THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William McKinnon, Circuit Court Judge

Case No.: 2015-CP-32-02990

State of South Carolina,

Respondent,

v.

Gonzales Wardlaw,

Appellant.

# NOTICE OF APPEAL

Gonzales Wardlaw, #343782, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed June 17, 2019, and the Order Denying Rule 59(E) Motion filed April 23, 2020 issued by the Honorable William McKinnon, presiding Judge.

May 4, 2020

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| STATE OF SOUTH CAROLINA<br>COUNTY OF LEXINGTON | IN THE COURT OF COMMON PLEAS<br>FOR THE ELEVENTH JUDICIAL CIRCUIT |
| Gonzales Reese Wardlaw, #343782<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | C/A No. 2015-CP-32-02990<br><br>**ORDER OF DISMISSAL** |

This matter comes before the undersigned by way of a post-conviction relief (PCR) application filed by Gonzales Reese Wardlaw (Applicant) on August 25, 2015. This matter convened for an evidentiary hearing on April 3, 2019, at the Lexington County Judicial Center, at which Applicant and appointed PCR counsel Aimee Zmroczek, Esquire, were present. Assistant Attorneys General Caroline Scrantom and Samuel Bailey appeared on behalf of Respondent, the State of South Carolina (the State).

In addition to the pleadings in this action, this Court had before it at the hearing the records of the Lexington County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the complete transcript of Applicant's trial which is included in the record on appeal from Applicant's direct appeal, and Applicant's remaining direct appeal records. Applicant testified on his own behalf at the evidentiary hearing, as did his trial counsel Elizabeth Fullwood, Esquire (trial counsel). The State presented testimony from Deputy Solicitor D. Shawn Graham who prosecuted the case along with now-Solicitor S. R. Hubbard, III (the prosecution). After a full-day evidentiary hearing, the undersigned requested closing argument from the parties, which was heard the morning of April 4, 2019.

After carefully considering the testimony presented at the hearing, the arguments presented by the parties, and the records pertaining to this action, this Court finds the application for PCR should be denied and dismissed in its entirety.

## I. THE ALLEGATIONS BEFORE THIS COURT

By and through PCR counsel and pursuant to Rule 71.1, SCRCP, Applicant filed an amended application on August 2, 2018. The amended application contained the following allegations:

(a) Ineffective assistance of trial counsel for failing to object to improper and prejudicial judicial comments during opening remarks;

(b) Ineffective assistance of trial counsel for failing to request and review all discovery materials and request testing of certain items;

(c) Prosecutorial Misconduct for failing to present the complete evidence to defense counsel;

(d) Ineffective assistance of trial counsel for failing to investigate and present evidence of decedent's prior violence including intoxication of the decedent;

(e) Ineffective assistance of trial counsel for failing to request an expert in forensic psychology to evaluate and present evidence of the failure to tell story to police and explain the rap lyrics;

(f) Ineffective assistance of trial counsel for failing argue and preserve the search warrant suppression issues;

(g) Ineffective assistance of trial counsel for failing to subpoena and present witnesses to corroborate Defendant's testimony;

(h) Ineffective assistance of trial counsel for failing to obtain an expert to independently examine the cell phone evidence and challenge the certainty of State's cell phone forensic expert;

(i) Ineffective assistance of trial counsel in failing to investigate and present the testimony of scientific forensic evidence;

(j) Ineffective assistance of trial counsel for falling to request, examine, and present records to prepare for cross-examination and impeachment purposes;

(k) Ineffective assistance of trial counsel for failing object to presentation of unauthenticated social media evidence;

(l) Ineffective assistance of trial counsel for failing to object to and preserve issue for appeal regarding the impermissible testimony by expert and lay witnesses;

(m) Ineffective assistance of trial counsel for failing to impeach lay witnesses;

(n) Ineffective assistance of trial counsel for failing to request and preserve objections regarding jury charges; and;

(o) Ineffective assistance of appellate counsel for failing to raise and brief issues (a), (l), and (n) above on direct appeal.

The State made the return to that application on September 4, 2018, and later moved for a more definite statement on December 31, 2018. Discovery was authorized in this case pursuant to S.C. Code Ann. § 17-27-150 and a series of Orders initiated by Applicant and resolved with the State's consent.

At the outset of the evidentiary hearing, PCR counsel represented to the Court that she would chiefly present testimony in pursuit of the following summary of allegations:

i. Ineffective assistance of trial counsel for the failure to investigate and present testimony from witnesses to the shooting;

ii. Ineffective assistance of trial counsel for failing to impeach certain witnesses;

iii. Ineffective assistance of trial counsel for failing to present or challenge testimony in relation to the rap lyrics, telephone records, and a Facebook page introduced at trial by the prosecution;

iv. Ineffective assistance of trial counsel for failing to object to alleged improper comments by the trial court in its opening and deliberative instructions to the jury; and

v. Ineffective assistance of trial counsel for failing to object to the prosecution's closing argument.

Also at the outset of the evidentiary hearing, PCR counsel expressly withdrew allegations (e) and (o), *supra*, which were pled in the amended PCR application. Likewise, at the conclusion of the evidentiary hearing, PCR counsel expressly withdrew allegation (c), *supra*, and offered no closing argument on that or any related allegation of prosecutorial misconduct. Accordingly, this Court deems allegations (c), (e), and (o) from the amended PCR application abandoned. This

Court also finds all claims from any *pro se* application not duplicated in the amended application waived and abandoned. S.C. Code Ann. § 17-27-90.

## II. STANDARD OF REVIEW

An applicant may seek PCR upon the following types of allegations:

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

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive the assistance of counsel guaranteed them by the Sixth Amendment to the United States Constitution. "In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984) (seminal case developing the ineffective assistance of counsel standard)). In regards to the first prong, "[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms." *Strickland v. Washington*, 466

U.S. at 688, 104 S.Ct. at 2065. The second prong requires a showing that counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018), *reh'g denied* (Mar. 29, 2018) (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)).

At all times during any PCR proceeding, the applicant maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). A PCR applicant must produce facts or testimony in support of each individual allegation in order to establish that the claim meets the standard warranting relief. S.C. Code. Ann. § 17-27-50. Otherwise, dismissal is appropriate. *See Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005); *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998).

Moreover, the proceeding is coupled with "a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011).

Therefore, Applicant must demonstrate 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.'" *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 441(1985) (quoting *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064). A court need not first determine whether

counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

## III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

As to the remaining allegations, this Court finds that Applicant has failed to satisfy either requirement of the standard established in *Strickland v. Washington*, *supra*. This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses and evidence presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State's Return, this Court proceeds to the claims defined by PCR counsel at the evidentiary hearing and finds each without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

A. Procedural History

Applicant is incarcerated within the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment by the Lexington County Clerk of Court. He is serving a life sentence without the possibility of parole stemming from a June 2012 indictment for murder (2012-GS-32-01261). On February 10, 2014, Applicant proceeded to a jury trial before the Honorable Thomas A. Russo and was found guilty. A timely notice of appeal was filed on Applicant's behalf. Appellate Defender David Alexander, Esquire, perfected the appeal pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). The South Carolina Court of

Appeals dismissed the appeal. *State v. Wardlaw*, 2015-UP-296 (Ct. App. filed June 17, 2015). The Remittitur followed on July 6, 2015, and this action commenced thereafter.

B. Facts Presented at Trial

This Court presents the following summary of facts from Applicant's underlying jury trial as an overview of the evidence presented against him. This Court considered the evidence presented at trial in its determination that Applicant has failed to meet his burden of proving prejudice on any of his allegations addressed below. The evidence includes, but is not limited to, the following:

The underlying facts of this action concern the December 29, 2011 murder of Thomas Hoefer in the parking lot of the Olive Garden on Harbison Boulevard. The victim was shot shortly after receiving a series of phone calls and leaving his family at the restaurant to walk out to meet an unknown party. No one could identify the shooter, but a witness in the Olive Garden parking lot saw a dark-skinned, shorter male in jeans and a hoodie speaking to the victim immediately prior to hearing the gunshot. (R.[1] pp. 133-200).

The victim's cell phone, recovered from the parking lot, showed that the phone number who had been contacting the victim's phone immediately prior to the shooting was registered to Applicant's mother, Sharon Wardlaw. (R. pp. 201-26). Applicant's stepfather identified the phone number which had been contacting the victim as belonging to Applicant; he testified that Sharon Wardlaw bought that phone for Applicant. (R. p. 260). Cell tower triangulation testimony presented at trial placed the phone registered to Sharon Wardlaw in and around the Harbison Boulevard area at the time of the murder. (R. pp. 280-89).

[1] Citations to "R." pertain to those from the record on appeal, which includes a complete copy of Appellant's trial transcript, and which was incorporated into this action through Respondent's amended return(s).

Applicant was arrested and it was discovered he been staying at the apartment of a female friend named Ce-Kia Bolton. Bolton consented to a search of her apartment, where law enforcement recovered rap lyrics, later identified to be handwritten by Applicant. (R. pp. 228-50). The lyrics read in part:

> SC Metro; right above Atlanta ho . . . hitting 'em in his chest and leave'em coughing up that yellow shit. . . . No face then no case. News 10 no evidence. Caught 'em at the Olive Garden munching on a breadstick. . . . live my life to da fullest . . . I'm going out with a bang, dis is so spontaneous. . . . he bound to die . . . Hustling is the prefix, killing is the suffix. . . . you bout to die if you cause disruptions . . . I'm going for da kill.

(R. pp. 251-52).

Applicant's stepfather testified that late on the night the victim was murdered, Applicant called and asked to be picked up at the Waffle House on Greystone Boulevard and taken to meet a young woman at the Red Roof Inn. During this interaction, Applicant told his stepfather that he got himself in some trouble; that he thought he shot somebody; that he went to buy marijuana from the victim and did not like what he got; that he pulled the gun out and the victim reached for it and it went off; and that he threw the gun in the river. He testified that the next day, he saw the shooting on the news and called Applicant, who responded to his stepfather's questions that he "already" knew Applicant had been at the Olive Garden the night before and that "he knew" the victim had died because "he saw it" on TV too. (R. pp. 257-72).

Applicant testified at trial as well. He stated he knew the victim from school and had purchased marijuana from him before. He testified he did not have a weapon, and that the victim pulled a gun on him when Applicant challenged the victim about the purchase. (R. pp. 307-59). Applicant testified he "just dropped the weed and [he] reached for the gun to try to wrestle it away from him." (R. p. 314). He testified they were "wrestling over the gun. [They were] tussling over the weapon. And, you know, everything just happened so fast. The gun just went



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off." (R. p. 314). He testified the victim ran after the gun went off, and Applicant put the gun in his pocket and picked up the weed and "the box of bullets that fell out of [the victim's] pocket" and ran. (R. p. 315). He testified he threw the gun in the Broad River. (R. p. 317). He testified that he did write the rap lyrics found in Bolton's apartment. (R. pp. 320-21).

The jury was instructed that they could convict Applicant of murder, convict of the lesser offense of involuntary manslaughter, or acquit him upon a finding of either self-defense or accident. (R. pp. 396-403).

C. Testimony Presented at the Evidentiary Hearing

Applicant testified before this Court that he met with trial counsel to discuss the case against him several times. Applicant expressed confidence in trial counsel's assessment that his version of events supported a case for self-defense which would be presented at trial. He testified that he was friends, or at least acquaintances, with the victim because he had previously bought marijuana from him. He stated he told trial counsel what he knew about the victim, including a belief that the victim was violent, had run from police in the past, and had gun charges pending against him at some time. Applicant further testified he was not aware of what voluntary manslaughter was that time of trial.

Applicant also affirmed his testimony from trial: that he met the victim at the Olive Garden at Harbison Boulevard to buy marijuana from him; that when he questioned the quality of the drugs he became scared for his life; that he and the victim wrestled over the gun which went off; and that he took a box of bullets and the gun with him from the shooting and then threw the gun in the river. Applicant testified that he remembered there being other people in the parking lot but did not recall anyone who could have watched the deal, which occurred at night and around the corner from any immediate foot traffic at the Olive Garden. Applicant further

testified that he did not really recall his surroundings because things happened quickly and in a blur. Applicant testified that he did call Lindsey Glover after the shooting that night and told him what happened, that he did see the incident reported on the local news later that night, and that he did tell Glover he was in trouble. Applicant admitted that he wrote the rap lyrics introduced against him at trial and recalled what those lyrics were. Applicant lastly testified that the Facebook page presented during his trial testimony was from his own account.

Trial counsel testified for a substantial amount of time and addressed a number of specific evidentiary items which will be addressed more thoroughly by this Court in relation to the associated ineffective assistance of counsel allegations. More generally, trial counsel established an extensive professional history as a public defender in the Eleventh Circuit that includes experience trying numerous murder cases. Trial counsel established that she represented Petitioner from January 2012 to February 2014 when his case went to trial. During her representation she received the evidence against Applicant in an ordinary manner and met with Applicant many times to review, discuss, and provide him with copies of the discovery produced by the prosecution. Trial counsel's testimony overwhelmingly demonstrated a familiarity with the totality of the evidence produced by the State prior to trial. Trial counsel established that Applicant had been offered a plea to the lesser charge of voluntary manslaughter, and that she advised him of all of the ramifications of that option, but that Applicant wished to proceed to trial with a self-defense claim due to the sentencing range voluntary manslaughter carried. Trial counsel further assessed that Applicant had a valid case for self-defense in addition to involuntary manslaughter and accident, each of which were charged to the jury, and that she advised Applicant on the elements of each of these potential outcomes. Trial counsel also assessed that the evidence as reported to her did not support the heat of passion necessary for a

voluntary manslaughter instruction, and that no witness could testify as to the aggressor in the situation.

Deputy Solicitor Graham's testimony on behalf of the prosecution established that there were no promising leads on any other potential witness from the Olive Garden parking lot. From the prosecution's investigation, no other on-scene witness could identify Applicant or what happened to cause the shooting. The prosecution testified that there was no evidence of a struggle between the affected parties—there were no defensive wounds and the bullet trajectory did not match that of a struggle between parties of the vast height differential involved in this case. The lead they followed to Applicant began with the victim's cell phone. The victim placed his last call to Applicant, and the victim's girlfriend could corroborate that the victim got out of her car to go meet someone with whom he had just gotten off of the phone. Then Lindsey Glover, Applicant's step-father, provided them with information regarding Applicant's confiding in him that he was in trouble, and why, hours after the shooting occurred.

The prosecution also identified the rap lyrics discovered through a search of a third party's apartment and pointed out the lyrics' express relation to the victim's death. The lyrics specifically referenced the shooting insofar as the lyrics stated, "hit 'em in his chest and leave 'em coughing up that yellow s---," and "Caught 'em at da Olive Garden munching on a breadstick." The lyrics stated, "Last thing I'm worried about is running out of ammo. Hollow tips flip, hit ya . . . ," a reference to the numerous hollow point bullets collected from the scene trailing away from the location of the shooting. The rap said, "No face then no case. News 10 no evidence," a reference to the fact that nobody was on scene to identify Applicant and that he saw the shooting reported on the local news later that night. In addition to a number of references to killing, the lyrics also identified "Grandma house the spot on Pelican" and "dipped in tree gear

came down like Rambo," which the prosecution explained were references to the area where Applicant's grandmother lived and Applicant stayed.

D. The Formal PCR Allegations

This Court reiterates its finding that claims (c), (e), and (o) from the amended application and that all claims from the *pro se* petition(s) not duplicated in the amended application are deemed waived and abandoned as they were either expressly withdrawn or were not addressed at the evidentiary hearing. S.C. Code Ann. § 17-27-90. This Court further notes that PCR counsel made no motion to amend its pleading to conform with the testimony and evidence presented, nor did the testimony presented establish a basis for additional allegations neither raised in the amended application nor summarized by PCR counsel during the course of the evidentiary hearing.

As a matter of general impression, this Court finds credible and persuasive the testimonies of trial counsel and the prosecution, as each of these witnesses presented well-recollected testimony of relevant events leading up to and during Applicant's jury trial. Conversely, this Court finds Applicant's testimony not credible in regards to any ineffective assistance of counsel allegation. Applicant's testimony established that he met with trial counsel to discuss the prosecution's case and potential defenses several times prior to trial. Applicant otherwise provided self-serving testimony which largely corroborated his testimony from trial in support of his self-defense claim and reached to the character of the victim which this Court finds is not probative to the outcome of this action.

i. The Evidentiary Allegations—Counsel's Failure to Investigate, to Present Certain Testimony, and to Challenge Other Evidence Through Impeachment or Objection[2]

[2] Claims (b), (d), (f), (g), (h), (i), (j) (k), (l), and (m) from the amended application, treated as presented by PCR counsel throughout the evidentiary hearing.

Applicant makes a series of claims alleging trial counsel failed to adequately investigate on-scene witnesses and various items of forensic evidence collected as part of the murder investigation. Counsel's claims extend to alleged failure to challenge certain evidentiary items presented at trial through objection or impeachment. At the evidentiary hearing, PCR counsel spent a great deal of time eliciting testimony from trial counsel about individual evidentiary items. This Court finds credible and persuasive trial counsel's demonstrated recollection of each evidentiary item – regardless of whether it was admitted at trial or was merely produced as discovery. Trial counsel additionally clearly articulated a reason as to why each piece of evidence was or was not relevant to her preparation of her client's defense. Trial counsel also testified as to a specific reason for treating certain evidence admitted at trial in the manner reflected in the record, and for not expounding upon certain angles presented to her through PCR counsel's questioning. Her testimony established a clear strategy regarding whether a certain item of evidence required additional investigation, or whether additional investigation, to include forensic testing, was detrimental or even relevant to the fortification of her client's defense.

This Court accordingly finds applicable the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment in her representation of Applicant at all stages of Applicant's trial. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland, supra*). "[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis in original). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they

were made. *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. Any post-conviction relief court must be wary of second-guessing trial counsel's tactics. *Whitehead v. State,* 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State,* 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State,* 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

This Court also notes the reasonableness standard attaching to its analysis of trial counsel's pre-trial investigation and preparations. "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State,* 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Edwards v. State,* 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington,* 466 U.S. at 691, 104 S. Ct. at 2066. "When counsel makes such a reasonable decision, he will have fulfilled the duty he owes to his client." *Edwards v. State* at 457, 710 S.E.2d at 64-65; *Ard v. Catoe,* 372 S.C. at 331, 642 S.E.2d at 597 ("this duty is limited to a reasonable investigation").

As to the defenses presented, trial counsel testified that Applicant expressed to her that he did not want to pursue voluntary manslaughter because he did not want to face the sentence carried by that lesser offense. (*See also* R. p. 362). Trial counsel also testified Applicant's version of the facts provided a viable claim for the affirmative defenses of self-defense and

accident, and for involuntary manslaughter as a lesser included. The jury was presented with each of these options during deliberations. (R. p. 363). And Applicant's PCR and trial testimonies agree with trial counsel's assessment, as Applicant testified that he acted in fear when the drug deal turned sour, there was some type of tussle over the gun, and the victim was shot. (*See* R. p. 307-19).

Further, as trial counsel testified at PCR, no witness could identify the aggressor. In order to garner an instruction on voluntary manslaughter, "[b]oth heat of passion and sufficient legal provocation must be present at the time of the killing." *State v. Byrd*, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996). Crucially, Applicant's version of what occurred did not support the sudden heat of passion necessary to obtain a jury instruction on voluntary manslaughter. (R. pp. 307-19). The facts further presented at the PCR hearing simply did not support that charge even if Applicant had wanted it. Instead, Applicant expressed to his trial counsel that he acted in fear and trial counsel accordingly prepared an appropriate presentation for trial. *See McCoy v. Louisiana*, 138 S.Ct. 1500 (2018) (declaring it structural error for counsel to override client's desire to contest guilt during first phase of capital trial). This Court finds trial counsel's assessment of potential defenses was not deficient performance, but instead constituted a sound strategic decision tied to the facts presented to her during her course of representation.

In regards to the alleged failure to investigate additional on-scene witnesses, testimony from the PCR hearing established that three witnesses identified by law enforcement at the Olive Garden parking lot were not called to testify by either party at trial. Testimony from trial counsel and the prosecution demonstrated that these three witnesses could not identify anything other than a vague reference to a tussle. Their written statements showed they could not identify either person involved, let alone the instigator. Though the prosecution listed these three witnesses on

their witness list for trial, both trial counsel and the prosecution testified that their analyses of these on-scene witnesses concluded that they added nothing probative to the case. Both parties agreed that some type of tussle occurred immediately preceding the shooting. In any event, trial counsel testified she requested unredacted discovery from the prosecution in order to "track down" these witnesses.

This Court finds it reasonable that trial counsel did not further investigate or present these witnesses in Applicant's defense given the fact that neither party disputed that the shooting resulted from some type of tussle, which is the extent of what these people identified that they witnessed. Trial counsel further established that Applicant did not assist in his defense in regards to this claim. As trial counsel testified at PCR, Applicant did not provide any leads on witnesses other than his stepfather Lindsay Glover, who testified against him. Given the foregoing, Applicant's claim regarding on-scene witnesses is speculative at best and Applicant is not entitled to relief from counsel's failure to further investigate or call these on-scene witnesses to testify. *See Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial); *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden); *see also Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992).

Applicant also complains of trial counsel's treatment of the rap lyrics introduced at trial. However, the record demonstrates that trial counsel lodged good faith challenges to the lyrics' authenticity, to calling them "rap lyrics," and to the parsing of the lyrics by any witness (R. pp.

69-71, 252-54; *see* R. pp. 245-46). As noted by PCR counsel, trial counsel did not object to the admissibility of the rap lyrics under Rule 403, SCRE or as improper character evidence. But trial counsel recognized the significance of the lyrics, which she referred to at the PCR hearing as reading almost like a confession. (*See* R. pp. 251-52). Trial counsel testified she researched this issue pre-trial and ultimately assessed she had no viable objection which could lead to the complete omission of the lyrics. And as established through the prosecution's PCR testimony and alluded to by trial counsel's as well, the number and type of references to the murder within the lyrics made them relevant, highly probative, and admissible under our prevailing case law. *Contra State v. Cheeseboro*, 346 S.C. 526, 550, 552 S.E.2d 300, 313 (2001) (finding rap lyrics inadmissible where they were minimally probative due to two references "too vague in context" to the crime). "Lyrics posted or authored by a defendant can be relevant if they match details of the alleged crime. That is so because the fact that a defendant posted lyrics about engaging in certain conduct makes it more probable that the defendant in fact engaged in that conduct." *United States v. Recio*, 884 F.3d 230, 235 (4th Cir. 2018) (citing, *e.g.*, *United States v. Belfast*, 611 F.3d 783, 820 (11th Cir. 2010) (rap lyrics referring to Liberian paramilitary group were relevant to show the defendant's "association with and continued identification as a member" of that group); *Holmes v. State*, 129 Nev. 567, 306 P.3d 415, 418-20 (2013) (rap lyrics describing "jacking" a necklace in a parking lot while wearing a ski mask were relevant to show that the defendant stole a necklace in a parking lot while wearing a ski mask)).

This court further notes that trial counsel established there was no basis to suppress the lyrics under the Fourth Amendment, as she testified at the PCR hearing that the lyrics were obtained via a third party's valid consent to search a premises in which Applicant enjoyed no privacy interest. (*See* R. pp. 232-33); *State v. Flowers*, 360 S.C. 1, 6, 598 S.E.2d 725, 728 (Ct.

App. 2004) (homeowner may grant consent to search *even* if guest has legitimate expectation of privacy there). And, as a means of combating or otherwise minimizing the effect of the lyrics, trial counsel questioned Applicant at trial about his ownership of the lyrics. Applicant testified that he wrote the lyrics to process what occurred because it happened so fast. He testified he should have expressed himself in a better way. (R. pp. 320-21). Later Applicant testified that his lyrics were not representative of "everything that's true." (R. pp. 347-49).

This Court finds trial counsel exercised well-researched and reasonable trial strategy in choosing to minimize, to the extent possible, the effect of the lyrics both through her own client's testimony and by lodging objections to the manner in which they would be incorporated in the record. This Court further finds that trial counsel properly assessed that the lyrics' admissibility, and did so only after conducting the proper research.

Similar to Applicant's ineffective assistance claim about the rap lyrics, Applicant criticized trial counsel's lack of objection to the authentication of Applicant's Facebook page. The prosecution showed a print-out of Applicant's Facebook page to a friend of his who testified, and the prosecution did so for identification only. That witness identified Applicant on the printout. (R. p. 247). That social media printout was later self-authenticated by Applicant during his cross-examination by the prosecution, but again it was offered only for identification and not as evidence. (R. p. 345; *see* R. p. 5). Also at that time, Applicant established that the Facebook posts introduced by the State were made near in time to the shooting. (R. p. 346). Thus, even if counsel had objected, Applicant fails to establish either deficient performance or prejudice due to Applicant's self-authentication of the social media posts which were not introduced into evidence.

Applicant elsewhere alleges trial counsel failed to investigate or present additional testimony to discredit the forensic evidence presented at trial and lend credence to Applicant's self-defense claim. This Court initially notes that Applicant presented no expert or other testimony in support of these allegations, and that any claim regarding trial counsel's failure to present expert testimony therefore fails. *Bannister v. State*, 333 S.C. at 303, 509 S.E.2d at 809 (a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial); *Glover v. State*, 318 S.C. at 498-99, 458 S.E.2d at 540 (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden); *see also Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992).

Second in regard to the forensic evidence allegations, this Court finds credible and persuasive trial counsel's testimony that even if she had requested additional forensic testing of the samples collected from the scene (such as gunshot residue swabs and fingernail scrapings collected from the victim), that the possible results of that testing did not alter her opinion on their relevance to or assistance with Applicant's self-defense claim. This Court finds counsel articulated a reasonable strategic decision to forego additional forensic testing or expert testimony as evidenced by her thorough testimony at the evidentiary hearing. At the core of this finding is the parties' agreement at trial that a dispute occurred during a drug deal that led to the shooting. No other parties were present and Applicant admitted his presence and participation. At best, additional forensic testing could only offer corroborative evidence. At worst, as testified to by trial counsel, additional forensic testing—such as a report showing no gunshot residue on

the victim—could only more closely associate Applicant as the instigator and diametrically oppose Applicant's self-defense claim.

At the evidentiary hearing, PCR counsel drew out numerous references to the unfired hollow point bullets collected from the scene which were also referenced in the rap lyrics and other statements produced to trial counsel during discovery. (*See* R. pp. 174-75). Trial counsel testified that she was familiar with that evidence, but chose to steer away from emphasizing any bullets connected to the shooting. Trial counsel wished to disassociate her client with the gun. Counsel's strategy is objectively reasonable because her client testified that the victim brought the gun to the drug deal. (R. p. 313). Trial counsel reasonably chose to forego emphasis on the gun and bullets in order to downplay her client's culpability and, by association, lend credence to his self-defense claim.

Moreover, as to any related claim that trial counsel prejudicially failed to impeach or cross-examine the victim's girlfriend about her knowledge of the victim's drug dealing and/or ownership of guns and bullets, trial counsel testified that she deemed the victim's character a minor matter. Again, no one disputed that the victim was engaged in a drug deal. Further, trial counsel recalled that the victim's girlfriend provided emotional testimony on direct examination and was evasive during her cross-examination. As a result, trial counsel testified she made a decision not to "beat up" the victim's girlfriend in front of the jury; she was the mother of the victim's child. And while Applicant testified at PCR that he had reason to fear the victim was a violent person, trial counsel credibly testified that Applicant never told her about the victim's violent nature during the course of their representation, for which trial counsel kept comprehensive notes. Trial counsel was aware of the victim's prior convictions, but she further assessed at PCR that the introduction of the victim's purported bad character was dicey: it may



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not have been admissible and she may not see it wise to tarnish or otherwise blame the victim in front of the jury.

Moving on to the PCR testimony concerning trial counsel's alleged deficient cross-examination of the forensic pathologist, trial counsel's PCR testimony established a sincere familiarity with the forensic pathologist who conducted Applicant's autopsy. Trial counsel testified she knew that if you tried to pin down this pathologist on a precise bullet trajectory, that this pathologist would respond by stating there were too many variables for her to make that decision. (*See* R. pp. 199-200). In short, trial counsel demonstrated local knowledge that she could not impeach this witness on the issue of trajectories, nor could she render an additional opinion or get additional testimony from this witness that was probative of her client's self-defense claim. Moreover, Applicant failed himself at PCR to discredit the pathologist's trial testimony through the testimony of any other witness. *See Bannister*, *supra.* Also, trial counsel credibly testified at PCR that in her assessment, the bullet trajectory neither assisted the defense nor provided otherwise missing evidence that Applicant acted in the heat of passion upon sufficient provocation. Thus, the trajectory was not probative to the defense. At most, the bullet trajectory could corroborate a tussle between the two, which was undisputed.

Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry upon its opportunity to examine a witness; "the proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases." *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (addressing claim of deficient performance during cross-examination and affirming grant of PCR); *see Willis v. United States*, 87 F.3d 1004, 1006 (8th Cir. 1996) ("In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional



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effectiveness, few would be the counsel whose performance would pass muster."). This Court finds trial counsel's collective strategy concerning treatment of the victim, the victim's girlfriend, and the bullets objectively reasonable, especially given Applicant's failure to inform trial counsel about the victim's alleged violent reputation. This Court further finds trial counsel's choice to omit certain challenges to the forensic pathologist's testimony objectively reasonable based upon trial counsel's demonstrated history as a well-versed and long-time advocate within the Eleventh Circuit Public Defender's Office.

As to the allegations concerning the failure to object to lay witness testimony about the victim's cell phone and Applicant's cell site location data, this Court finds unpersuasive Applicant's argument that the evidence was prejudicially received without objection. This Court further finds unpersuasive the allegation that trial counsel prejudicially failed to hire or consult with a cell phone or digital forensics expert to review the contents of the victim's phone. Testimony at the PCR hearing established that the victim's phone was a flip-phone rather than a "smart phone," the latter of which contains more sophisticated data. Trial counsel testified that now, five or so years later, technology is more sophisticated and that cell phone contents are now more carefully and expertly incorporated into evidence in courtrooms. The undersigned agrees. The burner-type phone at issue in this case led trial counsel no reason to believe that law enforcement's full cell phone "dump" was altered or incomplete in a manner requiring an independent investigation or other expert testimony. Trial counsel further identified during the PCR hearing that she had been provided and did review the complete contents of the victim's cell phone provided to her during discovery.

More crucially, the lay testimony at trial outlining the calls between victim and client and later outlining the cell tower information for Applicant during the time in question could not

prejudice Applicant's case in any way. Mapping Applicant's location near the Harbison Boulevard Olive Garden, and representing that he and the victim made phone contact prior to the shooting did not affect Applicant's self-defense claim. Applicant admitted he was present for the purpose of meeting the victim to buy marijuana. The fact that phone calls were placed also fails to provide evidence in furtherance of any other potential defense, including any viable claim that Applicant may have acted in the head of passion without time for reflection. In short, trial counsel aptly demonstrated that she investigated, analyzed, and considered the cell phone evidence and reasonably decided that it did not aid Applicant's self-defense claim.

Applicant alleges ineffective assistance of counsel for the failure to utilize the victim's toxicology report. This report showed positive results for marijuana. However, trial counsel unequivocally testified that she was aware of these results and saw no probative value in them because there was no question that the victim used marijuana and that the shooting occurred after Applicant contested the marijuana the victim sold him. As trial counsel assessed, the use of marijuana is not associated with aggressive behavior, nor known by the general public to incite violence. As a result, trial counsel testified that she chose not to call the victim's toxicology report to the attention of the jury because she did not want to give the jury a reason to find that the victim was stoned and taken advantage of by her client. The undersigned finds this strategy objectively reasonable, and further finds that the interjection of the victim's marijuana use would not have assisted in Applicant's self-defense claim or in establishing facts in support of any other lesser charge, including voluntary manslaughter, as the results themselves do not promote insight into who the aggressor was that led to the shooting.

Finally, some testimony was elicited regarding trial counsel's failure to request and/or introduce the 911 calls placed to report the shooting. The trial record demonstrates that those

who rendered aid to the victim, including his girlfriend, testified at trial that they called 911. (R. p. 136, 152). Applicant has shown no deficient performance or prejudice from the failure to introduce these calls at trial. These witnesses testified at trial. It is reasonable to infer that there was nothing more to add from the 911 calls themselves. Also, given that the victim's girlfriend both testified at trial that she was "screaming in the phone" at 911, and given that trial counsel testified at PCR that the girlfriend gave emotional testimony during trial, it is reasonable to infer that publishing that emotional 911 call to the jury would not aid Applicant's defense.

"[T]he proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases." *Rutland v. State*, 415 S.C. at 577, 785 S.E.2d at 353; *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). As to each of these allegations, because trial counsel exemplified exercise of reasonable trial strategy, Applicant has failed to demonstrate that he was burdened by deficient performance in any way. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Applicant also cannot prove on this record "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. at 117-18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). With Applicant failing to meet the two-prong burden established in *Strickland v. Washington, supra*, there exists no basis in the record for a grant of post-conviction relief, and the allegations pertaining to trial counsel's treatment of various evidentiary items are **DENIED**.

ii. The Jury Instruction Allegations—Counsel's Failure to Object[3]

Applicant alleges that trial counsel did not object to a brief series of jury instructions, prejudicing Applicant by not preserving for appellate review whether the jury instructions were inappropriate. This Court finds these allegations without merit.

First, Applicant claims trial counsel should have objected to opening remarks by the trial court which Applicant characterizes as inappropriately emphasizing the truth-seeking function of the jury. Applicant claims the error is controlled by *State v. Daniels*, a case issued prior to Applicant's trial in which the same trial court judge was admonished, but not reversed, by our Supreme Court for including in his jury charge "that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties." 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (also finding issue unpreserved for appellate review). Since that time, our appellate courts have gone on to decide the propriety of that exact instruction.

On this precise issue, our State Supreme Court had cautioned by the time of Applicant's trial that "[j]ury instructions **on reasonable doubt** which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to the defendant.'" *State v. Aleksey*, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (emphasis added). However, the *Aleksey* court went on to hold that because the "truth-seeking" instruction in that case was "given in the context of the jury's role in determining the credibility of witnesses" there was "not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt." *Id.* at 28-29, 538 S.E.2d at 252. That court cautioned the circuit courts to abandon the truth-seeking language in future charges, but held that the instruction as a whole in that case was a correct statement of law and

[3] Claims (a) and (n) from the amended application.

found no basis for reversal on that ground. *Id.* A more recent opinion, *State v. Beaty*, revisited the *Aleksey* decision and held that a preliminary instruction using the phrases "search for the truth," "true facts," and "just verdict" were delivered in error but caused no prejudice warranting reversal where the instruction appeared in the preliminary remarks to the jury and, again, did not speak to the State's burden of proof. 423 S.C. 26, 33, 813 S.E.2d 502, 506 (2018). The *Beaty* court held "the disputed comments can be distinguished from *Aleksey* because they were a mere statement to the jury and not a charge on the law. Further, the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in *Aleksey*." *Id.* at 34, 813 S.E.2d at 506.

Therefore, to the extent that trial counsel did not object to the trial court's opening remark that a trial is "a search for the truth in making sure that justice is done between the parties . . ." and "to reach a fair and just verdict," (R. p. 120-21; *see also* R. p. 125 ("true facts" in context of discerning witness credibility)), no prejudice results as a matter of law because the challenged instruction derives from the trial court's explanation of the roles of the parties within the courtroom and does not in any way pertain to or touch upon the burden of proof. (*Compare* R. p. 119-21 *and* R. p. 122-24). The limited nature of this phrase imparted no duty upon counsel to object in light of the *Aleksey* decision, which existed at the time of trial, and the failure to object to this limited phrase did not render counsel's performance deficient. Furthermore, pursuant to both *Aleksey* and *Beaty*, the instructions cited by Applicant did not warrant an objection. *Aleksey* at 28-29, 538 S.E.2d at 252; *Beaty* at 33-34, 813 S.E.2d at 506. Even had counsel objected and preserved the issue for appellate review, there is no reasonable likelihood of success at that stage given the previous finding of the South Carolina Supreme Court in regards to nearly identical instructions. *See State v. Smith*, 315 S.C. 547, 446 S.E.2d 411 (1994) (jury instructions should be

considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error).

Second, Applicant complains of trial counsel's failure to request the jury instruction on circumstantial evidence promoted in *State v. Logan*, 405 S.C. 83, 95-96, 747 S.E.2d 444, 450-51 (2013). Trial counsel testified at PCR that she did not identify anything erroneous about the jury instructions given by the court. Trial counsels' assessment is not incorrect. The court charged the jury on circumstantial evidence with the language from *Grippon v. State* rather than *Logan*. *Compare* R. p. 394 *and State v. Grippon* 327 S.C. 79, 83-84, 489 S.E.2d 462, 464 (1997). *Logan*, however, expressly sanctions continued use of the *Grippon* charge. *Logan* at 100, 747 S.E.2d at 452-53 ("Thus, we modify *Grippon* and *Cherry* to allow the additional language provided above if requested by a defendant."). Moreover, based upon the facts presented at trial and the court's guidance within the *Logan* opinion, this Court can identify no benefit to the *Logan* circumstantial evidence instruction had it been requested and used in lieu of the *Grippon* circumstantial evidence charge. *See id.* at 97, 747 S.E.2d at 451 ("the pertinent inquiry is the proper means for evaluating circumstantial evidence and how the trial court may best instruct a jury as to its analytical responsibility. While direct and circumstantial evidence carry the same value, a jury cannot accurately analyze these two types of evidence using identical approaches."). The jury in this case was instructed that "circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. . . . Circumstantial evidence is based on inference and not on personal knowledge or observation." And that it requires no greater degree of certainty than direct evidence. (R. p. 394). This Court finds that the jury was properly instructed on the means of analysis appropriate for the circumstantial evidence presented in this case, and that no deficient performance or prejudice flows from counsel's alleged omission.

This Court finds that the jury instructions Applicant cited do not form the basis for a grant of post-conviction relief as a matter of law. Any failure to object caused no prejudice as a complete review of the jury instructions issued in Applicant's case comport with those allowed, or at least deemed not prejudicial, under South Carolina case law. Applicant's ineffective assistance of trial counsel allegations regarding the failure to object to the trial court's jury instructions are **DENIED** as he has failed to meet his burden of proving *Strickland* error and prejudice.

iii. The Closing Argument Allegations—Counsel's Failure to Object

To the extent PCR counsel's arguments concerning the failure to object touched upon the failure to object to the prosecution's closing argument, this Court finds no error or prejudice within trial counsel's representation of Applicant during the prosecution's closing.

Regarding the alleged failure to object, there remains in this action the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment in his representation of Applicant at all stages of Applicant's trial. *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 596 (citing *Strickland, supra*). Because Applicant must establish prejudice from counsel's failure to object in order to garner relief, the underlying question before this Court is "whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998). "Solicitors are bound to rules of fairness in their closing arguments." *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). "[I]ts content should stay with the record and reasonable inferences to it." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The solicitor's closing argument must, of course, be based upon this principle. The argument therefore must be carefully tailored so as not to appeal

to the personal bias of the juror nor be calculated to arouse his passion or prejudice." *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). However, any excerpt of the State's closing exists as "one moment in an extended trial." *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974). Accordingly, a court must conduct an "examination of the entire proceedings" in context. *Donnelly* at 643, 94 S.Ct. at 1871; *Northcutt, supra* ("We must review the [closing] argument in the context of the entire record."); *State v. Bell*, 302 S.C. 18, 35, 393 S.E.2d 364, 374 (1990).

The undersigned finds the portions of the prosecution's closing argument referred to by PCR counsel at the evidentiary hearing are neither inflammatory nor improper. Rather, they directly pertain to evidence properly received at trial through Applicant's testimony. (*See* R. pp. 375-88). Applicant cited the prosecution's argument regarding Applicant's Facebook page, which contained "hate-filled language of murking [killing] season . . . ." (R. p. 386). However, this argument adhered to the record laid during the prosecution's cross-examination of Applicant, (R. p. 346), and permissibly argued that these facts supported a finding of malice. *Humphries v. State, supra.* This Court further notes that trial counsel was not a passive member of the courtroom during the prosecution's closing. She did object when a good faith objection arose. (R. p. 384).

Applicant's ineffective assistance of trial counsel allegation regarding the failure to object to the prosecution's closing argument is **DENIED** as he has failed to meet his burden of proving *Strickland* error and prejudice. The prosecution's closing argument did not leave room for a meritorious objection by trial counsel, and neither deficient performance nor prejudice results.

## IV. CONCLUSION AND NOTICE OF RIGHT TO APPEAL

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violation or deprivation 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent for completion of his sentence within the South Carolina Department of Corrections.

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

#2701

WILLIAM A. MCKINNON
Presiding Judge
Eleventh Judicial Circuit

York, South Carolina



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**FORM 4**

**STATE OF SOUTH CAROLINA**
**COUNTY OF LEXINGTON**
**IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE**
**CASE NUMBER 2015CP3202990**

| | | | |
|---|---|---|---|
| **Gonzales Wardlaw #343782** | | **State of South Carolina** | |

**PLAINTIFF(S)** **DEFENDANT(S)**

**Submitted by:** **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

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

**ORDER INFORMATION**

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

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

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

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
**Note: Title abstractors and researchers should refer to the official court order for judgment details.**
**E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.**

6/17/2019

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

**For Clerk of Court Office Use Only**

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on **17th of June 2019**, to attorneys of record or to parties (when appearing pro se) as follows:

**Aimee Jendrzejewski Zmroczek** PO Box 11961 Columbia, SC 29211

**Taylor Zane Smith** PO Box 11549 Columbia, SC 29211

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

**Court Reporter**

**Lisa M. Comer - Clerk of Court**

**Court Reporter:**

**E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.**

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

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

FILED
2020 APR 23 AM 10:04
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

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|---|---|
| **STATE OF SOUTH CAROLINA**<br>**COUNTY OF LEXINGTON** | **IN THE COURT OF COMMON PLEAS**<br>**ELEVENTH JUDICIAL CIRCUIT** |
| **Gonzales Reese Wardlaw**, #343782,<br>Applicant,<br><br>v.<br><br>**State of South Carolina,**<br><br>Respondent. | C/A No. 2015-CP-32-02990<br><br>**Order Denying**<br>**Petitioner's Motion to Alter or Amend**<br>(PCR Action) |

NOW COMES BEFORE THIS COURT Applicant's Rule 59(e) motion to alter or amend this Court's Order of Dismissal (Order) denying and dismissing the above-captioned post-conviction relief (PCR) application. The matter convened for an evidentiary hearing before the undersigned April 3-4, 2019, at the Lexington County Judicial Center. The undersigned considered the allegations raised in the amended application filed August 2, 2018 by Applicant's counsel Aimee Zmroczek, Esq, denying and dismissing each allegation with prejudice in an Order filed June 17, 2019. On June 21, 2019, Applicant filed a motion to reconsider seeking a blanket reconsideration of all allegations included in the amended PCR application. At the undersigned's request, Applicant submitted a more definite memorandum in support of its motion (Memo) on December 2, 2019, serving it upon Respondent the following day. Respondent submitted its memorandum in opposition to Applicant's motion on January 2, 2020.

After carefully considering the entire record of the April 3-4, 2019 PCR proceedings over which the undersigned presided, the motion and memorandum in support of Applicant's motion to alter or amend the order of dismissal, the State's response in opposition, as well as the records of the trial court proceedings, the undersigned **DENIES** Applicant's 59(e) motion.

**A. Applicant has failed to establish that the Court did not comply with S.C. Code Ann. § 17-27-80 and Rule 52(a), SCRCP, as its findings of fact and conclusions of law are supported by the record of the evidentiary hearing.**

The Court is required to "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented" at a PCR proceeding. S.C. Code Ann. § 17-27-80; Rule 52(a), SCRCP (in non-jury actions, "the court shall find the facts specially and state separately its conclusions of law thereon"); *see Fishburne v. State*, 427 S.C. 505, 512, 832 S.E.2d 584, 587 (2019), *reh'g denied* (Sept. 27, 2019) ("Over the years, we have issued numerous opinions addressing a PCR court's failure to make adequate findings of fact and conclusions of law regarding duly raised issues.") (collecting cases); *Reese v. State*, 425 S.C. 108, 111, 820 S.E.2d 376, 378 (2018) (holding the PCR court erred by signing an inadequate PCR order and by denying the applicant's Rule 59(e) motion); *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) ("In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the [State's proposed] order before adopting it."); *see also Pruitt v. State*, 310 S.C. 254, 255-56, 423 S.E.2d 127 (1992) (instruction counsel to be meticulous in preparing proposed orders). This Court denies Applicant's motion to alter or amend the judgment to adhere to the facts presented at the PCR hearing, as the undersigned's review of the evidentiary presentation in this matter leads it to conclude that the Order conforms to the evidence presented at the evidentiary hearing and that the factual account of the testimony occurring at the evidentiary hearing is also wholly supported by the record. *Compare* Order at 9-12 *and* PCR Tr. at 17-142. This Court also declines to find merit in Applicant's contention that the Order constitutes a legal error by virtue of its organization as its Order addresses the claims in the same manner categorized and presented by Applicant at the outset of the hearing. *E.g.*, Order at 3 *and* PCR Tr. at 14-16.

**B. Applicant is not entitled to a grant of post-conviction relief on any claim pursued at the hearing which relates to counsel's investigation and treatment of the evidence presented at trial.**

Applicant's memorandum largely serves to encourage this Court to find, on one or more specific grounds, that counsel was ineffective and Applicant was prejudiced by counsel's failure to pursue evidence which would support a finding of voluntary manslaughter or alternative verdict, including evidence that the victim had a propensity for violence. The undersigned finds Applicant's plea without merit. "[A] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066 (1984). To garner relief, a PCR applicant must also establish prejudice from the alleged act or omission. *Id.* "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State's case in light of all of the evidence presented to the jury." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018), *reh'g denied* (Mar. 29, 2018) (internal citations omitted). Applicant has failed to meet the two-prong test as to any claim in the amended application for the reasons previously cited by this Court. More specifically in regards to each of Applicant's separate pleas for alteration or amendment of the Order:

1. *Applicant did not meet the* Strickland *standard as to any general claim regarding the failure to pursue voluntary manslaughter*

Applicant has presented a general argument that counsel failed to present evidence which would demand a voluntary manslaughter instruction. Any such claim is discounted for the reasons apparent in the Order: trial counsel credibly testified Applicant did not wish to plead

guilty to voluntary manslaughter and he did not wish to pursue evidence in support of voluntary manslaughter at trial because he did not wish to face the time carried by the charge. As trial counsel testified before this Court: "You can only give advice. You can't make people take it." PCR Tr. at 85. A defendant has a Sixth Amendment right to assert an objective for his defense without an express override by his counsel. *McCoy v. Louisiana*, ___ U.S. ___, ___, 138 S.Ct. 1500, 1509 (2018) (declaring it structural error for counsel to override client's desire to contest guilt during first phase of capital trial) (citing ABA Model Rule of Professional Conduct 1.2(a) (2016) (a "lawyer shall abide by a client's decisions concerning the objectives of the representation")). Further, the facts supported self-defense rather than voluntary manslaughter. Order at 14-15; PCR Tr. at 38, 85-86, 105-07. Accordingly, Applicant cannot prevail in establishing deficient performance and prejudice as *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), requires.

*2. Ground G*

This Court's Order addresses Applicant's ineffective assistance claim regarding counsel's investigation of three on-scene witnesses from the Olive Garden parking lot who provided written statements to law enforcement, finding applicable the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment in her investigation and representation. Order at 13-16 (citing, *inter alia*, *Strickland v. Washington*, 466 U.S. at 689, 104 S.Ct. 2052; *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010); *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008); *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

The undersigned finds Applicant's arguments in support of its motion to alter or amend



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these findings unavailing. Applicant argues that the Court inaccurately found that trial counsel interviewed these witnesses, but that specific finding is not reflected in the Order. Applicant next conflates the State's trial presentation—that the elements of murder were satisfied—and the Deputy Solicitor's PCR testimony about the on-scene witnesses in an effort to establish that trial counsel was ineffective for presenting the on-scene witnesses to corroborate his claim for self-defense. In doing so, Applicant ignores trial counsel's assessment of the on-scene witness testimony. Though trial counsel also stated that it was "[n]ot so much" a strategy that she did not follow up with these witnesses, she reasoned that she did not follow-up with them because the State did not contest "that there was some sort of altercation that had occurred" immediately prior to the shooting. PCR Tr. at 41-42. The State agreed, with the Deputy Solicitor testifying at PCR that the on-scene witnesses "didn't really have a whole lot as far as who the aggressor was or really much about a struggle other than it was just some kind of – they were close together with hands on each other. May have been a shove." PCR Tr. at 125. The record reflects that trial counsel, the State, and the statements of the on-scene witnesses as relayed by trial counsel at the evidentiary hearing all account for some type of altercation immediately prior to the shooting. Yet, as trial counsel described, any evidence of a tussle contained within the on-scene witness statements was vague "[a]t best. And they didn't, none of them saw what happened at the crucial moment." PCR Tr. p. 108. This limited fact was not in dispute and, as expressed in the Order, counsel's analysis of these witness statements led both sides to conclude "that they added nothing probative to the case." Order at 16.

The undersigned declines to alter or amend its treatment of Ground G. Trial counsel reasonably assessed that she would not interview or call these witnesses to testify. Not only does the record reflect that counsel considered these statements in her preparation for trial, she



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adequately assessed that the statements could not further Applicant's claim of self-defense. These witnesses could not assist the jury in finding that Applicant, who met the victim outside the Olive Garden to buy drugs from him, "was without fault in bringing on the difficulty." *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (relaying elements of self-defense). They likewise were not probative in assisting Applicant in establishing that he "actually believed" or "actually was" in "imminent danger of losing his life or sustaining serious bodily injury." *Id.*

*3. Ground M*

Applicant challenges this Court's denial and dismissal of Ground M, wherein Applicant alleges that counsel did not subject the State's case to meaningful adversarial testing because she strategized against impeaching the victim's girlfriend with her recorded statement. Applicant asserts the recorded statement may have been utilized to bolster Applicant's case for self-defense by insinuating he had reason to be fearful when dealing with the victim. *See* PCR Tr. at 53-56. The undersigned considered this allegation in its Order, denying and dismissing the claim, specifically finding "trial counsel's collective strategy concerning treatment of the victim, the victim's girlfriend, and the bullets objectively reasonable, especially given Applicant's failure to inform trial counsel about the victim's alleged violent reputation." Order at 20-22.

The undersigned denies Applicant's request to alter or amend judgment. Applicant's reliance on *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984), is without merit. Applicant has not established any "actual breakdown of the adversarial process during the trial of this case." *Cronic*, 466 U.S. at 657-58, 104 S.Ct. at 2046. "Absent the[ ] narrow circumstances of presumed prejudice under *Cronic*, defendants must show actual prejudice under *Strickland*." *Nance v. Ozmint*, 367 S.C. 5457, 552, 626 S.E.2d 878, 880 (2006) (enumerating *Cronic's* three

rare applications) (citing *Strickland v. Washington, supra*). Applicant has elsewhere failed to meet the applicable *Strickland* standard for reasons enumerated in this Court's Order. Counsel found the victim's girlfriend "not very credible." Counsel further testified that she found any inconsistent statement by the victim "just sort of a minor matter and not really worth – and since she was emotional you would have been beating up on her sort of" if you continued to cross-examine her on the specifics of her recorded statement. PCR Tr. p. 56. Applicant has not shown that counsel's representation fell below an objective standard of reasonableness with regards to the victim's girlfriend. Quite plainly, tactical decisions made by trial counsel cannot be second-guessed on collateral attack. *Sexton v. French*, 163 F.3d 874, 887 (4th Cir. 1998); *Fitzgerald v. Thompson*, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial).

*4. Grounds D and J*

Applicant asks this Court to alter or amend its Order regarding its dismissal of allegations that counsel failed to present evidence of the victim's prior violence and intoxication, and that counsel was deficient in failing to request, examine, and present the victim's toxicology report to prepare for cross-examination and impeachment. The undersigned denied and dismissed Applicant's specific allegations, finding counsel credibly testified that Applicant never told her "that he knew that this was a scary violent guy," and that counsel otherwise strategized not to present the cited evidence because it was not probative and could not assist in identifying the initial aggressor. Order at 20-23; PCR Tr. at 68-69, 92-93, 109-113. In counsel's own words, "nobody was contesting that this guy wasn't a drug dealer and probably a drug user. Marijuana isn't the type of drug that's known for making people especially aggressive. . . . [Marijuana] just did not seem that significant[.]" PCR Tr. at 68. Counsel strategized against leaving "the jury with



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the impression that [the victim] was so stoned, you know, somebody [the defendant] gained advantage over him in a situation." PCR Tr. at 69. Counsel could not "think of a case where a client on marijuana went on a rampage" and the victim's toxicology results therefore did not support an alternative defense. The fact that the toxicology report showed marijuana in the victim's system "didn't make it more or less likely that the decedent was the primary aggressor." PCR Tr. at 112-13. Here, trial counsel again exercised reasonable trial strategy when she declined to harp upon the victim's toxicology report and Applicant has failed the first prong of the *Strickland* test. *Sexton v. French*, *supra*; *Fitzgerald v. Thompson*, *supra.*

And, as to the victim's character more directly, Applicant's testimony was never that he "came armed to a drug deal because [he] was scared of this guy, but [rather that] he pulled a weapon out on me and we struggled and the gun went off." PCR Tr. at 92-93. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland v. Washington*, 466 U.S. at 690, 104 S. Ct. at 2066. As testified to at PCR, the reason trial counsel never delved into the victim's prior record or character was because she was never told by her client that the victim generally caused him to be fearful, and further because she recognized that neither Applicant nor the State contested that the shooting occurred as a result of a drug deal. PCR Tr. p. 110. Given that her client has not explained that the victim was generally violent or scary, counsel reasonably assessed that the victim's known prior convictions for drugs were not probative of any alternative defense. Counsel had no reason to believe her client had previous knowledge that caused him to fear the victim. Thus, she could not have strategized with that information in mind, and her strategic decision-making regarding the victim's toxicology report and prior record are objectively reasonable.

In any event, Applicant cannot demonstrate prejudice as he cannot establish that the complained-of errors subject to grounds D and J demand a finding of a reasonable likelihood of an alternative outcome at trial. *Id.* at 691, 104 S.Ct. at 2066. Applicant's contention that the victim had a propensity for violence, or at least to carry a gun, does not obviate his own engagement of the victim in the drug deal that led to the shooting, nor does it obviate Applicant's self-proclaimed role in challenging the amount and/or quantity of the drugs received from the victim. PCR Tr. at 25-26. Again, Applicant has failed to establish that he was not at fault in bringing about the difficulty, which is a required element of self-defense. *See generally State v. Dickey, supra.* Nor has Applicant discounted the overall strength of the State's case, either in his presentation at the evidentiary hearing, or in his memorandum in support of his 59(e) motion.

*5. Ground F*

Applicant demands relief on the premise that trial counsel deficiently and prejudicially failed to argue to suppress the rap lyrics on the basis that they were "highly inflammatory" and improper character evidence. This Court concluded "trial counsel exercised well-researched and reasonable trial strategy in choosing to minimize, to the extent possible, the effect of the lyrics both through her own client's testimony and by lodging objections to the manner in which they would be incorporated in the record. This Court further f[ound] that trial counsel properly assessed that the lyrics' admissibility, and did so only after conducting the proper research." Order at 16-18; PCR Tr. at 43-45, 78-81, 108-09.

This Court declines to alter or amend its bases for dismissing this allegation. The lyrics in this case are probative in a manner far more direct than those of *Cheeseboro*, and that their probative value was not outweighed by the danger of unfair prejudice. Evidence of other crimes or bad acts, although generally inadmissible to prove the defendant's bad character, is admissible



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when it tends to establish motive, identity, a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE; *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). The probative value of such evidence must not be substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. Rap lyrics containing direct, enumerable reference to the facts of a particular case are highly probative. *See State v. Cheeseboro*, 346 S.C. 526, 550, 552 S.E.2d 300, 313 (2001). "Lyrics posted or authored by a defendant can be relevant if they match details of the alleged crime. That is so because the fact that a defendant posted lyrics about engaging in certain conduct makes it more probable that the defendant in fact engaged in that conduct." *United States v. Recio*, 884 F.3d 230, 235 (4th Cir. 2018). As recounted by the Deputy Solicitor at the PCR hearing, the lyrics in Applicant's case were highly probative as they made reference to many specifics in Petitioner's case. *See* PCR Tr. at 130-31. Both trial counsel and the State agreed that the lyrics "directly talked about things that had occurred during that homicide." PCR Tr. at 81. "It was direct evidence in this case." PCR Tr. at 141; *State v. Cheeseboro*, 346 S.C. at 550, 552 S.E.2d at 313 ("Unlike the letters to Virgil Howard which contain identifying details of the crimes committed, these lyrics contain only general references glorifying violence."). Counsel's reasoned, informed perception as testified to at PCR was that the lyrics constituted direct evidence of Applicant's involvement in the shooting. Applicant has not established deficient performance or prejudice from the failure to object to their admission pursuant to Rules 403 and 404(b), SCRE.

**C. Applicant is not entitled to a grant of post-conviction relief on any claim pursued at the hearing which is based upon trial counsel's representation in relation to the jury instructions issued by the trial court.**

Applicant seeks to preserve for appellate review un-enumerated allegations that counsel was ineffective and Applicant was prejudiced by counsel's failure to pursue a series of jury

instructions. Prior to the evidentiary hearing, Applicant represented that evidence would go forward on certain categories of allegations, stating in relevant part that the following would be pursued: "Failure to object to certain parts of the closing arguments and then more specifically failure to present, which I guess is the opposite of failure to object, but failure to present adequate and appropriate jury charges." PCR Tr. at 17. Now, Applicant argues that the "Court's order only addresses the failure to request the circumstantial evidence charge while ignoring the litany of challenges made to the jury instruction." Memo at 18. Applicant lodges no argument in favor of the "litany" of jury instructions, but rather only includes a series of instructions in the same form presented in a book of criminal charges. Memo at 21-26.[1] And no specific argument was made in relation to these jury instructions during Applicant's closing argument. Apr. 4, 2019 Tr. at 3-19.

With the exception of the enumerated grounds discussed below, this Court declines to alter or amend its judgment in regards to additional jury instruction claims and instead finds them procedurally defaulted. "An issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prod. Co.*, 381 S.C. at 177, 672 S.E.2d at 570. A PCR allegation may be treated as procedurally defaulted when (1) not included in the initial application, (2) not included in any amended application, (3) not cited by PCR counsel at the outset of the evidentiary hearing as a claim being presented, (4) not cited by PCR counsel as an additional allegation at the time the attorney elicited testimony on that point, and is (5) only mentioned by PCR counsel during closing argument and without any specificity as to the basis or explanation

[1] Specifically: "Intent . . . Prior Record of Defendant – Limited for Impeachment . . . Prior Record of Defendant – Limited for Lyle . . . Right to Act on Appearances . . . Words Accompanied by Hostile Acts . . . Prior Difficulties . . . Degree of Force . . ."



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for the claim. *Mangal v. State*, 421 S.C. 85, 92, 805 S.E.2d 568, 572 (2017). The *Mangal* court specifically concluded: "To the extent PCR counsel's brief statement constitutes a claim for ineffective assistance of counsel, we find a PCR judge would have difficulty recognizing it." *Id.* at 92-93, 805 S.E.2d at 572; *compare Love v. State*, 428 S.C. 231, 834 S.E.2d 196, 201-02 (2019) (finding error in PCR court's refusal to allow amendment of the PCR application with one additional record-based claim within 20 minutes of the start of the evidentiary hearing, and declining to remand three additional amendments the PCR court treated as procedurally defaulted). The undersigned finds these recent authorities compelling in regards to Applicant's "litany" of jury instructions allegation. The portion of the evidentiary hearing transcript Applicant cites in support of his claim is too vague and undeveloped to support any additional claim for relief, particularly given PCR counsel's closing argument, which only spoke to a triplet of specific jury instructions each then addressed by this Court in its Order. PCR Tr. at 85-93; Apr. 4, 2019 PCR Tr. at 18-19; Order at 25-28. Aside from that triplet, any additional claim rooted in counsel's failure to request certain jury instructions were not presented with sufficient particularity at any prior point in this proceeding and are procedurally defaulted.

In regards to each of Applicant's preserved allegations regarding counsel's alleged failure to request certain jury instructions, this Court declines to alter or amend its Order:

*I. Ground A*

This Court declines to alter or amend its findings as to the claim that counsel was ineffective for failing to object to the trial court's innocuous use of "just verdict," "true facts," and "search for the truth" in its opening remarks to the jury. (*See* R. p. 120-21; 125). Counsel's testimony on this issue is not persuasive as to its outcome in the manner Applicant presents. As stated in this Court's Order, the South Carolina Supreme Court had cautioned by the time of

Applicant's trial that "[j]ury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to the defendant.'" *State v. Aleksey*, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (emphasis added). But no "truth-seeking" instructions has since been held to have caused "a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt," particularly where, as in Applicant's case, the instruction does not speak about the burden of proof. *Id.* at 28-29, 538 S.E.2d at 252; *State v. Beaty*, 423 S.C. 26, 33-34, 813 S.E.2d 502, 506 (2018) (assessing *Aleksey* and holding that a preliminary instruction using the phrases "search for the truth," "true facts," and "just verdict" were delivered in error but caused no prejudice warranting reversal where the instruction appeared in the preliminary remarks to the jury and did not speak to the State's burden of proof). As a matter of law, prejudice cannot result when the challenged instruction derives from the trial court's explanation of the roles of the parties within the courtroom and does not in any way pertain to or touch upon the burden of proof. *Aleksey* at 28-29, 538 S.E.2d at 252; *Beaty* at 33-34, 813 S.E.2d at 506. Applicant cannot meet the *Strickland* standard on this allegation.

*2. Ground N: Voluntary Manslaughter Instruction*

Applicant more specifically contends trial counsel was ineffective for failing to request a jury instruction on voluntary manslaughter. Applicant argues that it was not sound legal strategy to refuse to request that charge because her client did not want it. But as previously stated, a defendant has a Sixth Amendment right to assert an objective for his defense without an express override by his counsel. *McCoy v. Louisiana*, ___ U.S. at ___, 138 S.Ct. at 1509 (declaring it structural error for counsel to override client's desire to contest guilt during first phase of capital trial) (citing ABA Model Rule of Professional Conduct 1.2(a) (2016) (a "lawyer shall abide by a



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client's decisions concerning the objectives of the representation")). Applicant "didn't want the jury to have that in a fall back position." PCR Tr. at 85. The Court undersigned acknowledged this testimony and its legal significance in its ruling. Order at 14-15.

Additionally, the record lacks evidentiary support for the heat of passion interpretation required to garner an instruction of voluntary manslaughter. Trial Tr. at 307-19; PCR Tr. at 25-29. "Both heat of passion and sufficient legal provocation must be present at the time of the killing" in order for voluntary manslaughter to apply. *State v. Byrd*, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996). As stated in this Court's Oder, "Applicant's version of what occurred did not support the sudden heat of passion necessary to obtain a jury instruction on voluntary manslaughter." Order at 14-15. Rather, as trial counsel acknowledged, the facts supported self-defense because Applicant became fearful when, as he testified, the victim injected the gun into the scenario. PCR Tr. at 105-07. Counsel's "assessment of potential defenses was not deficient performance, but instead constituted a sound strategic decision tied to the facts presented to her during her course of representation." Order at 15. The Court thus declines to alter or amend its Order regarding the failure to request a jury instruction on voluntary manslaughter.

*3. Ground N: Circumstantial Evidence Instruction*

This Court finds no basis upon which to alter or amend its prior findings that trial counsel's failure to request the circumstantial evidence charge iterated in *State v. Logan*, 405 S.C. 83, 95-96, 747 S.E.2d 444, 450-51 (2013), was neither erroneous nor prejudicial. Order at 27-28; *see* PCR Tr. at 88. Applicant's jury was instructed on circumstantial evidence in the manner prescribed by *State v. Grippon* 327 S.C. 79, 83-84, 489 S.E.2d 462, 464 (1997) and approved in *Logan*, 405 S.C. at 100, 747 S.E.2d at 452-53.

**D. Conclusion**

Based on all the foregoing, this Court hereby **DENIES** Applicant's motion brought pursuant to Rule 59(e), SCRCP. This Court again 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**AND IT IS SO ORDERED** this 8 day of April, 2020.

WILLIAM A. MCKINNON
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina