

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

H. Steven DeBerry, IV, Circuit Court Judge

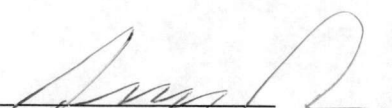
2018-CP-42-0995

Shedrick A. Savage, Appellant,
v.
The State, Respondent.

NOTICE OF APPEAL

Shedrick A. Savage appeals the Honorable H. Steven DeBerry, IV's Order Granting Applicant Belated Appellate Review Pursuant to *White v. State* and Dismissing All Other Claims with Prejudice filed December 23, 2021, and Order denying Applicant's motion to Alter or Amend the Judgment filed January 12, 2022.

This 24 day of January, 2022.


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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)
)
 Shedrick A. Savage, SCDC No. 294223)
)
 Applicant,)
 v.)
 State of South Carolina)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2018-CP-42-0095⁹

**ORDER GRANTING APPLICANT'S
 REQUEST FOR A BELATED
 APPEAL PURSUANT TO *WHITE*
V. STATE AND DISMISSING ALL
 OTHER PCR ALLEGATIONS**

This matter comes before the Court by way of Applicant Shedrick Savage's March 20, 2018, application for post-conviction relief. Respondent made its return on August 1, 2018 and requested an evidentiary hearing. An evidentiary hearing was convened on August 4, 2021 at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Attorney Susannah Ross. Assistant Attorney General William H Ray, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Deputy Solicitor Derrick Balsa of the Seventh Circuit Solicitor's Office also testified.¹ The Court had before it Applicant's records from the South Carolina Department of Corrections, the records from the Spartanburg County Clerk of Court, the trial transcript, Applicant's appellate records, and the pleadings in the current action. This Court has reviewed the record, the pleadings, observed the witnesses, and heard their testimony, and finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections. During its March 2015 term, the Spartanburg County Grand Jury indicted Applicant for murder

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¹ Applicant's trial counsel, Attorney Theo W. Mitchell, was unavailable and not present at the hearing.

(2015-GS-42-0810). Applicant was represented by Attorney Theo W. Mitchell and Deputy Solicitor Derrick Balsa of the Seventh Circuit Solicitor's Office prosecuted the case. On November 28, 2016, Applicant proceeded to a jury trial before the Honorable Roger L. Couch, circuit court judge. The jury found Applicant guilty as indicted. Judge Couch then sentenced Applicant to imprisonment for thirty years.

Applicant filed a notice of appeal and the appeal was perfected by Attorney Candice K. Lapham. The South Carolina Court of Appeals dismissed the appeal for failure to update the Court with the status of the transcript. The remittitur was sent on June 2, 2017.

II. FACTUAL HISTORY

Applicant's conviction arises out of the November 23, 2014 shooting death of Charles Jackson, Jr. ("victim") at the Universal Events nightclub in Spartanburg, South Carolina. Security ejected both parties after a fight broke out, and while the victim was walking away from the scene Applicant drove his truck alongside the victim and fatally shot him in the chest. (Tr. 82, 1 – Tr. 83, 22). A doorman at the club, Error Graham, witnessed the fight and walked the parties outside in order to calm the situation. (Tr. 98, 3 - 19). He testified that Applicant was "a little irate" and had his hand in his pants before he got in the driver's seat of his truck, pointed towards the victim, and drove in his direction. (Tr. 98, 16 – Tr. 99, 14). He stated that Applicant was not in a hurry to leave. (Tr. 99, 14). Graham then heard a gunshot coming from the area of the truck, but could not see it from around the side of the building. (Tr. 99, 15-19). He stated that about "half" of the people who were put out of the club got in a gold Nissan, and the other half got in the truck. (Tr. 101, 13). On redirect he clarified that he saw two people in the truck. (Tr. 105, 10-15).

Spartanburg County Sheriff's Deputy Brad James testified that he was in the Universal Events parking lot that night when he heard one gunshot, tried to figure out where it

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came from, and saw a blue truck leaving the scene. (Tr. 56, 10 – Tr. 59, 17). He pursued the vehicle but lost it after it left the parking lot and entered the roadway. (Tr. 59, 24 – Tr. 60, 8). He then returned to the scene to tend to the victim. (Tr. 60, 10-21).

The owner of the club, John Mitchell, testified that the victim was fighting with several guys, was told to leave, and walked down the driveway while the other participants in the fight were held inside for a few minutes. (Tr. 82, 1-11). Applicant was angry at the victim after the fight and commented that he was going to kill him. (Tr. 82, 13-20). Applicant then got in his truck with at least one other person, while another may have gotten in the vehicle or gone “around behind the truck.” (Tr. 82, 18-20). Mitchell then saw a flash out of the corner of his eye, heard a gunshot, and discovered that the victim had been shot and killed. (Tr. 83, 2-22). He stated with certainty that the shot came from the front seat of the vehicle. (Tr. 86, 8-17).

Cedrick Jones testified that he was an associate of the victim’s family and was with him at the club that night when the fight broke out. (Tr. 107, 22-20). He stated that someone put their hands on the victim, a fight ensued, and the victim was escorted from the club. (Tr. 108, 16-20). The victim did not have a ride, so he unsuccessfully attempted to get back in the club with other people at the scene. (Tr. 109, 5-13). Jones stated that he left with the victim and the two were walking towards his vehicle when Applicant drove up alongside them in his truck. (Tr. 109, 1-24). Words were exchanged, the victim threw a beer bottle at the truck, and Applicant immediately shot the victim in the chest. (Tr. 110, 19 – Tr. 111, 12). Jones panicked and called 9-1-1. (Tr. 114, 16-23). He did not talk to police at the scene, but did come forward and give a statement several weeks later after being asked to give a statement by the victim’s family. (Tr. 115, 4-11).

Police located the truck early the next morning after a BOLO was issued for a blue truck with paper tags. (Tr. 136, 8 – Tr. 137, 14). Two subjects were inside the vehicle, Applicant and

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Rashawn Miller, and Applicant was driving. (Tr. 140, 24 – Tr. 141, 18). No weapons or contraband were found in the vehicle at the scene. (Tr. 143, 4-18). Applicant's hands tested positive for gunshot residue, indicating that he likely had recently fired a gun. (Tr. 162, 9 – Tr. 164, 17). Less gunshot residue was found on Miller. (Tr. 164, 18 – Tr. 165, 17). Gunshot residue was also found on the victim, which was said to be common for gunshot victims. (Tr. 176, 1-15).

Ruben Landrum testified as a defense witness. He stated that he was at the scene that night and heard a shooting. (Tr. 238, 12 – Tr. 239, 3). He stated that he had seen Applicant's truck earlier in the night at a gas station and stated that there were three passengers. (Tr. 239, 17 – Tr. 240, 18). On cross-examination he stated that this was well before the incident. (Tr. 241, 1-9). He did not know the people in the truck, but saw it again when it was speeding away from the scene. (Tr. 241, 21 – Tr. 241, 11). He did not see how many people were in the vehicle as it was leaving. (Tr. 242, 12-18).

III. CURRENT APPLICATION

In his initial *pro se* application for post-conviction relief, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Failure to investigate, make proper motions and objections to preserve the record
2. Ineffective Assistance of Appellate Counsel
 - a. Failed to order transcript, allowed dismissal of appeal
3. Due Process Violations
 - a. unfair trial

Applicant, through counsel, amended his application on July 26, 2021. The allegations read as follows:

1. Ineffective assistance of trial counsel
 - a. failing to appeal
 - b. failing to move for immunity under §16-11-450 S.C. Code Ann.
 - c. failure to make objections or adequate responses to State objections

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1. no obj. bolstering Tr. p: 66, 1.23
2. State objected to reference to third party guilt counsel failed to argue it was supported by evidence in the case and went to the adequacy of the State's investigation. Tr. pp. 30-37, 69-72, 82, 192, 201-17
- d. failed to introduce 911 recording to impeach witness Cedric Jones. Tr. p. 119
- e. failed to effectively cross examine forensics officer Sean Nix. Tr. pp 134-6
 1. discovery showed beer bottle in cup holder in rear seat area of Applicant's truck was swabbed for DNA but State never introduced SLED report. Tr. p. 157-62.
 2. discovery showed blood and prints on and in rear driver's side door which was swabbed for DNA but State did not introduce SLED report or make any reference to the blood. Tr. p.161.
 3. no gun or casing were found in truck
- f. failure to make effective arguments in closing—
 1. heat of passion after witness John Mitchell said V. and D. fought at club and that he told V. to leave before D. and counsel never argues that the fact V. was still there and at D. truck would create a perceived threat for D. Tr. p. 82
 2. heat of passion or standing your ground law when witnesses admitted there had been a fight and the victim threw a bottle at the Applicant's truck which at night could have been perceived as a shot.
 3. witness Cedric Jones who was a close friend of the decedent and the only witness to identify the Applicant as the shooter said he called 911 but admitted he gave a false name, said he did not know who shot his friend and did not mention a blue truck. Tr. 110-12
 4. evidence supports third party in back drivers side seat was shooter.
2. Ineffective assistance of appellate counsel for
 - a. failing to perfect the appeal.

At the evidentiary hearing Applicant indicated that he was proceeding forward the allegations contained in the amended application.

IV. 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

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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 the probative evidence presented:

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), SCRCP. 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."

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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)).

A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn’t have to personally identify his or her thinking. It is enough that the record shows a basis for strategy, not that counsel announce that strategy on the record. See *Wood v. Allen*, 58 U.S. 290 (2010) (finding the PCR court was reasonable in inferring from evidence in the record

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that trial counsel's failure to pursue or present evidence of defendant's mental deficiencies was a strategic decision); *Koon v. Rushton*, 364 Fed.Appx. 22, 29 (4th Cir. 2010) (upholding PCR court finding that applicant failed to carry his burden where trial counsel had an articulable strategy behind his method of impeaching a witness); *McNair v. Campbell*, 307 F.Supp.2d 1277, 1312 (M.D.Ala 2004) ("Generally, courts have found that where counsel had an *articulable* strategy at sentencing, and where mitigation evidence at issue contradicted or weakened that strategy, counsel's decision not to enter the mitigation evidence was reasonable.") (emphasis added); *Geralds v. State*, 111 So.3d 778, 794 (Fl. 2010) (finding trial strategy from the record where trial counsel was deceased, and therefore not able to testify).

Request for Belated Appellate Review of Direct Appeal Issues

Applicant alleges both ineffective assistance of trial counsel and ineffective assistance of appellate counsel for failing to properly file and perfect his appeal. He asserts that he was deprived of his right to direct appellate review of his conviction without making a free, knowing, and voluntary waiver. This Court agrees, and finds that Applicant is entitled to relief on this narrow issue in the form of belated appellate review of his conviction due to the failure of appellate counsel to properly perfect the appeal.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. *Turner v. State*, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (internal citations omitted). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967). *Id.*

South Carolina's Appellate Courts have no jurisdiction to entertain appeals when the notice of appeal is not timely given and served. *White v. State*, 263 S.C. 110, 119, 208 S.E.2d 380 (1974). Nevertheless, if a PCR court finds that an applicant has been denied his right to object

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appeal from trial due to counsel's errors, his request for post-conviction relief may be denied, but he may be permitted to seek belated review of trial errors in conjunction with his appeal of the order dismissing his PCR application. *Id.*

Appellate counsel testified that she had been retained by Applicant to represent him on his appeal. The notice of appeal was filed, and she assumed representation. She stated that the trial transcript was lengthy, and Applicant's family, who was paying his legal fees, had trouble paying. She stated that by the time they were able to work out funding the time had lapsed to procure the transcript. She stated that she discussed the case with Applicant and informed him of his options, including the PCR process. She told him that she would handle the PCR instead of a direct appeal, given that she had already been paid some of the money she was owed. She stated that she then fell ill. By the time she began the process of filing the PCR application, applicant's current counsel had already filed one on his behalf and had taken over the case. She did not recall what issues, if any, Applicant wanted to be raised on appeal.

This Court finds that Applicant did not freely, knowingly, and voluntarily waive his right to pursue appellate review of his conviction. Counsel's testimony indicates that the appeal was abandoned because of Applicant's inability to pay his legal fees, not because he did not wish to continue with an appeal. Therefore, the Court finds that Applicant is entitled to relief on this narrow issue. Applicant shall be entitled to pursue belated appellate review of his conviction pursuant to *White*, 263 S.C. 110, 208 S.E.2d 35.

Failure to Move for Stand Your Ground Immunity

Applicant alleges that his counsel was ineffective for failing to make a pretrial motion for immunity from prosecution under South Carolina's Protection of Persons and Property Act,

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commonly known as "Stand Your Ground." S.C. Code Ann. §16-11-450. This allegation is without merit.

South Carolina law grants a person charged with using deadly force immunity from criminal and civil prosecution if the person is justified in using deadly force. S.C. Code Ann. §16-11-450(A). A defendant's entitlement to immunity from prosecution under this provision must be decided pretrial using a preponderance of the evidence standard. *State v. Duncan*, 392 S.C. 404, 410-11, 709 S.E.2d 662, 665 (2011). A defendant may seek immunity from prosecution by demonstrating the common law elements of self-defense. *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013). There are four elements a defendant must establish to justify the use of deadly force under the common law of self-defense:

- (1) The defendant must be without fault in bringing on the difficulty;
- (2) The defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
- (3) If his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life;
- (4) The defendant had no other probable means of avoiding the danger to losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011).

Applicant testified that the fatal gunshots came from his car, where he had a right to be. He also stated that the law allows one to protect themselves in their vehicle. He stated that his counsel did not move for immunity under the stand your ground law, and did not discuss self-defense with him. He stated that he felt threatened by the victim prior to the shooting. He stated that he was present at the fight prior to the shooting, but was not directly involved. He stated that he was

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driving a blue truck with Miller and another person in his backseat. He stated that he told his attorney who this third person was, but it was not investigated. He refused to provide any information about the person's identity at the evidentiary hearing. He stated that he was leaving the scene in his truck and became stuck in traffic while exiting when the shooting occurred.

When questioned, Applicant failed to explain whether his theory of the case was self-defense or third party guilt. He stated that he did not ask for a stand your ground hearing. He stated that he would not have testified that he shot the victim at the hearing, but instead would have done whatever his attorney told him to do. He asserted that he did not shoot the victim, but stated that he could have feared for his life because of a beer bottle that was thrown at his truck.

This Court find's Applicant's testimony to be inconsistent and lacking credibility. He indicated that he wanted a hearing to show he acted in self-defense, then refused to admit that he shot the victim, and refused to provide any information about the person who did. His assertion that he would have nevertheless taken the stand at a pretrial hearing and say whatever his attorney told him to say is especially damaging to his credibility. The record clearly shows that the defense counsel put forth was not self-defense, but rather was that someone else had shot the victim. A stand your ground hearing therefore would have made little sense, as it would have required Applicant to admit that he was the shooter. Therefore, this Court finds that counsel was not deficient for failing to move for immunity on this basis.

Furthermore, there is no likelihood that a pretrial motion for immunity would have succeeded. The record shows that Applicant was in an altercation with the victim, went to his car as the victim was leaving on foot, approached him, shot him, and then drove away. Self-defense does not apply to drive by shootings. Any assertion that a bottle thrown at his truck caused him to fear for his life is rendered moot because he was at fault for bringing on the difficulty of the case.

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have avoided the confrontation entirely by driving off, or by waiting for the victim to leave the scene. Instead he drove alongside him, rolled down his window, exchanged words, and shot him. Because a stand your ground motion would have failed, Applicant has not proven he was prejudiced by his counsel's performance. Therefore, this allegation must be denied and dismissed with prejudice.

Failure to Object to Bolstering

Applicant alleges that counsel was ineffective for failing to object to a comment made by Officer Brad James on direct examination. Officer James testified that he had "no reason to believe that [information indicating a blue pickup truck involved in the shooting had left the scene] wasn't reliable." This allegation is without merit.

To prove trial counsel's performance was deficient a PCR applicant alleging that counsel failed to object to bolstering testimony must show that counsel's representation fell below an objective standard of reasonableness. *Chappell v. State* 429 S.C. 68, 75, 837 S.E.2d 496, 500 (Ct. App. 2019). Assessment of witness credibility is within the province of the jury. *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Trial counsel's deficient failure to object to improper bolstering testimony does not remove a PCR Applicant's burden of proving prejudice. *Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018). Failure to object to bolstering comments may be prejudicial where the case hinges on the credibility of the bolstered testimony. *State v. Chavis*, 412 S.C. 101, 110, 771 S.E.2d 336, 341 (2015); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010). This will be the case when the State presents no physical evidence, or relies solely upon the testimony to establish the details of the crime. *Thompson*, 423 S.C. at 248, 814 S.E.2d at 494.

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Applicant stated that his counsel did not object to the comment made by Officer James. He acknowledged that Officer James was not the officer who arrested him, and confirmed that he was driving a blue truck away from the scene of the crime.

Deputy Solicitor Balsa testified that the State presented strong evidence of Applicant's guilt, including eye witness testimony and forensic evidence showing gunshot residue on Applicant's hands.

Counsel's unavailability prevented him from articulating his reasoning for failing to object to the comment made by Officer James. The record does not show whether this failure was a strategic decision, or a deficient omission. The Court notes that the witness's comment in question reads as a comment on the investigation, rather than an attempt to bolster the credibility of the information conveyed to him. Therefore the statement was likely not objectionable, thereby eliminating the possibility of deficiency.

In any event, this Court finds that Applicant could not have been prejudiced from counsel's failure to object to any bolstering comments made by Officer James, because the outcome of the trial did not hinge on his testimony. The information that he supposedly bolstered did not implicate Applicant whatsoever. He stated that he was told by people on the scene that a blue truck may have been involved in the shooting, and that officers responding to the scene were attempting to locate it. Numerous witnesses, including Applicant himself, confirmed that the blue truck was involved. Applicant would have been convicted of this crime, even if the entirety of Officer James's testimony were excluded from trial. Officer James was not the arresting officer, and therefore his testimony was largely immaterial to the determination of guilt. Therefore, Applicant has failed to prove that he was prejudiced by counsel's performance. As such, the allegation must be denied and dismissed with prejudice.

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Failure to Adequately Respond to State's Objections

Applicant alleges that counsel was ineffective in failing to properly respond to the State's objections to testimony alluding to a guilty third-party being present in the backseat of the truck by asserting that it was supported by the evidence, and went to the adequacy of the State's investigation. Specifically, Applicant finds fault with counsel's arguments at the pretrial motion hearing, his argument in response to an objection raised during the testimony of Officer Brad James, and his argument in response to an objection made during the testimony of Investigator Lorin Williams. These allegations are without merit.

A criminal defendant may present evidence of a third-party's guilt if the evidence raises a reasonable inference or presumption as to the defendant's own innocence, but not if it merely casts a bare suspicion upon another or raises a conjectural inference as to the commission of the crime by another. *State v. Gregory*. 198 S.C. 98, 16 S.E.2d 532 (1941). Exclusion of such evidence is permissible because it may be of marginal relevance, or pose an undue risk of harassment, prejudice, or confusion of the issues. *Holmes v. South Carolina*, 547 U.S. 319, 326-27, 126 S.Ct. 1727, 1732 (2006). To determine whether such evidence is admissible the trial court must consider the strength of the State's case alongside the strength of contrary evidence offered by the defense to rebut or cast doubt. *Id.* 547 U.S. at 331, 126 S.Ct. at 1735.

The State moved to exclude evidence of third-party guilt prior to trial, asserting that there was "no evidence whatsoever" of a person in the backseat being guilty of the shooting. (Tr. 30). The Deputy Solicitor explained that there was evidence of only one other person in the vehicle, Miller, who was merely present at the scene and was not charged. (Tr. 31-32). Counsel argued that the police investigation revealed some inference of a third party in the backseat, but that he would only be able to present it on cross-examination because the defense had no evidence submission

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the issue. *Id.* He did point out that Miller did have gunshot residue on his person. (Tr. 32). He also argued that the State's evidence indicating Applicant was the shooter "did not come out until about six or seven weeks later" from a friend of the deceased. (Tr. 33). The court allowed counsel to cross-examine witnesses on third-party guilt, but stated that he would have to "meet the [*Holmes*] test" for evidence he wished to introduce. (Tr. 31). The court specifically stated that counsel could cross-examine officers "concerning the scope of their investigation." (Tr. 34).

On cross-examination of Officer James, counsel asked if he recalled providing an investigator with the name "Derrick Tate." (Tr. 69). The State objected, and argued that Tate was an individual who had initially been implicated but ultimately ruled out by investigators. (Tr. 69-70). The Deputy Solicitor stated that Tate was implicated because he shared the same nickname, "Black," with Applicant. (Tr. 71-72). Counsel stated that the question was to determine if Officer James was "given that name and then came back with another name." (Tr. 71). Counsel admitted that there was no evidence that Tate was at the scene, let alone in the vehicle. (Tr. 72). The court permitted cross-examination, but limited the questions regarding Tate unless there was some greater connection than a common nickname. (Tr. 72). Ultimately the court determined that asking the witness if someone gave him the name was hearsay and sustained the objection. (Tr. 72-73).

The State again objected during the cross-examination of Investigator Lorin Williams, when he was asked if he was given Derrick Tate's name during the course of his investigation. (Tr. 191). The State asserted that counsel was again trying to go into third-party guilt based solely on a name being given. (Tr. 191-192). Counsel responded by stating that he was merely asking about the investigation of other individuals who may have perpetrated the crime, and expressed concern that Applicant's presumption of innocence was being violated. (Tr. 192-193). The court stated that it was attempting to view the issue from the perspective of Applicant's case and asked

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if there was any evidence support a third-party's guilt such that it would exclude Applicant's culpability. (Tr. 193). Counsel offered Miller as a possible suspect, but the court stated that alone was not substantial evidence indicating a third party was the perpetrator. (Tr. 193-194). The court allowed counsel to make a proffer to determine if evidence excluding applicant's guilty existed. (Tr. 194).

Investigator Williams then testified that he had been given the name of two other individuals, but focused on Applicant based on witness identification that excluded those two suspects. (Tr. 195). He stated that Applicant had been identified by Graham, who knew him previously but did not specifically witness the shooting. (Tr. 197). He also noted that the two other names given to him did not come up in any other context after they were excluded from the investigation. (Tr. 198). He acknowledged that he had been told three people were in the cab of the truck. *Id.*

Deputy Solicitor Balsa asserted that the evidence of a third party in the truck was hearsay, because it was told to investigators by a witness at the scene. (Tr. 199-200). Counsel correctly agreed. (Tr. 199). The court specifically referenced the *Holmes* case, and stated that it was looking for evidence indicating that another party was guilty of the crime. (Tr. 201-203). Counsel stated that there was no evidence that the two individuals named in the report were guilty, but that there may have been a third person in the back of the truck, based on Investigator Williams's report. (Tr. 203). The court stated that this alone does not indicate Applicant was not guilty, because he was driving the truck and the shot came from the driver's side. *Id.* The number of people in the vehicle did not change this fact. (Tr. 202-203). The court rejected counsel's arguments, stating that he needed to show that the shot came from another side of the cab or that some other person actually committed the crime, rather than showing that "there might have been a third person in the cab."

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(Tr. 204-205). The court specifically allowed counsel to continue questioning witnesses about the thoroughness of their investigations, but did not allow anything further. (Tr. 205).

As discussed above, Applicant refused to explain who was in the backseat of the truck. He simply asserted that someone was there but it was not properly investigated. Deputy Solicitor Balsa testified that the evidence at trial showed that the victim was walking away from the scene, Applicant drove up, they exchanged words, a bottle was thrown, and a shot rang out. When Applicant was arrested he initially had an alibi, then admitted he was there but claimed he was not driving the truck, but never asserted that a third person was in the backseat. He stated that he never became aware of anyone who may have been in the backseat, and that Derrick Tate was only mentioned to Officer James before being ruled out. He believed that the State presented a strong case, with eye witnesses and forensic gunshot residue evidence. He noted that the jury deliberated for less than two hours before returning with a guilty verdict.

This Court finds that counsel's performance was reasonable under the circumstances, given the facts and evidence in this case. The record clearly shows that counsel sought to present evidence that a third party was in the back of the truck and had committed the murder. He offered several suspects, including a passenger in the vehicle and another individual whose name had been given to officers during their investigation. However, the court properly excluded the testimony because it was not substantial enough to raise a reasonable inference that someone else had committed the crime. Applicant submitted photos of the vehicle containing a bottle and what appears to be blood in the rear of the vehicle. Applicant also relies on the testimony of John Miller, who stated that a third person may have gotten in the vehicle to show what counsel should have argued. (Tr. 92). The court explicitly rejected this argument, explaining that a third person simply being in the vehicle did not show that Applicant was not guilty. (Tr. 205). The court properly

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weighed the case counsel presented against the State's case and concluded that the evidence of third-party guilt was insufficient to put before the jury. Counsel's performance in this regard was objectively reasonable, and he was able to get the court to permit cross-examination on the investigation. Therefore, Applicant has failed to prove that counsel's performance was deficient.

Furthermore, Applicant has failed to prove counsel's performance prejudiced him. He refused to state who was in the backseat of the vehicle. His testimony at the evidentiary hearing blurred the lines between self-defense and third-party guilt, and casts serious doubt upon his credibility. Even assuming he testified truthfully, his allegations regarding his counsel's failure to make arguments in support of third-party guilt are unpersuasive. Counsel did precisely what he is alleging was omitted. Counsel pointed to the scant evidence that existed showing that someone other than Applicant may have been involved. The court ruled that his arguments were insufficient. Had counsel gone further and highlighted John Miller's testimony that there may have been a third person in the truck, there is still no probability that the outcome of the trial would have been different because the court's ruling explicitly addressed that slight probability and found it was not enough. Given that the court's ruling would have been the same had counsel shown that a third party was in the truck, there is no likelihood that the outcome of trial would have been different. Therefore, Applicant has failed to meet his burden of proving prejudice from counsel's performance. As such, the allegation must be denied and dismissed with prejudice.

Failure to Impeach Witness Cedric Jones with the 911 Call

Applicant alleges that his counsel was ineffective for failing to impeach witness Cedric Jones by introducing the 911 call he made on the night of the shooting. This allegation has no merit.

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The 911 trial was played aloud at the evidentiary hearing. The recording showed a distressed male voice requesting assistance for a fatal shooting. The man indicated that he could not tell if the victim was breathing, but did not provide information about the perpetrator of the shooting. He indicated that his last name was Johnson, and requested that emergency personnel rush to the scene. Applicant stated that he recognized the tape, as he had repeatedly requested counsel to play it at trial. He stated that he did not know Cedric Jones. He testified that the tape would have shown that Jones could not have seen what he claimed at trial.

At trial, counsel asked Jones questions about prior convictions, whether he was drinking the night of the shooting, and his relationship with the victim. (Tr. 116-118). He was then asked if he called 911 at the scene, which Jones admitted. (Tr. 118). He acknowledged that he gave a false name, and that he told the dispatcher he did not know who the perpetrator was. (Tr. 119). He also acknowledged that he did not give a description of the truck. (Tr. 120). He was then questioned about why he waited to contact police until six weeks after the shooting. Deputy Solicitor Balsa stated at the PCR hearing that he was aware of Jones giving a false name on the 911 call, but stated that it was not particularly uncommon in cases like this.

This Court finds that counsel's decision to not introduce the audio recording of the 911 call was a strategic decision based upon the record and upon listening to the recording. The recording features a man in distress, calling for help after witnessing a murder. The emotion is apparent in his voice and very possibly would have needlessly prejudiced the jury against Applicant. Counsel did, however, cross-examine Jones at length about the contents of the recording. Jones testified truthfully that he did not provide his true name, or describe Applicant to the first responders. Counsel's decision, therefore, was very likely a reasonably strategic choice made specifically to get in crucial challenges to the most important witness's credibility without inflaming the passions

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of the jury. Every bit of information that could have been shown from the call itself was brought out on cross-examination, without the risk of harming Applicant's chances of prevailing at trial. Therefore, counsel's failure to introduce the 911 call was not deficient. And because counsel chose a safer route to impeach Jones, Applicant could not have been prejudiced by counsel's performance in this regard. Therefore, the allegation must be denied and dismissed with prejudice.

Failure to Effectively Cross Examine Officer Nix

Applicant alleges that counsel was ineffective for failing to effectively cross examine forensics officer Sean Nix. Specifically, Applicant states that counsel should have questioned him about a beer bottle in the backseat of the truck that was swabbed for DNA but no results were introduced, blood and prints on the rear driver's side door which were also swabbed for DNA that was not introduced, and the fact that no gun or casings were found in the truck. These allegations are without merit.

Officer Sean Nix testified at trial that he was the forensics officer who examined the crime scene. (Tr. 125, 24 – Tr. 127, 5). He testified on direct examination that he did not find weapons or shell casings at the scene, despite spending a significant amount of time searching. (Tr. 128, 20 – Tr. 129, 11). He explained that this could have meant that the weapon used was a revolver that did not eject spent casings, or that the casing had been ejected into the vehicle. (Tr. 129, 14-19). He testified that he conducted a visual search of the vehicle after it had been stopped, and again did not find any casings or weapons. (Tr. 130, 2-20). He explained that this could have meant that someone had gone through the truck and removed the casings or weapon prior to law enforcement's arrival. (Tr. 131, 7-12). Officer Nix stated that his involvement in the case was limited to processing the vehicle, a little bit of the scene, and attending the autopsy.

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Counsel cross-examined Officer Nix on whether he obtained a warrant to search the vehicle, whether he found contraband in the vehicle, how he knew of the passengers, and who gave him his information. (Tr. 134, 1 – Tr. 135, 24). On redirect Officer Nix stated that there was a beer bottle in the backseat of the truck, but nothing that would be considered “contraband.” (Tr. 136, 2-20). Counsel did cross-examine Officer Robert Shaffer about blood found on Mr. Miller’s clothing. (Tr. 151, 4-16).

At the evidentiary hearing Applicant stated that he told his attorney about the beer bottle in the backseat of the car. Applicant introduced photos that were included in discovery showing the vehicle as well as the bottle in the backseat. Applicant stated that his attorney did not ask Officer Nix about the bottle, or whether it was swabbed for DNA. Applicant acknowledged that a beer bottle had been thrown at his truck, and refused to identify anyone who was in the backseat of the truck. He stated that he would have wanted his attorney to present this evidence of the bottle and blood in the backseat because it could have shown that a third party was responsible.

Deputy Solicitor Balsa testified that the vehicle had been found after the shooting and Applicant was driving. He stated that Applicant was interviewed and initially offered varying stories about his involvement, but never mentioned a third person in the backseat. He stated that a third person was never named and he was not aware of who the supposed third person could have been. He stated that he did not remember a bottle being found in the vehicle, and did not think that it was relevant. He stated that there was no DNA testing done in this case.

This Court finds that Applicant’s claims are without merit. Applicant has failed to meet his burden of proving counsel provided deficient representation by failing to cross-examine Officer Nix on these specific points because it is unclear what purpose it would have served in the presence of a beer bottle in the backseat of the vehicle does not, by itself, indicate that there is a

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third person in the backseat at the time of the shooting. Neither does the presence of blood. Even if these pieces of evidence had been tested for DNA, they would not place a third party at the scene of the crime at the time of the shooting. They would merely show that some other person had been in the backseat of the vehicle at some point, which was nevertheless presented to the jury through the testimony of Ruben Landrum. Nevertheless the record shows that Applicant's counsel did cross-examine Officer Nix on his involvement in the case, and did ask him if there was any contraband in the vehicle. This was objectively reasonable under the circumstances.

Furthermore, Applicant has failed to show that the outcome of his trial would have been different but for counsel's failure to adequately cross-examine Officer Nix. Officer Nix's testimony was hardly central to the State's case, and there is no probability that asking three additional questions about the presence of blood or a beer bottle in the vehicle would have altered the jury's findings. He stated that he did not find a weapon, shell casings, or contraband in the vehicle. He acknowledged on redirect that there was a beer bottle in the vehicle. The jury also heard that the passenger, Rashawn Miller, had blood on his clothing during counsel's cross-examination of another witness. Even if the jury believed that the mere presence of blood or the beer bottle meant that someone was in the backseat, it does not indicate that they were the person who shot and killed the victim. Nor does it indicate that this was a justifiable homicide under the circumstances. As such, there is no likelihood that counsel's cross-examination of Officer Nix changed the outcome of the trial. Therefore, Applicant has failed to meet his burden of proving prejudice. The allegation must be denied and dismissed with prejudice.

Failure to Make Effective Closing Arguments

Applicant alleges that counsel was ineffective for failing to make effective closing arguments. Specifically, Applicant asserts that counsel should have argued that the killing was

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done in the heat of passion in light of John Mitchell's testimony, should have argued self-defense because the evidence showed that a beer bottle had been thrown at Applicant's truck, should have argued that Cedric Jones lacked credibility because of his 9-1-1 call, and should have argued that the evidence supports a finding that a third party in the backseat was the shooter. These allegations are without merit.

The right to effective assistance of counsel extends to closing arguments. *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S.Ct. 1, 4 (2003). Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. *Id.* 540 U.S. at 6, 124 S.Ct. at 4. Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact," but which issues to sharpen and how best to clarify them are questions with many reasonable answers. *Id.* (citing *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550 (1975)).

The record shows that counsel gave a lengthy closing argument. (Tr. 251 – Tr. 257). He began by reminding the jury of the elements of the offense and the State's burden of proof and the elements of the offense. (Tr. 251, 10 – Tr. 252, 14). He acknowledged that there was a deadly shooting at the Universal Club. (Tr. 252, 15-18).

Counsel argued Cedric Jones's testimony was not credible because he had not given a statement to investigators until well after the shooting took place, did not truthfully disclose all information to the 9-1-1 operator, was biased in favor of the victim, and had been drinking at the time of the shooting. (Tr. 253, 9 – Tr. 254, 25).

Counsel argued that Ruben Landrum stated he saw three people in the truck 258-14-15). "Whether before, during, or after, or after, three people got out of it" he claimed, an

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obvious attempt to minimize the fact that Landrum had not placed a person in the backseat at the time of the shooting. (Tr. 254, 16-17). He stated that there was testimony that half of the people who vacated the club entered the truck and the other half entered another vehicle. (Tr. 255, 8-14).

This Court finds that counsel presented a reasonable closing argument in light of the facts of this case. Applicant's assertion that he should have argued for heat of passion in light of Mr. Miller's testimony is in stark contrast with his clear strategy of presenting the shooter to be someone other than Applicant. He did, contrary to Applicant's allegation, support this theory in closing by citing the testimony of witnesses who stated that there may have been three people in the vehicle at various points on the night of the crime. He also criticized Cedric Jones's testimony, the witness who saw Applicant shoot the victim, because of issues with the 9-1-1 call. Therefore counsel's closing argument was objectively reasonable under the circumstances and Applicant has failed to meet his burden of proving deficiency.

Furthermore, Applicant has not proven he was prejudiced by the closing argument. Given that several of Applicant's concerns were addressed in closing and he was nevertheless convicted, it is inconceivable that he could have been acquitted but for counsel's closing argument. The only issue Applicant raises that was not addressed in closing, the heat of passion defense, would not have changed the outcome of the case given the fact that this was a drive by shooting that took place after the fight had been broken up and the parties involved were leaving the scene. The Court recognized that there were extenuating circumstances because of the fight, and stated that this was likely a case where Applicant's evil intent formed immediately before the shooting. (Tr. 299, 15 – Tr. 300, 10). The Court did so without counsel making a heat of passion argument in closing. The Court treated this as mitigation, but did not attempt justify Applicant's actions by stating that the victim did not deserve to die for what happened that night. (Tr. 299, 19-21). Therefore, Applicant

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has failed to meet his burden of proving prejudice and the allegation must be denied and dismissed with prejudice.

Due Process Violations

Applicant alleges that he was deprived of due process when the Deputy Solicitor stated that there was no evidence to support a guilty third party when he failed to present forensic evidence indicating otherwise, and because counsel's representation amounted to a "total breakdown of the adversarial process." These allegations are without merit, largely for the reasons already explained above. The record clearly shows that counsel developed a reasonable defense strategy of arguing for third party guilt. The State objected to various references to unrelated third parties because there was no evidence that those specific persons had been involved in the commission of the crime. Applicant's counsel argued against the objections at length, and the court gave his arguments proper consideration before rejecting them. The record shows that there was little evidence indicating that a third party was in the backseat of the vehicle at the time of the crime, and this is made clear by Applicant's direct refusal to identify such a person at the post-conviction relief hearing. This Court can therefore find no violation of due process in the proceedings giving rise to Applicant's convictions, and the application for post-conviction relief must be denied and dismissed with prejudice.

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III. CONCLUSION

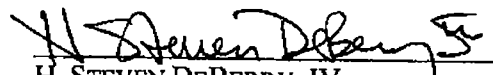
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.


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), SCRPC 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 remain remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 15 day of December, 2021.

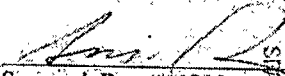

 H. STEVEN DEBERRY, IV
 Presiding Judge
 Seventh Judicial Circuit


 Florence, South Carolina
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seeing him walking down the drive to his car. (Tr. 82, 4-11). Witness Cedrick Jones said someone put his hands on the victim in the club and the victim just reacted and got escorted from club. (Tr. 108, 18). He then said the victim had no ride so instead of leaving, he tried to get back in club. (Tr. 109, 9-14). Jones said the Applicant approached while we were walking toward the car and started talking to the victim who then got upset and threw a beer bottle at the Applicant's car. (Tr. 110, 14-25). He said he did not see the Applicant move but there was a flash when the bottle was thrown and the victim was shot. (Tr. 111, 1-9). The trial testimony does not support the factual findings that the Applicant brought on the difficulty, approached the victim as he was leaving, or that this case could be characterized as a drive by shooting. Whether the Applicant could have avoided the confrontation by driving off is immaterial. "Consistent 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. This includes all elements of self-defense, *save the duty to retreat* [emphasis added]." State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (S.C. 2013).

Respectfully submitted,


Susannah Ross #11205
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Greenville, South Carolina
This 31 day of December 2021.



State of South Carolina
The Circuit Court of the Twelfth Judicial Circuit

H. Steven DeBerry, IV
Judge

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Florence, SC 29501-3466
Phone: (843) 665-3020
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January 7, 2022

Please find attached is PCR case number 2018-CP-42-0995 Motion for Reconsideration. This is the original copy to be filed in the Clerks office. Any questions or concerns please feel free to reach out to our office.

Thank you for your time,

Caleb Thompson

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