p. 497, 546. Moreover, Applicant was not acting lawfully at the time of the shooting, particularly in light of the fact he was not entitled to arm himself in self-defense at the time of the shooting. Indeed, Applicant brought on the difficulty and, therefore, cannot establish he acted in self-defense. After having been escorted from the bar, Applicant sat in his truck for some time, then decided to grab his gun and return to the bar. He chose to bring his gun, rather than any of the other non-lethal tools on his security belt. Applicant then entered the bar, with his gun visible to the other patrons, and had Buchanan put his hands on the bar. Because Applicant admitted to intentionally pulling the trigger and because Applicant was not acting lawfully at the time of the

shooting, Applicant was not entitled to a charge on accident. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to obtain a charge on involuntary manslaughter

Similarly, Applicant contends Counsel was ineffective for failing to obtain a charge on involuntary manslaughter. During the charge conference, Counsel requested a charge on involuntary manslaughter, which the trial court denied. Tr. p. 630. Counsel again requested a charge on involuntary manslaughter after the jury sent a note asking if they could consider the crime of involuntary manslaughter. Tr. pp. 724-25. The trial court again denied the request, finding the facts did not support a charge on involuntary manslaughter. Tr. pp. 726-27. Because Counsel did indeed request a charge on involuntary manslaughter and even moved for a new trial on the basis the jury asked to be able to consider it, this court finds Applicant has failed to establish any deficiency on the part of Counsel.

Furthermore, this court finds Applicant has failed to establish any resulting prejudice from the alleged deficiency. "'The law to be charged must be determined from the evidence presented at trial.'" *Mattison*, 388 S.C. at 479, 697 S.E.2d at 583 (quoting *Knoten*, 347 S.C. at 302, 555 S.E.2d at 394. "Involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." *State v. Smith*, 391 .C. 408, 414, 706 S.E.2d 12, 15 (2011) (citing *State v. Cabrera-Pena*, 361 S.C. 372, 380-81, 605 S.E.2d 522, 526 (2004)). Generally, a charge of involuntary manslaughter is inappropriate where the defendant admits he or she intentionally fired a gun.

See State v. Pickens, 320 S.C. 528, 531-32, 466 S.E.2d 364, 366-67 (1996) (holding the defendant was not entitled to a charge on involuntary manslaughter because he admitted to intentionally shooting the gun). Here, Applicant admitted to firing the gun twice. As found by the South Carolina Court of Appeals in this case:

> [B]ecause there is no evidence that [Applicant] did not intentionally fire his gun at Chaplin, he was not entitled to a charge of involuntary manslaughter. Moreover, this case does not fall under either prong of the involuntary manslaughter definition because: (1) firing a gun is considered conduct naturally tending to cause death or great bodily harm; and (2) [Applicant] was not acting lawfully by brandishing the gun in a bar.

Torrence, Op. No. 2013-UP-152. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to the contemptuous language charge

Applicant further alleges Counsel was ineffective for failing to object to the contemptuous language charge given by the trial court to the jury. *See* Tr. p. 703. "'The law to be charged must be determined from the evidence presented at trial.'" *Mattison*, 388 S.C. at 479, 697 S.E.2d at 583 (quoting *Knoten*, 347 S.C. at 302, 555 S.E.2d at 394. "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (2003) (internal citations omitted). In a trial for homicide, the South Carolina Supreme Court Carolina has found:

> It is always well to let the jury understand what was the condition of the accused as shown by his conduct and language preceding the deadly encounter. If the defendant was drunk, quarrelsome, insulting, these facts are relevant. It is always to be desired that the jury should understand how the accused was deporting himself immediately preceding the homicide.

State v. Rowell, 75 S.C. 494, 494, 56 S.E. 23, 28 (1906). Indeed, "the plea of self-defense is not

available to one who uses language so opprobrious that a reasonable man would expect it to bring on a physical encounter, and which did actually contribute to bringing it on." *Id.* 75 S.C. at 494, 56 S.E. at 29. *See also State v. Woodham*, 162 S.C. 492, 492, 160 S.E. 885, 889 (1931) (finding no error when the trial court charged the jury that self-defense was not available to a person who uses such opprobrious language that is reasonably calculated to bring on a difficulty, and which does actually contribute to the coming about of the physical encounter).

There is testimony providing that while Applicant was at Shaggy's, he was upset because Donna Muszynski, who he had been talking to, gave all of her attention to Chaplin. Tr. p. 174, 178, 216. Applicant proceeded to call Chaplin "faggot" and "Wolverine." Tr. p. 175, 216. He repeatedly called Chaplin names. Tr. p. 177. Applicant also made derogatory comments towards Buchanan about Buchanan being gay and to Muszynski. Tr. p. 264, 266, 286, 298-99, 323, 353. Applicant also called Buchanan a "faggot." Tr. 353. Indeed, Applicant asked Buchanan if Buchanan wanted Applicant to "kiss his ass." Tr. p. 265. Multiple people in the bar told Applicant to stop using these derogatory terms. Tr. 265, 266, 287, 299, 354. Based on the foregoing, ample evidence was introduced at trial to support the contemptuous language charge and the trial court's charge adequately covered the law. Accordingly, there was nothing objectionable about this charge, and this court finds Counsel was not deficient.

Similarly, this court finds Applicant has failed to establish sufficient prejudice resulting from the alleged deficiency. As aforementioned, Applicant repeatedly used derogatory terms in referring to Chaplin, Buchanan, and Muszynski. Indeed, Applicant's language was so contemptuous, a reasonable person would expect it to bring on a physical encounter. Indeed, after being repeatedly told to stop and ignoring those requests, Chaplin hit Applicant. It cannot be said someone who repeatedly calls a man derogatory terms is not at fault in bringing on the

difficulty. In fact, Applicant's language was so contemptuous so as to preclude his allegation he shot Chaplin in self-defense. This court finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to request a more detailed charge on citizen's arrest

Applicant further alleges Counsel was ineffective for failing to request a more detailed charge on citizen's arrest. A jury charge is correct if, when it is read as a whole, it contains the correct definition and adequately covers the law." *Adkins*, 353 S.C. at 318, 577 S.E.2d at 464. A jury charge which is substantially correct and covers the law does not require reversal. *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996). Furthermore, "the substance of the law is what must be charged to the jury, **not** any particular verbiage." *Adkins*, 353 S.C. at 318-19, 577 S.E.2d at 464 (emphasis added).

Where a statute defines the elements of a crime in plain and ordinary terms, it is proper for the court's charge to track the language of the statue. *Field v. Gregory*, 230 S.C. 39, 47, 94 S.E.2d 15, 20 (1956) ("As a general rule where the law governing a case is expressed in a statute, the court in its charge not only may, but should, use the language of the statute, and may, indeed, be guilty of error if it employs language which constitutes a departure in an essential respect from the statute.") (quoting 53 Am. Jur., Trial, para. 542, at p. 433); *United States v. Wills*, 346 F.3d 476, 494 (4th Cir. 2003) (approving of a jury instruction that "tracks the language of both the interstate stalking statute and of the indictment..."); *Accord State v. Zichko*, 129 Idaho 259, 264, 923 P.2d 966, 971 (1996) ("Ordinarily the language employed by the legislature in defining a crime is deemed to be best suited for that purpose, and error cannot be predicated on its use in jury instructions."); *Accord Lloyd v. State*, 152 A.3d 1266, 1271 (Del. 2016) ("An instruction

which tracks the statutory language is adequate to inform the jury."); *People v. Fromuth*, 2 Cal. App. 5th 91, 108, 206 Cal. Rptr. 3d 83, 97 (Ct. App. 2016) (statutory language "is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification. If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language."). The trial judge may read the language of the statute verbatim, or he or she may phrase the statute in his or her own words. *Keel v. Seaboard Air Line Ry.*, 108 S.C. 390, 95 S.E. 64, 65 (1918) ("He read the statute to the jury, and that was sufficient. He had the right to read the statute to the jury, or, if the language of the statute was embodied in his own language, this was sufficient.").

S.C. Code Ann. § 17-13-10 provides: "Upon (a) view of a felony committed, (b) certain information that a felony has been committed or (c) view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law." S.C. Code Ann. §17-13-10. S.C. Code Ann. § 17-13-20 further provides: "A citizen may arrest a person in the nighttime by efficient means as the darkness and the probability of escape render necessary, even if the life of the person should be taken, when the person has committed a felony . . ." S.C. Code Ann. § 17-13-20(A). Furthermore, "in order to invoke the defense of justifiable killing in apprehending a fleeing felon, [the defendant] at minimum must show that he had certain information that a felony had been committed . . . and he used reasonable means to effect the arrest." *State v. Cooney*, 320 S.C. 107, 111, 463 S.E.2d 597, 599 (1995). The determination of reasonableness is a question for the jury based on the facts and circumstances of the case. *Id.*

Here, Counsel requested a charge on citizen's arrest, specifically directing the court to sections 17-13-10 and 17-13-20 of the South Carolina Code, as well as some case law. *See* Tr.

pp. 620-22. Thereafter, the trial court gave the jury the following charge on citizen's arrest:

> I'm going to charge you the law in South Carolina as well on citizen's arrest, being the right that a citizen may have in making an arrest, a citizen's arrest.
>
> There are statutes in South Carolina which address that issue in Title 17[-]13[-]10 and Title 17[-]13[-]20.
>
> Upon A, a view of a felony committed, or, B, certain information that a felony has been committed, or, C, a view of larceny committed, any person may arrest the felon and take him to a judge or magistrate to be dealt with according to the law.
>
> A citizen's arrest is unlawful unless a felony has been committed, or if no felony has been committed.
>
> Under 17[-]13[-]20, a citizen may arrest a person in the nighttime by efficient means if the darkness and the probability of escape render it necessary, even if the life of the person may be taken if the person has committed -- when the person has committed a felony.
>
> In order to invoke the defense of a justifiable killing, it must be shown that the felony has been committed and that the shooter used reasonable means to effect the arrest.
>
> The determination of reasonable means depends upon the totality of the facts and circumstances in the case, even if -- even if it is later found that the person attempting to make a citizen's arrest, or the person that the arrestor is attempting to arrest did not commit a felony.
>
> The arrest would still be lawful if there was reasonable cause for suspicion.

Tr. pp. 707-08. The charge given by the trial court included not only the statutory language of citizen's arrest but also relevant case law; therefore, there was nothing to which Counsel must have objected. Accordingly, this court finds Applicant has failed to establish any deficiency on the part of Counsel.

Similarly, Applicant has failed to establish any resulting prejudice. The trial court gave

an extensive charge to the jury on citizen's arrest, and the jury was given the option to find Applicant not guilty based on a lawful citizen's arrest. After considering all of the evidence presented and the law as charged, including citizen's arrest, the jury chose to convict Applicant of voluntary manslaughter. There is no indication the jury would have been more persuaded by a "more extensive" charge on citizen's arrest. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to request a charge on the difference between "acting lawfully" and being "lawfully armed in self-defense"

Applicant also contends Counsel was ineffective for failing to request a jury charge on the difference between "acting lawfully" and being lawfully armed in self-defense. To establish self-defense, a defendant must show: (1) he or she was without fault in bringing on the difficulty; (2) he or she must have actually believed he was in imminent danger of losing his or her life or sustaining serious bodily injury, or he or she actually was in such imminent danger; (3) if he or she believed he was in imminent danger, a reasonably prudent person of ordinary firmness and courage would have entertained the same belief, or, if the defendant were actually in imminent danger, the circumstances would warrant the reasonably prudent person to strike the fatal blow to save himself or herself from serious bodily harm or death; and (4) he or she had no other probable means of avoiding the danger. *Goodson*, 312 S.C. at 280, 440 S.E.2d at 371 (citing *Davis*, 282 S.C. at 46, 317 S.E.2d at 453). "'Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense.'" *State v. Slater*, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007) (quoting *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999)). Where the defendant's unlawful possession of a weapon is merely incidental to the defendant's lawful act of arming

himself in self-defense, the unlawful possession of the weapon will not prevent the use of self-defense. *Id.* at 71, 644 S.E.2d at 53 (citing *Burriss*, 334 S.C. at 262 n. 5, 313 S.E.2d at 108 n. 5. If, however, the weapon is the proximate cause of the killing, then the unlawful possession of a firearm can constitute unlawful activity so as to preclude self-defense. *Id.* Indeed, when a defendant approaches an altercation that is already underway with a loaded weapon at his side, such activity could be reasonably calculated to bring on the difficulty and the defendant is not merely in unlawful possession of a weapon and "may not avail himself on a charge on self-defense." *Id.*

Here, as found by the South Carolina Court of Appeals, Applicant was not acting lawfully in brandishing the gun in a bar. Moreover, Applicant, after having been previously escorted out of the bar, returned with a loaded weapon at his side. Indeed, Applicant chose to approach an altercation that had been previously underway with a weapon. Such activity is reasonably calculated to bring on the difficulty, and Applicant's unlawful possession of the weapon was the proximate cause of the killing, thereby precluding Applicant from availing himself of a charge on self-defense. Because Applicant was unlawfully in possession of the weapon and because he did not lawfully arm himself in self-defense by bringing on the difficulty, this court finds Applicant has failed to establish any deficiency on the part of Counsel, nor did he suffer any resulting prejudice from the alleged deficiency. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to properly address the issues of docket manipulation and the use of Applicant's prior conviction at trial

Applicant further contends Counsel was ineffective for failing to properly address the issues of docket manipulation and the use of Applicant's prior conviction at trial. Specifically,

Applicant alleges Counsel was ineffective for failing to properly address the fact the solicitor called Applicant's later charge of assault and battery on a correctional officer prior to his murder charge. Applicant contends Counsel should have made an argument similar to that in *State v. Langford*, specifically that Counsel should have argued S.C. Code Ann. § 1-7-330, which vests control over the trial docket to the solicitor, was unconstitutional. 400 S.C. 421, 735 S.E.2d 471 (2012). Counsel, however, is not required to anticipate or discover upcoming changes in the law at the time of trial. *Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993).

Here, Counsel argued the State merely wanted to call the assault and battery case to trial before the murder case because the State wanted Applicant to have a prior record with which he could be impeached. Counsel further argued although S.C. Code Ann. § 1-7-330 "seems to give the solicitor full reign to call cases as they deem fit, we don't think that discretion is unfettered." Applicant's Exhibit #12 p. 4. He explained the solicitor was "manipulating the docket in an attempt to gain an advantage in a collateral manner." Applicant's Exhibit #12 p. 4. He further argued the solicitor's control of the docket violated Applicant's rights to fundamental fairness, equal protection, and due process. Although Counsel did not specifically argue that S.C. Code Ann. § 1-7-330 was unconstitutional, he made the strongest arguments he could at the time. Moreover, *Langford* was decided in November 2012, approximately eighteen months after Applicant's trial. Because Counsel was not required to be clairvoyant as to changes in the law and because Counsel vehemently argued the solicitor was manipulating the docket simply to have a prior conviction with which to impeach Applicant, this court finds Applicant has failed to establish Counsel was deficient.

This court further finds Applicant has failed to establish any resulting prejudice from the alleged deficiency. *Langford* still requires a defendant to show prejudice from the solicitor's

control of the docket. 400 S.C. at 436, 735 S.E.2d at 479. At trial, the court found the prejudicial effect of Applicant's prior conviction did outweigh its probative value but allowed the solicitor to question Applicant about it to the effect that Applicant had been convicted of a crime for which he could have been punished in excess of one year or up to three years. Tr. pp. 463-64. The trial court, however, would not allow the solicitor to question Applicant as to the nature of the offense. Tr. p. 465. Furthermore, Applicant's prior conviction was only mentioned once during the trial, during Applicant's direct examination, and the solicitor never asked Applicant about his prior conviction. Tr. p. 467. Accordingly, the trial court severely limited the manner in which the prior conviction could be raised at trial. This court, therefore, finds this allegation must be denied and dismissed with prejudice.

Prosecutorial Misconduct

Applicant further alleges prosecutorial misconduct. Specifically, Applicant alleges the State violated *Brady*[4] in not disclosing the aforementioned incident report from Rush's. *Brady* requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. *Clark v. State*, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A *Brady* claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate: (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Clark*, 315 S.C. at 388, 434 S.E.2d at 268 (citing *United States v. Bagley*, 473 U.S. 667 (1985)).

[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

Here, Deputy Solicitor Graham testified and confirmed that he did not have this incident report in his possession. Additionally, the evidence is not such that the result of the proceeding would have been different had it been disclosed by the defense. Specifically, the report merely questions Applicant's whereabouts in the hours before the shooting. In fact, the report simply makes it possible Applicant could have been at Rush's rather than State Street Pub around midnight on September 28, 2008. The shooting occurred at approximately 3:00 to 3:30 in the morning at Shaggy's bar. Multiple witnesses at trial, the video from Shaggy's, and Applicant himself placed him in Shaggy's and testified to Applicant's actions in the bar that evening. The hours preceding the actual shooting and the actions taken at a different bar, which Chaplin did not visit that evening, have no bearing on Applicant's actions at Shaggy's bar at approximately 3:00 in the morning. Because the report was not in the possession of the State and because it is not material to guilt or punishment, this court finds Applicant has failed to meet his burden. This court further finds this allegation must be denied and dismissed with prejudice.

Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing *Southerland v. State,* 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. *Southerland*, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. *See Ezell v. State*, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); *Southerland*, 337 S.C. 615-16, 524 S.E.2d at 836. *See also Simpkins v. State,* 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on

appeal that constituted reversible error).

Although ineffective assistance of appellate counsel claims for failure to raise a particular issue on direct appeal can be successful, the United States Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." *Thrift v. State,* 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing *Jones v. Barnes,* 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." *Jones,* 463 U.S. at 754. Additionally, the South Carolina Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. *Tisdale*, 357 S.C. at 476, 594 S.E.2d at 167. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" *Smith v. Robbins*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

In order to meet his or her burden, an applicant must establish a reasonable probability that, but for appellate counsel's failure to raise a specific issue on appeal, he or she would have prevailed on his or her appeal. *Smith*, 528 U.S. at 285-86.

Appellate Counsel's alleged failure to raise all meritorious issues on appeal

Applicant alleges Appellate Counsel was ineffective for failing to argue all meritorious issues on appeal. On appeal, Appellate Counsel raised the following issue: "Whether Andrew Torrence was entitled to a charge on involuntary manslaughter when he admitted intentionally

firing his weapon, but other circumstances indicated that he did not intend to inflict serious injury or death." The issue was thoroughly briefed not only at the South Carolina Court of Appeals but also at the South Carolina Supreme Court. The South Carolina Court of Appeals found Applicant was not entitled to an involuntary manslaughter charge because there was no evidence he did not intentionally fire his gun at Chaplin, and the South Carolina Supreme Court denied certiorari review of the issue.

Appellate Counsel explained his process of handling an appeal and the limitations on issues he could raise. He testified he looked at motions made at the end of the trial and worked his way through the transcript chronologically. Appellate Counsel further testified he marked direct appeal issues and post-conviction relief issues, which he flagged in hindsight. Appellate Counsel testified he raised the involuntary manslaughter issue on appeal because in his professional judgment, it was his strongest argument. Counsel explained, after the South Carolina Court of Appeals issued its opinion, he filed for a rehearing and a petition for certiorari, both of which were denied.

Regarding issues Applicant believes should have been raised, Appellate Counsel testified none of them were as strong as the one he raised. First, Appellate Counsel testified he did not raise the issue of Chaplin's aggressive nature because there was no evidence he had ever been aggressive toward Applicant before the night of the deadly shooting. Next, Appellate Counsel testified he did not raise the docket manipulation argument in relation to Applicant's prior conviction because the case law was still unsettled at the time of the direct appeal, and he believed the involuntary manslaughter issue was a stronger one to raise. Third, Appellate Counsel testified he did not raise the denial of the directed verdict motion because there was sufficient evidence of murder presented during trial so that it became something a jury must

decide. Fourth, Appellate Counsel testified he did not raise the issue of the denial of the admission of the in-car video because evidence issues are an abuse of discretion standard, meaning they are difficult to win a reversal on direct appeal. Fifth, Appellate Counsel testified he did not raise failure to charge accident to the jury because he believed the most favorable outcome to Applicant, based on the record and his research, would have been trying to get a new trial based on failure to charge involuntary manslaughter. Appellate Counsel further testified intentionally firing a gun twice would not qualify as an accident under the law in South Carolina. He explained it would have been very difficult to argue accident in Applicant's case. Finally, Appellate Counsel testified he did not raise prosecutorial misconduct issues because a curative instruction was given and it was not stronger than the involuntary manslaughter issue he raised.

This court finds Appellate Counsel's testimony credible and persuasive on all matters, noting Appellate Counsel is a respected appellate attorney in South Carolina. This Court finds Applicant has failed to establish the requisite deficiency of Appellate Counsel or prejudice entitling him to relief. First, this court finds Applicant has failed to show Appellate Counsel's performance was deficient, where there is no standard requiring appellate counsel to brief every possible meritorious issue and Appellate Counsel appropriately raised a stronger, meritorious issue on Applicant's behalf. Second, this court finds Applicant has failed to establish prejudice, as there is no reasonable likelihood Applicant would have prevailed on appeal.

Both the United States Supreme Court and the South Carolina Supreme Court have consistently ruled that appellate counsel has no duty to raise all meritorious issues on appeal. *See Jones*, 463 U.S. 745; *Smith*, 528 U.S. at 288; *Tisdale*, 357 S.C. 474, 594 S.E.2d 166. When appellate counsel reviews all possible issues and elects to raise those issues he or she deems most meritorious, he or she has performed in accordance with professional standards and is not

deficient. Throughout his testimony before this court, Appellate Counsel credibly stated he raised the argument on direct appeal he believed had the best chance of success after a thorough review of the record. As Appellate Counsel raised his strongest issue on appeal, his performance was in accordance with professional norms and this court finds this allegation must be denied and dismissed with prejudice.

Additionally, this court finds Applicant has failed to establish any prejudice from counsel's alleged deficiency. Applicant failed to demonstrate the result of his direct appeal would have been any different had Appellate Counsel raised any of the issues Applicant wished to be raised. First, as Appellate Counsel pointed out, whether Chaplin had an aggressive nature was not relevant where there was no evidence to show he had been aggressive toward Applicant prior to the night of the shooting so that Applicant would be in fear of his life. *See* Rule 404(a)(2), SCRE (providing for the circumstances when the character of the victim may be admitted). Further, when Counsel proffered the testimony of the witness who Applicant alleges would have said Chaplin had an "aggressive nature," the witness disagreed with Counsel's characterization of his statement. Tr. p. 208. The witness testified he did not say Chaplin was aggressive but said he had a short temper. Tr. p. 208. Given the abuse of discretion standard on appeal for admission of evidence, this court finds there is no prejudice to Applicant and he has failed to show the appellate courts would have reversed his conviction had Appellate Counsel raised this issue. *See State v. Martucci*, 380 S.C. 232, 247, 669 S.E.2d 598, 606 (2008) (explaining the admission or exclusion of evidence is left to the sound discretion of the circuit court, whose decisions will not be reversed on appeal absent an abuse of discretion or the commission of a legal error resulting in prejudice to the defendant) (citations omitted). This court finds this allegation must be denied and dismissed with prejudice.

Second, with regard to the failure to raise the docket manipulation allegation, this court finds Applicant cannot demonstrate prejudice where the issue, while argued, had not been decided at the time of his direct appeal, and Appellate Counsel testified there was little chance of success given the uncertainty of the law at the time. Further, as discussed above, the trial court limited the way in which Applicant's prior conviction could be used to impeach him. Tr. pp. 463-65; p.467; *see also* Rule 609(a)(1), SCRE (providing evidence of a defendant's prior crimes "shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused"). Accordingly, this court finds the issue would not have been successful in reversing Applicant's conviction had it been raised on direct appeal, and the allegation must be denied and dismissed with prejudice.

Third, this court finds Applicant fails to demonstrate prejudice regarding Appellate Counsel's alleged deficiency in not raising the denial of the directed verdict issue. Appellate Counsel testified he reviewed the record in its entirety and determined there was sufficient evidence of murder presented to submit the issue to the jury, and he presented the strongest issue on appeal. *See Brown v. State*, 307 S.C. 465, 468, 415 S.E.2d 811, 812 (1992) ("A case should be submitted to the jury if there is any substantial evidence, either direct or circumstantial, which tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced."); *see also State v. Bennett*, 415 S.C. 232, 236, 781 S.E.2d 352, 354 (2106) (explaining the jury must consider "alternative hypotheses" while the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt which is an objective test founded upon reasonableness, and the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt); *State v. Larmand*, 415 S.C. 23, 32, 780 S.E.2d 892, 896 (2015) ("[O]ur duty

is not to weigh the plausibility of the parties' competing explanations. Rather, we must assess whether, in the light most favorable to the State, there was *any* evidence from which the jury could infer [the defendant's] guilt.") (emphasis in original). Further, this court finds even if Appellate Counsel had raised the directed verdict issue, a reasonable probability of a different outcome does not exist because Applicant would not be entitled to a reversal. Applicant was not convicted of murder but was, instead, convicted of voluntary manslaughter. Accordingly, this court finds Applicant failed to demonstrated prejudice and the allegation must be denied and dismissed.

Next, this court finds Applicant cannot demonstrate prejudice for any alleged deficiency in failing to raise the denial of admission of the in-car video. As discussed above, the trial court ruled the video could be played without audio, but Counsel decided not to offer the video into evidence. Tr. pp. 439-43; pp. 586-87; p. 589. Appellate Counsel testified he did not raise the issue given the abuse of discretion standard for evidentiary issues on direct appeal. Given that Applicant's alleged remorse did not have any relevancy to his defense that he was effectuating a citizen's arrest, and given the abuse of discretion standard on appeal, this court finds there is no prejudice to Applicant and he has failed to show the appellate courts would have reversed his conviction had Appellate Counsel raised this issue. *See Martucci*, 380 S.C. at 247, 669 S.E.2d at 606 (explaining the admission or exclusion of evidence is left to the sound discretion of the circuit court, whose decisions will not be reversed on appeal absent an abuse of discretion or the commission of a legal error resulting in prejudice to the defendant). This court denies and dismisses this allegation with prejudice.

Fifth, the court finds Applicant failed to demonstrate the outcome of his direct appeal would have been any different had Appellate Counsel raised the failure to charge accident. As

Appellate Counsel credibly and correctly testified before this court at the evidentiary hearing, the law in our State does not support the charge and this court finds it does not entitle Applicant to a reversal of his conviction. As explained above, Applicant admitted he fired the gun twice and he could not claim he was acting in self-defense because he brought on the difficulty. *See Goodson*, 312 S.C. at 280-81, 440 S.E.2d at 372 (explaining "homicide is excusable on the ground of accident when it appears that the defendant was acting lawfully in self defense and the victim was shot by accident through the unintentional discharge of a gun"). Accordingly, Applicant has failed to demonstrate prejudice and this allegation is denied and dismissed.

Finally, this court finds Applicant failed to demonstrate prejudice for Appellate Counsel's failure to raise the prosecutorial misconduct claim made by Counsel. As Appellate Counsel testified, the trial court gave a curative instruction following Counsel's objection to the solicitor's cross examination of Applicant, cautioning the jury they were to disregard part of the questioning. *See* Tr. pp.502-20. Counsel did not object to the instruction given or otherwise seek a subsequent instruction. Had Appellate Counsel raised the issue on direct appeal, Applicant cannot show his conviction would have been reversed because the instruction given by the trial court was deemed to have cured any error. *See State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("If the trial [court] sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured."). Accordingly, this court finds Applicant failed to demonstrated prejudice and the allegation must be denied and dismissed.

Therefore, this court finds Applicant failed to demonstrate either deficiency or prejudice for any of the claims of ineffective assistance of appellate counsel, and all of the claims are denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this 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.

This court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if Applicant wishes to seek appellate review, post-conviction relief 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:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this April day of 22, 2019.

WALTON J. MCLEOD, IV
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina