

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY

Court of Common Pleas

Honorable William H Seals, Jr., Circuit Judge

Case No.: 2017-CP-22-0556

Jamie L. Giles 324946.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Jamie L. Giles appeals the Honorable William H Seals, Jr's September 6, 2020 Order of Dismissal. Undersigned counsel received notice of entry of the order on October 7, 2020. A copy of the order on appeal is attached hereto.



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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FOR THE FIFTEENTH JUDICIAL CIRCUIT  
COUNTY OF GEORGETOWN )

Jamie L. Giles, ) Case No.: 2017-CP-22-00556  
S.C.D.C. No. 324946, )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

**ORDER OF DISMISSAL**

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This matter comes before the Court by way of an application for post-conviction relief filed by Jamie L. Giles (“Applicant”) on July 7, 2017. Respondent made its return on or about October 5, 2017. The Court convened an evidentiary hearing into the matter on March 25, 2019, at the Georgetown County Judicial Center in Georgetown, South Carolina. Applicant was present at the hearing and represented by James K. Falk, Esq. Johnny Ellis James Jr., Esq., of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s trial counsel, Ronald W. Hazzard, Esq. (“Trial Counsel”) also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, the records of the Georgetown County Clerk of Court regarding the subject convictions, Applicant’s direct appeal records (including the complete trial transcript as included in the Record on Appeal), and the pleadings. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Applicant was indicted at the

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February 2015 term of the Georgetown County Grand Jury for two counts of attempted murder (2015-GS-22-00169, -00170), one count of possession of a weapon during the commission of a violent crime (2015-GS-22-00171), and one count of discharging a firearm into an occupied conveyance (2015-GS-22-00172). Ronald W. Hazzard, Esq. represented Applicant, and Richard D. Todd, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On February 1, 2014, Applicant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. The jury found Applicant guilty on February 4, 2016, of the lesser-included offense of assault and battery, third degree (-00169); of the lesser-included offense of assault and battery of a high and aggravated nature (-00170); and as indicted for the other two charges. Judge Culbertson sentenced Applicant to imprisonment for concurrent terms of 30 days for assault and battery, third degree; 20 years for ABHAN; 5 years for possession of a weapon; and 10 years for discharging into an occupied vehicle.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Pachak, Esq. filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), which offered the following issue:

Whether the trial court erred in refusing to allow defense counsel to impeach/cross-examine the victim, Daniae Kelly, about his reputation in the community for violence and weapon charges because it was essential to determining the credibility of that witness in a case where credibility was the key issue?

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Giles, Op. No. 2017-UP-128 (S.C. Ct. App. filed March 22, 2017). The Remittitur was issued on April 28, 2017.

### **Present Application**

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

1. "Ineffective assistance of trial counsel"
  - a. "My trial attorney, Mr. Ronald W. Hazzard, was ineffective because he failed to address my prior medical conditions leading up to the incident, Dec. 03, 2014, knowing that if he had subpoenaed my emergency room records and my medical records from my primary care physician, Dr. Mattox, at St. James Medical Clinic in Andrews, S.C., it would have established that I was previously assaulted and threatened by the victim and his friends in a manner that which lead me to believe that my life was in jeopardy."
  - b. "Also, my trial attorney failed to establish that my actions in this incident was in self-defense."
  - c. "My attorney failed to subpoena the SLED forensic analysis to show that Daniea Kelly and Tuvera McCrea did fire a weapon in that they had gunshot residue on their hands."
  - d. "My trial attorney was in violation of my due process, my 6<sup>th</sup> Amendment and I do believe if these matters were brought forth at trial, my trial outcome would have been different."
2. "Self Defense / Stand Your Ground"
  - a. "My trial attorney, Mr. Hazzard, failed to establish my self-defense/stand your ground defense. Upon finding by the State Law Enforcement Tuvera McCrea did in fact fired a weapon the night of the incident in retaliation. The SLED analysis showed and proved the gunshot residue was found on Mr. Kelly's hand and Ms. McCrae's hand. Mr. Hazzard should have brought this important and crucial piece of evidence to the Court's attention. I do believe if this matter was brought forth, the outcome of my trial would have been different."
3. "Due Process Violated"
  - a. "The South Carolina Rules of Criminal Procedure, and the Constitutional rules that govern our country, states that every Defendant is protected and is assured that the Due Process clause is mandated and in effect, and should be established in every criminal proceeding. I do believe that my Trial Counsel, Mr. Hazzard violated my due process and prohibited me from having a fair and just trial. I do believe if these/this right of my due application had been applied, my trial outcome would have been different."

Applicant subsequently amended his application by filing on August 27, 2018, which raised the following additional grounds for relief:

1. Ineffective assistance of appellate counsel, in that:
  - a. "The trial court's decision to prevent defense counsel from cross examining the alleged victim, Daniea Kelly, regarding his pending charges was an appellate issue worthy of a merits brief. Appellate Counsel provided ineffective assistance of appellate counsel by filing an Anders brief on the issue."
2. Ineffective assistance of trial counsel, in that:

- a. Trial Counsel failed “to present all meritorious arguments in opposition to the State’s suppression motion. Trial counsel failed to argue that since Kelly had pending charges before the 15<sup>th</sup> Circuit Solicitor’s office trial counsel should have been able to impeach Kelly for bias.”
- b. “Additionally, trial counsel failed to argue that preventing cross examination of Kelly on his pending gun charge violated Defendant’s rights under the 6<sup>th</sup> and 14<sup>th</sup> Amendments to present a defense.”

Applicant requests relief as follows:

- “New Trial”

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

### **A. Ineffective Assistance of Counsel**

Applicant’s allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel’s performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of

the evidence. Rule 71.1(e), SCRPC. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" Harrington, 562 U.S. at 111-12 (quoting Strickland,

466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. 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. *Id.* at 696-97.

***1. Failure to Establish Self-Defense, Stand-Your-Ground Defense***

Applicant alleges Trial Counsel was ineffective in failing to establish Applicant acted in self-defense.<sup>1</sup> The “Protection of Persons and Property Act” (“the Act”) provides that “[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force[.]” S.C. Code Ann. § 16-11-450. The Act further provides, in part, that:

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

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<sup>1</sup> Though Applicant’s second ground for relief, the Court addresses it first due to its breadth and comprehension of the other issues raised.

S.C. Code Ann. § 16-11-440(C). “A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard[.]” State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (citing State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011)).

Where a defendant seeks treatment under § 16-11-440(C), it is not enough for a defendant to establish that he was “not engaged in an unlawful activity” and was in a “place where he has a right to be.” Rather, “[c]onsistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity” save the duty to retreat. Id., 406 S.C. at 371, 752 S.E.2d at 266 (emphasis added). Notwithstanding the Act or other provisions of law, in order to establish self-defense, the defendant must show (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997).

That a defendant was engaged in unlawful activity at the time of the incident does not in-and-of-itself defeat a claim for immunity. Rather, where a defendant was engaged in unlawful activity at the time of the incident, the trial court must consider whether the unlawful activity was the proximate cause of the incident. A person who is otherwise acting lawfully is not deprived of the right to self-defense by merely incidental illegality. State v. Glenn, 429 S.C. 108, 120-21, 838 S.E.2d 491, 497-98 (2019) (citing State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999); State v. Goodson, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1994)).

### *Trial*

At trial, Trial Counsel moved the trial court grant Applicant immunity pursuant to S.C. Code Ann. § 16-11-440(C), and requested a hearing. (R. 51, ll. 2-18). Trial Counsel called only Applicant to testify for the hearing. The State called as witnesses the victims, Tuvera McCrea and Daniae Kelly; and the lead investigator Melvyn Garrett.

Applicant testified that on July 15, 2014, nearly five months prior to the shooting for which he was on trial, he was at the speakeasy of Punchy Burroughs, a neighborhood bootlegger, enjoying a few drinks when his then-partner Brenda Brown appeared. Applicant and Brown argued with escalating intensity until she beat him with her shoe, and Applicant reflexively stuck back, knocking her to the ground. (R. 54-56; R. 73-75). Others present broke up the fight temporarily, but Applicant and Brown began arguing again until Kelly, McCrea, and three to five additional people intervened and severely beat Applicant for three to five minutes. (R. 56-57; R. 74-77). Applicant testified that after the crowd was finished stomping him, Kelly retrieved a gun from his car, cocked it, and said something about coming "out of retirement," which prompted Applicant to leave the trailer park for fear of his safety. (R. 57-58; R. 76, ll. 2-15).

Applicant testified he went to the doctor sometime around August 4, 2014, after finding blood in his stool. (R. 58-59; R. 78, ll. 4-8). Applicant admitted that while he told the doctor about his various injuries, he did not tell her he was injured due to any beating, but rather told her that he had fallen from the rafters of a home while doing handyman work with a friend. (R. 58-59; R. 78-80). After the doctor's visit, Applicant's symptoms worsened, and he checked into the emergency room at Georgetown Memorial Hospital on or about October 20, 2014, but again Applicant did not tell doctors about the beating. (R. 60-61). Applicant explained he still did not disclose the beating because it had by that time occurred two months prior, and that Kelly had

apologized to him for the beating not long before the ER visit. (R. 61-62; R. 76-78; R. 80, ll. 16-23).

Applicant then turned to the events of December 3, 2014. Applicant was again at Punchy's speakeasy, drinking and chatting with a friend when, after about twenty to thirty minutes, Rodney Kinloch entered alongside Brown and her associates. (R. 62-64; R. 85, ll. 1-2). Kinloch ordered a drink, stared at Applicant for a time, and then went outside. (R. 64, ll. 3-8). Kinloch returned a few minutes later, purchased cigarettes, stared at Applicant again while standing right behind him, and then went back outside. (R. 64, ll. 8-10). Applicant denied speaking to Kinloch during either encounter. (R. 64, ll. 16-18).

Applicant testified he saw Kelly outside in his truck parked in the yard before the speakeasy; Kinloch met Kelly at the driver's side window of the truck, and Kelly provided him a gun. (R. 64-65; R. 80-81). Applicant alerted a friend, Barney Wilson, of the hand-off and continued to watch the situation through a window. Applicant noted that Kelly parked his truck "almost up in front of Mr. Burroughs' house" very near the door with a clear line-of-sight upon anybody who would come out of the door. (R. 65, ll. 11-21). Wilson provided Applicant a gun, and Kinloch entered again and again stood behind Applicant momentarily before leaving again without buying anything. (R. 65-66; R. 84, ll. 4-16). Worried Kelly might mean to harm him inside Punchy's, Applicant set out to leave to his own trailer only a few yards away; he opened the door and saw Kelly in his truck while Kinloch stood on the other side of the porch. (R. 66-67; R. 81-83; R. 85-88). The driver's side window of Kelly's truck was about halfway open. (R. 67, ll. 22-24; R. 81, ll. 10-13). Applicant testified he saw Kelly reach for something, as though reaching for a gun, and so Applicant drew his own gun and fired off two or three shots. (R. 67, ll. 7-12; R. 69, ll. 5-14; R. 83, ll. 6-7). Applicant asserted that based on his prior experience with

Kelly, his understanding of Kelly's reputation for violence in the community, the exchange of a weapon between Kelly and Kinloch, and the positions of Kinloch and Kelly outside the trailer, he believed Kelly was about to draw a gun and shoot him. (R. 68-69; R. 86, ll. 10-18).

Applicant testified he tried to shoot Kelly once more at close range, but his gun jammed. (R. 69, ll. 5-12; R. 82-83).

Applicant testified he had only seen Kelly once between the alleged beating and the shooting—other than in passing—and had not seen Kinloch at all during that period. Applicant explained his understanding that Kelly was a regular in the area near Punchy's, in that he often visited another neighbor in the trailer park and was known to deal narcotics in the area. (R. 70-73).

Tuvera McCrea was the State's first witness for the hearing. McCrea testified she was picked up on December 3, 2014, by Kelly and Kinloch, who were headed to Punchy's so that Kinloch could get a cigarette and to hang out. (R. 89-91; R. 100-03). McCrea denied the purpose of their trip was to sell drugs. (R. 101-02). McCrea demurred at the description of Punchy's home as a place of business, and described him as merely generous to friends and people he regularly dealt with. (R. 90-91).

McCrea recalled that they parked in front of Punchy's trailer and Kinloch went inside. Kinloch returned, told them the trailer was packed, listed off names of who was present, and noted that Applicant was "giving him a look." Kinloch had tried to shake hands with somebody conversing with Applicant inside, but only got "looks." Kelly and Kinloch discussed whether to leave, and Kinloch decided to get his drink and cigarette. Kinloch went back inside and Kelly repositioned the truck so the driver's side faced the door to the trailer. Kinloch emerged and started smoking a cigarette on or by the porch. (R. 93-94; R. 97-100; R. 106-08). The exact

number of times Kinloch entered and exited the building is not entirely clear, as McCrea variously testifies or acknowledges he went in and out three or four times. (R. 98-99; R. 104-05). McCrea denied she ever saw either Kelly or Kinloch with a gun, or that Kelly ever took a gun from Kinloch. (R. 91, ll. 9-19; R. 94, ll. 12-16). The truck windows were tinted and rolled up. (R. 92-93). Around thirty minutes passed since arriving at Punchy's. (R. 97-98).

McCrea recalled that she was gazing out the passenger window talking to Kelly when the first shot ring out; she heard the truck window shatter, saw Kelly flinching, and saw Giles fire the next round. McCrea leapt from the truck cab and hid "under the truck on the side of the truck. Kelly never shot back. (R. 92, ll. 5-20; R. 104, ll. 13-23). McCrea believed six or seven shots were fired. (R. 92, ll. 21-22).

At some point after the shooting, McCrea jumped back into the truck, took the wheel, and drove away from the scene while Kelly called family and 911. (R. 96, ll. 4-11). McCrea called her mother, who told her to stop "at the nearest place;" McCrea brought the truck—which lacked breaks—to a stop at an intersection with Morgan Avenue. (R. 96, ll. 11-22).

Victim Daniea Kelly was the State's next witness. Kelly recalled the earlier encounter with Applicant on July 15, 2014, and testified Applicant was heavily intoxicated at a cookout. (R. 110, ll. 16-23). Applicant began fighting with Brown inside Punchy's and the dispute spilled outside, where Applicant physically assaulted her. (R. 110-11). Kelly testified he, Kinloch, and a third man—Phillip Bell—intervened to restrain Applicant. (R. 111, ll. 3-6). A couple of weeks later, Applicant thanked Kelly for intervening and saving him a trip to jail. (R. 111, ll. 7-13). Kelly denied there was any fight, and asserted that Applicant would have required immediate medical attention at a hospital had the three men "jumped" him. (R. 111, ll. 13-23). Kelly denied ever possessing a gun during the July confrontation. (R. 111-12).

Turning to December 3, 2014, Kelly testified that he and Kinloch finished work at a barbershop, picked up McCrea to hang out, and then went to Punchy's so Kinloch could get some cigarettes and a drink. (R. 113, ll. 1-23). Kelly pulled up, saw Bell—who happened to live nearby—and began to talk to him while Kinloch went inside. (R. 114, ll. 14-20). Kinloch returned, reported that Punchy's was packed, and expressed discomfort with the circumstances; Kelly told him "Man, if you feel like that just go ahead, get your stuff and let's go[.]" (R. 113-15). Kinloch went back in, then emerged and began smoking a cigarette outside because Kelly did not permit smoking in his truck. (R. 115, ll. 5-10). Kelly testified it was a cold night, so his truck window was up. (R. 115, ll. 10-12). Kelly denied having a gun that night and asserted that, even if had possessed a gun, Applicant would not have been able to see any through the truck's tinted windows. (R. 115, ll. 15-24). Kelly further denied Kinloch or McCrea possessed a gun on the night of the shooting. (R. 115-16).

Applicant stepped out onto the porch and fired multiple shots, after which Kelly sensed "a lot of pain to the chest" and blacked out. (R. 115, ll. 12-14; R. 122-23). When Kelly came to, he was still in the truck at Punchy's as McCrea screamed at him not to die; he called 911 himself, but was unable to speak. (R. 122-25). McCrea did not take Kelly to the hospital, but came to a stop near railroad tracks in Andrews, South Carolina, where McCrea called her mother, who in turn called 911. (R. 124-25). Applicant shot Kelly three times: once in the chest, once in the hip, and once in the leg. (R. 126, ll. 5-13).

On cross-examination during the immunity hearing, Kelly admitted he was incarcerated at that time facing charges for drugs and guns in his car on October 15, 2015. (R. 117, ll. 3-21). Kelly also testified the truck was a rental and that he had never sold drugs in the trailer park where he was shot, or in any other trailer park. (R. 118-20).

Investigator Melvyn Garrett, who responded to the scene the night of the shooting and took over as lead investigator, found no shell casings or guns in Kelly's truck. (R. 126-27).

Garrett testified law enforcement retraced the path Kelly and McCrea took after the shooting and found no guns along the route. (R. 127-29).

After the conclusion of testimony for the immunity hearing, Trial Counsel introduced the SLED gunshot residue report provided to the defense by the State; the State objected that Trial Counsel failed to lay any foundation for the report, but admitted the State had provided the report and so the trial court let it into evidence for the immunity hearing. (R. 131-34).

Trial Counsel argued that Applicant possessed a reasonable fear of death or great bodily injury and that he was within his rights to stand his ground and shoot at Kelly due to (1) the prior beating and threats he received from Kelly and Kinloch, (2) Kelly's significant and known prior criminality and propensity for violence, (3) Kinloch's suspicious behavior inside Punchy's, (4) the exchange of a weapon from Kelly to Kinloch outside, and (5) the repositioning of the truck to produce a clear line of fire on the door to Punchy's. (R. 135-39). Trial Counsel noted the victims had gunshot residue on their persons, and that the GSR indicated they were using or handling a gun, but the trial court interrupted and contested the argument and noted nobody was present to explain the GSR report. (R. 139-40). Nonetheless, Trial Counsel argued that McCrae handled the gun Applicant spotted on Kelly and dispensed with it before police could meet up with her and Kelly. (R. 139-40). The trial court denied the motion for immunity and opined: "I don't know if the State is going to be able to disprove self-defense beyond a reasonable doubt, but my ruling is that the Defendant has not proved by a preponderance of the evidence that he is entitled to immunity under 16-11-440." (R. 140, ll. 11-24).

During opening statements, the State framed the case as one of a question of “why did he do this?” (R. 168, line 8). The State framed the answer as a desire for revenge after Kelly broke up the fight between him and Brown months prior. (R. 168-69). Trial Counsel argued that Kelly beat Applicant and racked a gun in his face during the July confrontation, and that Applicant acted in self-defense when Kelly positioned himself to ambush Applicant outside of Punchy’s. (R. 169-73).

In addition to other witnesses, the State called Kelly, McCrea, and Garrett at trial; their testimony was substantially consistent with that in the immunity hearing. The State also called Rodney Kinloch, who testified that the two men firmly but nonviolently intervened in Applicant’s July dispute with Brown. (R. 236-39; R. 247-48). Kinloch testified he, Kelly, and McCrea went to Punchy’s to get a couple of “looseys” and a drink, and got there sometime after 9 P.M. (R. 239-40; R. 245-46). Contrary to Kelly’s testimony, Kinloch described the evening’s weather as not cold, and even a little warm, because he did not “have no big jacket or nothing.” (R. 240, ll. 12-15). Kinloch went inside Punchy’s and tried to shake hands with all present, but Applicant would not acknowledge the gesture and instead unsettled Kinloch with a look. (R. 240-41; R. 249-50). Kinloch testified he entered and exited the trailer two or three times that evening. (R. 241, ll. 5-7; R. 246, ll. 15-20). Recalling the shooting itself, Kinloch testified he was standing outside when he heard the door to the trailer open; he turned to look, heard a gun cock, and “just took off running[.]” (R. 241, ll. 8-13). Kinloch denied seeing who the shooter was or who was shot; Kinloch only heard the shots as he fled. (R. 241-42; R. 253, ll. 13-21). Kinloch denied arguing with Applicant the night of the shooting, or that he knew Applicant would be at Punchy’s that evening; he only intended to go, get a drink, and leave. (R. 242, ll. 2-17). Kinloch denied possessing or exchanging a gun that night, or that he ever saw or knew

Kelly or McCrea to have a gun that night. (R. 242-43; R. 253, ll. 22-23). Kinloch confirmed the brakes in the rental truck would slip. (R. 247, ll. 13-20).

Wilbert "Punchy" Burroughs testified that on December 3, 2014, Applicant was in Punchy's home talking with Barney Wilson and a third unknown individual. (R. 254-58). Punchy overheard an exchange between Wilson and Applicant, after which Applicant had his coat on, walked outside, and gunshots rang out six or seven times. (R. 257-58). Punchy confirmed seeing and serving Kinloch that night. (R. 258-59).

Chakana Brown, niece of Brenda Brown, confirmed that an intoxicated Applicant had argued with Brenda, during which he went to another trailer, retrieved a screwdriver, and had to be restrained and beaten to prevent him from attacking Brenda. (R. 268-70). However, Chakana could not remember Kinloch being involved in the July altercation, and denied seeing Kelly at all. (R. 269, ll. 3-8). Applicant was able to flee under his own power. (R. 269, ll. 9-11). Chakana was also present at Punchy's on December 3, 2014, and confirmed that Applicant, armed with a gun, "opened the door and just started shooting and walk off the step and walk to Mr. Kelly's vehicle and then he just turned back, look around and walked off." (R. 271, ll. 17-25). Chakana did not initially sense that Applicant was heavily intoxicated, afraid, or concerned. (R. 271-72). However, Chakana recalled:

When [Applicant] saw Mr. Kinloch then he went to the door, he opened it, and he closed the door back. He went to Barney [Wilson] and said, "That's the n\*\*\*\*\* right there. I'm going to jail tonight." So he went in the back and made a phone call to someone, a short guy, and he came back with the jacket that Mr. Giles had on wrapped up. He went into the back room, put the jacket on, came by me again, look at me, did a little smirk and open the door and just started shooting.

(R. 272, ll. 13-20). On cross-examination, Chakana explained that Applicant told Wilson to call "whoever the guy was," and that "the guy" returned to Punchy's with a wrapped up jacket— Applicant had not initially shown up with a coat. (R. 273-74).

Investigator Brenda Lambert, of the Andrews Police Department, testified she took samples from McCrae's and Kinloch's hands for gunshot residue kits, another officer obtained a sample from Kelly, and all of the samples were sent to SLED for testing. (R. 309-14). Whitney Berry, an analyst for SLED, tested all three samples. (R. 318-24). Berry found particles associated with GSR from the discharge of a firearm on both of McCrae's hands, a single particle on Kelly's left hand, and nothing on Kinloch's hands. (R. 324-25). Berry explained that GSR can result "from firing a gun, being in the vicinity to the firing of a gun or coming into contact with something that was in the vicinity to the firing of a gun." (R. 326-28). Berry testified that the findings of GSR on Kelly and McCrae's hands were not consistent with the discharge of a firearm from within a vehicle. (R. 329, ll. 6-21). On cross-examination, Berry confirmed that a person who merely handled a gun that had not been cleaned could test positively for a small amount of GSR. (R. 330-31).

Applicant testified in his own defense, largely consistent with his testimony during the immunity hearing. (R. 339-97). On cross-examination, Applicant testified that when he visited the doctor after his July encounter with Kelly, he only provided symptoms and no explanation of how he may have potentially generated the problems. (R. 379-81). Applicant also testified nobody made any aggressive movements towards him inside Punchy's, and that he never bothered to call the police or ask others to do so at Punchy's despite knowing multiple people there may have had a cell phone, and despite calling Wilson on Punchy's phone. (R. 389-90).

In closing arguments, Trial Counsel argued Applicant acted in self-defense and that the case boiled down to who the jury believed: Applicant or Kelly, McCrae, and Kinloch. (R. 410, ll. 1-25). Accordingly, Trial Counsel committed a substantial part of his closing arguments to impeaching the three victims/witnesses. Trial Counsel framed the accusers' stories as a

nonsensical date between Kelly and McCrea with Kinloch as a third wheel, and that the three gave inconsistent explanations of what their purposes were for going to Punchy's that evening. (R. 411, ll. 1-17). Trial Counsel recalled Punchy's testimony that he served Kinloch a drink without fuss or delay, pointed the three were present for "the better part of an hour," and argued that their lingering both undermined their story and supported Applicant's fears. (R. 411-13). Trial Counsel reviewed Applicant's version of events up to the moment he walked out of the trailer, when Applicant found the three arranged to create a "triangular kill zone." (R. 413-17; R. 425-26). Trial Counsel then argued the accusers' recollections regarding precisely where Kinloch was and what he was doing at that moment were inconsistent and changed upon questioning. (R. 417-18). As for the State's repeated questions as to why Applicant did not call the police, Trial Counsel simply asserted that Applicant was within his rights to not live in fear or intimidation. (R. 418-19). Returning to the July confrontation between Applicant and Kelly, Trial Counsel argued that Chakana's testimony was inconsistent with that of Kelly and Kinloch, as she testified they beat Applicant "like a dog" and did not merely restrain him. (R. 419-20). Trial Counsel also drew the jury's attention to Kelly's denial of illegally possessing a gun after his 2007 conviction, despite Kelly's 2015 arrest for possessing guns and drugs in his car. (R. 421-22).

Trial Counsel emphasized in particular Applicant's right to act on self-defense, and that he did not need to wait for his assailant to get "the drop on him[,]" that Applicant had the right to act on appearances in determining whether to act in self-defense, and that the trial court would instruct the jury accordingly. (R. 422-23). Once again, Trial Counsel briefly reviewed the circumstances as they were perceived by Applicant: Kinloch entered and exited Punchy's, "mean mugged" Applicant, exchanged a weapon with Kelly (known to carry guns), and

positioned around the door to the trailer. (R. 423, ll. 7-15). As for McCrea's denial that any guns were in the truck that night, Trial Counsel assailed her testimony as to where they went and why after Kelly was shot, and argued that she drove them away from the scene and delayed in calling 911 in order to dispose of Kelly's gun. (R. 424-25). Trial Counsel then addressed each element of self-defense in turn and argued Applicant (1) was without fault in bringing about the difficulty, (2) actually believed he was in danger, (3) that a reasonably firm and prudent man would reach the same conclusion, and (4) that Applicant had no other means of avoiding the danger because calling the police while inside would only delay Kelly's ill intent, and it was too late to do anything but act in self-defense once Applicant stepped outside in an attempt to go home. (R. 426-28). Trial Counsel resumed arguing against the credibility of the accusers by exploring the myriad familial and romantic relations that connected the State's witnesses to one another and against Applicant, with a particular emphasis on Chakana, who attributed a statement to Applicant not mentioned by any other witness, and who admitted Applicant was thoroughly beaten during the July confrontation. (R. 428-31). After explaining why Applicant would understandably misremember how many times he fired the gun, and noting that McCrae was wholly unharmed, Trial Counsel emphasized that self-defense was a complete defense, and the burden was upon the State to disprove it. (R. 431-33). Trial Counsel concluded with a summary of the elements of the charges. (R. 433-36).

The State's closing was substantially shorter. (R. 436-43). The State emphasized Applicant was safe inside Punchy's trailer and that he brought about the difficulty "by walking out with his loaded, cocked weapon and started firing into the car," and thus brought about the difficulty and could not claim self-defense. (R. 440-42).

The trial court instructed the jury on all of the elements of self-defense, that self-defense is a complete defense, and that the State's burden was to disprove self-defense by proof beyond a reasonable doubt. (R. 456-58). The trial court, as part of its self-defense instructions, told the jurors that Applicant was:

. . . not required to wait until his adversary is on equal terms. He has the right to act under the law of self-preservation and prevent his assailant from getting the drop on him. Evidence of prior difficulties between the Defendant and the victim may be considered in deciding whether a threat existed, whether the Defendant had a reason to believe a threat existed and how serious that threat was.

(R. 457-58).

### *Findings*

The Court finds no ineffectiveness on the part of Trial Counsel. The Court finds Applicant's allegation that Trial Counsel failed to argue he shot at Kelly and McCrea in self-defense is *thoroughly* refuted by the record. Trial Counsel presented a well-prepared case for immunity under the Protection of Persons and Property Act, and then zealously advocated that Applicant legally acted in self-defense. Trial Counsel presented arguments drawn from the evidence presented to support each element of self-defense, and at great length worked to impeach the multiple witnesses and victims who testified against Applicant's claim of self-defense. Applicant cannot satisfy either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

### ***2. Failure to Present Evidence of Prior Assault, Battery by Victim***

Applicant alleges Trial Counsel was ineffective in failing to procure and present records from St. James Medical Clinic in Andrews, S.C., which Applicant avers would establish a previous violent confrontation with the victim Dania Kelly. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable

precisely to the extent that reasonable professional judgments support the limitations on investigation.” Strickland, 466 U.S. at 690-91. “In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Id. at 691. “In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” Id.

“The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.” Id. “Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.” Id. “In particular, what investigation decisions are reasonable depends critically on such information.” Id.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

The portions of Applicant's trial which provide the relevant context for this claim are already set forth in the prior section. During both the immunity hearing and the jury trial, Applicant testified about his medical appointments between the alleged beating and the shooting, and that he did not tell doctors his injuries were the result of a violent confrontation, but rather that he either (1) told doctors they were caused by a fall while working or (2) told doctors no information about the potential cause of his injuries.

During cross-examination at the PCR evidentiary hearing, Trial Counsel testified that he was able to locate and review the medical records requested by Applicant. Trial Counsel recalled that on or about January 14, 2016, he told Applicant that the records did not reflect he had received any beating, and that Applicant had not told the doctors about any fight. Trial Counsel expressed that the records were not as helpful as he had hoped.

Applicant merely offered he had wanted to talk about emergency room records from a prior incident where Kelly kicked him in the side. No medical records were introduced.

The Court finds no ineffectiveness on the part of Trial Counsel. The Court finds Trial Counsel's testimony credible, and accepts that he located the records, reviewed them, found them of little use to Applicant, and reported his findings to Applicant. Thus, the records were not presented at trial. As Trial Counsel conducted an adequate investigation into the matter, his strategic decisions regarding what he found are entitled to deference. Furthermore, Applicant has failed to meet his burden of proof by failing to introduce to this Court the records insisted upon. The only thing Applicant offers to contest Trial Counsel's judgment is his vague assertions that the prior records would have established what he purports they would have shown, which is inadequate. Applicant's description of the records and his prior difficulties with Kelly are not credible to this Court. For all of these reasons, Applicant has failed to meet his

burden as to either prong of Strickland, and his request for relief upon this allegation is **DENIED**.

### ***3. Failure to Introduce SLED Forensic Analysis***

Applicant alleges Trial Counsel was ineffective in failing to procure and present certain forensic records in the possession of the South Carolina Law Enforcement Division (SLED) which purportedly show that victims Daniea Kelly and Tuvera McCrea had gunshot residue on their hands. The relevant law to guide the Court's analysis is set forth in the prior sections of this Order.

During the Protection of Persons and Property Act hearing at trial, Trial Counsel was permitted to introduce the SLED's gunshot residue report. (R. 131-32). The State argued against the admissibility and probative value of the report, explaining that SLED did not normally test victims for GSR because "there's a lot of false positives" and that expert testimony would be needed to explain it. (R. 132-33). The trial court agreed that there would need to be groundwork for the purpose of presenting it to the jury, but permitted the introduction of the report for the stand-your-ground hearing. (R. 132-34). As summarized in Section II.A.1, above, witnesses testified to taking GSR samples from Kelly, McCrea, and Kinloch, that little to no GSR was found on each of the three, and that the GSR findings were not consistent with any of the three discharging a firearm in a closed space, but rather could be attributed to either being shot at or to handling a weapon previously discharged and not cleaned.

At the PCR evidentiary hearing, Trial Counsel testified that law enforcement conducted testing for gunshot residue and that both victims did test positive for GSR. Trial Counsel offered that, with the benefit of hindsight, an independent GSR expert could have been helpful.

The Court finds no ineffectiveness on the part of Trial Counsel. The Court finds Applicant's allegation that Trial Counsel failed to introduce evidence and establish that GSR was on Kelly and McCrea after the shooting is refuted by the record. Trial Counsel introduced SLED's GSR report for the immunity hearing and it was accepted by the trial court for the purposes of that hearing. The GSR report was thereafter introduced during the jury trial after the State laid the appropriate groundwork through law enforcement witnesses who took the samples and performed the testing. That trace particles consistent with GSR were found on Kelly and McCrea does not appear to have been a subject in dispute at trial, but rather the point of disagreement between the parties was what those trace particles represented. Trial Counsel speculated that an independent expert could have offered something to Applicant's benefit, but his speculation on the point is (1) purely through the lens of hindsight and (2) without the support of any such expert testimony at the PCR evidentiary hearing. Accordingly, Applicant has failed to satisfy his burden of proof as to either prong of Strickland, and his request for relief is **DENIED**.

#### ***4. Failure to Argue Against Suppression of Kelly's Pending Charges***

Applicant alleges Trial Counsel was ineffective in failing to offer arguments against the State's pre-trial motion to suppress questions regarding Daniea Kelly's charges pending at the time of trial.

#### *Trial*

At trial, the State expressed concern about questions asked of Kelly about his then-pending charges during the immunity hearing held the prior day. (R. 142-43). The State argued questioning regarding the pending charges was nothing but an attack on the victim's character using charges incurred a year after the shooting, and would be needless presentation of

cumulative evidence because Kelly had prior convictions that were admissible for impeachment purposes. (R. 143, ll. 5-20). Upon inquiry by the trial court, the State clarified it sought to suppress examination of Kelly on his then-pending drug charges: “He has a count of distribution, I believe a possession and a weapons charge.” (R. 143-45, quote at R. 144, ll. 3-4).

Trial Counsel answered that Kelly’s prior and pending charges were not limited and relevant “to the issue of his turbulence and violence in the community.” (R. 145, ll. 10-11). Trial Counsel noted that Kelly claimed in his immunity hearing testimony that he was not a violent person and, thus, the pending charges for having drugs and two guns in his possession were proper for the jury. (R. 145, ll. 12-19). Trial Counsel offered as a concession that the trial court could give a limiting instruction to the jury, but took exception to the State’s dressing of Kelly in plain clothes and desire to conceal his then-incarcerated status, and described those efforts as “misleading to the jury.” (R. 145-46). The trial court acknowledged that if Kelly denied ever carrying a gun, or something to that effect, the door would be opened to questioning regarding his pending charges, and questioned if Trial Counsel’s argument was that Kelly opened that door simply by taking the stand; Trial Counsel confirmed as much. (R. 146, ll. 10-18).

The State replied by citation to S.C. Code Ann. §16-3-1501 and State v. McCray, 413 S.C. 76, 94-95, 773 S.E.2d 914, 924 (Ct. App. 2015) to again argue that the passage of a year between the shooting and Kelly’s subsequent criminal acts rendered them irrelevant. (R. 147-49). The trial court took the matter under advisement. (R. 149, ll. 9-11).

After review of a plea offer on the record and a break in proceedings, the trial court granted the State’s motion to suppress based on McCray and “some other Supreme Court decisions[.]” (R. 153, ll. 1-11). Trial Counsel argued in reply that the questions should be

admissible under Rule 404(A)(2), SCRE; State v. Moody, 94 S.C. 26, 77 S.E. 713 (1913); and State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976): “that the general reputation for turbulence and violence of a putative victim is always for the jury to consider.” (R. 153-54, quotation at R. 154, ll. 8-10). The trial court followed up by describing a distinction in McCray—in that case the testimony of concern was to come from a witness who was neither the victim nor the defendant regarding conduct of which the defendant had not been aware, whereas Trial Counsel instead sought to directly impeach Kelly with the other bad act. (R. 154-55). The State replied that Applicant could not rely upon acts subsequent to the shooting to justify his frame of mind, and the trial court noted that Trial Counsel was not doing so but rather was seeking to attack Kelly’s credibility. (R. 155-56). Ultimately the trial court stood by its prior ruling granting the motion to suppress, primarily because the pending charges were based on acts occurring many months after the shooting. (R. 157-58).

Kelly was the State’s first witness. On cross-examination, Kelly artfully attempted to avoid opening the door to questions regarding his subsequent gun possession, but failed:

Q. Yes, sir. Okay. But now on this incident, December 3<sup>rd</sup> of 2014, you’re saying you didn’t have a gun that night.

A. Didn’t have a – I didn’t have a gun, sir.

Q. Okay. Okay. And you deny that you had a gun in July of 2014, didn’t have a gun that night?

A. Yes, sir. Didn’t have a gun in July neither, sir.

Q. Okay. So the only time you’ve had a gun was May 29<sup>th</sup> when you were convicted of the offense May 29<sup>th</sup> of 2007?

A. Yes, sir.

Q. That was the only time?

A. Sir?

Q. That was, that was the only time you ever had a gun in your possession?

A. Yes, sir. That's the only time I ever had a gun in my possession what I've been convicted of.

Q. Okay. Is that the only time you've ever had a gun in your possession?

A. That's the only time I ever had a gun in my possession what I been convicted of, sir.

Q. Okay. So when you were charged October 15<sup>th</sup> of 2015 for having two guns in your possession you didn't have those guns in your possession?

MR. TODD: Objection, Your Honor.

THE COURT: Overruled.

A. They were in the vehicle. They was not mine, sir.

Q. And whose vehicle were you in?

A. That was in my -- I was in my vehicle, sir.

Q. Okay. But December of 2014 you didn't have a gun in your possession?

A. No, sir.

(R. 187-88). Trial Counsel wove the exchange into his closing argument assailing Kelly's credibility and propensity for wrongdoing:

So Mr. Kelly, the putative victim, says, "Yeah. I, I didn't, you know, pose any threat to Mr. Giles or do anything of that nature," but what did Mr. Kelly say on the stand? He said, "Yeah. I was convicted of guns and drugs back in 2007," and I didn't even ask him this. He volunteered it and said, "Yeah. That was when the police came to my house with a search warrant." Now, how do you have to be living your life that the police go to a judge and get a search warrant to go in your home? But okay, we'll let that pass. People, people can change and people can be better. Right? They can be rehabilitated. That is what our system is about. I asked him then, "Well, okay. Illegally possessed a gun back then, no problem. You haven't done that since. Have you?" And what did he say? He said, "Oh, no, no, no, not me." I said, "Oh. Well, wait a minute now Chief. Weren't you arrested on October 15<sup>th</sup> of 2015 for having two guns and more drugs in your car?" "Oh, well, yeah." Is that someone who seems like a person who wouldn't have a gun in their possession? Eight years, ain't nothing changed. Ain't a thing changed in eight years, and what did he say about the October 15<sup>th</sup>, 2015, is that, "Yeah. The guns weren't mind. They're, they're the fellow in the car." I said, "Okay. I can appreciate that. Whose car was it?" "My car." "How many guns were in it?" "Two guns." Is this someone who strikes you as a peaceful and law-

abiding individual, and is this someone who strikes you as someone whose words are worthy of belief?

(R. 421-22). Trial Counsel again noted Kelly's illegal gun possession in October 2015 while contrasting his denial beating Applicant during the July 2014 confrontation to Chakana Brown's testimony that he very much beat Applicant. (R. 425, ll. 20-23).

#### *PCR Evidentiary Hearing*

Trial Counsel testified at the evidentiary hearing that, with respect to the pending gun charges, he was attempting to show to the jury that Kelly was a bad guy and still was a bad guy. Trial Counsel opined that Kelly's credibility was important to Applicant's defense. Trial Counsel acknowledged that he did not argue the other bad acts could be admissible as character evidence under Rule 608(c), SCRE. On cross-examination, Trial Counsel acknowledged that he was ultimately permitted to question Kelly regarding the subsequent weapons charges. After thinking further on the question of Kelly's bias, Trial Counsel testified the questioning of Kelly regarding his charges played out such that it appeared as though Kelly had received some great benefit or deal for his testimony, even though the charges against him were only ultimately dismissed after trial because he passed away.

#### *Findings*

The Court finds no ineffectiveness on the part of Trial Counsel. Whether Trial Counsel did or did not make any particular arguments against the State's motion to suppress questioning regarding Kelly's pending charges is of no consequence; Trial Counsel was ultimately permitted to question Kelly on the subject and argue in closing against Kelly's credibility and for Kelly's propensity to always carry a gun based (in part) on the pending gun charges. Applicant cannot show prejudice, and accordingly his request for relief by way of this allegation is **DENIED**.

## **B. Ineffective Assistance of Appellate Counsel**

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). “However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) (“For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .”)).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 525; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon neglecting to file a merits brief, Applicant must show that (1) appellate counsel unreasonably failed to discover non-frivolous issues and file a merits brief raising them, and (2) a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he or she would have prevailed on his appeal. Smith v. Robbins, 528 U.S. 259, 285 (2000). Applicant must show that a reasonably competent attorney would have found one nonfrivolous issue warranting a merits brief, and that the issue identified would have won on appeal. Id. at 288.

### ***1. Failure to Appeal Ruling re: Cross-Examination of Daniea Kelly on Pending Charges***

Applicant alleges Appellate Counsel was ineffective in failing to appeal the trial court's ruling regarding cross-examination regarding the permissible scope of Trial Counsel's cross-examination of Daniea Kelly regarding his charges pending at the time of Applicant's trial. This allegation is resolved by the same facts and findings as set forth by Section II.A.4, above: Trial Counsel was ultimately permitted to question Kelly regarding his pending gun charges. Thus, Appellate Counsel could not have appealed the issue. See Davis v. South Carolina, 420 S.C. 98, 103, 800 S.E.2d 493, 495 (Ct. App. 2017) (quoting Rule 201(b), SCACR) ("Only a party aggrieved by an order, judgment, sentence[,] or decision may appeal. If a party prevails on an issue below, the party is not an aggrieved party with respect to those rulings, and thus, the party may not appeal those issues."). Applicant cannot meet his burden as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

### **C. Due Process Violation**

Applicant alleges his rights to due process of law were violated. "Due process considerations apply in contested cases or hearings which affect an individual's property or liberty interests as contemplated by the federal and state constitutions." Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 353-54 (2008) (citing U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3). "The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review." Id., 376 S.C. at 179, 656 S.E.2d at 354 (citing State v. Hill, 368 S.C. 649, 656, 630 S.E.2d 274, 278 (2006)). The substantive component of due process, meanwhile, "requires

a rational basis for legislation depriving a person of life, liberty, or property.” In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 311 (2003).

However, when asserting a violation of a constitutional right in a post-conviction relief action, the applicant “generally must frame the issue as one of ineffective assistance of counsel.” Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)); but see Fortune v. State, 428 S.C. 545, 559, 837 S.E.2d 37, 44 (2019) (“In some circumstances, however, an inmate may present a claim for PCR based on constitutional violations other than ineffective assistance of counsel[;]” thereafter finding the prosecutor’s misconduct could only be reviewed as a due process claim in PCR). Issues which could have been raised at trial or on direct appeal are not cognizable in an action for post-conviction relief. S.C. Code Ann. § 17-27-20(b); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). But for those deprivations which cannot be addressed in either the context of a direct appeal or a claim of ineffective assistance of counsel, an applicant who contends his due process rights were violated must show he was deprived of those rights due representation that fell below an objective standard of reasonableness, and that but for counsel’s unprofessional errors, the result of the proceeding would have been different. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Fortune, 428 S.C. 558-59, 837 S.E.2d at 44-45.

Applicant does not identify any particular errors or violations of his Due Process Rights beyond his general proposition that Trial Counsel’s performance deprived him of due process. The Court finds Applicant has failed to state a cognizable due process claim: To whatever extent Applicant intends to reassert the previously addressed claims of ineffective assistance of counsel in the context of the right to due process, and notwithstanding the finding that those claims are not cognizable, the Court incorporates its prior analysis by reference and finds

Applicant has failed to establish a deprivation of his right to due process. Applicant's request for relief by way of this allegation is **DENIED**.

### III. CONCLUSION


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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

#### IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 6 day of Sept., 2020.

  
WILLIAM H. SEALS, JR.  
Presiding Judge  
Fifteenth Judicial Circuit

 \_\_\_\_\_, South Carolina