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2022-CP-10-0798

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
Gregory Kyle Green, #299039, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

Case No.: 2022-CP-10-00798

**ORDER OF DISMISSAL**

JULIE J. ARMSTRONG  
CLERK OF COURT

2025 APR 11 AM 9:33

FILED

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Gregory Kyle Green (Applicant) on February 17, 2022. Respondent made its return requesting an evidentiary hearing. Respondent also moved to dismiss claims related to actual innocence, constitutional violations, and violations of Court rules. On December 17, 2024, an evidentiary hearing convened before the Honorable Jocelyn Newman. Applicant was present and represented by Christopher Murphy, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. At the hearing, the Court heard testimony from Applicant; trial counsel Taylor J. Stewart, Esquire; Appellate Defender Wanda H. Carter; and Assistant Solicitor Thomas R. Waring, II. Following a thorough review of the records before this Court and the testimony 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 presently confined in the South Carolina Department of Corrections serving an aggregate forty-year sentence. In June 2017, the Charleston County Grand Jury indicted Applicant for murder (2017-GS-10-6993), second-degree arson (2017-GS-10-6995), and possession of a weapon during the commission of a violent crime (2017-GS-10-6994).

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On November 4–7, 2019, Applicant proceeded to a jury trial before the Honorable Perry M. Buckner. Public Defenders Taylor J. Stewart and Teresa L. Norris represented Applicant, and Assistant Solicitors Thomas R. Waring, II and John W. Sowards prosecuted the case. The jury convicted Applicant of murder and the weapon charge but acquitted him of arson. Judge Buckner imposed concurrent terms of forty years for murder and five years for the weapon charge.

Applicant filed a timely notice of appeal, which was perfected by Deputy Chief Appellate Defender Wanda H. Carter through the filing of an Anders<sup>1</sup> brief raising the following issue:

The trial judge erred in allowing appellant’s Facebook posts (state’s exhibits 116, 122, 123, and 124) into evidence at trial because they lacked relevance and were more prejudicial than probative.

The South Carolina Court of Appeals dismissed pursuant to Anders, State v. Green, Up. Op. No. 2022-UP-034 (filed Feb. 2, 2022). The remittitur was sent March 3, 2022.

#### **SUMMARY OF EVIDENCE PRESENTED AT TRIAL**

At trial, Terrance Doucet testified he went to Applicant’s house sometime after 3:00 a.m. the morning of the murder, but Applicant wasn’t home. (R. 124-26, 130-31). Doucet stated Applicant needed a ride, so Doucet left in his Chrysler 200 to pick up Applicant from a home on Bailey Drive. (R. 115, 128-29). Doucet initially had trouble finding the home and asked two men who were outside if they had seen “Kone”<sup>2</sup>; the men indicated that wasn’t his house, so Doucet left. (R. 129). After speaking to Applicant on the phone and receiving clearer directions, Doucet returned to pick him up.<sup>3</sup> (R. 130-31, 140-44). According to Doucet, Applicant came out of the home with “some blood on his shirt” and “a firearm in his hand.” When Doucet asked Applicant

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<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

<sup>2</sup> Kone is Applicant’s nickname.

<sup>3</sup> During Doucet’s testimony, the State entered call records from Doucet’s phones showing multiple calls between Applicant and Doucet between 3:22 and 4:54 a.m. (R. 132-39).

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what was going on, Applicant responded with “mumbled words mixed with like you know I don’t know if somebody had got shot or something along those lines.” (R. 144-45). Doucet testified Applicant said, “I don’t know what the ni\*\*\* did.” (R. 145). Doucet became concerned after they returned to Applicant’s home and suggested Applicant return and burn the house. (R. 146). Doucet testified he cleaned his car with bleach, and it was stolen a few weeks later. (R. 146-48).

One of the men Doucet spoke to—Jonathan Seabrook—testified at trial and corroborated portions of Doucet’s testimony. Seabrook recalled being outside with Kendyl Rice and seeing a Chrysler 200 driving back and forth on Bailey Street. (R. 230-31). He testified the driver of the vehicle asked if they had seen “Kwan”; Seabrook acknowledged telling police he “wasn’t sure if they said Kone or Corn.” (R. 232-33). Seabrook also recalled seeing the victim enter his home with “a black man,” but he didn’t get a good look at the man. Seabrook likewise couldn’t provide a description of the driver. (R. 233-34). During Seabrook’s testimony, the State entered text messages between Seabrook and Rice recounting the events as they observed them. (R. 237-42).

The State also called Rice, who recalled hanging out with Seabrook that morning and seeing a car pull up; he stated the driver spoke to Seabrook but Rice didn’t hear the conversation. (R. 268-71). However, Rice acknowledged he “might” have told law enforcement the driver was looking for someone. (R. 271). Rice claimed he did not see anything happen prior to the fire or see anyone at the victim’s home. (R. 272). He recalled hearing “commotion” outside when he was inside and seeing someone ride away on a bike after the house was on fire. (R. 272-74).

Lanica Walker, Doucet’s girlfriend, testified Doucet went to her home around 8:45 or 9:20 the following morning acting “antsy, real fidgety”; Doucet recounted to her what had happened, including picking up a man “who came out with a gun and he was bloody.” (R. 252-57). Although Walker did not identify Applicant at trial, her testimony about what Doucet told her corroborated

Doucet's version of events. Likewise, Brandi Dobbins testified she was at Applicant's home that night and recalled Applicant leaving sometime after 2:00 a.m., and Doucet later leaving after receiving a phone call. (R. 289-90). She testified she did not see Applicant again but overheard him arguing with Doucet. (R. 291-92). Dobbins later left with Doucet, who told her he had bleached the car seat. (R. 292).

Donna Money, an expert in DNA analysis, testified a cigarette butt recovered from the top of the victim's trashcan contained a mixture of the victim's DNA and Applicant's DNA. (R. ). She also analyzed blood spots from Doucet's car and testified a blood spot from the passenger side front door panel contained moderate support for Applicant's DNA and weak support for the victim's DNA; a blood spot on the passenger rear door contained strong support for Doucet's DNA and weak support for the victim's and Applicant's DNA; and a blood spot on the passenger side between the front and rear seats contained strong support for the victim's DNA and weak support for Applicant's DNA.

To establish motive, the State entered screenshots from Applicant's Facebook account of June 6, 2017<sup>4</sup> posts stating:

- Those who don't know the value of loyalty won't understand the cost of betrayal.
- I cut people off with no hesitation, no explanation, no warning if you do some phony sh\*\* or if I feel you can't be trusted. Life is too short. I'm getting too old to be hanging with people who don't understand.
- I'm getting too old to be hanging with people who don't understand the concept of loyalty. I can't trust everybody. I can't love everybody.

(R. 547-47). The last post contained "a gun graphic and a bullet hole graphic on the MIME." (R.

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<sup>4</sup> The murder occurred in the early morning of June 8, 2017.

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547). The State also entered jail calls and recording of jail visits.

Applicant did not testify or present a defense. The jury acquitted him of arson but convicted him of murder and possession of a weapon during a violent crime.

### CURRENT APPLICATION

On February 17, 2022, Applicant timely filed this PCR application alleging:

1. Ineffective Assistance of Trial Counsel
  - a. “Although trial counsel made several objections to exclude evidence admitted in violation of Applicant’s 4<sup>th</sup> Amendment Rights, trial counsel never requested a Franks<sup>5</sup> hearing.”
2. Ineffective Assistance of Appellate Counsel
  - a. Failed to raise preserved issue related to a Fourth Amendment Violation;
  - b. Failed to raise preserved issue related to a Brady violation.
3. "Actual Innocence"
  - a. “Victim’s DNA found in Co-defendant’s car could not have been placed by the Applicant. DNA analysis confirmed Victim’s DNA was mixed with an unidentified unrelated individual. Tr. 476 lines 8-20.”
  - b. Clay Simmonds FBI cellular analysis expert testified that contrary to information provided to Applicant’s arrest warrant affidavits stating cell phone records place Applicant at the scene of crime, Applicant’s records place him at his residence during the alleged times of incident. Tr. 689 lines 7-13.”
4. “SCR Crim P. Rule 5 and Brady<sup>6</sup> Violations”
  - a. “Solicitor Waring brought up in [redirect] examination of Det. Sanchez a photo lineup presented to witness Kendyl Rice which was not placed in Applicant’s Rule 5 motion of discovery. Tr. 627 lines 3-24.”

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<sup>5</sup> Franks v. Delaware, 438 U.S. 154 (1978).

<sup>6</sup> Brady v. Maryland, 373 U.S. 83 (1963).

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5. “Constitutional Violations”

- a. “Det. Sanchez obtained an arrest warrant with deliberately falsified information with reckless disregard for the truth. Det. Sanchez asserted in his warrant affidavit that (1) a third-party witness indicated that Applicant was a suspect, Lanica Walker never identified Applicant by name, nickname, photo or otherwise. Trial Brief p. 6. (2) Witness statements were corroborated by other witnesses who gave initial description. Both eyewitness descriptions were total opposite of Applicant. Trial Tr. p. 246-47 lines 20 – 3. (3) Cell phone records indicate that [Applicant] was on Bailey St. during time of the incident. Det. Sanchez did not attempt to obtain records until August 30, 2017, a month after he applied for the arrest warrant on July 7, 2017. Det. Sanchez also testified to cell state analysis at Applicant’s preliminary hearing on August 15, 2017. He stated that he had sent cell records to the solicitor’s office. Also, Det. Sanchez admitted at trial he did not have these records until September 2019, two months prior to trial. Tr. 606 line 21 – 615.”
- b. “The witnesses also heard the name ‘Kone’ uttered by co-defendant. Det. Sanchez invoked the Applicant’s government and nickname to both eyewitnesses in their interviews. Despite the uncertainty of either witness identifying what name they heard. Det. Sanchez inserted this moniker ‘Kone’ into the affidavit. Trial Tr., Pretrial Motions, and Witness interviews can confirm all above allegations. Tr. 245 lines 12-18; p. 279 lines 34-35; p. 280 lines 1-21.”

6. Prosecutorial Misconduct

- a. “Solicitor Waring knowledge of photo lineup not included in Rule 5 motion of Discovery and not disclosing this information to defense was dishonest. Tr. 627 lines 3-24.”
- b. “Solicitor Waring made improper remarks during closing arguments to the Jury. He stated, ‘I think you know what to do, it’s time to find him guilty.’ Tr. 732 line 25 – p. 733 line 1”
- c. “Solicitor Waring improperly vouched for Det. Sanchez in his closing arguments by stating that he ‘wasn’t lying and was overworked government employee’ despite the Det. Dishonesty and reckless disregard for the truth throughout the Applicant’s proceedings.” Tr. 645 line 17 – p. 746 line 2.”
- d. “Solicitor Waring denied giving codefendant a deal in his closing arguments which was dishonest and deceptive. A proffer

agreement was signed by co-defendant to avoid prosecution in return for ‘identification and implication of Applicant’ on January 24, 2018. Tr. 746 line 9 – 11.”

- e. “Solicitor Waring contacted trial counsel and stating cell phone records would not be used at trial because of Det. Sanchez’s errors were deceptive and dishonest.”

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

This Court has had the opportunity to review the records before it, including the Charleston Count Clerk of Court records of the underlying convictions; Applicant’s records from the South Carolina Department of Corrections; the trial transcript, the records of Applicant’s direct appeal; and the records of this PCR application. This Court has further had the opportunity to observe the witnesses presented at the PCR hearing, closely pass upon their credibility, and weigh their testimony accordingly.<sup>7</sup> 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 facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

### **Respondent’s Motion to Dismiss**

In its return, Respondent moved to dismiss Applicant’s claims of actual innocence, asserting such claims are not cognizable under the PCR Act. This Court agrees. See S.C. Code Ann. § 17-27-20(a)(6) (providing the PCR act “shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.”); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) (interpreting the statute as barring such claims as inappropriate for consideration under the act). Thus, allegation 3, as set forth above, is dismissed with prejudice.

Respondent likewise moved to dismiss Applicant’s stand-alone claims of a Fourth Amendment violation (related to the arrest warrant); a Brady violation; and a Rule 5, SCRCrimP

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<sup>7</sup> This Court will reference PCR testimony where relevant below.

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violation. This Court agrees Applicant's claim related to an alleged Rule 5 violation should be dismissed, as there is no provision in the PCR Act that allows a stand-alone claim based on a violation of a court rule. See S.C. Code Ann. § 17-27-20 (a) (setting forth cognizable PCR claims).

This Court further finds Applicant's claims related to alleged Fourth Amendment and Brady violations are more properly addressed in the context of ineffective assistance of counsel and/or prosecutorial misconduct claim. Although the Act permits a claim based upon a Constitutional violation, such claims are often more appropriately couched as claims of ineffective assistance of counsel. See § 17-27-20(b) (providing the PCR Act "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court"); Drayton, 312 S.C. at 8, 430 S.E.2d at 520 (providing a PCR application cannot assert issues that could have been raised at trial or on appeal); Fortune v. State, 428 S.C. 545, 558, 837 S.E.2d 37, 44 (2019) ("In most circumstances, therefore, to be properly presented in a PCR action, a claim must be based on ineffective assistance of counsel."). Here, Applicant separately raised his Fourth Amendment violation allegation as a claim that counsel was ineffective for not moving to suppress the arrest warrant under Franks. Likewise, Applicant separately raised his allegation of a Brady violation as a claim of prosecutorial misconduct. This Court finds these are the proper lenses for evaluating these claims, and will address allegation four in the context of ineffective assistance of counsel and allegation five in the context of prosecutorial misconduct.

### **Ineffective Assistance of Counsel**

In a PCR action, an applicant bears the burden of proving the allegations. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In evaluating claims of ineffective assistance of counsel, courts apply the two-pronged test outlined in Strickland v. Washington, 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. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,” and an applicant must overcome this presumption to receive relief. Id.; Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove the deficiency prejudiced him 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.

*Franks issue*<sup>8</sup>

Applicant alleges counsel was ineffective for not challenging the arrest warrant pursuant to Franks. He contends Detective Sanchez’s arrest warrant affidavit contained false information. Applicant further contends Detective Sanchez testified at Applicant’s preliminary hearing about records he had not yet obtained, and admitted at trial he did not have those records until later. This Court finds Applicant did not prove 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

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<sup>8</sup> This section combines allegations (1) and (5), as set forth above.

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.

In the affidavit supporting Applicant's search warrant, Detective Sanchez alleged:

[O]n June 8<sup>th</sup>, 2017, at approximately 4:46 A.M., officers of the North Charleston Police Department responded to a report of a fire located at Bailey Street. Fire fighters located the body of a male later identified as Freeman Rivers. Autopsy showed that Rivers had sustained multiple gun shots which resulted in his death. Detectives obtained a description of the vehicle used by the defendant who was seen entering and fleeing the victim's residence the night of the incident. This vehicle was described as a light blue new Chrysler 200. Video from the area an hour prior to the incident shows a 2017 light blue Chrysler 200 bearing SC tag [redacted] entering the neighborhood and pulling into the Cheapway Gas Station at 3615 Dorchester Road. **A witness to be named in court provided a third party confession indicating that the co-defendant dropped off and picked up the defendant who committed the murder and advised him to burn the house along with the evidence. The witness' statements were corroborated by details provided by other witnesses that viewed the car drop off and pick up the suspect and gave the initial description.**

In addition, the witness stated the vehicle had blood transfer to the interior of the car as the suspect of the crime was covered in blood at the time of the incident. On June 22, 2017, Doucet's 2017 Chrysler 200 was located, after being reported stolen on June 19, 2017. **Testing of the interior of the vehicle reviewed presumptive positive results for trace evidence of blood after a search was conducted of the car pursuant to a lawful search warrant. Defendant's cell phone records indicate that he was on Bailey Street during the time of the incident and match the witness description and timeline of events. The witnesses also heard the name "Kone" uttered by the co-defendant, when searching for him in front of the house, and this is a known alias of the defendant.**

(emphasis added).<sup>9</sup> At the PCR hearing, Petitioner alleged the affidavit contained false statements

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<sup>9</sup> The bold portions are the portions Applicant contends are false.

in that: (1) Detective Sanchez did not have Applicant's phone records; (2) witnesses did not place Applicant at the scene because Applicant wasn't there and Lanica Walker did not identify him at trial; (3) the eyewitnesses provided a description "opposite of" Applicant; (4) Detective Sanchez suggested his nickname "Kone" to witnesses, and at trial the witnesses testified it could have been Korn or Kwan; and (5) Detective Sanchez alleged he had forensic evidence when he did not have DNA evidence.

Trial counsel testified she reviewed the arrest warrant and was involved in the preliminary hearing, and she believed Detective Sanchez had credibility issues. Although she did not recall whether she considered a Franks hearing, she clarified she wanted to preserve the issue of Detective Sanchez's false testimony and use it to impeach him at trial. She further clarified she wanted to surprise the State with this line of attack.<sup>10</sup>

This Court finds counsel articulated a valid strategy in using inconsistencies in Detective Sanchez's affidavit, preliminary hearing testimony, and trial testimony to impeach him at trial. At trial, counsel cross-examined Detective Sanchez about the fact he did not have Applicant's phone records when he filled out the arrest warrant affidavit, and Detective Sanchez admitted he did not have them although he alleged otherwise. (Tr. 600-06). She also cross-examined him about his testimony at the preliminary hearing, including his testimony that he had reviewed the phone records when he did not yet have them. (Tr. 607-15). Finally, she cross-examined Detective Sanchez about a discrepancy in the search warrant return for Doucet's vehicle.<sup>11</sup> (Tr. 620-23). This

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<sup>10</sup> Counsel *did* move during trial to suppress jail calls and recorded jail visits as fruits of the poisonous tree, arguing Detective Sanchez falsely stated in the search warrant affidavit that he had phone records when he did not in fact have those records. (R. 369-70, 384).

<sup>11</sup> Detective Sanchez testified he was filling out the return while another officer was collecting evidence, and he miscounted the number of swabs collected; he stated one of the items he listed as a swab "was actually a napkin." (Tr. 622).

Court finds this strategy of impeaching him with his prior sworn statements was a valid strategy. As part of this strategy, counsel credibly testified she wanted to surprise the State with this questioning. In light of this, counsel's failure to file a Franks motion was reasonable under prevailing professional norms and not deficient. In other words, filing a Franks motion would have highlighted to the solicitor—in advance of trial—the inconsistencies in Detective Sanchez's affidavit, which would have directly undermined counsel's stated strategy of surprising the State. Based on the foregoing, counsel articulated a valid strategy and was not deficient.

Further, this Court finds Applicant did not establish prejudice. Initially, Applicant had a indicted on December 5, 2017. Thus, even if the arrest warrant was subject to suppression under Franks, the State still would have been able to proceed to trial upon properly indicting Applicant. Further, nothing was recovered from Applicant at his arrest to be suppressed at trial; thus, it is not reasonably likely a successful Franks motion would have changed the outcome of trial.<sup>12</sup>

Finally, Applicant did not meet his burden of proving a Franks challenge would have been successful. Specifically, Applicant did not prove Detective Sanchez provided false information about witness statements or forensic evidence in Doucet's car. Although Detective Sanchez was not called as a witness at the PCR hearing, Applicant entered into evidence a deposition from a federal lawsuit Applicant has pending against Detective Sanchez.<sup>13</sup> In the deposition, Detective

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<sup>12</sup> Admittedly the State entered evidence that Application sought to flee at the time of his arrest, which arguably would have been subject to suppression had the arrest warrant been suppressed. However, in light of the other evidence presented—including Applicant's DNA at the scene and in Doucet's car, his Facebook posts establishing motive, and Doucet's testimony implicating Applicant (which was partially corroborated by Walker, Seabrook, and Rice)—this Court finds it is not reasonably likely the outcome would be different had the flight evidence been suppressed.

<sup>13</sup> Green v. Sanchez, CA No. 2:21-cv-1376-RMG-MGB. This case has been held in abeyance pending the outcome of this PCR matter.

Sanchez testified about his interviews of Lanica Walker<sup>14</sup> (Depo 24-26), Terrance Seabrook, (Depo 18-20, 23) and Kendyl Rice (Depo 18-20, 23); and the forensic evidence recovered from Doucet's vehicle. This deposition testimony did not establish that the allegations about witnesses or the forensic evidence in the affidavit were false.<sup>15</sup>

Although Detective Sanchez's trial and deposition testimony establish Detective Sanchez did not have Applicant's phone records when he filled out the arrest warrant affidavit, Detective Sanchez provided an explanation for that in his deposition. This Court does not make any credibility findings related to Detective Sanchez because Detective Sanchez did not testify before this Court. *Assuming arguendo* Detective Sanchez's allegation related to the phone records rises to the level of a "deliberate falsehood or reckless disregard for the truth," this Court finds that if the sentence "*Defendant's cell phone records indicate that he was on Bailey Street during the time of the incident and match the witness description and timeline of events*" is stricken from the affidavit, probable cause remains for the arrest. Thus, Applicant did not meet his burden of proving a Franks challenge would have been successful, and he did not prove prejudice.

#### **Ineffective Assistance of Appellate Counsel**

Applicant contends appellate counsel was ineffective for not raising preserved issues related to a Fourth Amendment violation and a Brady violation. This Court finds Applicant did not prove appellate counsel was ineffective.

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<sup>14</sup> Pertinently, Detective Sanchez testified Walker provided the name "Kone" as the person that Doucet said he picked up from the home who had "blood on him" and said "he just killed his cousin and that he shot him in the house." (Depo 24-26). Detective Sanchez clarified he knew Applicant's nickname was Kone based on Facebook and "I think it was on some police records as far as like a nickname or a moniker that was listed for him."

<sup>15</sup> This Court does not make any credibility findings related to Detective Sanchez because he did not testify before this Court. This Court simply finds this deposition transcript does not establish that these allegations were false. Applicant did not submit any other evidence before this Court to establish these allegations were false and thus did not meet his burden in this regard.

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) citing Jones v. Barnes, 463 U.S. 745 (1983). “For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . .” Jones, 463 U.S. at 754.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent 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).

#### *Fourth Amendment violation*

Applicant’s Fourth Amendment violation claim centers on his claim related to an alleged Franks violation. At the PCR hearing, Appellate Defender Wanda Carter testified she did not raise this issue because she did not believe it was meritorious. She explained the threshold for probable cause is low, she reviewed this arrest warrant, and this didn’t stand out as a meritorious issue. Carter testified she reviewed the entire record and filed an Anders brief because she did not see any issues worthy of raising on appeal.

This Court finds Carter articulated a valid reason for not raising this issue in that she did

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not believe it was meritorious. Although trial counsel did not move pretrial to suppress the arrest warrant, counsel *did* move to suppress recorded jail visits and jail calls for various reasons, including that (1) the State did not obtain a search warrant to obtain the videos and calls, and (2) the recorded visits and jail calls were fruits of the poisonous tree because the search warrant affidavit falsely stated Detective Sanchez had Applicant's phone records. (R. 363, 369, 384). This Court finds Carter correctly determined these were not meritorious issues.

Initially, an inmate has no reasonable expectation to privacy in calls while incarcerated—especially when he knows is being recorded. See United States v. Van Poyck, 77 F.3d 285, 290 (9th Cir. 1996) (“The Fourth Amendment is not triggered unless the state intrudes into an area in which there is a constitutionally protected reasonable expectation of privacy.”); United States v. Castellanos, 716 F.3d 828, 832 (4<sup>th</sup> Cir. 2013) (providing that in order to have a legitimate expectation of privacy, one must have a subjective expectation of privacy that is objectively reasonable, i.e., one that society is willing to recognize as reasonable); Van Poyck, 77 F.3d at 290-91 (providing prisoners have neither a subjective nor an objective expectation of privacy in calls made on prison telephones); id. at 290 (providing a prisoner does not have a subjective expectation of privacy when the prisoner is notified that his calls are being monitored); id. at 290-91 (providing no prisoner should reasonably expect privacy in outbound calls due to the severe curtailing of other privacy rights by virtue of being imprisoned); see also United States v. Clark, 651 F. Supp. 76, 81 (M.D. Pa. 1986) (finding prisoners do not have a legitimate expectation of privacy in prison calls because prisons routinely monitor and record phone conversations to enhance security). Likewise, the record indicates Applicant was aware that the visits were recorded; thus, he did not have a reasonable expectation of privacy in those conversations. (R. 363). Thus, Carter correctly concluded this issue lacked merit.

Further, trial counsel's Franks objection was limited to Detective Sanchez's misstatement that he had the phone records when he signed the affidavit. However, as this Court has found, the affidavit contained sufficient probable cause without the sentence about the phone records. Based on the foregoing, it is not reasonably likely this conviction would have been reversed had these issues been raised. Thus, Applicant did not prove deficiency or prejudice.

*Brady Violation*

Applicant asserts appellate counsel was ineffective for not raising on appeal an issue related to a Brady violation. This Court finds Applicant did not meet his burden.

At trial, the following exchange occurred during the State's recross-examination of Detective Sanchez:

Q. Detective Sanchez, I kind of want to go through a couple of the points that the Defendant brought up. Witness Kendyl Jerome Rice were you in here earlier in the week when he was testifying?

A. I was.

Q. Okay. Now you interviewed him.

A. I did.

Q. All right. Did you show him at any point a photographic lineup?

A. I did.

Q. And did that lineup include a picture of the Defendant?

A. It did.

Q. Was he able to identify the Defendant as the person that he saw that night?

A. No, he was not.

(Tr. 627). Counsel objected and approached the bench. The Court sustained the objection, and trial counsel then told the Court she had a matter of law. Later, the parties put the following on the record from the bench conference:

[Trial counsel]: Judge, I was not given any photographic lineup that was shown to Kendyl Rice. I wanted—

The Court: —nor was any introduced in the trial of this case.

[Trial counsel]: I understand that, Your Honor. But if there was such a lineup and a lineup was completed and not disclosed to me I absolutely would have questioned Mr. Rice about that lineup especially given that it was so close in time to the crime.

The Court: The only time that was brought up was with the testimony of Mr. Sanchez. It was not elicited during Mr. Rice's testimony either by the State. The State in direct examination of Mr. Sanchez asked about it.

Solicitor let me hear from you on this because my understanding is you went back and he confirmed that there was such a thing.

[Solicitor]: Your honor, it got a little confusing. I believe the discovery mentions a photographic lineup. I don't believe we've ever received a photographic lineup and I honestly don't know whether one exists or not.

The Court: You have none in your file?

[Solicitor]: Not to my knowledge, Your Honor. Of course I'm going to go back and comb through it but I don't remember ever seeing one.

The Court: Well, the defense attorney is right if there had been one you had a duty you understand under Rule 5—

[Solicitor]: —yes, your Honor—

The Court: —and under Brady if it was to any extent it was exculpatory. I don't see any prejudice to that at the bench when she raised the issue to me during the objection during the examination of Detective Sanchez because he was asked was he shown a lineup and he couldn't pick anybody out from the lineup.

So I don't think there is any prejudice from the Defendant for the way the jury was given the information. I don't know whether or not there is any exculpatory language. The solicitor tells me he doesn't have a photo lineup at this state that he knows of. And he believes he has given you all the discovery materials. So to the extent your motion now says that you want some relief, I assume a mistrial as a result of this, your motion is respectfully denied.

(Tr. 698-99).

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At the PCR hearing, Applicant alleged the State's failure to disclose the lineup violated his Brady rights, and appellate counsel should have raised this issue on appeal. Appellate counsel testified she reviewed the transcript and filed an Anders brief because she did not see any issues worthy of raising on appeal.

This Court finds counsel articulated a valid reason for filing an Anders brief in that she did not see any issue worthy of raising and thus finds counsel was not deficient. This Court further agrees with counsel's assessment that this was not a reversible issue. Assuming arguendo the lineup existed and the State failed to disclose it, this Court finds the trial court properly found Applicant cannot show prejudice because *the testimony presented to the jury indicated Rice did not select Applicant from a lineup that contained Applicant's picture*. Thus, to the extent this was exculpatory, it was presented to the jury, and this Court finds it is not reasonably probable an appellate court would have reversed this issue on appeal. See State v. Gathers, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988) ("The State's failure to disclose information warrants a reversal as a Brady violation only if the omission deprived the defendant of a fair trial."); id. (finding defendant did not prove prejudice from alleged Brady violation when defendant effectively impeached witness at trial using the alleged undisclosed evidence); State v. Jones, 325 S.C. 310, 322, 479 S.E.2d 517, 523 (Ct. App. 1996) ("We agree with the trial judge's finding that Appellants have demonstrated no prejudice resulting from the State's failure to reveal Doe's new statement. Counsel was in fact able to impeach Doe about the new allegation by introducing her prior statement into evidence and asking her about the discrepancy. Accordingly, the trial judge did not abuse its discretion in denying the motion for a mistrial.").

### Prosecutorial Misconduct

When alleging prosecutorial misconduct, an applicant bears the burden of proof. Alabama v. Smith, 490 U.S. 794 (1989). Although a PCR applicant may present a claim based on constitutional violations other than ineffective assistance of counsel, such constitutional violations may only be alleged if the issue could not have been raised at trial or on direct appeal. Gibson v. State, 329 S.C. 37, 41 496 S.E.2d 426, 428 (1998); S.C. Code Ann. § 17-27-20(B) (providing the PCR Act “is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court”); S.C. Code Ann § 17-27-90; Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“[A]n application for post-conviction relief is not a substitute for an appeal.”); Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (“Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel.”); but see Fortune v. State, 428 S.C. 545, 559, 837 S.E.2d 37, 44 (2019) (addressing issue of prosecutorial misconduct that implicated due process and was not adequately raised as a claim of ineffective assistance of counsel).

As a threshold matter, this Court finds these allegations of prosecutorial misconduct are not properly alleged because they could have raised at trial or on appeal. This Court thus finds they should be dismissed for failing to state a cognizable PCR claim. Nevertheless, this Court will address these allegations out of an abundance of caution.

#### Brady violation

Applicant’s claim of a Brady violation related to prosecutorial misconduct relates to his allegation that the solicitor did not disclose an exculpatory lineup presented to Rice. This Court incorporates herein its argument set forth above related to Applicant’s failure to demonstrate prejudice here where the information that Rice did not select Applicant from a lineup was in fact

presented to the jury. This Court further finds Applicant did not show any lineup actually was presented to Rice—and thus did not meet his heavy burden of proving prosecutorial misconduct. Specifically, at trial, counsel herself stated,

One quick matter, I wanted to clarify for the record, there was a mention of a possible lineup with the witness Kendall Rice. I just wanted to put it out there that it was mentioned in the discovery that one was complied for him. ***It's my understanding that it wasn't actually shown to him due to his saying that he didn't get a good look at the suspect and we done have one and it's my understanding there wasn't one, Your Honor.***

(Tr. 712-13, emphasis added). At the PCR hearing, the solicitor testified that after reviewing the file, he did not believe Rice was ever presented the lineup because Rice did not get a good look at the person. This court finds this testimony—which is consistent with what trial counsel stated to the trial judge—to be credible. This Court further finds Applicant has failed to prove a Brady violation related to the lineup, and this claim is denied.

#### *Closing argument*

Applicant next contends the prosecutor engaged in misconduct by making the following statements during closing argument: “I think y’all know what to do. It’s time to find him guilty.” (Tr. 732-33). Applicant did not prove this ground.

“A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it.” State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). “A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony.” Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). “On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's

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instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt.” *Id.* “Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” *Id.* “The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.*

This Court finds Applicant has not shown this statement was improper. Specifically, this Court finds the foregoing did not appeal to personal biases of the jury or arouse its passions and prejudices. Applicant has failed to present any valid legal objection to this argument and thus failed to meet his burden of proving it was improper. *Cf. Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (“[T]he PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se.”). Further, even if improper, this mere passing statement did not violate due process. *See Vasquez*, 388 S.C. at 458, 698 S.E.2d at 566 (“The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.”). Applicant thus did not meet his burden, and this claim is denied.

*Closing argument – Improper Vouching*

Applicant next contends the solicitor improperly vouched for Sanchez by arguing he was overworked and that he wasn't lying. Specifically, he contends the following was improper:

Ms. Stewart would like you to believe that Detective Sanchez here just got up here and lied about everything involving this case. There's a difference between willful lying about something and being mistaken about certain things in this case. He works for the North Charleston Police Department. He works in the persons crime unit. He is one of six detectives that handles all of these kinds of cases. They are overworked. That does not excuse what happened

in this case, but it shows that he's human, he's overworked, mistakes were made. But that's what these are, mistakes; these are not lies. He's not getting up there and lying.

(Tr. 745-46). Applicant did not prove this ground.

“A prosecutor arguing forcefully during closing argument that the jury should believe a particular witness is well within her proper role as a zealous advocate, so long as the argument is based on evidence admitted during trial.” State v. Busse, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023). “Zealous advocacy crosses the line and becomes improper vouching, however, when the prosecutor indicates to the jury—even implicitly—that her argument as to the credibility of a witness is based on anything other than the evidence admitted.” Id. at 109, 886 S.E.2d at 211. “[A] prosecutor is expected to comment on the credibility of the witnesses when making a closing argument. Far from improper, . . . doing so is one of the fundamental responsibilities of a lawyer.” Id. at 111, 886 S.E.2d at 212).

As a threshold matter, the foregoing was based on reasonable inferences from the record and did not constitute improper vouching. Specifically, Detective Sanchez testified he initially subpoenaed the wrong phone records and did not realize his mistake until later because he handled a high volume and “sometimes things get lost in the mix.” He explained, “And this is one of the unfortunate moments when that happens.” (Tr. 576-77). On cross-examination, he admitted he made some mistakes in this investigation after being questioned about his preliminary hearing testimony. (Tr. 599). On redirect, Detective Sanchez reiterated he was one of six detectives in North Charleston, they were overworked, and there was room for improvement. (Tr. 629). Based on the foregoing, the solicitor's argument was a reasonable inference from the evidence and not improper vouching.

Further, the foregoing argument did not so infect the trial with unfairness as to violate due

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process. See Vasquez, 388 S.C. at 458, 698 S.E.2d at 566 (“The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.”). Critically, this argument was made in response to trial counsel’s closing argument—where she vigorously accused Sanchez of lying. (Tr. 737-38). See Tappeiner v. State, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) (“[C]ourts may occasionally apply the “invited reply” doctrine, and find that although a solicitor's closing argument was inappropriate, it was responsive to statements or arguments made by the defense, and thus did not deny the defendant due process.”). This argument must, therefore, be weighed along with trial counsel’s argument in determining its overall effect on the fairness of the trial. Overall, this brief argument did not so infect the trial with unfairness as to violate due process. See Darden v. Wainwright, 477 U.S. 169 (1986) (finding solicitor’s improper comments—which included statements such as “He shouldn’t be out of his cell unless he has a leash on him and a prison guard a the other end of that leash” and “I wish that I could see him sitting here with no face, blown away by a shotgun”—did not so infect the trial with unfairness as to violate due process). Thus, this claim is denied.

*Dishonest and deceptive – Closing argument*

Applicant next contends the prosecutor was “dishonest and deceptive” when he argued, “I want to make something clear about Terrace Doucet, I’ve given him no deal. I want that to be clear. He has not received a deal from us.” (Tr. 746). This Court finds Applicant did not prove prosecutorial misconduct in this regard.

Initially, this Court finds the solicitor was not lying when he made this statement. At the PCR hearing, the solicitor explained what a proffer agreement is used for and credibly testified a proffer agreement is not a deal. This Court finds Applicant did not show the prosecutor was being dishonest and deceptive. Further, to the extent this can be construed as an allegation of improper

vouching, Doucet testified he did not have a deal with the State and the State had not promised him anything in exchange for his testimony. (Tr. 171, 186-90). Thus, the argument was based on the evidence and did not constitute improper vouching. Finally, this comment, in context, did not so infect the trial with unfairness as to violate due process. This claim is thus denied.

*Deceptive and dishonest – Told defense would not use cell records at trial*

Finally, Applicant contends the solicitor was deceptive and dishonest because he told trial counsel he would not use cell records at trial. Applicant did not prove this ground.

At the PCR hearing, the solicitor testified Detective Sanchez initially put the wrong dates in the subpoena for cell phone records. When the solicitor realized this mistake, he asked Detective Sanchez to issue a corrected warrant. The solicitor stated he notified the defense one or two months before trial that he had obtained corrected records. Trial counsel likewise testified she discussed the phone records with the solicitor prior to trial. Although trial counsel recalled the discovery did not contain a lineup that was presented to Rice, she did not recall anything else surprising at trial.

This Court finds the foregoing testimony by the solicitor and trial counsel credible. Based on this credible testimony, this Court finds Applicant has not shown the solicitor was deceptive or dishonest. Applicant thus did not meet his burden of proof, and this claim is denied.

**CONCLUSION**

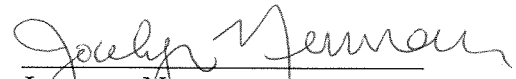
Based on the foregoing, this Court concludes Applicant has not established any constitutional violations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice. Should Applicant wish to appeal, he must file and serve a notice of appeal within thirty 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), SCRCR. Attention is directed to Rule 243, SCACR, for appellate procedures.

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 3<sup>rd</sup> day of April, 2024. <sup>5</sup>

  
JOCELYN NEWMAN  
Presiding Judge  
Ninth Judicial Circuit

Columbia, South Carolina



ALAN WILSON  
ATTORNEY GENERAL

April 8, 2025

The Honorable Julie J. Armstrong  
Clerk of Court - Charleston County  
100 Broad Street, Suite 106  
Charleston, South Carolina 29401

***Re:* Gregory Kyle Green, #299039 v. State of South Carolina**  
**Case No: 2022-CP-10-00798**

Dear Ms. Armstrong:

Enclosed please find the original Order of Dismissal signed by the Honorable Jocelyn Newman, in the above-captioned case, for filing in your office. Please forward a time-stamped copy back to our office for our file.

Sincerely,

Danielle Dixon  
Assistant Attorney General

DD/vh  
Enclosure

cc: Christopher L. Murphy, Esquire