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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Robert J. Bonds, Circuit Court Judge

Case No. 2018-CP-07-0562

Earnest Stewart Daise,

Petitioner,

vs.

The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Notice is hereby given that Petitioner hereby appeals the final order of dismissal filed October 4, 2023 but received by counsel on October 12, 2023. A copy of the order is attached.

Respectfully submitted,

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October 16, 2023

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT Earnest Stewart Daise, #, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT **2018-CP-07-0562** **ORDER OF DISMISSAL**

2023 OCT -4 PM 12: 21
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Earnest Stewart Daise (Applicant) on March 13, 2018. On March 17, 2023, an evidentiary hearing convened before the Honorable Robert J. Bonds. Applicant appeared pro se.[1] Assistant Attorney General Danielle Dixon represented Respondent. Following a thorough review of the records before this Court and the testimony and evidence presented at the hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

Procedural History

Applicant is currently incarcerated in the South Carolina Department of Corrections serving a life sentence. In December 2009, the Beaufort County Grand Jury indicted Applicant for two counts of murder (2009-GS-07-02636; -02639), assault and battery with intent to kill (ABWIK) (2009-GS-07-02637), possession with intent to distribute (PWID) marijuana, 3rd or subsequent (2009-GS-07-02595), and trafficking in cocaine 10g – 28g, 3rd or subsequent (2009-GS-07-02594).

On October 8, 2013, Applicant proceeded to a capital jury trial before the Honorable

[1] Applicant was previously appointed counsel in this matter. By order dated April 18, 2022, Applicant's prior counsel was relieved at Applicant's request and Applicant was permitted to proceed pro se.

Carmen T. Mullen. Applicant was represented by William S. McGuire, Casey Secor, and S. Boyd Young, all of the Division of Capital Trial Defense; Mark J. McDougall, Catherine Creely, and Jessica A. Fitts, all of Akin, Gump, Strauss, Hauer Feld, LLP.; and Micah Leddy of The Leddy Law Firm, LLC. Solicitor Isaac McDuffie Stone, III, Chief Deputy Solicitor Sean Thornton, and Deputy Solicitor Carra Henderson prosecuted the case.

The jury found Applicant guilty as indicted. On October 21, 2013, the capital penalty phase began, and on October 23, 2013, the jury sentenced Applicant to life imprisonment on both counts of murder. Judge Mullen sentenced Applicant to consecutive sentences of twenty years for ABWIK, thirty years for trafficking cocaine, and twenty years for PWID marijuana.

Applicant filed a timely notice of appeal, which was perfected by A. Mattison Bogan and Chief Appellate Defender Robert M. Dudek. On appeal, Applicant argued the trial court erred in (1) allowing hearsay violative of the Confrontation Clause, (2) permitting a witness to comment on the credibility of another witness, (3) admitting testimony that a victim feared Applicant, (4) failing to require the State to produce materials that allegedly amounted to a "handbook" on circumventing a *Batson* challenge, (5) admitting a photograph of Applicant in a custodial pose, and (6) admitting two photographs in which a child victim's birthday cake was visible. Applicant also argued the court's cumulative errors denied him a fair trial. The Court of Appeals affirmed. State v. Daise, 421 S.C. 442, 807 S.E.2d 710 (Ct. App. 2017). Applicant filed a petition for rehearing, which was denied. The remittitur was sent January 22, 2018.

SUMMARY OF TRIAL TESTIMONY

At trial, the State presented evidence that Jeanine Mullen, the victim, was involved in a romantic relationship with Applicant. Frank Mullen, Jeanine's father, testified he arrived at Jeanine's home between 6:30 and 7:00 p.m. on November 15, 2009, to drop off Jeanine's two

oldest children. When they arrived, the group noticed the doors to Jeanine's white van were open and it appeared "ransacked." Inside the home, Frank discovered Child 2's[2] deceased body in the kitchen and Jeanine's deceased body in her bedroom. Although Child 1[3] was still alive, he had been shot. The only item missing from the home was a .38 pistol. According to paramedics, Child 1 indicated "Daddy" did this when questioned on the way to the hospital.

Around 2:00 a.m. on November 16, police apprehended Applicant at the home of his friend, Janelle Jay Simmons, located on 43 Poppy Hill Road. Police searched Applicant's bedroom in that home and found half a pound of marijuana, an electronic scale, ammunition commonly associated with an AK-47, a set of keys for Jeanine's van, twenty-six grams of crack cocaine, and Applicant's cell phone. Police also documented a red smear on the door into the bedroom, noted what appeared to be "fresh" blood on the front-left pocket of Applicant's jeans, and photographed a cut on Applicant's right hand. A DNA expert testified the DNA from the smear on the door matched Applicant's blood. Additional testing revealed blood from both Applicant and Jeanine on Applicant's jeans.

During his initial interview, Applicant denied being at Jeanine's home or driving her van. However, video surveillance from a gas station showed Applicant with Jeanine's van between 11:45 a.m. and 12:18 p.m. the day of her murder, and Michael Wilson testified he saw Applicant driving a "white soccer mom van" around dusk that evening. (Tr. 2025). Wilson testified he overheard Applicant on the phone say, "Who the f*** you think you talking to?" prior to hanging up. (Tr. 2024).

Phone records showed Jeanine's phone called Applicant's phone eighteen times between

[2] Child 2 was Jeanine's four-year-old son from a different father; he died from a gunshot wound to the head. Likewise, Jeanine died from a gunshot wound to the head, but she had an additional gunshot wound on her left thigh. The pathologist opined Jeanine's head wound was caused by a gun being placed directly against her head.
[3] Child 1 was Jeanine and Applicant's two-year-old son.

11:39 a.m. and 3:52 p.m.. Although most of the calls went to voicemail, the 3:52 p.m. call lasted twenty-eight seconds. Additional records showed Applicant's phone placed nine calls to Simmons's phone between 6:00 p.m. and 6:18 p.m. At 6:04 p.m., Simmons's phone sent Applicant's phone a text indicating he was "on the way." Simmons testified that sometime after 6:00 p.m., he picked up Applicant on the side of the road and gave him a ride. He admitted he sent the text that said "On the way." On cross-examination, Simmons claimed he never picked up Applicant but only said he did because police threatened to charge him as an accessory.

A trace evidence expert testified she found gunshot residue on Applicant's jeans. On cross-examination, she admitted she only found a single particle of gunshot residue on each leg and acknowledged gunshot residue can remain on unwashed clothing for many months. She also testified there was no gunshot residue on Applicant's sweatshirt.

CURRENT APPLICATION

On March 13, 2018, Applicant timely filed this PCR application alleging he is being held in custody unlawfully due to various grounds of ineffective assistance of counsel. Prior to the hearing, he amended his application and raised the following:

Ineffective assistance of counsel:

> 1. Counsel failed to object to hearsay testimony from EMS personnel that when victim Jeremiah Daise was asked "Who hurt you," he responded "Daddy." Both Danny Tinnel and Shayna Orsen testified at a pre-trial hearing and at trial without any hearsay objections from trial counsel.
>
> 2. Counsel failed to establish Applicant had a legitimate reasonable expectation of privacy to challenge the legality of a search warrant that was executed on 43 Poppy Hill Road, and a search warrant executed on the person of Earnest Daise for clothing Applicant was wearing at the time of hi interview with Beaufort County Sheriff's Office investigators.

3. Counsel failed to timely file ad serve judge and State with "Memorandum in Support of Defendant's Motion to Suppress."

4. Counsel failed to object at first opportunity during State's opening argument when State mentioned evidence that is fruit of search warrant that was executed on the person of Earnest Daise for clothing Applicant was wearing thereby waiving Applicant's pre-trial motion to suppress fruits of search warrant.

5. Counsel mentioned fruits of search warrant executed at 43 Poppy Hill Road and fruits of search warrant executed on the person of Earnest Daise for clothing being worn by Applicant during interview with Sheriff's Office investigators during defense opening argument thereby waiving applicant's pre-trial motion to suppress both search warrants.

6. Counsel mentioned and elicited testimony during cross examination of State's witness Jeff Crooks of fruits of search warrant executed for clothing being worn by Earnest Daise at time of interview with investigators before a final ruling was made, thereby waiving Applicant's pre-trial motion to suppress fruits of search warrant.

7. Counsel mentioned to jury during defense opening arguments that Applicant had a gun.

8. Counsel elicited testimony from State's gunshot residue expert that gunshot residue on Applicant's jeans could have come from Applicant shooting an AK-47 "from the hip."

9. Counsel failed to interview and subpoena Cassandra Simmons to testify at trial in order to rebut and impeach State's witness, Michael Wilson.

10. Counsel failed to cross examine State's witness, Michael Wilson, about prior statement he made to law enforcement.

11. Counsel failed to object on all available grounds to hearsay testimony from State's witness, Frank Mullen, about Jeanine Mullen being afraid of Applicant. Rule 401, 403.

12. Counsel failed to object to testimony of State's witness, Michael Wilson, on all available grounds including but not limited to Rule 401, 403, and 404(b).

13. Counsel failed to ask judge before the start of opening arguments to state for the record that her pre-trial rulings denying Applicant's motion to suppress fruits of search warrants for 43 Poppy Hill Road and clothing being worn by Earnest Daise were final rulings so as to preserve Applicant's objections to fruits of searches for direct appeal.

Ineffective Assistance of Appellate Counsel:

1. Counsel failed to brief and raise for appeal trial court's denial of Applicants motion to suppress fruits of search warrant executed at 43 Poppy Hill Road.

2. Counsel failed to brief and raise for appeal trial court's denial of Applicant's motion to suppress fruits of search warrant executed on the person of Earnest Daise for clothing being worn by Applicant at the time of his interview with Beaufort County Sheriff's Office investigators.

3. Counsel failed to brief and raise for appeal Applicant's objection to hearsay testimony from Frank Mullen that Jeanine Mullen was afraid of Applicant.

At the PCR hearing, Applicant waived issue number nine, which was related to Cassandra Simmons. Applicant proceeded on the remaining allegations from his Amended Application, as set forth above.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the records before it, including the Beaufort County Clerk of Court records of the underlying convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the records from this PCR action. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove "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, 466 U.S. 668. 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, 466 U.S. 668. First, an applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, courts measure 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 an 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). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove that counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Hearsay testimony

Applicant contends counsel was ineffective for not objecting to hearsay testimony from EMS personnel that when Child 1 was asked "Who hurt you," he responded "Daddy." He further contends both paramedics testified at a pre-trial hearing and at trial without any hearsay objections from trial counsel.

At trial, paramedic Shayna Orsen testified she and Crew Chief Danny Tinnel transported Child 1 to the hospital. She stated Child 1 was initially unresponsive but became more responsive in the ambulance. (Tr. 1805). During her testimony, the following exchange occurred:

> A Crew Chief Tinnel was asking [Child 1] who hurt him.
>
> Q Okay.
>
> Mr. McGuire: Your Honor, I hate to interrupt, but for the record, we need to renew our *Crawford* objection.
>
> The Court: Thank you. It's noted for the record, sir.
>
> By Mr. Stone:
>
> Q So, I'm sorry. Crew Chief Tinnel—start that over. I'm sorry.
>
> A Crew Chief Tinnel was asking him questions, basically just to keep him awake and talking, and one of the questions he did ask him was who had hurt him.
>
> Q And did he answer?
>
> A It sounded like he said *Daddy.*

(Tr. 1806-07). Later, paramedic Tinnel's testified, "I was asking [Child 1] who hurt him, and when I asked him who hurt him, he responded *Daddy.*" (Tr. 1821). Prior to this testimony, counsel renewed the *Crawford* objection. (Tr. 1820).

At the PCR hearing, Applicant averred counsel was ineffective for not objecting to this hearsay testimony. He stated appellate counsel raised this issue in his brief, but the Court of Appeals found it was not preserved. (PCR 30-32). Applicant further averred the excited utterance exception was inapplicable because no testimony indicated Child 1 "was under the excitement of the events causing his injury. This is because [Child 1] was not under the stress of excitement, rather [Child 1] was groggy, nonresponsive and uttering complete nonsense." (PCR 34-37). He also contended the present sense impression exception did not apply. (PCR 37).

William McGuire testified he was lead counsel during the guilt phase. (PCR 111-12). He stated Child 1—who was Applicant's biological child—was two years old at the time of the shooting and six years old at the time of trial. (PCR 112). McGuire stated the State planned to call Child 1 as a witness, which was a concern for the defense team. He testified the defense team consulted with an expert on memory issues, who indicated research showed young children could remember traumatic events. (PCR 112-13). McGuire explained "having a young child testify that his father was the assailant that . . . shot him in the head would be pretty emotional and pretty damning evidence"—especially in a capital trial. (PCR 113-14). He stated the defense team discussed strategies to keep Child 1 from testifying. McGuire testified, 'I can't remember if we forged an agreement with the prosecutor, or if we just had a strategy decision to soft-pedal our objections to the statements that were already—that were coming in the record through Danny Tinnel." (PCR 114). He recalled having a conversation with the deputy solicitor about whether the State would call Child 1 if his statements came in through another witness. McGuire stated, "I don't know if we forged an agreement, or how specific that was, but, ultimately, [Child 1] did not take the stand." (PCR 115). He averred the jury would have been sympathetic to Child 1 if he had testified, which would have prejudiced Applicant. (PCR 115).

McGuire recalled raising a *Crawford* objection to the testimony. (PCR 116, 124). He did not believe a hearsay objection would have been a strong objection because the testimony would likely fit the excited utterance exception. (PCR 116, 122-23).

This Court finds the foregoing testimony by McGuire to be credible. This Court further finds McGuire articulated a valid, reasonable strategy for not further objecting to hearsay statements of Child 1 and thus was not deficient. Specifically, McGuire credibly testified the State planned to call Child 1 as a witness, which would have been damaging to Applicant's case. Ultimately, counsel's strategy was to keep Child 1 from testifying, which was especially reasonable considering this was a capital case. (PCR 124-25). Thus, Applicant did not show counsel was deficient in this regard. Further, this Court finds it is not reasonably likely the outcome would have been different had counsel raised a hearsay objection. This court agrees with counsel's assessment that the hearsay objection would not be strong considering the trauma Child 1 experienced.[4] See Rule 803(2), SCRE (providing "[a] statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition" is not excluded by the rule against hearsay). Finally, this Court finds the State presented overwhelming evidence of Applicant's guilt such that it is not reasonably likely the outcome would be different had Child 1's statement been excluded.[5] Thus, Applicant did not

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[4] Counsel *did* raise and renew a *Crawford* objection to the testimony. (Tr. 1806, 1820).

[5] In examining a different issue, our Court of Appeals concluded there was overwhelming evidence of Applicant's guilt that did not include Child 1's statement. See State v. Daise, 421 S.C. 442, 461, 807 S.E.2d 710, 719-20 (Ct. App. 2017) ("Phone records revealed that between 11:39 a.m. and 3:52 p.m. on November 15, 2009, Jeanine called Daise eighteen times. Child 1 testified Daise drove the white van away from Jeanine's home on the morning of November 15. Video surveillance shows Daise had the van at a gas station shortly before noon, and he was seen driving the van near Eddie's Disco around dusk. Frank, Child 1, and Child 2 arrived back at Jeanine's around 7:00 p.m., where they saw the "ransacked" van in the driveway. Inside the home, Frank discovered Jeanine, John Doe 1, and John Doe 2. Contrary to Daise's claim that he was not in the vicinity of the residence on the evening of the incident, Simmons testified he picked up Daise about a mile from Jeanine's and dropped him off near the tracks on Poppy Hill Road. Further, when Daise was arrested, gunshot residue and traces of Jeanine's blood were found on his jeans. Thus, we find the State presented overwhelming evidence of guilt such that any error in the admission of the "fear" statements was harmless."). Child 1 in the Court of Appeals' opinion referenced an older child of the victim—not the two-year-old child that is identified as Child 1 in this order.

prove prejudice, and this claim is denied.

Search warrant – Expectation of Privacy

Applicant next contends trial counsel was ineffective for failing to establish Applicant had a legitimate reasonable expectation of privacy to challenge the legality of a search warrant that was executed on 43 Poppy Hill Road, and a search warrant executed on the person of Earnest Daise for clothing Applicant was wearing at the time of his interview with Beaufort County Sheriff's Office investigators. This allegation lacks merit.

At the PCR hearing, Applicant stated he raised this issue to protect himself "in case the State said, 'well he never established that he had a right to privacy or an expectation to privacy.'" (PCR 39). He acknowledged this was never an issue at trial. (PCR 39, 42). Applicant explained the State wanted to establish the room at Poppy Hill belonged to him so they could convict him of drug-related charges stemming from the search. (PCR 42). Thus, the State never raised the issue of whether Applicant had an expectation of privacy in the room. (PCR 42). Applicant reiterated, "[I]t's probably not really an issue, I just kind of raised that just to . . . kind of protect myself." (PCR 43).

Applicant acknowledged at the PCR hearing that the State never raised an issue regarding whether he had an expectation of privacy in his bedroom at the Poppy Hill home or to the search of his clothes. Further, this Court has reviewed the transcript of the suppression hearing, and the State never argued that Applicant did not have an expectation of privacy or that the Fourth Amendment did not apply. In short, no one contested that Applicant had an expectation of privacy in his bedroom at Poppy Hill or that the Fourth Amendment applied. Thus, counsel was not deficient for not addressing this issue, nor was Applicant prejudiced by counsel's failure to

establish Applicant's expectation of privacy—especially when the State never disputed it. Thus, this allegation is denied and dismissed.

Search Warrant – Failed to file and serve Memorandum

Applicant contends counsel was ineffective for failing to timely file and serve the trial judge and State with "Memorandum in Support of Defendant's Motion to Suppress." Applicant has not shown counsel was ineffective in this regard.

Prior to trial, trial counsel filed a motion to suppress items seized from Applicant. (Record on Appeal[6] (hereinafter R.), 2656). Thereafter, trial counsel filed a supplemental motion seeking to suppress evidence from search warrants of (1) his bedroom at 43 Poppy Hill Road and (2) the clothes he wore when he spoke to law enforcement. (R. 2661). In the motion, trial counsel specifically argued the warrants were defective because "each warrant was presented containing inaccurate and misleading information and material omissions." (R. 2662).

On February 4, 2013, the trial court held a hearing on Applicant's motion. (February 4, 2013 transcript, hereinafter "Feb. Tr."). At the hearing, Magistrate Orville G. Chase testified he did not receive any evidence outside the affidavit itself. (Feb. Tr. 10-11). Master Sergeant Jefferey Purdy testified about the affidavit supporting the search warrant of Applicant's clothes, and Sergeant Wilson testified about the affidavit supporting the search warrant of 43 Poppy Hill Road. (Feb. Tr. 14-21, 48-54). During the hearing, trial counsel Casey Secor cross-examined the officers about whether the affidavits adequately provided the source of their information. (Feb. Tr. 25-47, 54-70). Trial counsel also called the victim's neighbor, Rebecca Nation, to establish she told law enforcement that she saw the victim's boyfriend pull into her home the evening of the shooting but did not know his name. (Feb. Tr. 75-81). At the end of the hearing,

[6] Respondent provided this Court a copy of the record on appeal prior to the evidentiary hearing.

trial counsel requested time to order the transcript and brief the issue. (Feb. Tr. 100). The trial court agreed. (Feb. Tr. 101).

On May 6, 2013, the trial court issued an order denying the motion to suppress. In the order, the Court found the affidavits contained sufficient probable cause for the search warrant.[7] On September 11, 2013, trial counsel filed a memo in support of Applicant's motion to suppress items from the search warrant.[8] In it, counsel cited Franks.

During trial, which began October 8, 2013, counsel again raised the motion to suppress and specifically cited Franks. The court acknowledged it had previously determined the search warrants contained sufficient probable cause. (Tr. 2139, 2142). Thereafter, counsel renewed its objection each time the State entered evidence from the search warrants. (Tr. 2142, 2357, 2360).

At the PCR hearing, Applicant acknowledged counsel moved pretrial to suppress the items seized from the warrants. However, he averred counsel was ineffective for not filing its memo in support of the motion until after the court ruled on the motion. He acknowledged the memo may have been emailed before it was filed. (PCR 47).

This Court finds Applicant did not prove counsel was ineffective in this regard. Notably, the trial court had the memo in advance of trial. Each time evidence from the warrants was introduced, counsel renewed their Franks motion. The trial court had the benefit of the memo when the motion was renewed and thus had an opportunity to fully consider the arguments therein at that time. Likewise, the court could have altered its pretrial ruling when this issue was raised again by counsel during trial. The court did not do so, even though it had the memo at that time. Based on the foregoing, this Court finds it is not reasonably likely the court would have ruled differently had it received the memo earlier.

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[7] Applicant entered this order at the PCR hearing.
[8] Applicant entered this memo at the PCR hearing.

Likewise, counsel raised similar issues at the Franks hearing itself. The memo primarily focused on allegations that officer (1) misstated that a neighbor said she saw Applicant at the home when the neighbor merely stated she saw Jeanine's boyfriend and (2) misled the magistrate regarding the reliability of the two-year-old child's statement identifying "Daddy" as the shooter. At the Franks hearing, counsel extensively cross-examined the officers about whether the affidavits adequately provided the source of their information and called Nation to establish she told law enforcement that she saw the victim's boyfriend pulled into her home the evening of the shooting but did not know his name. (Feb. Tr. 25-47, 54-70, 75-81). Ultimately the court had the opportunity to consider the primary issues raised in the memo at the time of the Franks hearing. This Court has reviewed the memo and the transcript of the Franks hearing and finds it is not reasonably likely the outcome would have been different had counsel provided the memo earlier.[9] Thus, Applicant did not prove prejudice, and this claim is denied.

Search Warrant – Failed to preserve objection[10]

Applicant next contends counsel was ineffective for not objecting during State's opening argument when State mentioned evidence that was fruit of search warrant, which he contends waived his pretrial motion to suppress the warrants. He also contends counsel was ineffective for not asking the judge before opening arguments to state that her pretrial rulings denying Applicant's motion to suppress were final rulings. This Court finds Applicant did not prove counsel was ineffective in this regard.

At the PCR hearing, Applicant averred counsel should have objected when the State argued, "[W]hen Earnest Daise was arrested that night, on his pants, he had Jeanine Mullen's blood mixed with his own blood form a fresh cut on his hand, mixed with gunshot residue."

[9] This issue is addressed more thoroughly below in the discussion of whether appellate counsel was ineffective.
[10] This section combines arguments four and thirteen, as set forth above.

(PCR 49; Tr. 1693). He asserted counsel did not ask the court whether its ruling on the motion to suppress the warrants was final. He noted counsel asked the court during a proffer if it was a final ruling but did not ask whether its ruling on the Franks motion was final. Applicant averred counsel was "constantly getting up" to renew the Franks objection rather than "just asking the Judge to state on the record that her ruling was a final ruling, then the issue would have been preserved, and they wouldn't have had to . . . .keep getting up." (PCR 60-61; Tr. 1943).

Initially, counsel renewed its Franks objection at the proper time—making this issue preserved for appeal. Counsel did not need to object during the State's opening argument to preserve this issue. See State v. Jones, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021) ("If an evidentiary ruling is pretrial, a contemporaneous objection must be raised during trial *when the evidence is admitted*, whereas a party need not renew an objection if the decision is final." (emphasis added)). Thus, Applicant did not prove deficiency or prejudice related to counsel's failure to object during the State's opening to statements about items recovered from the warrants. Likewise, because this issue was properly preserved, Applicant cannot show prejudice from counsel's failure to ask the court to state for the record that her pretrial rulings denying Applicant's motion to suppress fruits of search warrants were final. Thus, Applicant has not shown counsel was ineffective in this regard, and this claim is denied.

Mentioning fruits of search warrants during opening argument[11]

Applicant contends counsel was ineffective for mentioning the fruits of the search warrants during opening argument, which he contends waived his pretrial motion to suppress the warrants. This Court finds Applicant did not prove counsel was ineffective in this regard.

At the PCR hearing, Applicant asserted counsel mentioned during opening argument that he had blood and gunshot residue on his pants, and police found crack cocaine in his bedroom.

[11] This section addresses issue five as set forth above.

(PCR 50; Tr. 1696, 1704, 1706). Applicant contended counsel waived his objection to the search warrants by mentioning items seized during the search warrants during opening statement.

William Sean McGuire testified that at the time of opening argument, the court had denied their pretrial motion to suppress the warrants, so they expected the evidence from the warrants to be admitted. (PCR 118). When asked why he would mention drug and gun evidence during opening argument, he explained,

> [S]o there was some forensic evidence regarding gunshot residue on [Applicant's] clothing, and it was not gonna be a wise strategy to pretend that he wouldn't have any contact with guns or firearms or ammunition, 'cause the only explanation would be a shooting, and we tried the case as a residual doubt case. Also, we knew in the penalty phase that there was gonna be substantial testimony regarding his growing up, and the fact that he did deal drugs, and that his mother was addicted to crack. And there's some pretty sad anecdotal stories about him when he was selling drugs at a young age to put food on the table, and to make sure his little sisters had clothes and things like that. One night he went—a car approached, rolled down the window at a location where he sold drugs and he went up to the car, and his mother was in the car. And she was an absent mother, and he refused to sell crack to that car, which was, I think, a pretty sympathetic story. So we knew that a history of drug dealing was gonna come in. . . . I mean there—the charges were necessary to have evidence of drug dealing based on the indictments, so we knew it was coming in. So the sooner a jury hears something, the . . . farther they are from fixing penalty when they get to that job. So it was coming in, so we dealt with it upfront.

(PCR 118-19). McGuire agreed they were successful during the penalty portion of trial. (PCR 125) He explained that maintaining credibility before the jury was especially important in a capital trial, and they would lose credibility if they tried to assert Applicant was "like a Boy Scout choir boy." McGuire further explained that by being upfront about Applicant handling guns, they could suggest that as a reason he had gunshot residue on his clothes. (PCR 127).

Initially, this Court finds counsel did not waive the preservation of Applicant's pretrial

motion to suppress the warrants by mentioning drugs and guns during opening argument. Further, this Court finds the foregoing testimony by counsel to be credible, and counsel articulated a valid reason for mentioning drug and gun evidence during opening statement. Specifically, he testified he expected evidence about gunshot residue on Applicant's clothing and drugs to be admitted. Further, he explained their motion to suppress the warrants had been denied, and they expected evidence from the warrants to be admitted. Part of the evidence officers retrieved from Applicant's bedroom was AK-47 ammunition. In light of the fact this evidence was likely going to be admitted (and was in fact admitted), and this was a capital trial, this Court finds counsel articulated a valid strategy for raising gun and drug evidence during opening statement and thus was not deficient. Further, based on the fact this evidence *did* come in at trial, this Court finds it is not reasonably likely the outcome would have been different had counsel *not* mentioned gun and drug evidence during opening argument. Thus, Applicant did not prove prejudice, and this claim is denied.

Eliciting information about fruits of search warrant during Crooks' testimony

Applicant contends counsel was ineffective for eliciting testimony about the fruits of the search warrants during cross-examination of Crooks, which he contends waived his pretrial motion to suppress the warrants. Applicant did not prove counsel was ineffective in this regard.

During cross-examination of Lieutenant Crooks, the following exchanges occurred:

> Q Okay. Did you later obtain shoes that, through chain of custody, you were informed had belonged to the defendant in this case, Earnest Daise?
>
> A Well, later that night, yes, sir, I did. I did observe the shoes he had on, yes, sir.
>
> Q And did you make a comparison of those shoes and the 19 footprints you found?

A Yes, sir. I looked at his out sole, his outsole design on his shoes, yes, sir, I did.

Q And you concluded that none of those prints matched Mr. Daise's shoes?

A That is correct.

(Tr. 1771).

Q All right. Okay. And in the—as depicted in these photographs, the number of footprints you found approached 20, and none of the are Earnest Daise's. Is that right?

A That is correct.

(Tr. 1774).

Q Okay. The jury's heard discussion of blood stains, and blood stains are detected.

A Yes, sir.

Q And in the case of the blood stain that was detected on Mr. Daise's pants, do you have an opinion with regard to whether that was put there by transference or splatter?

A It looked to me like it was transfer stains. Yes, sir.

Q All right. And splatter would be, and I'm going to use layman's terms, but splatter would be blood that is transferred to a surface in an explosive manner, airborne in some way.

A Yes, sir. It's projected blood.

Q Okay. And transference would be surface-to-surface.

A Yes, sir.

Q Body part to clothing, or something that had the blood on it.

A Yes, sir.

Q And your view is it was transference.

A That's what it appeared to be to me, yes, sir.

Q Now, in the course of the same investigation, the Sheriff's Office informed you that a DNA analyst in the Sheriff's Office had found color specks on the sweatshirt that looked like blook spatter. Do you recall that?

A Yes, sir, I do.

Q Okay. And you tested that garment with LCV; didn't you?

A Yes, sir, I did.

Q And it's correct that, when that garment was delivered to you, it was described as having been taken from the defendant, Earnest Daise.

A Yes. I don't recall if I was told where—who it came from. I know it was submitted, and they requested that I check it for—for evidence of blood stain, yes, sir.

Q And in fact, you found no blood spatter there; did you?

A No, sir, I didn't find any blood on it.

Q What you found were red thread fivers in the—that were embedded in the fabric.

A Yes, sir. They were very small red spots on the shirt, and when I looked at it under a magnifying glass, I was able to determine that it was actually red thread woven into the design of the shirt.

(Tr. 1780-81). At the PCR hearing, Applicant asserted counsel was ineffective for eliciting the foregoing testimony about blood on his shoes and stains on his pants. He contended the State had not yet introduced these items into evidence, and the foregoing therefore waived his pretrial motion to suppress the warrants. (PCR 51-52).

This Court finds Applicant did not prove counsel was ineffective in this regard. Initially, as previously discussed, counsel did not waive Applicant's objection to the search warrants by raising this issue through cross-examination. Further, a review of this transcript shows counsel elicited testimony that (1) footprints near the scene did not match Applicant's shoes, (2) blood on

Applicant's pants was caused by transference rather than spatter, and (3) law enforcement did not find blood on Applicant's shirt. The foregoing testimony benefitted Applicant's case, and this Court finds counsel was not deficient for eliciting this testimony. Likewise, this Court finds it is not reasonably likely the outcome would have been different had counsel *not* clarified the foregoing for the jury. Thus, Applicant did not prove prejudice, and this claim is denied.

Mentioning gun during opening statement

Applicant contends counsel was ineffective for mentioning to jury during opening statement that Applicant had a gun. At the PCR hearing, he explained the State had dismissed a possession of a firearm by a convicted felon charge because they never found the gun. However, he testified counsel told the jury during opening statement that he had a gun. (PCR 52-53; Tr. 1708). This Court finds Applicant did not prove counsel was ineffective in this regard.

At the PCR hearing, McGuire testified that at the time of opening argument, the court had denied their pretrial motion to suppress the warrants, so they expected the evidence from the warrants to be admitted. (PCR 118). When asked why he would mention gun evidence during opening argument, he explained,

> [S]o there was some forensic evidence regarding gunshot residue on [Applicant's] clothing, and it was not gonna be a wise strategy to pretend that he wouldn't have any contact with guns or firearms or ammunition, 'cause the only explanation would be a shooting, and we tried the case as a residual doubt case. . . . So the sooner a jury hears something, the . . . farther they are from fixing penalty when they get to that job. So it was coming in, so we dealt with it upfront.

(PCR 118-19). McGuire agreed they were successful during the penalty portion of trial. (PCR 125) He explained that maintaining credibility before the jury was especially important in a capital trial, and they would lose credibility if they tried to assert Applicant was "like a Boy Scout choir boy." McGuire further explained that by being upfront about Applicant handling

guns, they could suggest that as a reason he had gunshot residue on his clothes. (PCR 127).

This Court finds the foregoing testimony by counsel to be credible. This Court further finds counsel articulated a valid reason for bringing up gun evidence during opening statement. Specifically, he testified he expected evidence about gunshot residue on Applicant's clothing to be admitted. Further, he explained their motion to suppress the warrants had been denied, and they expected evidence from the warrants to be admitted. Part of the evidence officers found in Applicant's bedroom was AK-47 ammunition. Because this evidence was likely going to be admitted (and was in fact admitted), and this was a capital trial, this Court finds counsel articulated a valid strategy for mentioning gun evidence during opening statement and thus was not deficient. Further, because this evidence was admitted at trial, it is not reasonably likely the outcome would have been different had counsel *not* mentioned gun evidence during opening argument. Thus, Applicant did not prove prejudice, and this claim is denied.

Elicited testimony from gunshot residue expert

Applicant contends counsel was ineffective for eliciting testimony from the State's gunshot residue expert that gunshot residue on Applicant's jeans could have come from Applicant shooting an AK-47 "from the hip." At the PCR hearing, Applicant explained he had a gunshot residue particle on his pants, and counsel asked the expert if that could have gotten there from him shooting an AK-47 from the hip. He averred this was a bad strategy because it intimated to the jury that he possessed a very deadly weapon. Applicant further averred it was especially prejudicial because counsel had previously told the jury he had a gun. This Court finds Applicant did not prove counsel was ineffective in this regard.

At trial, Illa Simmons, an expert in trace evidence, testified she examined the jeans Applicant was wearing when he was arrested and found "a particle of gunshot residue on both of

the front sides, as well as round lead particles on both—both front leg and the front groin area." (Tr. 2332). On cross-examination, she clarified she found only one particle of gunshot residue on each side of the jeans. (Tr. 2334). MacDougall questioned her about weather gunshot residue required a combination of three elements rather than just lead; whether gunshot residue would last a long time on an inanimate object such as clothes; and whether clothing could contain gunshot residue eight or nine months later. (Tr. 2334-38). He also questioned her about the fact she could not determine *when* gunshot residue was deposited on clothing or specifically on Applicant's jeans. (Tr. 2338). After being questioned about a graphic the jury had seen of gas being expelled from a firearm, Simmons testified most of the gunshot residue would come out of the muzzle of the gun. (Tr. 2338-39). Thereafter, the following exchange occurred:

> Q Are you familiar with 7.62, 39 ammunition?
>
> A No, sir.
>
> Q Okay. You're not?
>
> A No, sir.
>
> Q Okay. Have you ever heard of an AK-47?
>
> A I've—I've heard of the caliber, yes, sir.
>
> Q Okay. And you know that an AK-47's ammunition can be . . . loaded in a clip? Is that right?
>
> A Yes, sir.
>
> Q Okay. And sometimes people who fire them . . . will fire them in rapid succession in a semi-automatic fashion, or even an automatic fashion, if they have an unlawful weapon. Is that right?
>
> A Yes, sir.
>
> Q And you're aware that people, when they are shooting recreational, but probably not for accuracy, don't always fire from ,you know, this position. Is that right?

> A I suppose they could, yes, sir.
>
> Q Right. And sometimes they'll fire it from the hip position. Is that right?
>
> A Yes, sir, they can.
>
> Q Okay. So, one way that gunshot residue could be deposited on a pair of pants would be someone firing an AK-47 or similar rifle form a hip position?
>
> A Yes, sir.
>
> Q And . . .the more rounds that are fired, the more likely it is that gunshot residue can be deposited. Is that right?
>
> A Yes, sir.

(Tr. 2339-41). Thereafter, upon further questioning, Simmons testified gunshot residue can be transferred, she did not find any gunshot residue in the jeans' pockets, and she did not find any gunshot residue on the sweatshirt Applicant was wearing. (Tr. 2341-47).

At the PCR hearing, MacDougall explained he was trying to elicit the fact that Applicant's clothing did not contain a great deal of gunshot residue and "to make clear . . . that gunshot residue lasts a long time on clothing, and it can come from all kinds of places and reasons for anyone that's been using a firearm." (PCR 148). He agreed he was trying to show there were other explanations for the gunshot residue on Applicant's pants, and to show "whatever gunshot residue was on . . . Mr. Daise's clothing was not probative of whether or not he had committed a crime."

This Court finds the foregoing testimony by MacDougall is credible, and MacDougall articulated a valid, reasonable strategy for his cross-examination. Specifically, based on MacDougall's PCR testimony and this Court's review of the cross-examination itself, this Court finds MacDougall was offering the jury alternative theories as to how gunshot residue could have

gotten on Applicant's clothing. This Court finds this strategy was reasonable within prevailing professional norms and not deficient. Likewise, this Court finds it is not reasonably likely the outcome would have been different had counsel not engaged in this cross-examination. Thus, Applicant did not prove prejudice, and this claim is denied.

Failed to cross-examine Michael Wilson

Applicant avers counsel was ineffective for failing to cross examine Michael Wilson about prior statement he made to law enforcement. This Court finds Applicant did not prove counsel was ineffective in this regard.

At trial, Wilson recalled seeing Applicant at Eddie's Disco around dusk on the evening of the murders. He stated Applicant was talking on the phone, and he overheard Applicant say, "Who the F do you think you're talking to?" before hanging up. (Tr. 2022-24). Wilson testified Applicant left in a "white soccer mom van." (Tr. 2024-25). Counsel did not cross-examine Wilson.

At the PCR hearing, Applicant contended counsel should have crossed Wilson about who Applicant was talking to. McGuire explained that Wilson testified he overheard Applicant say "Who the F do you think you're talking to." He stated the State used that to insinuate he was talking to Jeanine at the time. McGuire testified he did not see anything he missed in terms of cross-examining Wilson. (PCR 120).

This Court finds the foregoing testimony by McGuire is credible, and Applicant has not set forth a valid cross-examination that McGuire should have employed and thus did not prove counsel was ineffective. To the extent Applicant contends McGuire should have crossed Wilson about who Applicant was talking to, this Court notes Applicant did not enter any statement from Wilson or otherwise have Wilson testify at the PCR hearing. Thus, it is speculative as to what

Wilson would have said if counsel had asked him that question.[12] Without knowing what Wilson might have said, this Court cannot discern whether Applicant suffered prejudice from counsel's failure to ask this question. Further, Applicant did not introduce into evidence any statement from Wilson; thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Failed to object on all grounds to Frank Mullen's testimony

Applicant contends counsel was ineffective for failing to object on all available grounds to hearsay testimony from Frank Mullen about Jeanine being afraid of Applicant. Applicant specifically cites Rules 401 and 403 of the South Carolian Rules of Evidence. Ultimately, this Court finds Applicant did not prove counsel was ineffective in this regard.

Initially, counsel vigorously argued against the testimony of Frank during trial, and the State proffered his testimony outside the jury's presence. (Tr. 1842-57, 1942). Following the proffer, the Court determined he could testify that Jeanine said she was afraid of Applicant. (Tr. 1857, 1923, 1931-35, 1943). After the jury returned, Frank testified Jeanine had recently told him she was leaving Applicant because she "couldn't deal with him anymore." (Tr. 1996-97). When asked if Jeanine was afraid of Applicant, Frank responded, "Yeah, and that's—oh, yeah." (Tr. 1996). Counsel did not renew their objection.

Admittedly, the Court of Appeals found the objection to Frank's testimony about Jeannie's fear unpreserved. State v. Daise, 421 S.C. 442, 461, 807 S.E.2d 710, 719 (Ct. App. 2017). However, this Court finds Applicant did not prove prejudice. First, given the lengthy argument against the admissibility of Frank's statement—which was premised on State v. Garcia, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999), this Court finds it is not reasonably likely the trial court would have excluded the testimony had counsel further objected. Further, and

[12] Without knowing the answer to this question, it would have been risky for counsel to ask Wilson who Applicant was talking to, as Wilson may have responded "Jeanine."

critically, this Court finds it is not reasonably likely the Court of Appeals would have reversed on this issue had it been preserved. Notably, in ruling that the trial court erred in admitting Porter's testimony about Jeanine's fear of Applicant, the Court of Appeals found the error harmless due to other overwhelming evidence of Daise's guilt:

> Phone records revealed that between 11:39 a.m. and 3:52 p.m. on November 15, 2009, Jeanine called Daise eighteen times. Child 1 testified Daise drove the white van away from Jeanine's home on the morning of November 15. Video surveillance shows Daise had the van at a gas station shortly before noon, and he was seen driving the van near Eddie's Disco around dusk. Frank, Child 1, and Child 2 arrived back at Jeanine's around 7:00 p.m., where they saw the "ransacked" van in the driveway. Inside the home, Frank discovered Jeanine, John Doe 1, and John Doe 2. Contrary to Daise's claim that he was not in the vicinity of the residence on the evening of the incident, Simmons testified he picked up Daise about a mile from Jeanine's and dropped him off near the tracks on Poppy Hill Road. Further, when Daise was arrested, gunshot residue and traces of Jeanine's blood were found on his jeans. Thus, we find the State presented overwhelming evidence of guilt such that any error in the admission of the "fear" statements was harmless.

State v. Daise, 421 S.C. 442, 461, 807 S.E.2d 710, 719–20 (Ct. App. 2017). In light of the foregoing, this Court finds it is not reasonably likely this issue would have been reversed on appeal had it been preserved. Thus, Applicant did not prove prejudice, and this claim is denied.

Failed to object on all grounds to Wilson's testimony

Applicant contends counsel was ineffective for failing to object to Michael Wilson's testimony on all available grounds, including but not limited to Rule 401, 403, and 404(b).

McGuire recalled Wilson's testimony placed Applicant at Eddie's Disco in Jeanine's van around the time of the shooting. He testified the State's theory was Applicant had borrowed Jeanine's van and would be frustrated that he had not returned it. McGuire stated he did not see any Rule 403 objection that could have been made.

This Court finds Applicant has not shown counsel was ineffective for not objecting to Wilson's testimony. Initially, this Court finds the testimony was relevant to the State's theory that Applicant had borrowed Jeanine's van and would be frustrated that he had not returned it. See Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Likewise, this Court agrees with counsel's assessment that there was not a viable Rule 403 objection. See Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). Finally, this Court finds this testimony supported the State's theory of motive and thus would not have been excluded by Rule 404(b). See Rule 404(b), SERE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of common scheme or plan, the absence of mistake or accident, or intent."). This Court finds Applicant has not set forth a valid, viable objection to Wilson's testimony and thus did not prove deficiency. For the same reason, this Court finds it is not reasonably likely the outcome would have been different had counsel objected to Wilson's testimony. Thus, this claim is denied.

IX. Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397

S.E.2d 523, 526 (1990). "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 v. Barnes, 463 U.S. 745, 754 (1983).

Courts apply Strickland when analyzing a claim of ineffective assistance of appellate counsel. Thus, courts must consider (1) whether appellate counsel's performance was deficient, and (2) whether the applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). 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).

Search Warrant Issue

Applicant contends appellate counsel was ineffective for failing to brief and raise for appeal the trial court's denial of his motion to suppress the search warrants executed at 43 Poppy Hill Road and for the clothes he was wearing when he was interviewed by law enforcement. This Court finds Applicant has not shown counsel was ineffective in this regard.

"In Franks v. Delaware, the United States Supreme Court held that the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed." State v. Missouri, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). The Franks court set forth the following test:

> 1) To mandate an evidentiary hearing, the challengers' attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof; and

> (2) If these requirements are met, and if, when material that is subject of the alleged falsity or recklessness disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

Id. at 554, 524 S.E.2d at 397. "Franks addressed an act of commission in which false information had been included in the warrant affidavit. However, the Franks test also applies to acts of omission in which exculpatory material is left out of the affidavit." Id. "To be entitled to a Franks hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge." Id. "There will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause." Id.

At the pretrial hearing and the PCR hearing, Applicant focused on two alleged omissions of the affidavits supporting the search warrants: the warrants did not (1) sufficiently indicate the age and circumstances under which the two-year-old identified his father as the shooter or (2) explain that the neighbor who indicated she saw Applicant identified him as the victim's boyfriend rather than by his name. In the memo, which was introduced at the PCR hearing, Applicant suggested the following modifications:

> That on November 15, 2009 three people were shot at a residence 20 Player Road in Dale within Beaufort County South Carolina. Two of the people died at the scene. During the investigation information was revealed that Ernest [sic] Daise was the possible shooter in the incident. Witnesses placed ~~the subject~~ a black male at the scene at the time of the incident. The surviving victim is the victim's two-year-old son who told EMS personnel that his "daddy" ~~Ernest Daise~~ was the one who shot him. When asked to identify his father, the child did not respond. The child was severely injured at the time he made the statement and, when asked his own name, said the wrong name. A red in color substance was observed on the subjects [sic] clothing at the time of his interview and the substance appears to be blood. The substance appears as a

> small spot. The clothing the subject was wearing during his interview is inconsistent with a witness's description of the possible shooter's clothing.[13]

Applicant likewise suggested the following modifications for the other affidavit:

> Shortly before 7:00 PM on November 15, 2009, BCSO responded to 20 Player Rd, Dale, SC, regarding the report of three gunshot victims inside the residence. Two of the victims, a woman (Jeanine Mullen), and her four-year-old son, were pronounced dead at the scene; her two-year-old son also sustained a gunshot wound and was transported the [sic] hospital. A witness reported that earlier in the afternoon, ~~Ernest [sic] Daise, who is Jeanine Mullens boyfriend~~, a black male was observed pulling into the driveway of 20 Player Rd in Ms. Mullen's van, and getting out of the vehicle. ~~Following the shooting incident, while being treated for his injuries, the two-year-old child said, "Daddy did it."~~ The surviving victim is the victim's two-year-old son who told EMS personnel that his "daddy" ~~Ernest Daise~~ was the one who shot him. When asked to identify his father, the child did not respond. The child was severely injured at the time he made the statement and, when asked his own name, said the wrong name. Even though the child's name is Jeremiah, he told EMS personnel that his name was Doug. These are conflicting witness accounts concerning whether the child was able to accurately answer any other questions, or if he was able to answer at all. Ernest [sic] Daise is the child's father. Shortly after 2:00 AM on November 16, 2009, Ernest [sic] Daise was located at 43 Poppy Hill Rd, Burton, SC, where he lives, ~~which is a residence he frequents~~. He was wearing blue jeans, on which a read stain that appeared to be dried blood was observed just below the left front pocket opening. The substance appears as a small spot. The clothing the subject was wearing during his interview is inconsistent with a witness's description of the possible shooter's clothing. It is believed that based on the foregoing information, evidence of the murder will be located at the premises to be searched.

This Court finds it is not reasonably likely the appellate court would have reversed had this issue been presented on appeal. Initially, this Court finds insufficient evidence of "deliberate falsehood or of a reckless disregard for the truth" in either of these allegations. Further, even if

[13] The portions that are struck through are portions Applicant believed should be deleted, whereas the portions that are underlined are portions Applicant believed should be added. This Court notes the modified version does not indicate the witness/neighbor stated she saw the victim's boyfriend at the scene at the time of the incident. Notably, evidence showed Applicant and the victim were romantically involved and had a child together.

the affidavits were rewritten in the manner set forth in Applicant's memo to the trial court, this Court finds sufficient probable cause for the warrants. Based on the foregoing, appellate counsel was not deficient for not raising this issue, and Applicant likewise has not shown prejudice. Thus, this claim is denied.

Frank Mullen Hearsay Issue

Applicant next contends appellate counsel was ineffective for not briefing and raising for appeal his objection to hearsay testimony from Frank Mullen that Jeanine Mullen was afraid of Applicant. This Court finds Applicant has not shown counsel was ineffective in this regard.

Initially, as noted by the South Carolina Court of Appeals, there was no objection to Frank's testimony about Jeanine's fear of him. State v. Daise, 421 S.C. 442, 4560-61, 807 S.E.2d 710, 714, 719 (Ct. App. 2017). Thus, this issue was not preserved for appellate review, and appellate counsel was not deficient for not raising it. See id. at 450, 807 S.E.2d at 714 ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."). Likewise, and for the same reason, Applicant cannot show prejudice from appellate counsel's failure to raise this unpreserved issue on appeal. Thus, this allegation is denied.

CONCLUSION

Based on the foregoing, this Court concludes Applicant has not established any constitutional violations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of

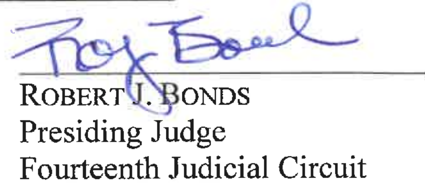
the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and

2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 29 day of Sept, 2023.



ROBERT J. BONDS
Presiding Judge
Fourteenth Judicial Circuit

Walterboro, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2018CP0700562

Earnest Stewart Daise		**South Carolina State Of**	

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

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

IT IS ORDERED AND ADJUDGED: ☒ **See attached order** ☐ Statement of Judgment by the Court:

ORDER INFORMATION

Order of Dismissal

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

s/ R. J. Bonds	2770	9/29/2023
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **October 4, 2023**, and a copy mailed first class or placed in the appropriate attorney's box on **October 9, 2023**, to attorneys of record or to parties (when appearing pro se) as follows:

Earnest Stewart Daise #287516 Broad River C.I. Marion #252 4460 Broad River Road Columbia, SC 29210

Danielle Dixon PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

MK

Court Reporter

Jerri Ann Roseneau - Clerk of Court

Court Reporter:

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

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

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

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

Robert J. Bonds
Judge

Post Office Box 2120
101 Hampton Street
Walterboro, SC 29488-0470
Phone: (843) 898-6980
rbondsj@sccourts.org

2023 OCT -4 PM 12: 20
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

October 2, 2023

Beaufort County Clerk of Court
102 Ribaut Road
Beaufort, SC 29902

RE: Orders for Filing

Greetings:

Enclosed please find PCR Orders for filing. Should you have any questions or concerns, please contact me.

Very Truly Yours,

Gayle

Gayle Benton
Administrative Assistant to
Judge Robert Bonds

/bgb
Enclosure as stated