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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

On Petition for Writ of Certiorari to Lexington County
(Appeal, DNA Testing Act)

The Honorable Walton J. McLeod, IV, Circuit Court Judge

WORTH EDWARD COOK, III,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2021-001267

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the circuit court erred in summarily dismissing Petitioner's application for DNA testing under the Access to Justice Post-Conviction DNA Act (the Act) where the court did not apply the correct standard for deciding when summary judgement is proper and considered the wrong section of the Act in making its decision?

(Petition at 1).

STATEMENT OF THE CASE

On January 13, 2014, a Lexington County grand jury returned a true-billed indictment against Petitioner for the murder of David Diblasi. (App. 1095-96). A jury trial began on February 29, 2016. Sally Henry, Esq., and Beth Fullwood, Esq., represented Petitioner on the charge. The Honorable R. Knox McMahon presided. (App. 1). On March 4, 2016, the jury returned with their verdict finding Petitioner guilty as charged. (App. p. 974). Judge McMahon sentenced Petitioner to thirty-five years imprisonment for murder and terminated Petitioner's probation for a prior conviction. (App. 990). Petitioner timely appealed.

Appellate Defender Susan Hackett, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Petitioner on appeal. Appellate Counsel filed an *Anders*[1] Brief of Appellant on February 13, 2017, and raised the following issue:

> Did the trial judge err in admitting statements made by Appellant to law enforcement where (1) the police failed to scrupulously honor his invocation of his right to counsel and (2) the police coerced him to waive his rights to counsel and silence by threatening to arrest the mother of his child and place his child in the custody of social services?

[1] *Anders v. California,* 386 U.S. 738 (1967) (allowing direct appeal review by appellate court where appellate counsel has found no issues of arguable merit to raise); *see also State v. Williams,* 305 S.C. 116, 406 S.E.2d 357 (1991) (setting out appellate procedure for *Anders* review).

(*Anders* Brief, p. 1).[2]

After the required review, this Court dismissed the appeal by unpublished opinion issued April 4, 2018. *State v. Cook,* Unpublished Opinion No. 2018-UP-139 (S.C.Ct.App. filed April 4, 2018). The court issued the remittitur on April 24, 2018.

On May 4, 2018, Petitioner filed his first application for post-conviction relief. (2019-CP-32-01554).[3] Art Aiken, Esq., represented Petitioner in the action. An evidentiary hearing was held on April 5, 2019. The Honorable Walton J. McLeod, IV, presided. At the start of the hearing, after introduction of the case, PCR counsel advised Judge McLeod that applicant would present only the one ground asserted in the amendment to the PCR application: the allegation that trial counsel was ineffective for failing to request, or failing to object to the absence of, a permissive inference instruction under *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). (PCR App. at 1025-27; *see also* PCR App. at 1017-19). By Order filed June 27, 2019, Judge McLeod denied relief. (PCR App. at 1043-52). Petitioner timely appealed.

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[2] The brief is not included in the appendix to the petition; however, the documents were filed with this Court in the direct appeal and this Court may take judicial notice of the records as contained in Appellate Case No. 2016-000546. *See Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984) ("A court can take judicial notice of its own records….") (citing 31 C.J.S., Evidence, Section 50(1), p. 1018-1021). Further, Petitioner quoted from the brief in his Application for DNA testing. (App. 998). He also generally referenced some other portions of the procedure history since trial. (*See* App. 997- 1012).

[3] These records are not included in the appendix, but are also a part of this Court's records as filed with the subsequent PCR appeal. As with the direct appeal records, this Court may take judicial notice of these documents as reflected in Appellate Case No. 2019-001248.

Appellate Defender Sarah E. Shipe from the Division of Appellate Defense was appointed to represented Petitioner in his PCR appeal. On March 9, 2020, PCR appellate counsel filed a *Johnson*[4] Petition for Writ of Certiorari in the Supreme Court and raised the following issue:

> Did the PCR court err in finding trial counsel was not ineffective for failing to object to the trial court's omission of any permissive inference language where the jury was instructed on inferred malice?

(*Johnson* Petition at 1).

Petitioner filed a *pro se* response on July 9, 2020, in which Petitioner presented additional issues alleging prosecutorial misconduct, ineffective assistance of PCR counsel, and failure to objection to the State's closing argument. On July 28, 2020, our Supreme Court transferred the case to this Court.

By Order dated August 11, 2021, this Court, noting its "careful consideration of the entire appendix," denied the petition, and subsequently issued the remittitur on September 8, 2021.

Petitioner has also filed a petition for writ of habeas corpus in the United States District Court, District of South Carolina, on March 17, 2022. (C/A 2:22-cv-00904-BHH-MGB). Petitioner requested a stay of his federal proceedings pending asserting a pending second PCR application (2022-CP-32-00620); a pending new trial motion (*see* 2013A3210200659, Lexington County Public Index); and the appeal of the denial of DNA testing (the basis for this appeal). A stay has not been entered as of this time, and the federal action is still currently pending.

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[4] The Supreme Court of South Carolina "has approved the withdrawal of counsel in meritless post-conviction appeals, provided the procedures outlined in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), were followed." *Johnson v. State*, 294 S.C. 310, 310, 364 S.E.2d 201, 201 (1988).

The DNA Act Filings and Disposition of the Application

On November 16, 2020, Petitioner filed a *pro se* application for DNA testing. (App. 992-1029). The State filed its response on February 5, 2021, and moved for summary dismissal. (App. 1030-44). Petitioner filed a reply on March 1, 2021. (App. 1046-61). On July 1, 2021, the Honorable Walton J. McLeod, IV, issued a conditional order of dismissal, noticing an intent to grant the State's motion for dismissal, and allowing Petitioner twenty days in which to submit an explanation as to why the order should not become final. (App. 1065-70). On June 21, 2021, Petitioner filed his response opposing the dismissal. (App. 1071-88). On October 7, 2021, after review of the response, Judge McLeod granted the motion for summary dismissal by way of a final order, finding "Applicant is not entitled to DNA testing and no purpose would be served by any further proceedings." (App. 1094). This appeal follows.

RESPONDENT'S STATEMENT OF FACTS

On March 9, 2013, David Diblasi's brother, Mark Calhoun Diblasi, filed a missing person's report with law enforcement, having last seen his brother on February 25th. (App. 221-22). Detective James Kemfort reviewed David's financial records and found a transaction posted after his disappearance. (App. 228). He obtained video of from the local Walmart where the card was used. (App. 229). The video showed two individuals. (App. 248). Petitioner would later admit the use of the card and being one of the men. (App. 793).

The Night of the Murder

Damian Hoffman testified that he had purchased heroin from David. David was to meet Damian at his house to collect money. On the night he last saw David, David was at Hoffman's house, "sitting in a van" that he "didn't recognize at the time," when Hoffman returned with his father and girlfriend, Melinda Gladden. He testified David was with two men he did not know,

but later identified Petitioner as one of the men and also the driver of the white van that Hoffman saw on that night. (App. 263-64; 270). Hoffman testified, that the two men left (he chased them off) and he paid David. David had at least two thousand in cash perhaps that much again, he was sure David "had $2,000 and some more heroin." (App. 267).

Hoffman's girlfriend, Gladden, testified similarly, but also identified Rick Barnes as the other male with David and Petitioner. Further, she recalled that David had two thousand dollars in cash and "about a gram of meth" and "8 or 9 bundles of heroin." (App. 283-84).

Rick Barnes[5] had a girlfriend at that time by the name of Kaycee Turner. She testified that in the afternoon on the day David was last seen alive, she and Barnes received a phone call to pick up Shannon Tart, Petitioner's girlfriend, at Petitioner's home. (App. 344-45). Barnes knocked on the door, and eventually Tart came out of the home. They then left for Barnes' home where they watched TV, and Barnes spoke with his father. However, later that night, Turner told Barnes to contact Petitioner and tell him that Tart needed to leave the house. Barnes sent a text to Petitioner, and received a response that they should wait "15 to 20 minutes and then bring her home." (App. 346-49). It was nighttime, "pitch black," when they arrived at the house. Tart knocked, but it took Petitioner "[m]aybe 10 minutes," to open the door. (App. 351). Petitioner appeared "clean" (which was striking "[b]ecause he doesn't usually take a bath"), "out of breath and he had a weird look in his eyes." (App. 352). In the home, Turner noticed a chair was missing from the living room; the couch was moved; and a table was missing. She noticed no injuries, cuts or bruises on Petitioner. (App. 352-53; 357). Barnes went outside several times, but on the last trip back into the home, Turner testified that Barnes "looked like somebody had scared him." (App. 355-57).

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[5] Rick Barnes did not testify. He was, at the time of trial, incarcerated in Manning Correctional Facility, having pled guilty to accessory after the fact. (App. 342 and 1039).

Investigator Mike Phipps testified that David's body was found buried in Petitioner's backyard, wrapped in a shower curtain and with a blanket. He was clothed but did not have wallet, money or shoes, nor were there any drugs found on the body. (App. 495-96 and 502). In investigating the matter, the investigator photographed portions of the home and collected evidence, including: a Walmart bag with a stain consistent with blood and swabs from spots in the "den" area of the home with stains consistent with blood. (App. 481 and 488).

Samuel Stewart, a SLED DNA analyst, testified that swabs from the Walmart bag and den area produced profiles that were consistent with David's DNA profile. (App. 587).

Further, phone records revealed victim's phone was last used at 11:37 pm on a tower near Petitioner's residence. (App. 519-20). And, further still, Kayla Mattoni testified that a few weeks after David's disappearance, she saw Petitioner with David's distinctive heroin bags – wax bags that had a stamp in red that read "First Call." (App. 599-600).

Petitioner gave seven different statements during the investigation. (App. 46). In his final statement, Petitioner admitted killing David, claiming David attacked him and during a struggle, David was accidentally stabbed in the neck, but that was not a fatal wound. According to Petitioner, he stabbed David in the eye so that David would not suffer anymore. (App. 647-49).

At trial, Petitioner testified that the killing was in self defense. He testified he, David and Barnes were going to collecting debts owned to David. (App. 759). At one point, Barnes left, and he and David picked up some meth, then went to Petitioner's home and smoked the meth. (App. 765-67). After some drug swapping between the two, David left. Barnes picked up Petitioner's girlfriend, Tart, and brought her to the home. Barnes left. Then, David burst into Petitioner's home, screaming and asserting people were taking advantage of him. (App. 770 -76). He demanded drugs and money that he asserted David had given to him earlier. (App. 776). Petitioner

testified David began to wave his arms and he saw a knife. Then, Petitioner rushed at him and there was a struggle over the knife. (App. 778-79). Petitioner tripped, fell into a chair, David fell on him with on hand on Petitioner's throat, the other holding the knife. (App. 779). Petitioner testified Tart came into the room at that point, and David kicked her in the stomach, knocking her back into a dresser. Petitioner grabbed a knife from a table and stabbed him. (App. 708, 781). The struggle continued and Petitioner eventually also stabbed David in the eye. (App. 782).[6] Petitioner testified he cleaned the room; buried David's body in the backyard; disassembled David's truck and motorcycle and sold the parts; and also admitted using David's credit card at Walmart. (App. 788-94).

Shannon Tart also testified at trial.[7] Barnes picked her up earlier that evening and she went to Barnes' home until around 11:00 pm. (App. 699-701). She recalled going in to take a bath and later heard a bunch of yelling and noise. (App. 701-702). She testified when she went to investigate, she saw a man pinning Petitioner down, a hand on his neck, and the man had a knife. She testified she tried to intervene but the man pushed her into a dresser. She testified she hit her

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[6] Defense counsel candidly admitted in her opening statement that Petitioner "is responsible for David Diblasi's death." (App. at 216). The defense was self-defense and defense of others – "an unprovoked attack by David Diblasi" in Petitioner's home that threatened him, and his fiancée who was carrying their child. (App. 217). Further, and consistently, according to appellate counsel in the direct appeal:

> There was no dispute that Appellant killed the deceased, David Diblasi. R. 216, ll. 22-23; R. 905, ll. 1-3; R. 910, ll. 12-13. The only question was whether Appellant acted in self-defense, defense of others, and/or defense of habitation. R. 216, l. 25 – R. 217, l. 2; R.910, ll. 21-23.

(*Anders* Brief at 3).

[7] Later, on May 11, 2017, Tart pled guilty to misprision of a felony in regard to the murder. (App. 1039).

head and was knocked out. (App. 702-706). She testified she regained consciousness and saw Petitioner pick up a knife and stab the man in the neck. (App. 706-707). She also saw Petitioner stab him in the eye. (App. 729).

STANDARD OF REVIEW

No clear standard has been announced for appellate review of a ruling made on an application filed under the Access to Justice Post-Conviction DNA Testing Act. However, the statute provided that the application is filed as part of the criminal case with the prosecutor tasked with response. *See* S.C. Code § 17-28-50. Further, the Act provides if a hearing is ordered, "All rules and statutes applicable in *criminal proceedings* are available to the application and the solicitor or Attorney General, as applicable." S.C. Code § 17-28-90 (emphasis added). Consequently, Respondent submits that the standard of review should be that applied to review of motions for a new trial under Rule 29, S.C.R.Crim.P. : "The decision whether to grant a new trial rests within the sound discretion of the [circuit] court, and [an appellate court] will not disturb the [circuit] court's decision absent an abuse of discretion." *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009). This "deferential standard of review constrains [an appellate court] to affirm the [circuit] court if reasonably supported by the evidence." *Id.,* at 167, 672 S.E.2d at 565. "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007).

DISCUSSION

Petitioner's argument is not preserved for review. Even so, the circuit court judge did not err, as argued by Petitioner, in conflating the requirements of S.C. Code §§ 17-228-40 and 90; rather, the circuit court judge considered the petition lacked sufficient explanations under S.C. Code § 17-28-40 as evidenced by his reference to the explanations required as set out in that section in summarily denying the petition for DNA testing.

Petitioner submits that the circuit court judge erred by conflating Sections 17-28-40 and 17-28-90 resulting in a higher burden than necessary, and that Petitioner needed only to show basic assertions in his application to avoid summary dismissal. (Petition at 11). Neither the record nor the statute support Petitioner's arguments, but as an initial matter, this argument was not made below and is not properly before the Court for a merits review.

The Issue Raised on Appeal Was Not Raised Below

Petitioner raises an issue on appeal that was not raised below. In his response opposing the conditional order of dismissal, Petitioner *relied upon* Section 17-28-90, and did not argue that he was only required to offer his allegations, as he now asserts on appeal. Notably, the conditional order begins with the explanation required under Section 17-28-40, then, in a separate paragraph, speaks to the factors under Section 17-28-90). (App. 1066-67). Admittedly, the final order shows that the judge, after reviewing Petitioner's submission, *additionally* found Petitioner failed to established by the factors by a preponderance of the evidence. (App. 1093, beginning sentence with "Furthermore"). That would appear to borrow from Section 17-28-90, but it is an independent phrase which does not invalid the remainder of the order – particularly since the judge was adopting the conditional order that did not contain that phrase. (*See* App. 1068-70).

Further, the conditional order set out the judge's reasoning that Petitioner made only "a conclusory statement" and failed to explain "how DNA testing would exclude Applicant as a suspect" and the record was solidly against him. (App. 1069). This tracks Section 17-28-40.

Section 17-28-40 (C)(5) requires an applicant to "explain why the identity of the applicant was or should have been a significant issue" at trial "not withstanding … incriminating statements or admission…." The judge explained that in addition to the other evidence at trial – *i.e.,* DNA that supported the victim bled in Petitioner's home; the fact the victim was buried in Petitioner's backyard; Petitioner used victim's financial card after victim's death; and Petitioner had victim's heroin after victim's death – there was also Petitioner's testimony and another eyewitness to the stabbing. (App. 1069). The judge reasoned "any DNA that might be found on the items that Applicant identified would not exclude Applicant as a suspect, and if presented at trial, would not have changed the outcome." (App. 1069). He explained that DNA testing could not produce exculpatory results given the blood testing from the home and van were not likely to be exculpatory; nothing demonstrated a more probative result would be produced with new testing; and nothing in the requested testing "would show that Applicant is, in fact, innocent of this crime." (App. 1069). Again, this appears to track Section 17-28-40. *See* Section 17-28-40 (C) (6) ("explain why … material … if … previously subjected to DNA testing … how the requested DNA test would provide a substantially more probative result" and (7) "if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction … if a new trial is granted and is not merely cumulative or impeaching." and (8) "provide that the application is made to demonstrate innocence….") In short, the discussion of why the application would be summarily dismissed most comfortably follows the initial requirement of Section 17-28-40 – the judge simply found the application lacking.[8]

[8] The judge does use "material" as a description whether new matter could reasonable be thought to determine identity. (*See* App. 1069 and 1093). "Material to the issue of identity" is Section 17-28-90 and not in 17-28-40. Even so, "material to" does not carry a burden in and of itself, and can be just as easily used to denote simply significant or "[h]aving some logical connection with the consequential facts." *Black's Law Dictionary* (11th ed. 2019) (defining

Petitioner, in response, asserted the judge should not deny the application for testing based on his own incriminating statements, as that would violate Section 17-28-90. (App. 1076). He also argued it was inconsistent for the State to rely on Tart's testimony when the State argued at trial that she testified falsely, (App. 1082); that ice on the victim's eye was somehow dispositive of factual error (which, of course, had nothing to do with DNA), (App. 1082-83); and, generally, that no one knows what the test results may show if testing is not done and could lead to identify of another, (App. 1086). He argued for a hearing under Section 17-28-90 "so that a record can be made as required…." (App. 1086-87).

In the final order, the judge again phrased his findings in line with Section 17-28-40 and not under the greater and more specific Section 17-28-90, apart from the one section noted above. As Petitioner admits, there is no doubt overlap between the sections, but the answers under Section 17-28-40 should be evaluated for dismissal. (*See* Petition at 10). They were, but critically, Petitioner never asserted to the circuit court judge that he erred in conflating the provisions or deciding the matter under Section 17-28-90 instead of Section 17-28-40. The issue is barred from review. *See, e.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule

"material"). Critically, the judge did not assign a burden, and did consider the evidence in the light most favorable to Petitioner. The use of the word "material" simply does not convert the proper analysis into an improper analysis when the text and context of the order shows a proper disposition, and no abuse of discretion.

on the issues, and thus provide us with a platform for meaningful appellate review."). This Court should find the issue procedurally barred.[9]

Even so, a review of the record shows no abuse of discretion in the circuit court judge's ruling.

Relevant Facts:

1. Petitioner's Request for DNA Testing

Petitioner sought testing of items found with the vicitm's body including, gloves, blanket, clothing, and the plastic bag found around victim's head. He further sought testing of items recovered from his home including: shoes, a bandana, a pregnancy test, a zip lock bag, swabs taken from blood drops in the home and the white van, adding he may not be aware of testing done on what items. (App. 1017-23).

Petitioner claimed the testing would show he did not kill or bury the victim; may identify others as possible suspects; prove that Petitioner's "testimony was based on misguided legal advice from a jail house lawyer," "that Tart's testimony was also influenced by applicant's research of the very limited discovery materials given to" Petitioner who was guided by a "jail house lawyer"; prove discovery and exculpatory evidence was withheld by the prosecution; and, together, these "issues would have changed the out come" and shown Petitioner was innocent. (App. 1024-52).

2. Ruling on the DNA Testing Petition

The circuit court judge, after having express an intent to dismiss the action, received and reviewed Petitioner's opposition to dismissal. He concluded:

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[9] Unlike most litigants, the application of the procedural bar here will not necessarily prevent Petitioner from submitting another application for testing. S.C. Code § 17-28-50 provides that another application may be filed "provided the applicant asserts grounds for DNA testing which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application."

> … Even viewing this evidence in the light most favorable to the Applicant, the Court finds that the *Applicant has failed to provide factual and legal reasonings* as to why his application should not be dismissed. Furthermore, Applicant has failed to establish all the factors enumerated in the Act by a preponderance of the evidence. The burden of proof is on the Applicant to show why additional DNA testing is necessary.
>
> In his response, Applicant asserts his application was denied wholly based on incriminating statements made at trial. The Court disagrees. The Courts [sic] initial decision to deny the Applicant's application was based on a totality of the circumstances review of all testimony and evidence introduced at trial. Even if the Applicant's testimony was false, as he now alleges, the Court also considered the testimony of other witnesses, in addition to the evidence presented.
>
> Additionally, as the Court previously found, the evidence that the Applicant is requesting be tested is not material to the issue of Applicant's identity as the perpetrator of the offense. The Applicant fails to set forth the basis for the request of additional testing as required by the Act. *The Applicant's request is not specific and does not provide any justification for why the testing is relevant*. In the Applicant's response to the conditional denial, he asserts that the victim was not killed in his home. If the victim was not killed in his home, the testing of any item found in his home would not make any fact of consequence more or less probable. Moreover, as previously held, there were DNA swabs taken from Applicant's home. This Court maintains its position that the requested DNA test on these swabs would not provide a substantially more probative result. Even assuming that another individual's DNA is found on any of the items described above, that in and of itself would not shed any additional light as to who killed the victim. No DNA testing of the evidence listed in the application would change the evidence presented at trial, including both the Defendant's own testimony as well as eyewitness testimony provided.

(App. 1093-94) (emphasis added).

Further, judge declined to pass on Petitioner's allegations of ineffective assistance of counsel, as those allegations were proper for his post-conviction relief action, not the request for DNA testing. *Id.* The judge then dismissed the application "[p]ursuant to S.C. Code Ann. § 17-

28-50 (c), finding Petitioner did not show that he was entitled to testing and concluding "no purpose would be served by any further proceedings." (App. 1094).

Discussion:

Petitioner's argument distilled to its essence is that once an application is submitted reflecting an explanation under the factors listed in S.C. Code § 17-27-40, the circuit court judge cannot evaluate the explanation for sufficiency of the assertions, but must hold a hearing. (*See* Petition at 10). Petitioner asserts that the judge must consider the asserted facts "in the light most favorable" to Petitioner, and presume them to be correct. (Petition at 10). An immediate problem emerges for Petitioner's argument – the circuit court judge *did* consider Petitioner's assertions in the light most favorable to him. (App. 1068 and 1093). However, the assertions were not sufficient to prompt further review. That is clearly an anticipated result in the statute as Section 17-28-50 allows for summary dismissal "on the basis of the application, the responses, or the motion" by the prosecutor. Comparing the assertions of the filings – which include reference to the trial record – is not only *not* improper, it is *anticipated* for summary dismissal proceedings. *Accord* S.C. Code § 17-28-60 ("The court must appoint counsel for an indigent applicant after the court has determined that *the application is sufficient* to proceed to a hearing…."). Petitioner's argument is contrary to the statute.

Petitioner further argues the judge erred in not accepting Petitioner's assertion that he lied in his testimony; that the stains in his home were red paint and not blood; and testing the items listed could reveal the true killer. (Petition at 10-11; *see also* App. 1049, 1055 and 1057-58). Aside from the suspicion logically associated with Petitioner asserting he lied under oath *and had another (Tart) falsely testify in complement to his own false testimony* so he should be credited without further ado, it blinks reality to suggest the judge must accept the trial DNA testing on the samples

from Petitioner's home were misidentified as blood when those samples tested presumptive positive *then* analyzed for specific DNA profiles. (App. 586-87; *see* App. 1034).

Petitioner also complains the circuit court erred in considering the Petitioner's statements asserting the statute "plainly prohibits the consideration of any incriminating statement or admissions…." (Petition at 11). Petitioner misreads the statute. The statute actually provides "not withstanding" the admissions, but it does not plainly prohibit *any* consideration of the statements. In other words, admissions do not automatically bar the ability to obtain testing. Notably, the circuit court judge explained that he was not basing denial solely on Petitioner's incriminating statements. (App. 1093). Here, as the State pointed out in their response to the petition, there is ample evidence that places the victim, bleeding, in Petitioner's home, and his body was recovered in Petitioner's backyard. At most, the admissions are consistent with the other evidence of record which makes it harder to show a sufficient explanation, if summarily dismissed, or proof by a preponderance of the evidence if the matter goes to a hearing. Assuming Petitioner lied about self-defense does not require the reviewing court to substitute a theory that the victim was never killed in the home. Even so, here, it was *not* just Petitioner's statements at issue – it was *Tart's* testimony, as well. There is no stretching the statute to suggest that Tart's testimony may not be considered.

In sum, Petitioner cannot show an abuse of discretion in the summary dismissal disposition in light of his failure to sufficiently allege the factors in Section 17-28-40. *See generally Mercer, supra.*

CONCLUSION

For the reasons stated above, this Court should denied the petition.

Respectfully submitted,

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October 7, 2022
Columbia, South Carolina

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SC Court of Appeals

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PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2021-001267

PROOF OF SERVICE

I, Melody J. Brown, hereby certify that as per the March 20, 2020 Order of the Chief Justice, a copy of the Return Petition for Writ of Certiorari, and Proof of Service, has been served on Petitioner's counsel, Jessica M. Saxon, Esq., via email today, October 7, 2022 to jsaxon@sccid.sc.gov, as well as to her assistant at kwarren@sccid.sc.gov.

s/Melody J. Brown

By: _____
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ATTORNEY FOR RESPONDENT

From:	Melody Brown
To:	Saxon, Jessica; "Warren, Kaylynn"
Cc:	Angela Brown
Subject:	RE: 2021-001267 Worth Edward Cook, III v. The State
Date:	Friday, October 7, 2022 11:36:00 PM
Attachments:	Cook, Worth - DNA appeal - Return. Oct. 2022 (03121643xD2C78).PDF image003.png

Dear Counsel:

Attached please find the State's Return to the Petition in the above referenced case, with proof of service. I am e-filing a copy with the Court of Appeals this evening, as well.

Sincerely,
Melody

MELODY J. BROWN, Senior Assistant Deputy Attorney General
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