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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Nathaniel Antron Hunter, #372378

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE ELEVENTH JUDICIAL CIRCUIT

) Case No.: 2019-CP-32-04672

) **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (“PCR”) filed by Nathaniel Antron Hunter (“Applicant”) on November 20, 2019, and amended on March 29, 2023. The Court convened an evidentiary hearing into the matter on April 3, 2023, at the Lexington County Courthouse. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Zachary W. Jones represented Respondent. After reviewing all records and evidence before the Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections. Applicant was arrested on April 17, 2014, following an investigation into a violent burglary, shooting, and subsequent police chase. During its December 2014 term, the Lexington County Grand Jury indicted Applicant for attempted murder (2014-GS-32-3689); first-degree burglary (2014-GS-32-3687); third-degree criminal sexual conduct (CSC) with a minor (2014-GS-32-3688); and possession of a weapon during the commission of a violent crime (2014-GS-32-3692).

On April 24, 2017, Applicant proceeded to a jury trial before the Honorable Thomas W.

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Cooper, Assistant Public Defenders Jason S. Chehoski and Jael D. Gilreath, along with Dayne C. Phillips, Esquire (collectively, Trial Counsel) represented Applicant. Assistant Deputy Solicitor L. Suzanne Mayes and Assistant Solicitor Robert E. McNair, III, prosecuted the case.

A. Summary of Evidence Adduced at Trial

Larenda Simon (Victim) and her nine-year old daughter (Child) lived in an apartment complex in West Columbia. R. 272-74. During the early morning hours of April 13, 2014, Victim and Child were asleep in Victim's bed when Victim awoke to see a man in a ski mask and hoodie standing over her holding a gun. R. 277. The man was dressed in all black and wearing boots. R. 277. Victim began to plead with the man, telling him she did not have any money. R. 277. The man took her phone and told her to take off her panties. R. 278-79. Victim asked that Child be allowed to leave the room, and the man told Child to go into the bedroom closet. R. 279. Victim removed her panties but informed the intruder that she was menstruating. R. 280. The man then asked how old her daughter was, and he told Child to come out of the closet and remove her clothes. R. 280. While holding Victim at gunpoint, the intruder began to take out his penis. R. 281. Rather than allow the man to rape her daughter, Victim jumped on the intruder and attempted to wrestle the gun from him. R. 282.

Victim and the intruder struggled over the gun, and the intruder told Victim that he was going to kill her. R. 282. As Victim tackled the intruder, the weight of her body carried the two across the hall into the bathroom. R. 282. During the struggle, the man shot Victim several times, but Victim continued to fight. R. 282-84. The intruder finally fled from the apartment, leaving Victim with gunshot wounds to her chest, arm, hand, and underarm. R. 284; 554. Victim and Child fled the apartment and sought aid from a neighbor, who called 911. R. 286-87. Victim required surgery, but she survived her injuries. R. 288.

Victim described the intruder to police as around five feet and four to six inches tall. R. 442. Although Victim could not see the intruder's hands or other body parts because he was wearing a disguise, she recalled looking directly into his eyes and hearing his voice. R. 233. After having an opportunity to look Applicant in his eyes and hear him speak during court proceedings, Victim identified him as her attacker. R. 302-03. Child testified, corroborating Victim's account. R. 395-404. Child testified that the intruder's handgun was black. R. 402.

Investigators with the West Columbia Police Department investigated the scene. R. 574-76. Police found five shell casings in the bathroom of Victim's apartment and collected four projectiles from Victim's and her neighbor's apartments. R. 593. These items were tested by a ballistics expert at the State Law Enforcement Division (SLED), who concluded they were fired from a .40 caliber pistol made by either Glock or Smith and Wesson. R. 828-29. Inside Victim's bathroom, police also discovered a black hoodie sweatshirt with a skull cap tucked inside the hood. R. 591-94. Victim testified the clothing did not belong to her. R. 298. Officers requested an expedited DNA analysis of the clothing. R. 778. SLED technicians conducted an "ownership swab" of the cap and hoodie in an attempt to extract skin and other cells deposited in the clothing over time. R. 848. DNA extracted from the skull cap matched Applicant's DNA, which was entered into the state's DNA database in 2004. R. 773; 869-70.

On April 16, three days after the burglary, Applicant called the Department of Probation, Pardon and Parole (DPPP) and SLED to request that his DNA be removed from the state's DNA database. R. 155-56; 455, lines 4-5; 768-69; 777-78. Applicant provided the agencies with his name and telephone number. R. 769. Applicant called DPPP again on April 17th to follow up on his request and answered a return phone call at the number he provided. R. 771. Prior to trial, police searched Applicant's phone and extracted call log, text message, and internet browser data.

R. 928-31. The data showed caller ID-blocked outgoing calls to the Richland County Sheriff's Office warrants division, Columbia Police Department warrants division, and SLED between April 15th and 17th. R. 936-39. The data also showed calls to a rental car company and the Carolina Trader magazine that were not caller ID-blocked. R. 938-39. The State presented evidence showing Applicant took out an advertisement in the Carolina Trader to sell his car on April 17th. R. 568-70. The data also showed numerous internet searches related to removal of DNA from DNA databases, visits to local crime news sites, the U.S. Marshalls most wanted fugitives list, and a news article entitled "Arrest Warrant Issued for Burglary Suspect." R. 937-40. The State originally intended to offer the data to show an absence of activity on the phone during the time of the incident, but after hearing inconclusive testimony from both prosecution and defense experts, the court ruled the State could not introduce the data for that purpose. R. 717; 905-18.

Based on the DNA tests and Applicant's suspicious attempts to destroy his DNA sample, officers obtained an arrest warrant for Applicant. R. 454. On April 17th, SLED agents tracked Applicant to an apartment complex in Columbia near Interstate 277. R. 456-57. Police spotted Applicant leaving the apartments driving a rental car. R. 457; 462. When signaled to stop, Applicant fled. R. 457-58. Disregarding traffic signals and speed limits, Applicant led police on a three-mile chase until he eventually pulled over near 2548 North Main Street, where they arrested him. R. 458. Officers observed scratch marks on Applicant's face and an abrasion on his shoulder. R. 468-70. Applicant denied involvement in the burglary but offered the police information on an unrelated murder case in exchange for a plea deal. R. 502. When confronted with information that his DNA was found at the scene, he told officers he had given away clothes to a thrift store or a "crackhead." R. 495. When asked about the scratches on his face, he told officers that he'd gotten the scratches while play-fighting with his cousin and roommate, Tanisha Taylor. R. 496. Applicant

gave officers a different phone number than he had given employees of DPPP. R. 73; 85.

Taylor denied causing the injuries to Applicant's face. R. 796. She testified she awoke around four o'clock on the morning of the incident date and saw Applicant washing clothes. R. 793-94. Applicant was wearing only boxer shorts and a tank top, and made a comment about the injuries to his face. R. 794-95. Applicant did not have the injuries the night before. R. 796. Taylor testified Applicant owned a black handgun which she believed to be a .40 caliber Glock. R. 799-800. After being shown a picture of Applicant holding a black handgun, Taylor testified she believed it was the same gun she saw Applicant with on prior occasions. R. 803. The trial judge prevented the State from publishing the photograph to the jury because it also showed Applicant holding a second handgun. R. 803; 837-38. Taylor testified Applicant was upset with her for telling law enforcement about the gun. R. 815. The gun was never located. R. 738.

B. Verdict & Subsequent Proceedings

On April 28, 2014, the jury returned a verdict of guilty on each indictment. Judge Cooper sentenced Applicant to concurrent terms of forty-five years' imprisonment for burglary, thirty years' imprisonment for attempted murder, fifteen years' imprisonment for CSC, and five years' imprisonment for possession of a weapon during the commission of a violent crime.

Applicant filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins (Appellate Counsel) perfected the appeal by briefing the following issues:

- I. Did the trial judge err in refusing to declare a mistrial when, in opening statement, the prosecution referenced photographs of Appellant with a gun found on Appellant's phone, although, prior to opening statements, Appellant objected to the admissibility of the photographs, the trial judge withheld ruling on the admissibility of the photographs pending further testimony, and ultimately the photographs were not admitted in evidence?

- II. Did the trial judge err in admitting a witness statement recorded by police while the witness was at the hospital being prepared for surgery and included statements by treating medical personnel without conducting a Rule 403 balancing test when portions of the recording were irrelevant and any possible probative value in the recording was substantially outweighed by the danger of unfair prejudice and the needless presentation of cumulative evidence pursuant to Rule 403, SCRE?
- III. Did the trial judge err in admitting the content of text messages derived from a cell phone extraction report?
- IV. Did the trial judge err in refusing to declare a mistrial based on the fact that the cumulative effect of the errors adversely affected Appellant's right to a fair trial?

On August 28, 2019, the Court of Appeals issued an unpublished opinion affirming Applicant's convictions and sentences. *State v. Hunter*, Op. No. 2019-UP-312 (S.C. Ct. App. filed Aug. 28, 2019). The case was remitted to the circuit court on September 13, 2019. Applicant commenced this PCR action on November 20, 2019.

II. CURRENT APPLICATION

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

1. Ineffective Assistance of Trial Counsel
 - a. "Counsel motioned for a Jackson v. Denno hearing when there was no reason for it."
2. Ineffective Assistance of Appellate Counsel
 - a. "Appellate counsel failed to raise issue that's preserved for appeal."
3. "Great Seal missing from the laws I'm serving time for 1993 Act No. 184 1995 Act No. 7."

Applicant requests relief as follows:

"Reverse and remand for a new trial."

Applicant amended his application on March 29, 2023, raising the following allegations:

1. Ineffective assistance of Trial Counsels
 - a. Failure to object to the jury pool not being an adequate cross-section of the residents of Lexington County.
 - b. Failure to request sequestration of the Victim during the *Jackson v. Denno* hearing.
 - i. While the Applicant was warned about the dangers of testifying, he was never warned that his voice would be used against him during a pretrial hearing.
 - ii. The Victim identified the Applicant during this hearing by his voice, counsel failed to object when the prosecutor asked her if she actually identified him while he was sitting at the table with trial counsels.
 - c. Trial counsels should not have requested a *Jackson v. Denno* hearing because it was unnecessary as Applicant never gave a written statement.
 - d. Trial counsel did not adequately move to quash Applicant's statements. When the investigators asked for a second statement from Applicant after the Applicant was arrested and when Applicant had already requested the public defender represent him.
 - e. Failure to challenge the chain of custody adequately on the DNA.
 - i. The nylon cap was not listed on the incident report, nor the search warrant return and there was no photograph of the cap taken.
 - ii. Did not adequately address Investigator Bramlett's testimony during the *Schmerber* hearing about the nylon cap and Bramlett testifying the "black nylon cap" was photographed and marked separately when, in fact, it was not.
 - iii. The West Columbia person who logs the evidence in did not testify nor did Ms. Stephens from SLED.
 - f. *Neil v. Biggers* hearing request – Trial counsels failed to conduct sufficient pre-trial research and investigation to adequately evaluate and challenge the State's in-court identification of the Applicant.
 - i. Furthermore, in the discovery there is a notation that the investigator asked for a photo line-up, but that photo line-up has not been produced and nor was this issue raised at the trial. If the line-up exists, it could have been favorable to the Applicant.
 - g. Trial counsels were ineffective for failing to adequately cross-examine the Victim on key points during her testimony which also would have shown that some of her testimony was false.
 - i. Trial counsel did not adequately address with the Victim during her testimony that she initially identified the perpetrator as a "light-skinned, black male" when the Applicant is not.
 - h. Trial counsels were ineffective for failing to inform the Applicant of his 5th Amendment right against self-incrimination and the consequences of exercising and waiving those rights.
 - i. Trial counsel were ineffective when they failed to consult a touch DNA expert which resulted in inadequate cross-examination of the State's DNA expert on the issue of touch DNA.
 - j. Trial counsel was ineffective when they did not request a curative instruction after the timeframe exhibit wasn't allowed into evidence.
 - k. Trial counsel did not object to admitting the State's DNA witness as an expert.

- l. Trial counsel failed to object to the Solicitor's improper comments during their closing argument.
 - i. Prosecutor referenced dreads at p.120, line 1–2, when no evidence the perpetrator had dreads was discussed in the trial;
 - ii. Reference to gloves and how DNA is found on page 1020, lines 3–13;
 - iii. Statement made about Applicant being worried about being seen in a car near the crime scene, Tr. p. 1019, lines 1–7.
 - iv. Tr. p. 1022, line 22–p.1023, line 2 – regarding his cell phone and not having activity.
 - m. Trial counsel failed to argue in closing that while the Applicant owned the black nylon cap at some point, he did not have ownership of it at the time of the incident.
 - n. Failed to argue at closing that it was unbelievable that the Victim could identify the Applicant after more than three years.
 - o. Failed to argue in closing that there could be multiple guns that could match, not just the ones in evidence.
 - p. Failure to object to the trial court's instructions that stated "[i]nferred malice may also arise when the deed is done with a deadly weapon. A handgun or pistol in our law is a deadly weapon; that is, an instrument that could be used to cause death or great bodily harm." Tr. p. 1070, lines 11–15.
2. Ineffective Assistance of Appellate Counsel
 - a. Failure to raise the *Batson* issue on appeal.
 - b. Failure to argue on appeal the issue regarding the chain of custody of the DNA.
 - c. Failure to argue on appeal the issue regarding the continuance request made before trial and the *Schmerber* hearing.
 - d. Did not raise on appeal the preserved directed verdict issue.
 - e. Failure to argue the trial court's denial of the *Neil v. Biggers* hearing.
 - f. Did not raise on appeal the voice identification of the Applicant in the courtroom.
 - g. Appellate counsel should have filed a Petition for Rehearing and a Petition for a Writ of Certiorari to the S.C. Supreme Court.

At the outset of the evidentiary hearing, Applicant introduced a "memorandum of law" that restated most of the issues raised in the amended application. However, the memorandum also alleged that an incident report was improperly altered to list Applicant as a suspect, when he was not known to be a suspect until several days after the incident.

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, and weighed the testimony accordingly. Before the Court are Applicant's records from the South Carolina Department of Corrections, the transcripts of Applicant's trial, the records of the Lexington County Clerk of Court regarding the subject

convictions, Applicant's appellate records, the original and amended applications for post-conviction relief, and the memorandum submitted at the outset of the evidentiary hearing. This Court has reviewed the records submitted to it by the parties, the legal arguments made by the attorneys, and the pleadings. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

Ineffective Assistance of Trial Counsel

Applicant's allegations of ineffective assistance of Trial 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). Applicant must prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRPC. 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). 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.”).

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: Jury Pool

Applicant argues Trial Counsel failed to challenge the racial composition of the jury pool, which was mostly white. Applicant also complains that the State struck every black juror, causing him to be tried by an all-white jury. Applicant contends this violated the requirement that a jury

must represent a fair cross-section of the community. The Court finds this allegation to be without merit.

“In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show that 1) the group excluded is a ‘distinctive’ group in the community; 2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) this underrepresentation is due to a systematic exclusion of the group in the jury selection process.” *State v. Patterson*, 324 S.C. 5, 21, 482 S.E.2d 760, 767–68 (1997). Applicant acknowledges that there were some black jurors in the jury pool, and he has not offered any evidence that black jurors were materially underrepresented relative to their proportion of the community. In addition, he has not shown any evidence of “systematic exclusion” of black jurors from the jury selection process.

The transcript reflects that, during jury selection, the State struck two black jurors. A third black juror was selected as an alternate but did not serve on the panel. Trial Counsel made a timely *Batson* motion, and the trial court demanded a racially neutral explanation from the solicitor. The solicitor explained that one of the jurors had a recent criminal domestic violence conviction and that the State had also struck a white juror due to a recent criminal conviction. The solicitor further explained that the second black juror was struck because she admitted knowing Applicant’s family and stated she was nervous. The trial court ruled that the State had articulated racially neutral reasons for striking the two black jurors and denied Trial Counsel’s *Batson* motion. (Tr. pp.46–59).

There is no indication in the record before the Court that the jury pool violated the fair cross-section requirement, and Applicant has not met his burden of proving such a violation at the evidentiary hearing. Furthermore, the transcript reflects that Trial Counsel was attentive to the

racial composition of the jury and made the appropriate *Batson* motion after the State struck two black jurors from the jury pool. The Court finds Applicant has failed to prove either deficiency or prejudice as to this allegation; accordingly, this allegation is denied and dismissed with prejudice.

B: Victim's presence at *Jackson v. Denno* hearing

Applicant argues Trial Counsel failed to move to sequester the Victim during the *Jackson v. Denno* hearing or to inform him that the Victim would be able to identify him by his voice if he testified at that hearing. The Court finds this allegation is without merit.

A party is not entitled to the sequestration of witnesses as a matter of right. *State v. Caldwell*, 378 S.C. 268, 662 S.E.2d 474 (Ct. App. 2008); *State v. Fulton*, 333 S.C. 359, 375, 509 S.E.2d 819, 827 (Ct. App. 1998). In addition, “[a] person must not be sequestered from a proceeding adjudicating an offense of which he was a victim.” S.C. Code Ann. § 16-3-1550(B). Furthermore, the purpose of sequestration is to prevent witnesses from shaping their testimony to match that given by other witnesses, not to prevent a witness from having an opportunity to identify the defendant in court. *See* Rule 615, SCRE (“[A] court may order witnesses excluded so that they cannot hear the testimony of other witnesses”); *see also State v. Huckabee*, 388 S.C. 232, 241, 694 S.E.2d 781, 785 (Ct. App. 2010) (holding the purpose of Rule 615, SCRE, is to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at trial). The Court finds Trial Counsel was not deficient for failing to move that the Victim be sequestered from the *Jackson v. Denno* hearing because there were no grounds for sequestration.

In addition, the Court finds Trial Counsel was not deficient for failing to anticipate and advise Applicant that, years after the offense occurred, the Victim—who had never previously been able to positively identify Applicant as the perpetrator—would be able to remember the perpetrator's voice and match it to Applicant's voice at a pre-trial *Jackson v. Denno* hearing.

Applicant is entitled to reasonable advocacy, not perfect advocacy judged with the benefit of hindsight. *Yarborough*, 540 U.S. at 6. To Counsel Chehoski's credit, after he was informed of the Victim's identification of Applicant, he immediately requested a *Neil v. Biggers* hearing to challenge the reliability of the identification, arguing that the circumstances of the *Jackson v. Denno* hearing were unduly suggestive. (Tr. p.223, lines 6–25). The trial court declined Trial Counsel's request. (Tr. p.225, line 9–p.226, line 12). Nevertheless, Counsel Chehoski elicited from the Victim on cross-examination that she first identified Applicant while he was sitting at the defense table surrounded by defense attorneys, and Counsel Gilreath argued in closing that the identification of Applicant's voice was not reliable. (Tr. p.363, line 16–p.364, line 2; Tr. p.1032, line 14–p.1033, line 23). The Court finds Trial Counsel was not deficient as to this allegation. Accordingly, this allegation is denied and dismissed with prejudice.

C: Unnecessary *Jackson v. Denno* hearing

Applicant argues Trial Counsel was ineffective for requesting a *Jackson v. Denno* hearing, inadvertently causing Applicant's voice to be identified by the Victim. Applicant alleges a *Jackson v. Denno* hearing was unnecessary because he never confessed. The Court finds this allegation is without merit.

At the evidentiary hearing, Counsel Phillips credibly testified that he requested a *Jackson v. Denno* hearing to ensure that the defense was made aware of any statements from Applicant that the State would attempt to introduce at trial. He testified that, in some trials, law enforcement had failed to disclose a defendant's statements until the last minute, and he wanted to avoid an ambush. He testified that it is his practice to request a pre-trial *Jackson v. Denno* hearing in most cases so that he has enough advance notice to adequately prepare for trial and to prevent any unknown inculpatory statements from coming in.

Moreover, as explained above, the Court finds Trial Counsel was not deficient for failing to anticipate that the Victim would suddenly be able to identify Applicant's voice at the hearing, three years after the crime had occurred. At the time, it was far from obvious that a *Jackson v. Denno* hearing would expose Applicant to any prejudice. Therefore, the Court finds that Trial Counsel was pursuing a valid trial strategy by requesting a *Jackson v. Denno* hearing in this case, regardless of whether Applicant's statements are characterized as "confessions" or not.¹ Accordingly, Trial Counsel's performance was not deficient, and this allegation must be denied and dismissed with prejudice.

D: Failure to quash Applicant's statements

Applicant argues Trial Counsel did not adequately move to quash Applicant's statements to law enforcement on the ground that Applicant was under arrest and had requested a public defender at the time his second statement was made. The Court finds this allegation is without merit.

As Applicant points out in his "Allegation C" above, Trial Counsel *did* obtain a *Jackson v. Denno* hearing to challenge the admissibility of his custodial statements to law enforcement. At the conclusion of that hearing, Counsel Phillips argued that Applicant's custodial interrogation was improper because, by the time he gave the second statement, he was represented by the public defender's office. (Tr. p.194, line 23–p.195, line 12). The trial court denied Trial Counsel's motion to suppress the statement on that ground. (Tr. p.196, line 8–p.197, line 5). Trial Counsel renewed the objection when Applicant's statements were offered into evidence before the jury. (Tr. p.518, lines 16–17).

¹ Although Applicant neither admitted nor denied his guilt in his statements to law enforcement, he did state it would not help him to tell the truth, and he attempted to bargain for certain charges to be dropped in exchange for telling the truth. (Tr. p.144, line 11–p.145, line 2; p.558, lines 14–19). The Court notes that, while Applicant's statements may not be "confessions" in the colloquial sense, they did tend to inculcate him.

The Court finds Trial Counsel adequately challenged the admissibility of Applicant's statements. Although the challenge was ultimately unsuccessful, Applicant has not alleged any other grounds that would have supported Trial Counsel's motion. Accordingly, the Court finds Applicant has not met his burden of proving either deficiency or prejudice as to this allegation. This allegation is, therefore, denied and dismissed with prejudice.

E: Chain of custody

Applicant argues Trial Counsel failed to adequately challenge the chain of custody of the nylon cap, from which the DNA evidence was obtained, on the ground that some persons in the chain of custody did not testify—namely, the West Columbia evidence custodian and Amy Stephens, one of the forensic technicians at SLED who handled the evidence. Applicant also complains that investigators never photographed the nylon cap at the crime scene or listed it in the incident report or search warrant return. The Court finds this allegation is without merit.

At the pre-trial *Schmerber* hearing, Investigator Charles Bramlett testified that he retrieved a dark-colored hoodie from the crime scene that appeared to have been pulled off of the perpetrator during the struggle. Inside the hood section of the hoodie was a nylon cap. Investigator Bramlett testified he packaged the hoodie and the cap together because he feared that removing the cap from the hoodie might cause evidence such as skin cells or hair particles to be lost.² (*Schmerber Tr.* p.51, line 15–p.53, line 3). Investigator Bramlett did not testify at Applicant's trial; however, Investigator Scott Neel testified that he was with Investigator Bramlett at the crime scene when the hoodie and cap were collected. In response to Counsel Phillips' cross-examination, Neel

² Applicant claims Investigator Bramlett falsely testified that the nylon cap had been photographed and marked separately from the hoodie. The Court notes that Bramlett stated a "cloth" was photographed and marked separately from the hoodie, immediately after being questioned about an unrelated cloth found outside the apartment. Bramlett had already explained that the cap was found inside the hoodie and was not removed out of evidence preservation concerns, so he could not have meant that the cap was marked and photographed separately. In context, the most plausible reading of Bramlett's testimony is that the cloth outside the apartment—not the cap—was photographed and marked separately from the hoodie. (*Schmerber Tr.* p.53, line 8–p.55, line 2).

admitted the cap itself was not listed in the incident report or search warrant return; however, he explained that this was because the hoodie and cap were collected together as one item. Neel testified that the cap was logged into the computer system after it was transported to the evidence room. (Tr. p.779, line 24–p.780, line 8; p.782, line 20–p.789, line 5). The transcript reflects that Trial Counsel challenged the chain of custody of the DNA evidence on the ground that the West Columbia evidence custodian and Amy Stephens did not testify. (Tr. p.954, line 3–p.955, line 8). Trial Counsel renewed that challenge later in the trial. (Tr. p.1002, line 7–p.1003, line 7).

The Court finds Trial Counsel adequately exposed the fact that the nylon cap was not photographed at the crime scene nor listed in the incident report or the search warrant return on cross-examination of Investigator Neel. The Court further finds that Trial Counsel attempted to challenge the chain of custody on exactly the same grounds Applicant now raises in his amended PCR application. Therefore, the Court finds Applicant has not met his burden of proving Counsel was deficient as to this allegation, and this allegation is denied and dismissed with prejudice.

F: *Neil v. Biggers* hearing request

Applicant argues Trial Counsel failed to adequately challenge the in-court identification of the Applicant by the Victim. Applicant claims Trial Counsel should have cited *State v. Collier*, 421 S.C. 426, 807 S.E.2d 206 (Ct. App. 2017), in order to challenge the propriety of an identification made for the first time at a *Jackson v. Denno* hearing. The Court finds this allegation is without merit.

The *Collier* decision was not published until October 4, 2017, months *after* Applicant's trial concluded on April 28, 2017. Therefore, Trial Counsel could not have relied upon it to challenge the Victim's identification of Applicant. Furthermore, the *Collier* court affirmed the admission of a witness's in-court identification, despite the witness's presence at the pre-trial

Jackson v. Denno hearing. Even if the *Collier* decision had been available to Trial Counsel at the time of Applicant's trial, that decision does not clearly support Applicant's position.

Applicant also claims a photo line-up was shown to the Victim, and the results of the line-up "could have been favorable" to Applicant. However, no such line-up was presented at the evidentiary hearing, so Applicant's claim that it "could have been favorable" is purely speculative. Regardless, the Victim consistently reported that the perpetrator was wearing a mask and that all she could see were his eyes. Under those circumstances, a photographic line-up would be of negligible probative value. However, Trial Counsel was able to use the lack of a photographic line-up to criticize the State's case on closing argument. (Tr. p.1032, lines 5-13).

The Court finds Applicant has failed to prove either deficiency or prejudice as to this allegation. Therefore, the allegation is denied and dismissed with prejudice.

G: Cross-examination of the Victim

Applicant argues Trial Counsel failed to adequately cross-examine the Victim to expose inconsistencies in her story. Specifically, Applicant complains that Trial Counsel never questioned the Victim about her alleged statement to investigators that the perpetrator was a "light-skinned black male," whereas Applicant is a dark-skinned black male. The Court finds this allegation is without merit.

On cross-examination by Counsel Phillips, Investigator Thomas Griffin testified that he was told by a Sergeant Libertini that the suspect was a light-skinned black male. (Tr. p.562, lines 10-23). Counsel Phillips also elicited from Child that the perpetrator's skin color was lighter than the Victim's skin color. (Tr. p.461, lines 10-15). Counsel Gilreath pointed out in her closing argument that the suspect was described as light-skinned. (Tr. p.1040, lines 14-23).

Although Trial Counsel did not pose these questions to the Victim directly, the transcript

reflects that the issue of the perpetrator's skin color being described as "light" was explored and used by Trial Counsel in closing to argue to the jury that Applicant did not fit the initial description of the suspect. Additional testimony in that vein would have been merely cumulative. In addition, Applicant has failed to prove that the *Victim* ever said the perpetrator was light-skinned; the transcript merely reflects that Investigator Griffin was told that information by another officer. Investigator Griffin went on to testify that third-hand information is sometimes inaccurate. (Tr. p.601, lines 2-4). Had Trial Counsel cross-examined the Victim on this point, she may have denied telling investigators that the perpetrator was light-skinned; as the Victim did not testify at the evidentiary hearing, Applicant cannot show what her testimony on this point would have been. Finally, as explained in the Court's analysis of "Allegation F" above, the Victim consistently claimed the perpetrator was wearing a mask, the room was dark, and all she could see were his eyes. Under those circumstances, it would not be surprising for a witness to mistake a dark-skinned black male for a light-skinned black male.

For these reasons, the Court finds Applicant has failed to prove either deficiency of Trial Counsel or resulting prejudice as to this allegation. Accordingly, this allegation is denied and dismissed with prejudice.

H: Right against self-incrimination

Applicant argues Trial Counsel failed to advise him of his 5th Amendment right against self-incrimination. At the evidentiary hearing, Applicant clarified he was referring to the *Jackson v. Denno* hearing where his voice was heard by the Victim, who identified him on that basis. Applicant complains that nobody informed him the Victim would be able to identify him based on his voice. The Court finds this allegation is without merit. As already explained, Trial Counsel was not deficient for failing to anticipate the Victim's identification of Applicant by his voice. In

addition, it is well-settled that, while the 5th Amendment protects criminal defendants from being compelled to testify, it does not prevent the State from requiring a defendant to provide a voice sample for identification purposes. *See, e.g., U.S. v. Wade*, 388 U.S. 218 (1967) (holding the privilege against self-incrimination was not violated by a defendant being required to say “put the money in the bag” in a line-up); *Schmerber v. California*, 384 U.S. 757, 764 (1966) (holding the 5th Amendment “offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture”). Therefore, the Victim’s identification based on the sound of Applicant’s voice does not implicate Applicant’s 5th Amendment rights. Accordingly, the Court finds Applicant has not established either deficiency or prejudice as to this allegation.

I: Touch DNA expert

Applicant argues that Trial Counsel failed to consult a touch DNA expert prior to trial and that this alleged deficiency prejudiced him because Trial Counsel was unable to adequately cross-examine the State’s DNA expert. The Court finds this allegation is without merit.

At the evidentiary hearing, Applicant did not introduce any testimony from a touch DNA expert to substantiate this allegation, nor did he call the State’s DNA expert to demonstrate how a more thorough cross-examination might have resulted in a different outcome at trial. Therefore, Applicant has not met his burden of proving this allegation. *See Dempsey v. State* 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding a PCR applicant failed to show prejudice from his trial counsel’s failure to hire an expert because he did not have an expert testify at his PCR hearing), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

Furthermore, at the evidentiary hearing, Applicant admitted that he once possessed the cap

that was found at the scene, although he claimed that he gave it away before the crime occurred. Applicant does not deny that his DNA was found on the cap. Therefore, it is not clear how further cross-examination of the State's DNA expert, or the testimony of a DNA expert for the defense, would have changed the result of the trial.

Accordingly, the Court finds Applicant has failed to prove either deficiency or prejudice as to this allegation.

J: Curative Instruction

Applicant argues Trial Counsel failed to seek a curative instruction after the trial court agreed to suppress part of State's Exhibit 122, a summary of cell phone activity taken from Applicant's phone. The Court finds this allegation is without merit.

At Applicant's trial, the State called Jill Sparks, custodian of records for the mobile phone company Sprint. Without objection, the State introduced a document reflecting that Sprint's records of cell tower information do not include any records of activity related to Applicant's phone number between 1:00 and 5:00 a.m. on the night of the crime. (Trial Tr. pp.464-66). On cross-examination, Counsel Gilreath elicited from Sparks that Sprint's cell tower records would not show wi-fi activity, such as browsing the internet. (Trial Tr. p.470, line 11-p.471, line 11).

Later in the trial, the State sought to introduce a summary of Applicant's cell phone activity, based on data ripped from the cell phone itself, from shortly before the crime occurred until the time of Applicant's arrest. The State argued that the information was relevant for the following reasons: first, Applicant's communications with Tanisha Taylor tended to corroborate her testimony; second, Applicant's cell phone and web browsing history after the crime showed he was trying to have his DNA removed from the government database; third, Applicant's visits to news websites concerning stories of burglaries and fugitives suggested he was trying to monitor

police investigations related to the crime; fourth, Applicant's communications with Carolina Trader and car rental services supported the State's argument that Applicant was trying to evade detection by getting rid of his car after the crime; fifth, Applicant's calls to law firms tended to show consciousness of guilt; and finally, a lapse in cell phone activity between 1:00 and 5:00 a.m. on the night of the crime suggested Applicant was not using his phone at the time the crime occurred. Following extensive argument and in-camera testimony from both parties' experts, the trial court ruled that the evidence could come in as to the first, second, third, and fourth purposes. (Trial Tr. pp.678-777; pp.958-80). However, the trial court agreed to suppress the evidence of Applicant's communications with law firms, reasoning that Applicant's exercise of the constitutional right to counsel could not be used as evidence against him. (Trial Tr. p.971, lines 4-17). The trial court also suppressed the portion of the summary purporting to show the timeline of Applicant's cell phone use, finding that the experts' testimony was inconclusive as to whether the phone was actively being used during the relevant period and that it would merely confuse the jury. (Trial Tr. p.969, lines 6-10). The court then went through the summary page-by-page marking which portions could come in and which portions had to be redacted. (Trial Tr. pp.970-80). These proceedings occurred outside the presence of the jury.

After the jury returned to the courtroom, the State admitted the summary through its expert, Investigator Michael Phipps, and the exhibit was published to the jury. (Trial Tr. p.987, lines 2-10). Phipps testified about Applicant's cell phone usage, but he did not go into the calls to law firms or the purported lapse of cell phone activity from 1:00 to 5:00 a.m. on the morning the crime occurred.

At closing argument, the solicitor relied on the testimony of Jill Sparks to argue that the Sprint cell tower records did not reflect any calls to or from Applicant's cell phone during the time

the crime occurred. However, the solicitor did not rely on any of the data ripped from Applicant's cell phone itself to argue that Applicant's phone was not in use during that period. (Trial Tr. pp.1022–23). Counsel Gilreath argued, based on Sparks' testimony, that the State could not prove Applicant's cell phone was not in use during that period because Sprint's cell tower records could only record phone calls, not wi-fi use. (Trial Tr. p.1051, line 22–p.1052, line 5).

Applicant contends Trial Counsel should have requested a curative instruction because the portion of the cell phone data extraction summary related to the State's timeframe argument was suppressed. However, the record indicates that the suppressed portion of the summary was carefully reviewed by the trial court and redacted before ever being published to the jury. Because the suppressed evidence was never seen by the jury, a curative instruction was not warranted. Moreover, the solicitor did not rely on that portion of the summary, either in direct examination of Investigator Phipps or on closing argument. The solicitor's timeframe argument during closing was properly based on the cell tower data and the testimony of Jill Sparks, which was neither objected to nor suppressed. Counsel Gilreath ably attacked the State's timeline argument by pointing out that Applicant's wi-fi use would not have shown up on Sprint's records.

The Court finds Applicant has not established any ground for seeking a curative instruction as to this issue. Accordingly, Trial Counsel's performance was neither deficient nor prejudicial, and this allegation is denied and dismissed with prejudice.

K: Objection to State's DNA expert

Applicant argues Trial Counsel failed to object to the qualification of the State's DNA witness as an expert. The Court finds this allegation is without merit. Applicant has not explained why the qualification of the State's witness as an expert was erroneous. Trial Counsel credibly testified that there were no grounds to object to the expert's qualification. Accordingly, the Court

finds Applicant has not met his burden of proof as to this allegation.

L: Improper comments during closing argument

Applicant argues Trial Counsel failed to object to improper comments made by the solicitor during closing argument to the jury. The Court finds this allegation is without merit. Applicant takes issue with four portions of the solicitor's closing argument:

- i. "[H]e's got his dreads most likely tucked down in the back of one of his shirts." (Trial Tr. p.1020, lines 1-2);
- ii. "Don't think for a minute that he wouldn't come into that house without gloves on. He absolutely would. Anybody, anybody, knows about fingerprint evidence. There's no way he goes to all that effort to conceal his identity and doesn't have on gloves. Of course he does." (Trial Tr. p.1020, lines 3-13);
- iii. "[H]e's already trying to get \$10,000 for that car and he's driving a rental car. In his ad he states car runs really well, so we know it works. What's he really worried about? Somebody saw it near the crime scene? Somebody's going to link him to that car? He needs the ten grand to get out of Dodge. He's done everything possible at this point to dissociate himself with that vehicle." (Trial Tr. p.1019, lines 1-7).
- iv. "We know from the testimony of Jill Sparks, the custodian of records for the Sprint corporation, he had no cell tower activity during the timeframe of this crime. No ingoing, outgoing calls, no ingoing, outgoing texts. The phone could not be traced by any cell tower." (Trial Tr. p.1022, line 22-p.1023, line 1).

Applicant contends these comments were not supported by the evidence. The Court finds the solicitor's arguments were not improper. In each case, the solicitor made a permissible inference from the evidence presented. "It is undisputed that closing argument is not merely a

time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence.” *United States v. Francisco*, 35 F.3d 116, 120 (4th Cir. 1994); *see also State v. New*, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (“If a Solicitor’s closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs.”).

The first comment, regarding dreads, was merely a possible explanation for why the Victim never described the perpetrator as having dreadlocks; the Victim herself testified that she would not have seen whether the perpetrator had dreads because he had the hood of his hoodie tied tight over his head. (Trial Tr. p.362, lines 14–20).

The comment regarding gloves was offered as a possible explanation for why the perpetrator’s fingerprints were not found at the crime scene. When a burglar does not leave any fingerprints at the scene of a crime, it is permissible to infer that the burglar was wearing gloves.

The solicitor’s suggestion that Applicant was worried about his car being seen at the crime scene was based on the evidence that Applicant had started trying to sell his car and had obtained a rental car shortly after the crime was committed. Due to the suspicious timing of Applicant’s attempts to sell his car, at the same time Applicant was trying to erase his DNA from the government database and checking for news of local burglary investigations, it was permissible to infer that the car was somehow used in connection with the crime and that Applicant was attempting to cover his tracks by getting rid of it.

Finally, the Solicitor’s reliance on Jill Sparks’ testimony was proper. Applicant never objected to Sparks’ testimony or to the Sprint cell tower records. The trial court’s later ruling limiting the State’s use of the cell phone data extraction report did not retroactively render Sparks’ testimony inadmissible, nor did it prevent the State from relying on her testimony to suggest there was a lapse in Applicant’s cell phone usage at the time the crime was being committed.

The Court finds Applicant has failed to prove that any of these comments by the solicitor were improper. Therefore, Applicant has not proved that Trial Counsel was ineffective for failing to object to them. Accordingly, this allegation is denied and dismissed with prejudice.

M: Ownership of nylon cap

Applicant argues Trial Counsel failed to argue that Applicant did not own the nylon cap at the time of the crime. Applicant argues there was evidence at trial that, prior to the crime, he gave some of his clothes away to a thrift store and to some drug users. The Court finds this allegation is without merit.

At the trial, Investigator Griffin testified that, during the initial interview with law enforcement, he confronted Applicant with the DNA evidence found at the crime scene. In response, Applicant claimed he had recently given “jeans, hoodies, and shirts” away “to a thrift store or a crackhead.” (Trial Tr. p.551, lines 17–22). In addition, the solicitor argued in his opening statement to the jury that, when confronted with the DNA evidence, Applicant gave the excuse that he had given some clothes away to a crackhead or a thrift store. (Trial Tr. p.248, lines 9–11). Applicant did not testify at trial, nor did he go into any further detail during his testimony at the PCR hearing. Applicant’s mother testified at the PCR hearing, but all she said was that she had seen Applicant carrying two or three trash bags, ostensibly containing clothing, and put them in the trunk of his car, a few weeks before he was arrested.

The Court finds Trial Counsel was not deficient for failing to pursue this line of argument during closing statements. The only evidence at trial that would have supported the argument was Applicant’s self-serving statement to law enforcement, made after he had been confronted with the DNA evidence against him. The statement does not even mention the cap specifically, although it does refer to “jeans, hoodies, and shirts.” The statement does not identify the thrift

store or the unnamed “crackhead” to whom Applicant purportedly gave his clothes.³ Rather than rely on this argument, it appears Trial Counsel preferred to focus on the weakness of the State’s evidence connecting the cap to the scene of the crime, by pointing out that the cap was not photographed at the scene or recorded in the incident report or search warrant return. (Trial Tr. p.1042, line 9–p.1044, line 23). In accordance with the “strong presumption” that Trial Counsel’s argument strategy was not the result of “sheer neglect,” but was a legitimate tactical choice to focus on the stronger argument,⁴ the Court finds Trial Counsel’s performance was not deficient. *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690). Accordingly, this allegation is denied and dismissed with prejudice.

N: Identification of Applicant after three years was unbelievable

Applicant argues Trial Counsel failed to argue at closing that, because more than three years had passed since the crime, the State’s position that the Victim could identify Applicant was unbelievable. The Court finds this allegation is without merit. Counsel Gilreath repeatedly argued that Victim’s identification of Applicant by only his eyes and voice, three years after the crime occurred, was unreliable. (Trial Tr. p.1032, lines 2–4; p.1032, line 22–p.1033, line 4; p.1033, lines 16–18). The Court finds this allegation is conclusively refuted by the record. Accordingly, this allegation is denied and dismissed with prejudice.

O: Multiple matching guns

Applicant argues Trial Counsel failed to argue in closing that there could be multiple guns

³ In addition, the State’s DNA expert, Agent Mary Ann Boehm, testified that cleaning an item of clothing would remove the DNA. (Trial Tr. p.927, lines 21–23). Therefore, for Applicant’s DNA to still be on the cap by the time it was found at the crime scene, it would have to have not been cleaned since the last time Applicant had worn it. It strains credulity to suggest that the cap would still have had Applicant’s DNA on it weeks after he gave it away to someone else.

⁴ The fact that the *solicitor* chose to emphasize Applicant’s story about giving away his clothing in the State’s opening argument further indicates that, at the time of trial, the lawyers on both sides viewed Applicant’s story as a weak argument for the defense.

matching the evidence, apart from the .40 caliber Glock Applicant owned. The Court finds this allegation is without merit.

Investigators recovered projectiles and cartridge cases from the crime scene consistent with .40 Smith & Wesson caliber ammunition. The State's firearms identification expert, SLED Agent Chad Smith, examined the markings on the projectiles and made a list of seven firearms manufacturers whose products could have fired the projectiles: Bursa, Glock, Heckler and Koch, IMI, Kahr Arms, Vektor, and Walther. Agent Smith then examined the cartridge cases found at the scene and determined from microscopic examination of the firing pin impression that they had been fired from either a Glock or an early Smith & Wesson Sigma series pistol. No firearm was ever recovered in connection with the crime. (Trial Tr. pp.875–86).

Applicant's roommate, Tanisha Taylor, told investigators that she had previously seen Applicant handling and cleaning a gun, which she believed to be a .40 caliber Glock. (Trial Tr. p.855, lines 12–25). She stated the gun was black and that Applicant kept it in a plastic stand in the bedroom, but it was not there when investigators searched the residence. (Trial Tr. p.856, lines 4–19).

Applicant contends Trial Counsel did not argue in closing that there were multiple guns that could match the evidence, presumably referring to Agent Smith's testimony that the markings on the projectiles recovered from the crime scene were consistent with guns produced by seven different manufacturers.⁵ However, Trial Counsel did make this argument in closing, pointing out Agent Smith's testimony that "these particular bullets could have been fired by six [*sic*] different

⁵ It is significant that, although the projectiles could have come from six different manufacturers, Agent Smith also determined that the firing pin impressions on the cartridge cases could only have come from two manufacturers. The Court notes that the only manufacturer who matched both the projectile markings and the firing pin impressions was Glock.

types of guns.” (Trial Tr. p.1051, lines 11–17). Accordingly, this allegation is refuted by the record and is denied and dismissed with prejudice.⁶

P: Inferred malice instruction

Applicant argues Trial Counsel failed to object to the trial court’s instruction that malice may be inferred from the use of a deadly weapon. (Trial Tr. p.1070, lines 11–15). The Court finds this allegation is without merit. While the language used by the trial court was ultimately deprecated by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), that case had not been decided at the time of Applicant’s trial in 2017. Trial Counsel cannot be found deficient for failing to anticipate a future change in the law. *See, e.g., Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993). In addition, the *Burdette* court expressly held that “today’s ruling will not apply to convictions challenged on post-conviction relief.” *Burdette*, 427 S.C. at 505, 832 S.E.2d at 583.

Prior to *Burdette*, the instruction was only held improper where there was some evidence “that would reduce, mitigate, excuse or justify” a homicide or assault with a deadly weapon, such as evidence of self-defense. *State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). In all other murder or attempted murder cases involving the use of a deadly weapon, the permissive inference instruction was held to be proper. *Id.*

In this case, it has never been disputed that the perpetrator shot the Victim multiple times during a home invasion and attempted rape of the Victim and her six-year-old daughter. There was absolutely no evidence presented that would reduce, mitigate, excuse, or justify the shooting of the Victim; all the evidence overwhelmingly established malice. Therefore, at the time of the

⁶ At the evidentiary hearing, Applicant also argued Trial Counsel should have exposed the discrepancy between the Victim’s initial description of the gun as being silver and the other witnesses’ description of the gun as being black. The Court finds Trial Counsel appropriately covered this ground in cross-examination and argument. (Trial Tr. p.563, lines 4–14; p.868, lines 8–10; p.1035, line 14–p.1036, line 9).

trial, there was no ground to object to the trial court's inferred malice charge under *Belcher*. The Court accordingly finds Trial Counsel's performance was not ineffective as to this allegation. This allegation is, therefore, denied and dismissed with prejudice.

Ineffective Assistance of Appellate Counsel

Applicant's allegations of ineffective assistance of Appellate Counsel are likewise without merit. In analyzing a claim of ineffective assistance of appellate counsel, courts must apply the *Strickland* test just as they would when analyzing a claim of ineffective assistance of trial counsel. *Bennet v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). Therefore, a PCR applicant alleging ineffective assistance of appellate counsel must prove counsel's performance was deficient and the applicant was prejudiced thereby. *Id.*

Appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on direct appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). Counsel is not required to raise every non-frivolous issue on appeal but may select among them to maximize the likelihood of a favorable outcome. *See Bennet*, 383 S.C. at 309, 680 S.E.2d at 276. "A decision with respect to appeal is entitled to the same presumption that protects sound trial strategy." *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993). Indeed, "[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." *Jones*, 463 U.S. at 754.

"Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Smith v. Robbins*, 528 U.S. 259, 288

(2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

A: *Batson* issue

Applicant argues Appellate Counsel failed to raise the *Batson* issue on appeal. The Court finds this allegation is without merit. At the evidentiary hearing, Appellate Counsel credibly testified she believed the trial court's rejection of Trial Counsel's *Batson* challenge was proper because the State articulated a reasonable race-neutral explanation for each of the challenged strikes. The Court agrees with Appellate Counsel's assessment of the *Batson* issue and finds Applicant has failed to prove either deficiency or prejudice as to this allegation.

B: Chain of custody

Applicant argues Appellate Counsel failed to raise issue regarding the chain of custody of the DNA evidence on appeal. The Court finds this allegation is without merit. Appellate Counsel credibly testified she did not think the chain of custody issue was as strong or as well-supported as the other issues she ended up raising. Again, the Court agrees with Appellate Counsel's assessment of the chain of custody issue; although some members of the chain of custody did not testify, there does not appear to be a gap in the chain of custody. *See, e.g., State v Taylor*, 360 S.C. 18, 598 S.E.2d 735 (Ct. App. 2004) (a complete chain of custody does not require the testimony of each person in the chain if the identity of each person is established). Applicant has failed to explain how the chain of custody issue was "clearly stronger" than any of the four issues raised and argued by Appellate Counsel in this case. *Robbins*, 528 U.S. at 288. Accordingly, this allegation is denied and dismissed with prejudice.

C: Pre-trial continuance request

Applicant argues Appellate Counsel failed to challenge the denial of Applicant's pre-trial continuance request on appeal. The Court finds this allegation is without merit. Again, Appellate Counsel credibly testified that she did not think the continuance issue was a strong one. The Court, again, agrees: "[r]eversals of refusal of a continuance are about as rare as the proverbial hens' teeth." *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (citing *State v. Lytchfield*, 230 S.C. 405, 95 S.E.2d 857 (1957)). Applicant has again failed to explain how this issue was clearly stronger than the four issues Appellate Counsel chose to raise instead. Accordingly, this allegation is denied and dismissed with prejudice.

D: Directed verdict issue

Applicant argues Appellate Counsel failed to challenge the denial of Applicant's directed verdict motion on appeal. The Court finds this allegation is without merit. On appeal from the denial of a directed verdict, the appellate court views the evidence in the light most favorable to the State; if there is any evidence from which the defendant's guilt can be fairly and logically deduced, the jury verdict will not be disturbed. *See State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). Therefore, even if Appellate Counsel had raised the directed verdict issue to the court of appeals, Applicant could only have prevailed if there was *no* evidence from which his guilt could have been deduced, when viewed in the light most favorable to the State.

The State introduced considerable evidence of Applicant's guilt: Applicant's DNA was found on the cap recovered from the crime scene; the Victim identified Applicant's eyes and voice in court; Applicant's roommate, Tanisha Taylor, awoke to find Applicant in his underwear washing his clothes around four o'clock in the morning after the crime was committed, and she noticed he had a fresh abrasion on his forehead; Applicant falsely told investigators he received the abrasion from Taylor; Taylor saw Applicant handling what she believed to be a .40 caliber

Glock, which would have matched the cartridge cases and projectiles found at the crime scene; Applicant began trying to have his DNA removed from the government database after the crime; Applicant frequently checked the news for stories related to burglaries and fugitives in the days following the crime; Applicant tried to sell his car after the crime and began driving a rental car; and Applicant fled from police when they first attempted to perform a traffic stop. There was substantial direct and circumstantial evidence, viewed in the light most favorable to the State, from which Applicant's guilt could fairly be deduced. Therefore, a challenge to the trial court's directed verdict ruling was unlikely to succeed on appeal, and the Court finds Appellate Counsel acted reasonably in focusing her efforts on other issues. Accordingly, this allegation is denied and dismissed with prejudice.

E: *Neil v. Biggers* hearing

Applicant argues Appellate Counsel failed to challenge the denial of Applicant's request for a *Neil v. Biggers* hearing. The Court finds this allegation is without merit. As Appellate Counsel acknowledged at the evidentiary hearing, *State v. Lewis* was the controlling precedent by the time of Applicant's trial, and *Lewis* held that a *Neil v. Biggers* hearing is unnecessary when a witness identifies a criminal defendant for the first time in court. *See State v. Lewis*, 363 S.C. 37, 42, 609 S.E.2d 515, 518 (2005) (holding that "*Neil v. Biggers* does not apply to in-court identifications and that the remedy for any alleged suggestiveness of an in-court identification is cross-examination and argument."). Appellate Counsel credibly testified she chose to focus on other issues, rather than to argue against precedent by challenging the holding of *State v. Lewis*. The Court finds Appellate Counsel acted reasonably in making this decision; therefore, this allegation is denied and dismissed with prejudice.

F: Voice identification issue

Applicant argues Appellate Counsel failed to challenge the Victim's in-court identification of Applicant's voice. The Court finds this allegation is without merit. Other than the *Neil v. Biggers* issue, which has already been addressed, Applicant does not allege any other trial court error with respect to the Victim's identification of his voice. Therefore, the Court finds Applicant has not met his burden of proof as to this allegation.

G: Failure to seek rehearing and a writ of certiorari

Applicant argues Appellate Counsel failed to file a petition for rehearing and a petition for a writ of certiorari after the court of appeals affirmed his convictions and sentences. The Court finds this allegation is without merit. There is no right to discretionary review by the South Carolina Supreme Court. *See Douglas v. State*, 369 S.C. 213, 216, 631 S.E.2d 542, 543–44 (2006) ("We find that the decision whether to pursue certiorari is a matter left solely to the appellant's attorney's professional discretion."). Furthermore, Applicant has failed to point out any error in the decision of the court of appeals, such that he likely would have prevailed on rehearing or on further review by the supreme court. Accordingly, Applicant has failed to prove either deficiency or prejudice as to this allegation, and it is denied and dismissed with prejudice.

Prosecutorial Misconduct

In the "memorandum of law" introduced at the beginning of the evidentiary hearing (Court's Exhibit 1), Applicant alleges prosecutorial misconduct related to the fact that an incident report, dated April 13, 2014, lists him as a suspect, even though he contends he was not a suspect until April 17, 2014, when he was arrested. Applicant argues this shows the prosecution falsified the incident report and perpetrated a fraud upon the court. The Court finds this allegation is meritless. Applicant has not alleged any reason to suspect the incident report was falsified, rather than merely amended once investigators matched the DNA collected at the crime scene to Applicant through

the CODIS database. (Trial Tr. p.123, lines 16–20). At the evidentiary hearing, Applicant suggested the incident report was in violation of SLED regulations, but the regulation he cited—S.C. Code of Regulations R. 73-30—states that incident reports “must include, to the maximum extent possible, . . . follow-up investigations, . . . changes in the status of any case, and similar comments.” Far from *prohibiting* the amendment of incident reports, the cited regulation appears to *require* that all incident reports be updated with the results of follow-up investigations before being submitted to SLED. Accordingly, the Court finds Applicant has failed to prove any prosecutorial impropriety as to this issue. Therefore, this allegation is denied and dismissed with prejudice.

Great Seal

In his original application for post-conviction relief, Applicant alleges that the laws he was convicted under, 1993 Act No. 184 and 1995 Act No. 7, are lacking the impression of the Great Seal. The Court finds this allegation is meritless. The South Carolina Supreme Court has held that absolute literal compliance is not essential to valid legislation, but substantial compliance is sufficient. *Smith v. Jennings*, 67 S.C. 324, 45 S.E. 821, 824 (1903); *see, e.g., S.C. Op. Att’y Gen.*, 2017 WL 6189878 (S.C.A.G. December 1, 2017). Further, under the Enrolled Bill Rule, an act is deemed to be properly passed when it has been ratified by the presiding officers of the General Assembly, approved by the Governor, and enrolled in the Office of Secretary of State. *Medical Soc. of South Carolina v. Medical Univ. of South Carolina*, 334 S.C. 270, 278, 513 S.E.2d 352, 356 (1999); *Beaufort County v. Jasper County*, 220 S.C. 469, 487, 68 S.E.2d 421, 430 (1951); *State v. Town Council of Chester*, 39 S.C. 307, 17 S.E. 752, 755 (1893) (“when the bill . . . is deposited in the department of state, according to law, its authentication as a bill that has passed congress is complete and unimpeachable).

Other jurisdictions have upheld acts challenged as invalid because there was not strict compliance with a constitutional provision. *See Taylor v. Wilson*, 22 N.W. 119 (Neb. 1885) (finding an act was not unconstitutional when the president of the senate did not sign it as required by the state's constitution); *Commr's of Leavenworth Co. v. Higginbotham*, 17 Kan. 62 (Kan. 1876) (“[T]he mere failure of the president of the senate to do his duty cannot have the effect to invalidate the law.”).

The Court finds the acts Applicant currently challenges were properly passed and have substantial compliance with the constitutional requirements, rendering them valid laws. Accordingly, this allegation is meritless as a matter of law and is therefore denied and dismissed with prejudice.

II. 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 cautions 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), 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 Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 3rd day of October, 2023.

Kristi F. Curtis

KRISTI F. CURTIS
Presiding Judge
Eleventh Judicial Circuit

Sumter, South Carolina