STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
Jun 09 2025
S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Case No. 2020-CP-32-03490

James Bubba Patterson, #217543, ... Petitioner,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant, James Bubba Patterson, appeals the order of the Honorable Perry H. Gravely, filed on or about April 14, 2025, and received by the undersigned on June 2, 2025.

June 9, 2025

ASHLEY A. MCMAHAN, ESQUIRE
MCMAHAN LAW, LLC
PO Box 50536
Columbia, SC 29250
803-219-1110
ashley@mcmahanlawsc.com
SC Bar No. 71676
ATTORNEY FOR APPLICANT

Opposing Counsel:
Donald J. Zelenka, Deputy Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

FILED
2025 APR 14 AM 10: 04
LISA M. CODIER
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) FOR THE ELEVENTH JUDICIAL CIRCUIT

James Bubba Patterson, SCDC #217543,) Case No. 2020-CP-32-3490

Applicant,

v. ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before this Court by an application for post-conviction relief filed by James Bubba Patterson (Applicant) on October 14, 2020. The Respondent made a motion to dismiss as a violation of the statute of limitations on June 18, 2021. A Conditional Order of Dismissal was entered by Judge William Keesley on July 21, 2021. On September 23, 2023, appointed counsel Ashley A. McMahan, served an Amended Application asserted that the statute of limitations should be equitably tolled. Subsequently a hearing was held before Judge George McFadden on October 9, 2022. Judge McFadden entered an Order on December 21, 2022 denying the State's motion to dismiss, concluding that the Applicant was entitled to equitable tolling. On December 13, 2023, the Applicant filed a second amended application by appointed counsel Ashley A. McMahan.

On December 18, 2023, the matter was convened before this Court. The Applicant was presented and represented by his appointed counsel, Ashley A. McMahan. The Respondents was represented by Deputy Attorney General Donald J. Zelenka. Testimony was received from the Applicant and his former counsel Robert Madsen. At the conclusion of the hearing, this Court took the matter under advisement. This Order of Dismissal follows.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was arrested on November 16, 2012, following an investigation for an armed robbery that occurred several months earlier at a jewelry store in West Columbia. During its April 2013 term, the Lexington County Grand Jury indicted Applicant for armed robbery (2013-GS-32-0891); grand larceny (2013-GS-32-0890); and possession of a weapon during the commission of a violent crime (2013-GS-32-1132).

On April 11, 2016, Applicant proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr. Chief Public Defender Robert M. Madsen and Assistant Public Defender David M. Mauldin represented Applicant. Deputy Solicitor Suzanne Mayes and Lester McGill Bell, Jr., prosecuted the case. At the conclusion of the multi-day trial, the jury convicted Applicant as indicted. Judge Cooper sentenced Applicant to concurrent terms of twenty years' imprisonment for armed robbery, ten years for grand larceny, and five years for possession of a weapon during the commission of a violent crime.

Applicant filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issue[s]:

> I. Did the trial judge err in admitting testimony that [Applicant]'s DNA was contained in the DNA database when the State failed to authenticate and establish the chain of custody for the DNA sample contained in the database?
>
> II. Did the trial judge err in admitting testimony that [Applicant]'s DNA was contained in the DNA database because the testimony constituted improper evidence of a prior bad act?
>
> III. In his preliminary comments, did the trial judge err by indicating to the jury that a trial was a search for die truth?

Following briefing and oral argument, the Court affirmed Applicant's convictions and sentences in a published opinion issued January 4, 2019. *State v. Patterson*, 425 S.C. 500, 823 S.E.2d 217 (Ct. App. 2019), *reh'g denied* (Feb. 21, 2019), *cert. denied* (June 28, 2019). Applicant's subsequent petition for rehearing and petition for writ of certiorari were denied. The case was remitted back to the circuit court on June 28, 2019. Applicant commenced this PCR action on October 14, 2020.

II. Current Application

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

1. Ineffective assistance of trial counsel
   a. "Trial counsel was ineffective for not 'objecting' to the use of mug-shot photos used[*sic*].
   b. Nor did he request to view the video surveillance tape of the date (November 15, 2012) the photo lineup shown to the vic Frank Mancine."
2. Ineffective assistance of appellate counsel
   a. "Trial counsel adequately preserved several issues for appellate review that called for reversal and remand for a new trial. However, appellate counsel only raised 'DNA' argument on direct appeal and appellate counsel's argument and research was 'deficient' and fell below the professional norms under Strickland v. Washington."
   b. "Appellate counsel never challenged or addressed the comp to stand trial hearing on December 3, 2014, by Dr. Tross; nor did he address the Blair hearing by Judge Addy [in] December 2015. Both issues were preserved for appeal and should have been raised on direct appeal."
   c. "Appellate counsel did not address the Applicant's confrontation rights violations that trial counsel 'objected' and were preserved for appeal. Trial counsel objected to the chain of custody the State was allowed to willfully violated[*sic*] Rule #6 of the South Carolina Rules of Criminal Procedure, the rule for chemical analysis and chain of custody. The confrontation clause does not permit the prosecution to introduce a forensic

laboratory report containing a testimonial certification, made for the purposes of proving a particular fact through the in-court testimony of a scientist who did not sign the laboratory or perform or observe test lab reported in the certification."

   d. "The constitution provides every person accused of a crime the right to confront his accusers. That promise was broken in the Applicant's trial when the State never made Officer Chuck Bramlet of the West Columbia Police Department available or Applicant to cross-examine him pretrial in regards to the search warrant. At trial, the State used Captain Joseph Odom of the Richland County Sheriff's Department to testify as to what Officer Chuck Bramlet (who had passed away) would have said. However, appellate counsel totally ignored the confrontation rights 'violations' that were clearly preserved. Also, there were several other confrontation rights violations that trial counsel preserved in regards to DNA analysis, etc."

3. Due process violation
   a. "On cross-examination, trial attorney Mr. Madsen, see Trial transcript p. 417; line 3 through 11. Captain Joseph Odom of the Richland County Sheriff's Department states that the deceased investigator Chuck Bramlet processed everything and took all of the photos of the van in question. However, the State never made Investigator Chuck Bramlet available for Applicant to confront or question in regards to the pictures that were taken of the van."
   b. "The State also allowed Ms. Jennifer Aycock, forensic technician for SLED's evidence control department testify what Ms. Nikki Perry Hughes and Ms. Doris Yarborough did with evidence without the Applicant confronting them."
4. "The Applicant's due process rights were violated . . . when the State was allowed to willfully violated[*sic*] Rule #6 S.C.R.CrimP., the rule for chemical analysis and failed to establish a complete chain of custody."
   a. "Investigator James Sullivan of the West Columbia Police Department on page 274; admits that he is the person that on May 9, 2012, after putting on protective equipment, he picked the 'hat' up off the ground and put it into a locked vault in his vehicle. He logged this into the West Columbia Evidence Repository. Whereas the 'hat' was later transported by Investigator James

Sullivan to the State Law Enforcement Division (SLED) for further testing."

b. "There is no time frame in regards to how long the 'hat' was left in the West Columbia's Evidence Repository. Nor is there any mention of anyone at SLED signing for the evidence when it was dropped off; no date or time it was dropped off. This is a clear violation of Rule #6, S.C.R.CrimP (B) Certified or sworn statement . . ."

c. On page 428 of the Applicant's trial transcript, Detective Paige McCraw of the West Columbia Police Department. Under oath testifies that at the Court hearing on December 14, 2015, she took two (2) buccal DNA swabs. One of the left and right cheeks of the Applicant. However, she states that after labeling it with date and time the swabs were placed in a bag that she sealed and initialed and took to SLED. There's no mention as to who she left the swabs wit at SLED; who signed for them; or how long they remained at SLED because there is no time frame given and no SLED officials signatures."

5. Abuse of discretion

    a. "[T]he trial court abused its discretion by allowing the State to allude to evidence that was not admitted into evidence. This was done several times in the presence of the jury and calls for reversal of trial and conviction."

    b. "Trial counsel never 'objected' to this miscarriage of justice that results in a reversal of conviction and new trial. The State's solicitors in this case Ms. Suzanne Mayes and Mr. Lester McGill Bell alluded to evidence not admitted into evidence. Before the trial began in opening statements by Mr. Bell, see p. 168 of trial transcript. Also, in Ms. Mayes closing arguments on p. 539 and 540 of trial transcript. The gun owned by Mr. Frank Mancine, a jeweler at K & M jewelry, that as robbed on May 9, 2012, was never admitted into evidence. Nor was the white 1995 Plymouth Voyager van admitted into evidence at the Applicant's trial. . . This practice disregard[*sic*] indeed violates the rules governing the admission of evidence."

    c. "The Court allowed witnesses in the presence of jury two photos of the White 1995 Plymouth Voyager van that was on the lot of the Eagle One Towing. . . The Court could have allowed the jury to personally go view the van at Eagle One Towing. Instead elected to

publish illegal photos into evidence. Also, allowed State's witnesses to testify about the van . . ."

d. "Also see excerts[*sic*] of the trial transcript and the following witnesses[*sic*] testimony – Captain Bruce Wade, p. 336 and 337. Mr. Brendon Pennington, Deputy Sheriff, p. 374. Anthony Kennedy p. 385. Ms. Clarissa DuBard on 394 and Captain Joseph Odom p. 403 and 40."

The Applicant, through appointed counsel McMahan, filed a "Second Amended Application" raising the following new allegations:

I. Ineffective Assistance of Counsel of Robert M. Madsen and David M. Mauldin:

a. Failure to adequately cross-examine the witnesses as to identification when the witnesses didn't testify to identifying the Applicant;

b. Failure to object to the testimony of Investigator Wade when he informed the jury about the notice from SLED of the Applicant's DNA in the CODIS database, which was prejudicial to the Applicant's case because of how DNA gets into that database. See Tr.p. 331 (ROA 350)

The Applicant's counsel further indicated the following original *pro se* allegations relating to ineffective assistance of appellate counsel were being abandoned at the outset of the hearing:

Ineffective assistance of appellate counsel:

a. *"Trial counsel adequately preserved several issues for appellate review that called for reversal and remand for a new trial. However, appellate counsel only raised 'DNA' argument on direct appeal and appellate counsel's argument and research was 'deficient' and fell below the professional norms under Strickland v. Washington."*

b. *"Appellate counsel never challenged or addressed the comp to stand trial hearing on December 3, 2014, by Dr. Tross; nor did he address the Blair hearing by Judge Addy [in] December 2015. Both issues were preserved for appeal and should have been raised on direct appeal."*

c. *"Appellate counsel did not address the Applicant's confrontation rights violations that trial counsel 'objected' and were preserved for appeal. Trial counsel objected to the chain of custody the State was allowed to willfully violated[sic] Rule #6 of the South Carolina Rules of Criminal Procedure, the rule for chemical analysis and chain of custody. The confrontation clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made for the purposes of proving a particular fact through the in-court testimony of a*

scientist who did not sign the laboratory or perform or observe test lab reported in the certification."

d. *"The constitution provides every person accused of a crime the right to confront his accusers. That promise was broken in the Applicant's trial when the State never made Officer Chuck Bramlet of the West Columbia Police Department available or Applicant to cross-examine him pretrial in regards to the search warrant. At trial, the State used Captain Joseph Odom of the Richland County Sheriff's Department to testify as to what Officer Chuck Bramlet (who had passed away) would have said. However, appellate counsel totally ignored the confrontation rights 'violations' that were clearly preserved. Also, there were several other confrontation rights violations that trial counsel preserved in regards to DNA analysis, etc.*

This Court has before it the Lexington County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; and the records of the current PCR action.

SUMMARY OF THE EVIDENCE

Around 2:30 p.m. on the afternoon of May 9, 2012, Frank Mancine was working at K & M Jewelry, a jewelry store located in West Columbia, South Carolina, when a man wearing a dark-colored suit, a dark-colored fedora, and sunglasses entered the store. (R. p. 82; p. 89; p. 95; pp. 100-102; pp. 195-196; p. 247). Recognizing the man from a visit to the store only two days earlier, Mancine went over to provide him with assistance, and the man asked to be shown some necklaces. (R. p. 103; pp. 114-115; p. 196; p. 198; p. 202; p. 204). Based on the man's request, Mancine unlocked several of the store's jewelry counters and began to show various items to the man while Mancine's mother, who was the store's owner, assisted two other customers nearby. (R. pp. 195-196; p. 202). As Mancine showed the man the store's merchandise, the man suddenly pulled out a pistol, pointed it at Mancine and the other people in the store, and demanded the store's jewelry. (R. p. 97; pp. 196-197; pp. 220-221). The robber then filled a bag with approximately $29,000

worth of the store's gold necklaces and bracelets and began to exit the store. (R. p. 197; p. 203; p. 209). When he did so, Mancine retrieved his own pistol, which was concealed nearby, and fired a shot at the robber. (R. p. 118; p. 197; p. 233; p. 235). However, Mancine's gun jammed and his shot missed, and the robber was able to quickly flee from the store. (R. p. 120; pp. 203-204; p. 235). Mancine then unjammed his pistol and promptly chased after the robber. (R. p. 121; p. 204; p. 211). During the chase, he observed the robber's hat on the ground outside the store. (R. p. 69; p. 211). He then saw the robber seated in an older light-colored van parked nearby, and he shot out the rear window of the van as the robber "violently" sped away from the scene with the stolen jewelry. (R. pp. 121-123; p. 209; pp. 212-213; p. 237).

Minutes later, law enforcement officers began arriving at the jewelry store after being alerted of the armed robbery. (R. p. 245; p. 248; p. 258; pp. 289-291; pp. 346-347). Upon arriving, Sergeant Ronald Fair of the West Columbia Police Department spoke with Mancine, obtained a description of the robber, who was described as an approximately forty-year-old man that was 5'5" tall and weighed 150 pounds, and relayed that description to other officers in the area.[1] (R. p. 214; p. 254). Additionally, Sergeant Fair briefly spoke with Mancine's mother and the two customers who were inside the store at the time of the robbery. (R. p. 256; p. 371). Furthermore, officers reviewed and obtained surveillance footage from the jewelry store recorded on both the day of the robbery and two days earlier, located and collected a black fedora from the sidewalk outside of the jewelry store, and collected two fingerprints from the glass jewelry counters inside the store.[2] (R.

[1] Later that day, Mancine provided a slightly different description to another officer and indicated the robber was roughly 5'7" to 5'8" tall and weighed roughly 120 pounds. (R. pp. 68-69; pp. 88-89; pp. 347-348).

[2] Subsequent to the robbery, the two fingerprints collected from the jewelry store were analyzed by James Hickman, a latent print examiner for the Lexington County Sheriff's Office and an expert in fingerprint analysis. (R. p. 320; p. 336; pp. 475-476; pp. 478-479). After conducting

p. 81; pp. 199-200; pp. 249-253; p. 259; pp. 291-293; p. 296; pp. 309-311; p. 348). However, the officers were unable to locate the robber that day, and the jewelry taken during the incident was not recovered. (R. p. 321; p. 348).

Thereafter, on May 29, 2012, Investigator James Sullivan of the West Columbia Police Department transported the black fedora collected from the scene of the robbery to the South Carolina State Law Enforcement Division ("SLED") for analysis. (R. pp. 289-293; p. 322; pp. 468-469). A few weeks later, Betty Butler, a forensic technician at SLED, collected a DNA sample from the hat and submitted it for further analysis. (R. pp. 492-497). Subsequently, in September of 2012, Maryann Boehm, an expert DNA analyst at SLED, developed a DNA profile from the evidence collected from the hat and entered that profile into SLED's DNA database. (R. p. 504; p. 506; pp. 509-513; p. 533). Based on that submission, Applicant James Bubba Patterson was identified as a suspect in the robbery after it was determined his DNA profile, which had previously been submitted to the DNA database, matched the profile collected from the hat found at the crime scene, and that information was relayed to Captain Bruce Wade of the West Columbia Police Department. (R. p. 70; pp. 342-343; p. 346; p. 350; pp. 533-534; p. 537; pp. 543-545).

Upon learning of Applicant's connection to the robbery, Captain Wade obtained a photographic lineup from SLED that contained Applicant's photograph along with the photographs of five other similar-looking individuals and took that photographic lineup to the jewelry store on November 15, 2012. (R. pp. 72-74; p. 218; pp. 350-351; p. 354). At the jewelry store, Captain Wade showed the photographic lineup to both Mancine and Mancine's mother.[3] (R.

his analysis, Hickman concluded one of the fingerprints recovered from the scene was left by Mancine's mother while the other fingerprint was not of sufficient quality to be used for comparative purposes. (R. pp. 483-485).

[3] In addition to showing the photographic lineup to Mancine and Mancine's mother, Captain Wade contacted the customers who were present in the store at the time of the robbery in an

p. 72; p. 91; pp. 105-107; p. 217; pp. 353-355; pp. 369-370; p. 384). Mancine's mother was unable to select anyone from the lineup. (R. p. 91; p. 370). However, "almost immediately" after seeing the lineup, Mancine identified Applicant's photograph as an image of the individual who robbed the jewelry store. (R. p. 72; pp. 75-76; p. 90; pp. 108-109; p. 219; p. 355).

On the same day, Captain Wade tracked Applicant's vehicle to an impound lot for a towing company and went to examine the vehicle along with Captain Joseph Odom of the Richland County Sheriff's Office after a search warrant was obtained for it.[4] (R. pp. 70-71; pp. 151-152; pp. 356-358; pp. 363-364; pp. 399-401; pp. 420-421; pp. 426-427). Upon examining the vehicle, which was an older light-colored van consistent with the van used by the robber, the officers discovered the van had been repainted and appeared to have had its rear hatch replaced with a rear hatch from a different brand of vehicle.[5] (R. p. 71; pp. 359-361; p. 425; pp. 427-428; p. 434). Additionally, the officers discovered the van had a puncture mark to its ceiling near the rear hatch window. (R. pp. 431-432).

Based on the information Captain Wade collected during his investigation, Applicant was arrested in connection to the armed robbery on the following day. (R. p. 77; p. 364; pp. 388-389). At the time of his arrest, Applicant was forty-nine years old, was 5'5" tall, and weighed 140 pounds. (R. pp. 389-390). Following Applicant's arrest, Captain Wade met with Applicant and advised him of his rights, and Applicant signed a waiver form indicating he relinquished those

---

effort to have them view the lineup, but they indicated to the officer "they didn't want anything else to do with" the case and, as a result, were never actually shown the lineup. (R. p. 99; p. 371).

[4] Applicant's vehicle had been securely held at the impound lot since May 24, 2012, and was never reclaimed. (R. p. 357; pp. 393-394; pp. 399-401).

[5] When Applicant purchased the van in December of 2010, it had all its original parts other than its engine, which had been replaced. (R. pp. 406-408; p. 417).

rights. (R. pp. 78-79). Captain Wade then advised Applicant he wanted to speak with him about a robbery of a jewelry store located in West Columbia. (R. p. 80). In response, Applicant, a resident of Columbia, claimed he had only been to West Columbia three or four times during his lifetime and denied any involvement in the robbery. (R. p. 80; p. 85; pp. 377-378). At that point, Captain Wade alerted Applicant his DNA had been collected from a hat recovered at the scene of the crime, and Applicant responded to that information by becoming irate, cursing, ripping up the waiver form he had signed, and eating the pieces of that form. (R. p. 80; p. 85). Applicant then invoked his rights, and Captain Wade terminated the interview.[6] (R. p. 80; p. 86).

Thereafter, officers collected a sample of Applicant's DNA, and it was transported to SLED for analysis.[7] (R. p. 36; pp. 446-447; p. 471). Upon receiving Applicant's DNA sample, Boehm developed a DNA profile for Applicant and compared that profile to the profile that had previously been developed from the hat found at the scene of the robbery. (R. p. 519). After conducting that analysis, Boehm concluded Applicant's unique DNA profile matched the DNA profile found on the robber's hat. (R. p. 519).

During trial, Mancine testified about the harrowing details of the armed robbery along with his concerted efforts to stop the perpetrator of the crime, positively identified Applicant in the courtroom as the robber, and indicated he was certain of his identification of the robber. (R. pp. 195-222). Additionally, Jennifer Hubbard, a resident of West Columbia, recounted she was at a bus stop near the jewelry store on the afternoon of the incident, observed a man wearing a suit park

---

[6] During trial, the trial judge ultimately suppressed testimony related to Applicant's post-arrest statement. (R. pp. 131-133).

[7] Initially, Applicant's DNA sample was collected in 2013 by a detective who subsequently died before Applicant could be brought to trial. (R. p. 36). As a result, a new sample of Applicant's DNA was collected in December of 2015, and a new analysis of that DNA sample was conducted prior to trial. (R. p. 50; pp. 446-447; pp. 513-514; p. 519).

a light-colored van in a parking lot nearby, watched the man walk in the direction of the jewelry store with a bag, and then saw the man run back to the van a few minutes later before an armed individual ran up and fired gunshots at the man's van as it sped away from the area.[8] (R. pp. 264-280). Likewise, evidence was presented establishing Applicant purchased a light-colored van a few years before the incident, that van was repainted and had its rear hatch replaced at some point thereafter, and the van was never reclaimed after it was taken to an impound lot subsequent to the robbery. (R. pp. 359-361; pp. 392-396; pp. 398-402; pp. 404-408; pp. 413-417; p. 425; pp. 427-428). Furthermore, the officers and other law enforcement personnel involved in the investigation into the armed robbery testified about the details of their investigation and Applicant's eventual arrest for the commission of the crime. (R. pp. 245-256; pp. 258-260; 289-336; pp. 346-389; pp. 388-390; pp. 420-437; pp. 475-485). Notably, during Captain Wade's testimony, the officer informed the jury – without objection – he received notice from SLED and its DNA database that identified Applicant as a suspect in the armed robbery. (R. p. 350).

Testimony was presented establishing DNA samples were collected from the hat recovered at the scene of the crime and from Applicant following his arrest.[9] (R. pp. 446-447; pp. 493-497). Additionally, Maryann Boehm, who was qualified as an expert in DNA analysis and statistical calculation, confirmed she developed a DNA profile from the hat and entered it into SLED's DNA database, which she stated contained profiles from "known individuals" as well as from evidence

[8] Similar to the description of the robber provided by Mancine, Hubbard described the man she observed get into and out of the van around the time of the robbery as an approximately forty-year-old man who was roughly 5'5" to 5"6" tall and weighed between 180 and 200 pounds. (R. pp. 267-268; p. 283).

[9] Testimony was also presented during trial establishing a complete chain of custody in regard to the hat, the evidentiary swab collected from the hat, and the DNA swab collected from Applicant. (R. pp. 292-293; pp. 446-447; pp. 468-471; pp. 473-474; pp. 493-497; pp. 509-511; pp. 513-516).

collected at crime scenes. (R. pp. 511-513). She further confirmed she later developed a DNA profile from the sample of Applicant's DNA and compared it to the DNA profile she developed from the hat. (R. pp. 513-514; p. 519). After conducting that comparison, Boehm testified she conclusively determined Applicant's DNA profile, which she indicated was unique to him, matched the DNA profile developed from the hat.[10] (R. p. 507; p. 519). Regarding the strength of that match, Boehm indicated the probability of randomly selecting an unrelated individual with a matching DNA profile was a one-in-730-quintillion chance. (R. p. 519).

During the course of trial, the solicitor called Rhonda Fields, a SLED employee who worked in the agency's DNA database unit, to the witness stand, and defense counsel immediately raised an objection to her testimony. (R. pp. 337-338). In support of that objection, defense counsel indicated – outside of the presence of the jury – SLED had received a "CODIS hit" in Applicant's case, noted Lieutenant David McClure from SLED alerted Captain Wade of the "hit" as opposed to Fields, contended a reference to the DNA database match would inappropriately confirm to the jury the existence of Applicant's prior record in light of the reason DNA profiles were included in the DNA database, and asserted there was no chain of custody regarding the DNA profiles entered into the database.[11] (R. pp. 338-339). In response, Fields confirmed she intended to testify in Lieutenant McClure's place in light of his retirement, and the solicitor contended the testimony related to the DNA database match was probative and necessary to explain to the jury how law enforcement was able to identify Applicant as a suspect in the armed robbery, which the

[10] During her testimony, Boehm explained DNA profiles consist of a series of numeric codes representing loci and alleles, which are developed into charts and compared to one another to check for a match. (R. pp. 522-527).

[11] During sentencing proceedings, the solicitor recounted the details of Applicant's substantial prior criminal record, which spanned roughly thirty years and contained numerous felony convictions. (R. pp. 609-611).

jury would have had no way of knowing without testimony related to the match made by SLED, while confirming she would not seek admission of the letter from SLED confirming the DNA database match during the trial. (R. pp. 338-341). After hearing the contentions of the parties, the trial judge asserted:

> The collection of DNA materials that form the database, I agree that it's taken from a thousand different places and it may not always be – and I'm not certain of this fact, it may not always be indicative of a prior criminal record. It may be. It may be, but, as I said, I'm not certain of that, but that's the primary source of the DNA that's in the databank. But unless you can show me some case law that says they can't use it, I'm gonna allow it.

(R. p. 340). Defense counsel then again contended the evidence was inadmissible based on a chain of custody problem while alleging Fields had no personal knowledge in regard to the DNA match in Applicant's case. (R. pp. 340-341). At that point, the trial judge directed the solicitor to proffer Fields's testimony. (R. p. 342).

During the proffer, Fields confirmed Captain Wade was notified Applicant's DNA profile was determined to match the DNA profile developed from the hat recovered at the scene of the robbery following a search involving the SLED DNA database. (R. pp. 342-343). Additionally, Fields confirmed Lieutenant McClure conducted the search of the database after Boehm entered the profile developed from the hat. (R. p. 343). Fields further confirmed she might have been involved in reviewing the match once it was made, but she was not certain at that time. (R. p. 344). Based on that testimony, the trial judge advised Fields she needed to get all the relevant information related to the case, and the solicitor indicated the matter needed to be reserved for a later time. (R. p. 344).

As the trial continued forward, the solicitor again proffered the testimony of Fields. (R. p. 532). During the second proffer, Fields testified the DNA profile developed from the hat was entered into SLED's DNA database by Boehm for a search. (R. p. 533). After that, Fields stated

she personally reanalyzed the data received as a result of that search for confirmation purposes, which she noted was the process followed in every database search, and personally confirmed both Applicant's DNA profile from the database matched the DNA profile developed from the hat and the fingerprint associated with Applicant's DNA profile, which had been assigned a unique identification number, had been verified to belong to Applicant. (R. pp. 533-536; pp. 540-541). Additionally, Fields noted the information collected as a result of the database search was further reviewed by another analyst before the confirmation of the match was sent to Captain Wade. (R. p. 537). Furthermore, Fields conceded she did not have all the chain of custody information for the DNA profiles included in the DNA database. (R. p. 538; p. 540). However, she stated the profiles in the DNA database were usually collected at the time an individual was arrested for or convicted of a crime, and she indicated SLED had a tracking system that showed when a sample was collected for the database and sometimes who actually collected the sample.[12] (R. pp. 538-539).

At the conclusion of the proffer, defense counsel reiterated his objection to the proffered testimony and argued it should be excluded because it was allegedly irrelevant, unduly prejudicial, violative of due process based on a lack of authentication and a sufficient chain of custody, inadmissible as evidence of a prior bad act, inadmissible as improper impeachment evidence, cumulative, and inadmissible without the testimony of Lieutenant McClure. (R. pp. 541-542). In rebuttal, the solicitor contended the evidence was admissible and necessary to show how Applicant was identified as a suspect in the armed robbery, which could not be shown without that particular link in the investigation. (R. p. 542). After considering the arguments of counsel, the trial judge

[12] Although she disclosed it during the second proffer, Fields did **not** reveal to the jury DNA samples collected for the DNA database were usually collected at the time of arrest or conviction. (R. pp. 538-539; pp. 543-547).

overruled defense counsel's objections and ruled Fields could testify before the jury in the limited manner proposed by the solicitor. (R. p. 542). Following that ruling, Fields testified before the jury and noted – over objection – the DNA profile developed from the hat found at the crime scene was entered into SLED's DNA database, which led to Applicant being developed as a suspect in the robbery. (R. pp. 543-546).

Thereafter, at the conclusion of the evidentiary phase of trial, the parties rested their cases and presented their closing arguments to the jury. (R. p. 547; pp. 556-585). During the prosecution's closing argument, the solicitor noted to the jury Applicant was only identified as a suspect in the jewelry store robbery after a DNA profile developed from the robber's hat was entered into SLED's DNA database, which led to the inclusion of Applicant's photograph in the photographic lineup, Mancine's subsequent identification of Applicant as the armed robber, and the discovery Applicant's DNA profile conclusively matched the DNA profile developed from the evidence collected at the scene of the crime. (R. pp. 563-564; pp. 568-569). Conversely, during the defense's closing argument, defense counsel characterized the investigation into the armed robbery as "incomplete, inept, and inaccurate," contended the flaws with the investigation meant Applicant's case was "drenched" in reasonable doubt, and called the jurors' attention to evidence that had not been presented, including testimony from Mancine's mother and the other victims present during the armed robbery aside from Mancine. (R. p. 570; pp. 571-572; p. 574).

Following the parties' closing arguments, the trial judge instructed the jury on the applicable law. (R. pp. 585-598). In instructing the jury on the law, the trial judge thoroughly defined reasonable doubt and specifically explained Applicant was not required to prove his innocence, Applicant was presumed to be innocent, Applicant could only be convicted based upon evidence proving his guilt beyond a reasonable doubt, and the State had the sole burden of proving

Applicant's guilt for each and every element of the charged crimes beyond a reasonable doubt.[13] (R. pp. 588-590; p. 593).

At the conclusion of trial, the jury convicted Applicant as indicted. (R. p. 606). Following the verdict, the trial judge sentenced Applicant to an aggregate term of imprisonment of twenty years. (R. pp. 614-615).

Summary of PCR Hearing Testimony

James Bubba Patterson

During the PCR hearing, James Bubba Patterson testified that he was represented at trial by David Mauldin and Robert Madsen. He stated that he was arrested in November 2012 and remained in jail. He stated that there was one bond hearing and it was denied. He claimed that his counsel came to see him only three or four times. Counsel advised him that there was an investigation of what actually happened in his case.

The Applicant contends that there was a Sixth Amendment violation because his counsel failed to come to see him and explain the status and what is allowed in his case. He stated that he did not know the law and he needed counsel's assistance.

The Applicant stated that he never told his attorney that he would plead guilty. The Applicant asserted that there were no deals because the solicitor was not making any plea deal on his case. He claimed that there was a due process violation because there was new evidence presented at the trial that he had never heard about. He specifically referred to the testimony of Investigator Bruce Wade and he was not sure what it meant to his case.

---

[13] At the conclusion of his jury charge, the trial judge presented a supplemental instruction to the jury to clarify Applicant had pled not guilty to the charged crimes and again reiterated the State had the burden of proving Applicant's guilt beyond a reasonable doubt at that time. (R. p. 600).

The Applicant claimed that the chain of custody was not adequate and was not objected to by the defense as it related to the DNA and how they processed it. He claimed that the defense should have presented evidence that would have refuted the DNA testimony.

The Applicant also claimed that counsel should have objected to the lineup as unduly suggestive which he claimed counsel did not do. The Applicant also claimed that he wanted to see the video. He claimed there was nothing said about being identified prior to the trial.

On cross-examination, the Applicant stated that he told his counsel in their first meeting that he did not commit the crime. His counsel kept telling him that they were waiting on the evidence months later when counsel finally met him again. Patterson claimed that there were different descriptions of the person who came out of the store, particular as to his weight. He also complained about the conflicting evidence about the identification and of the descriptions of the vehicle. He also claimed that before trial he only met 2 or 3 times with counsel. The Applicant claimed that he was worried that when he got to court that he would be identified. Concerning the state's case against him., he said counsel advised him that he was charged with armed robbery and that there was evidence connecting the crime to him that was found on the property. Patterson stated that this was probably about the hat. He further stated that his counsel advised him not to testify at trial.

Robert Madsen

Counsel Rob Madsen testified that he is presently retired, but was criminal defense lawyer, primarily with the Lexington Public Defenders Office. He stated he represented the Applicant after the office was appointed in January 2013. Madsen testified that he first met with Applicant on January 17, 2013. He described that this case involved the robbery of a jewelry store by a person who was wearing a suit, hat and dark glasses. Madsen stated that there were four people in the

store at the time, including the owner, his mother and his wife. Madsen described that the state's evidence indicated that the individual ended up pulling out a gun and taking some jewelry. He described that the robber dropped his hat when he left the store and that the owner shot at the truck of the robber as he escaped. Madsen indicated the Applicant subsequently reported that his truck was lost a few days later. However, Madsen said that the truck was stopped and impounded on May 24, 2012 when Kenneth Bates, the driver at that time, was arrested on separate unrelated charges.

Madsen indicated throughout his representation he received various information from his client. Madsen stated that he spoke with ATF concerning the Applicant's assertions in their defense after a discussion with Patterson. Madsen also looked at the case as a possible inside insurance scam based upon his client's representations to him.

Counsel testified that he received discovery from the state initially on January 31, 2013. He stated that he met with the Applicant on May 5, 2013 and went over that discovery with him. He stated that his client did not want a copy of the discovery to keep at that time. Madsen stated at that point of time, the discovery did not include the DNA evidence information related to the hat. He stated that there was additional discovery later after the CODIS hit. Madsen testified that he recalled that there was a hat and two cigarette butts recovered at the crime scene area. He testified that there was a Schmerber hearing related to the DNA swabs of the Applicant. He recalled that the DNA comparison number was a gigantic number as to the hat and the Applicant.

Counsel stated that an initial part of his investigation was focused on whether it was an inside insurance scam job. At another meeting with the Applicant, Patterson indicated it was an insurance scam that was run by Muslims and Koreans. Counsel stated that he looked into the Applicant's theory of involvement in an insurance scam, but in one meeting he drastically changed

his story and denied being involved in the incident. An additional alibi theory caused him to go to the South Carolina Department of Corrections to talk with potential witnesses about the scam. Later, Patterson had indicated on an alibi issue to investigate, albeit after he had claimed to counsel that he was involved in an inside job. He had an investigator attempt to locate information and corroboration of the limited information he received from Patterson. Patterson claimed an alibi defense in North Carolina, but he was unable to give Madsen anything to substantiate the assertion. Madsen also indicated that he considered an issue concerning the Applicant's competency to stand trial. Madsen hired a private consultant who concurred with the State mental health evaluator that Patterson was competent to stand trial.

Madsen pointed out that the Applicant had a significant criminal record and he advised the Applicant about the potential impeachment if he testified. He testified that he did not think that the Applicant would be a credible witness at trial.

Madsen testified that he was assisted at trial by David Mauldin. Mauldin's role was to take notes and point out matters that needed to be explored or missed. He was focused on areas related to the hats, cigarettes, chain of custody and issues with the officer who had died in the interim. Madsen recalled the he explored the critical issues on cross-examination and also moved to exclude evidence related to the search of the van and the DNA evidence.

Concerning the Applicant's complaints about photo lineups, counsel thought that these were adequately covered during the Neil v. Biggers hearing and that he thought that he would have objected and asserted to rely on the trial record. As far as the testimony from the people in the store, he did not recall at the hearing if all of them testified, but he knew the mother did not testify. Counsel thought the discrepancies were brought out on cross-examination at trial. Counsel stated

that he tried to get the identifications suppressed and emphasized that that the owner of the vehicle was not the person driving when the vehicle was stopped at a later date.

On cross-examination, Madsen testified that he learned either though discovery by the State or in their investigation that Applicant had called in a claim that the van was stolen.

As to the alibi suggestion, counsel thought the Applicant was very vague about North Carolina and did not indicate to him any hotel or specifics as to where he was staying. The Applicant also made claims to counsel about working with ATF or the FBI, but counsel was never able to substantiate them.

Counsel testified that he met with the Applicant 14 times, contrary to the Applicant's assertion of much fewer meetings. He declared the Applicant switched his theory from actual involvement in the crime to an alibi during the last meetings before trial.

Contrary to the assertion by the Applicant, the Applicant was given a plea offer at one point, according to Madsen. He went over the offer on September 4, 2013. He recalled that the offer was to plead guilty straight up to armed robbery and to dismiss kidnapping, but the Applicant rejected it. He was always facing 10 to 30 years. The State never offered a better plea offer and the Applicant rejected the same offer again prior to the trial.

General Law Related to Issues.

Ineffective Assistance of Trial Counsel, Generally

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant—like all other defendants—the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S.

668, 685 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally

competent assistance" demanded of attorneys in criminal cases. *Id.* Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; *see* also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland, 466 U.S.at 688–89; *see id.* at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.* at 689. The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied Strickland's deferential standard.

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. 466 U.S. at 691–92. In order to prove prejudice, an

applicant must demonstrate 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. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. *See id.*, at 695 (Where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial.*" *Id.* at 687 (emphasis added). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690. Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at

690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686; *see* Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding").

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Cross-examination and Evidence related to the Identification of the Applicant

In his second amended application, allegation 1(a), the Applicant contends that counsel failed to adequately cross-examine the trial witnesses as to the identification of him. His apparent claim is that defense counsel did not focus his cross-examination related to the crime scene witnesses who did not identify him at the robbery or testify at trial. This Court must find that he failed in his burden of proof of showing either deficient performance or prejudice.

How the Identification was presented at trial

The record shows that an *in camera* hearing was held prior to the trial related to the identification of the Applicant by Frank Mancine. During this proceeding, Investigator Bruce Wade testified about his preparation of a line-up and that the Applicant had been linked to the incident. The line-up was prepared by SLED and the photos looked similar. Tr.p. 53-54; ROA 72-73. Mancine was told by Investigator Wade that the perpetrator may or may not be in the lineups. Tr.p. 55; ROA 74. On November 15, 2012, when shown the lineup, Mancine made an identification in less than a minute. Tr.p. 57; ROA 76. It was determined after the arrest that the Applicant was 5'5" and weighed approximately 150 pounds. Tr.p. 62; ROA 81. Investigator Wade also indicated that he had reviewed the surveillance tape of the incident from the May 9, 2012 date of the robbery and the earlier date of May 7 which showed that the Applicant had contact with

Mr. Mancine on both dates at less than two feet apart on multiple times and conversing in the videos. Tr.p. 63; ROA 82.

On cross-examination of Investigator Wade, counsel Madsen developed that they had recorded the interview with Mr. Mancine, but did not record the interview with the Applicant on November 16, 2012. Tr.p. 65; ROA 84. He stated he did not have a copy of the waiver form because Patterson tore it up destroying it and he may have eaten it as Wade recalled. Patterson claimed to them that he did not have any involvement in the robbery.

Investigator Wade described that SLED had prepared the photographic lineup. Wade stated that SLED sent one lineup set in black and white and one lineup set in color. Investigator Wade used the black and white lineup concluding that it was harder for the witness to pick one out in black and white than in color lineup. Investigator Wade described the unwritten protocol he used for photo lineups based upon his training.

> That you let the victim know I've got a photo lineup to show you, it will be a series of six photos, the suspect may or may not be in this photo lineup, but if you see the person who committed this crime against you, I'd like for you to select him in the photo lineup.

Tr.p. 68; ROA 87.

Investigator Wade stated that Mr. Mancine indicated to him in the May 9, 2012 interview that the perpetrator was a black male, five-seven to five eight, early forties, and 120 pounds and wearing a hat. Tr.p. 69-70; ROA 88-89. Investigator Wade also recalled that the robber was wearing a hat and large sunglasses in the surveillance video. Investigator Wade further confirmed that in the photo the Applicant had a pencil line mustache above his lip. Tr.p. 70,; ROA 89. Investigator Wade also confirmed that it took less than a minute for the identification after viewing the lineup. Tr.p. 71; ROA 90.

Investigator Wade also confirmed that he had shown the lineup to Mr. Mancine's mother who was also in the store that date. She had been waiting in a different room than Mr. Mancine was when he identified the Applicant. Investigator Wade stated that she looked at it a while but did not pick out the suspect. Tr.p. 72-73.; ROA 91-92.

On re-direct examination, the State had Investigator Wade confirm that the photographs in the lineup (State Exhibit 1) did not have a significant facial hair and facial hair had not been part of the description for the lineup. Tr.p. 77, ROA 96. The State, though Deputy Solicitor Mayes then focused her questioning with Investigator Wade about his inquiry about Mr. Mancine's mother, Tokye Mancine.

Q. Was she also present at the jewelry store on the date of the robbery, May 9, 2012?

A. That's correct.

Q. Have you had the opportunity to review the video surveillance as to her degree of interaction with the suspect?

A. Yes, ma'am. She had limited interaction with him. It was more of him dealing with Mr. Mancine.

Q. All right. When he came into the store on May 7th -- or the suspect came into the store on May 7th, who was he conversing with?

A. Mr. Mancine. I don't even recall seeing Mrs. Mancine in the store that particular day.

Q. All right. And then two days later on the date of the robbery, who was the suspect interacting with prior to pulling out the weapon?

A. Mr. Mancine.

Q. And who was it that he actually pulled out the weapon and pointed it at?

A. Mr. Mancine.

Q. All right. And then at some point is Mrs. Mancine present on the video?

A. She is.

Q. Based upon your observations, was her degree of interaction with the suspect the same or equal to that of Mr. Mancine?

A. No.

Tr.p. 78-79; ROA 97-98.

Counsel Madsen then inquired of Investigator Wade if he had shown the photographic lineup to anyone else and he declared that he had not. Tr.p. 80, ROA 99.

Next, during the *in camera* hearing, Frank Mancine testified. He described the perpetrator, his clothes, his suit and his hat. Tr.p. 82-84; ROA 101-103. Mancine also described the process of the presentation of the line-up to him. Tr.p. 88- 90; ROA 107-1089. Mancine testified it only took him a few seconds to identify the Applicant's photo. Tr.p. 90; ROA 109. He acknowledged that he was speaking to the Applicant at a distance of approximately two feet. Tr.p. 92; ROA 111.

On cross-examination, counsel Madsen developed through Mancine that on the 7th his mother was in the store with him when the Applicant first came to the store. Tr.p. 93; ROA 112. He confirmed on the first day, the Applicant was there two to three minutes. On the date of the robbery, Mancine stated that the Applicant was in the store, less than ten minutes. Mancine described two other customers in the store; Tommy and his girlfriend. Tr. p. 94-95; ROA 1134-114. He recalled that his mother was dealing with Tommy and Amanda. Tr.p. 95; ROA 114. During the robbery, Mancine recalled that his mother put the jewelry in the bag that was thrown at them after the perpetrator pulled out the gun after he showed him the gold necklaces. Tr.p. 98; ROA 117.[14] Mancine described shooting his gun at the perpetrator after he fled from the store when his gun initially jammed. Mancine takes the bullets from the gun and clears it. He then leaves

[14] In his testimony before the jury, Mancine indicated that the perpetrator filled up the bag himself. Tr.p. 178; ROA 197.

the store giving chase. When he sees the driver pull out, Mancine fired another round from the store and hits the back glass of the van. Tr.p. 102-104; ROA 121-123. Mancine describes on November 15, 2012 when Investigator Wade presented the lineup and confirmed that his mother was not in the same room when he did his lineup. Tr.p. 106-107. ROA 125-126.

On re-cross-examination, counsel Madsen confirmed that Mancine initially gave a description of five-five, 150, mid-forties and black. Tr.p. 109-110. ROA 128-129.

The defense urged that the identification evidence should be suppressed. Tr.p. 114-116. ROA 133-135.The trial court denied the defense request and found that it was admissible. Tr.p. 119-122. ROA 138-141.

Trial Matters Related to the Identification and Photo Line-up

A review of the trial reveals the manner that the defense handled the issues related to the identification before the jury. The testimony was similar to the *in camera* proceeding.

In the opening statement at trial, Assistant Solicitor Gill Bell discussed briefly the circumstances of the crime and the victim's initial description of the robber. Tr.p. 167-169. ROA 186-188. He stated that sometime later law enforcement reached back out to the victim with a photo lineup and the lineup had six photos of a gentlemen with similar features, how SLED put the lineup together, and that Frank Mancine, unaware that one of the six was a DNA match to the hat, selects Patterson as the man who was the robber. Tr.p. 169; ROA 188.

In the defense opening statement, counsel Madsen urges the reasonable doubt standard, urging the jury that there were no fingerprints inside the business, no jewelry was recovered of the Applicant, and no evidence that the Applicant fenced the jewelry. Tr.p. 174-175. ROA 193-194.

Frank Mancine was the initial witness before the jury. He testified similarly to his earlier testimony related to the identification and lineup. He described that on May 9, 2012, while his mother was assisting two customers, a gentleman came into his jewelry store wearing sunglasses, a dark suit, and a fedora hat. He was carrying a dry-cleaning bag. Tr.p. 177; ROA 196. He asked to see some necklaces which Mancine then showed him. However, the man eventually pulled out a pistol and a dark bag, demanding that he fill it up. Tr.p. 178-179; ROA 196-197.

Mancine stated that he did not fill up the bag. The perpetrator threw the bag at one of his customers and then recovered the bag. The perpetrator filled up most of the bag himself. Mancine described that the perpetrator leaned over the showcase and started grabbing a tray and filling it up with necklaces and bracelets. Most of the bracelets he took were made of 10 karat gold. Tr.p. 177-178; ROA 196-197.

Mancine described the fact that he had seen the same person in the store two days before. He stated the person on that date was wearing the same clothes -- the suit, sunglasses, the fedora hat and possessed the dry-cleaning bag. It was at closing time. The person indicted to Mancine that he just wanted to look around and did not buy anything and left without a problem. Tr.p. 179; ROA 198.

As the surveillance video was played to the jury of the May 9 incident, Mancine described the incident, including his face to face discussions with the person. Tr.p. 182-183; ROA 201-202. Mancine confirmed that he could see the features of the perpetrators face and could make out the features of his nose, mouth and prominent lips. Mancine noted that his mother kept coming into the frame on the video. Tr.p. 184; ROA 203. Similarly, Mancine described the earlier May 7 video when the perpetrator entered the store briefly at closing time and his ability to describe his features. Tr.p. 185-186; ROA 204-205.

Mancine noted that the counter between them was approximately 20 inches or less than two feet. Mancine noted in the video that the perpetrator was leaning in and was closer which gave him a good opportunity to see his face in his well-lit store with the sunlight. Tr.p. 188-189; ROA 207-208.

Mancine described that he pursued the perpetrator after his initial shot missed. While in pursuit, he saw the hat the individual was wearing on the ground as he ran passed it. He then saw the van that the individual had entered and Mancine shot the van's back window which shattered. Tr.p. 193-195. ROA 211-213.

When he returned to his store, he contacted law enforcement and made an initial description of the perpetrator as five-five, approximately 150 pounds, with a hat and sunglasses, and dry-cleaning bag wearing a dark suit and Black. Tr.p. 195-196; ROA 214-215.

Mancine was then shown the hat which he also identified on the video and explained why it appeared to be a different color on the video based on the lighting in the store. Tr.p. 197-198; ROA 216-217.

Mancine then described a later meeting with law enforcement again to look at a lineup at his store, referring to State Exhibit 1. Mancine described to the jury that the exhibit was the same lineup that he was shown that day with 6 individuals. He stated that the lineup was laid out on the top of the store's showcase. He stated that the officers did not hover over him or make any gestures or suggestions as to who to pick. He stated that it only took him a few seconds to select number 3 out of the lineup, which he circled and signed with his initials. He told them that he was the guy who robbed them. Tr.p. 199-200; ROA219-220. He had no doubt that this was the perpetrator who robbed him.

Mancine described that at the time of the incident there were four individuals that Patterson pointed the gun as he was waving it around. Mancine described the pregnant female in the store was terrified, and her boyfriend was shocked and could not move. The female customer ran behind the showcase lying down to hide which Mancine confirmed was shown in the video. Tr.p. 202; ROA 221. Mancine described that he thought he felt an adrenaline rush and was shocked and not well, when the gun was pointed at him. *Id*. However, Mancine did not think it affected his ability to perceive what was happening or affect his vision or his judgment. Mancine admitted that he wore corrective lenses then and now. He then pointed out the Applicant in court as the person who robbed him without any doubt. Tr.p. 203; ROA 222.

On cross-examination, counsel Madsen got Mancine to confirm that at the earlier meeting of the perpetrator at his store on May 7, that he only saw the perpetrator for a couple of minutes and that his mother was the only other person present at the time. However, counsel Madsen pointed out that it was actually only 50 seconds according to the surveillance video. Tr.p. 204; ROA 223. Counsel pointed out that the individual came from the right of the store and that Mancine was cleaning the showcases when he entered. However, Mancine confirmed he did not see what vehicle the individual was driving initially. He was able to describe a suit-styled shirt, pants, hat and sunglasses, but did not recall any type of facial hair. Tr.p. 205-206; ROA 224-225.

As to the day of the incident, Mancine recalled he was just standing there when the individual entered the store and that his mother was assisting the other customers. Although he did not feel he could state how long the person was in the store, it was pointed out to Mancine that at a prior hearing, he had testified it was about ten minutes.[15] Tr.p. 206-207; ROA 225-226. It was

[15] During the in camera proceeding, Mancine testified on defense questioning that it was "about ten minutes." Tr.p. 95, l. 4; ROA 114.

then pointed out by the defense that it was only three minutes, which did not surprise Mancine. There was also a discussion about what Mancine meant when he described the sunglasses as being large. Tr.p. 207; ROA 226.

The defense further inquired about the audio statement Mancine made at his store with the Columbia Police Department with Mancine's family friend and lawyer Adrian Falgione present. Mancine indicated to defense counsel that he could not remember it when asked to confirm whether he told investigator Wade that the individual's weight was 170 pounds, five-seven or five-eight or had prominent or large lips. Tr.p. 208-209; ROA 227-228.[16] He confirmed that he did not remember the weight. *Id.*

Mancine confirmed to the defense counsel that the individual pulled out the gun from his left side and held it with his left hand. He stated that he believed the bag could have been underneath the dry-cleaning bag, but his did not specifically recall. He stated that he was probably a couple of feet away when the gun came out but admitted he was too busy looking at the gun. He admitted feeling lightheaded at that time. Mancine stated the individual threw the bag at the female customer and she did not touch it. Tr.p. 210; ROA 229.

Mancine confirmed that the perpetrator leaned over the counter and grabbed the jewelry trays and he believed that his mother put the jewelry into the perpetrator's bag. Tr.p. 212; R. 231. Once the robber started to leave, Mancine confirmed that he turned around and went into the back room and grabbed his loaded gun. Mancine stated he then fired a shot at the individual as he was facing Mancine. Mancine saw him go to the right of the store running off. Tr.p. 214-215; R. 233-

[16] Mancine testified on direct examination that his initial description was that the individual was five – five and approximately 150 pounds. Tr.p. 195; ROA 214. In the in camera proceeding, he testified similarly at five-five and 150 pounds. Tr.p. 103; ROA 127. However, he stated that he did not recall that he estimated that the suspect was five-seven to five -eight to Investigator Wade. *Id.* See also Tr.p. 98; ROA 117 (120 pounds).

234. Mancine said his gun jammed with the first shot. Mancine described coming out of the store and getting the gun unjammed and he saw the van was not moving. Upon seeing Mancine, the van pulled out violently and Mancine fired again, this time shattering the back window of the van. Tr.p. 216-218; R. 235-237. Mancine described that about six months later he was shown a line-up at his business by West Columbia police officers. He confirmed that this was the first time he was shown any line-ups. Tr.p. 219; R. 238.

Sgt. Ronald Fair of the West Columbia Police Department testified about his arrival at the scene within a minute of the 911 call. He spoke with Mancine and received a description of the suspect. Tr.p. 229; R. 248. On cross-examination, Sgt. Fair confirmed that he spoken with Mr. Warner and Ms. Knight, the two individuals inside the store at the time of the incident. Tr.p. 237; R. 256.

West Colombia Police Investigator Bruce Wade testified that about six months after the incident, the Applicant was developed as a suspect in the case. Investigator Wade showed the line-up which included Applicant to Mancine who identified the suspect as the perpetrator "almost immediately" in less than a minute. Tr.p. 331-336; R. 350- 355.

On cross-examination of Investigator Wade, counsel Madsen developed that others at the scene were also interviewed. Tr.p. 348-350; R.p. 367-369. Investigator Wade confirmed that he was not sure that the mother of Mancine, Kim Mancine was interviewed, however, he acknowledged he later showed her the line-up. Tr.p. 350-351; R.p. 369-370. Counsel Madsen's questioning had Wade confirm that Ms. Mancine did not pick out anyone and that the line-up when his client was in the line-up. Counsel Madsen also had confirmation that Tommy Warner and

Ashley Knight were interviewed who were in the store, as well as Jennifer Hubbard[17] and Norman Bradwell. Tr.p. 351; R. 370.

Madsen had Wade confirm that the line-up was not shown to anyone other than Mancine and his mother. Wade indicated that there was an attempt to show the line-up to Ashley Knight and Tommy Warner, but when Wade made contact with them they told him that they had passed that point in their life and they did not want anything else to do with it so they did not come in and see the line-up. Tr.p. 352; R. 371. Madsen had Investigator Wade confirm that line-ups were not also shown to Jennifer Hubbard, Norman Bradwell, and Kenneth Branham. Tr.p. 353, R. 372.

On re-direct, Solicitor Mayes developed that Kim or Tokye Mancine's first language was not English, but was Korean. Upon reviewing the videos of the crime on May 9th and on May 7th, it appeared that the perpetrator had more contact with Mr. Mancine than with her on the 9th and that she had no contact with him on the 7th. Tr.p. 355; R. 385. In addition, Wade confirmed when the line-up was developed six months later on November 15, 2012, customer Tommy Warner was no longer interested in continuing to participate in the investigation, which is common for crime victims and were not shown the line-ups. Tr.p. 366-367; R. 385-386.

During the closing arguments, defense counsel Madsen asserted that the state's theory in the case was "speculation, conjecture and assumption that comes from an investigation that was

[17] Jennifer Hubbard testified that she was at a children's school bus stop with her child when a man parked his van near her, grabbed a plastic bag and walked toward the area where the jewelry store was. She described that later the man was seen running back to the van and then she saw another man running toward the van and that man fired a shot breaking the window of the van as it drove off. Tr.p. 245-264. She gave similar description of the man in the van as a black male, early to mid-forties, 5'5" to 5' 6" tall in a suit, white button up shirt, dress shoes, no tie between 180 to 200 pounds. Tr.p. 248-249,261, 264. Counsel Madsen cross-examined her related to her description of the person who both left and later entered the van as to being a black male, early to mid-forties and about 180 to 200 pounds, which was what she told the police. Tr.p. 264-266; R. 283-285.

incomplete, inept and inaccurate. An incomplete, inept and inaccurate investigation." Tr.p. 551, ll. 15-18. R.p. 570.

In addressing the identification of the Applicant, defense counsel pointed out:

> Everyone's in there for the same three minutes. Mrs. Mancine is just as close as Mr. Mancine. Mr. Mancine really wants to believe, but he ' s wrong. So you've got no ID by Kim Mancine. We've got fingerprints, so we know she's within arm's reach. Tommy Warner, the other fellow in that small store. You don't think that if he picks out James he's not here. No, we don't need that. How about Ashley Knight? The testimony is that the bag was thrown to her, which means she's nice and tight. It's not that far from one side over there to the other. No ID. You can never put a quantitative numerical value on reasonable doubt. Twenty-five percent of the people ID'd my client. Like I said, you can't put a numerical value on reasonable doubt, but I would assume that you, if there was a number, that twenty-five percent would be that number. That would be the gold standard of that number.

Tr.p. 554-555; R.p. 573-574. Counsel Madsen further argued that Jennifer Hubbard, the woman at the bus stop by the parked vehicle did not make an identification of the Applicant because she only focused on the victim's gun. Tr.p. 555-557, R.p. 574 -576. Counsel Madsen speculated that law enforcement did not want her to attempt a photographic identification, because they already had one from Mancine.

Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S.Ct. 2052. In addition, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed deficient performance. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000). As the Supreme Court explained in Strickland,

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to

> reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-95 (citations omitted). Stone v. State, 419 S.C. 370, 383–84, 798 S.E.2d 561, 568 (2017).

The Applicant Failed to Prove that Counsel was Deficient in his cross-examination of the witnesses related to a failure to identify the Applicant and Prejudice under Strickland has not been shown.

This Court finds that the Applicant failed to show that counsel was deficient in the manner he questioned State witnesses about the lack of identification of the Applicant by others at the crime scene. The Strickland presumption that counsel's conduct fell within the wide range of reasonably professional assistance operates with particular force when the conduct at issue relates to counsel's conduct of cross-examination. "Decisions about 'whether to engage in cross-examination, and if so to what extent and in what manner, are ... strategic in nature' and generally will not support an ineffective assistance claim." Dunham v. Travis, 313 F.3d 724, 732 (2d Cir.2002) (quoting United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir.1987)) (omission in original); see also Eze v. Senkowski, 321 F.3d at 132. United States v. Soto–Alvarez, 958 F.2d 473,479 (1st Cir.1992). In order for Applicant to meet the Strickland standard when claiming inadequate cross-examination, he must (1) provide "facts indicating that the cross-examination was inadequate" to show that counsel committed errors so serious as to fall below an objective standard of reasonableness, and (2) indicate "what further cross-examination might have revealed" to show that Petitioner was prejudiced by the concealment of such information. See Shraiar v.

United States, 736 F.2d 817, 818 (1st Cir.1984). Here, he has shown neither. This case presents no exception to this general rule.

Counsel's presentation on cross-examination before the jury was reasonable. As noted above, counsel Madsen presented through cross-examination of Investigator Wade the fact that Kim Mancine was unable to identify the Applicant in the line-up when it was shown to her. Tr.p. 350-351; R. 369-370. Counsel Madsen further developed through Investigator Wade that he had not shown the line-up to anyone else. This included customer Tommy Warner, customer Ashley Knight, bus stop witness Jennifer Hubbard and Norman Bradwell. Tr.p. 350-352; R. 371-372. Jennifer Hubbard testified about her description of the person she saw, but never identified the Applicant as that person. Tr.p. 264-266; R. 283-285.

Counsel used this information about the lack of identification by other scene witnesses in his closing argument. Tr.p. 554-557; R.p. 573-576. He contended that the failure of the other scene witness to either identify or be asked to identify suggested law enforcement did not want to risk undermining Mancine's favorable identification of the Applicant which created a doubt.

The Applicant has failed to show how reasonable counsel would have handled the cross-examination differently, just gives a conclusory suggestion that the examination of the witnesses who testified should have been examined differently. The Applicant's conclusory speculation is insufficient to show how reasonable and competent counsel would have acted differently related to the cross-examination. Since counsel has not been shown to be deficient under Strickland, 6th Amendment prejudice has also not been proven. Second Amended Application ground 1(a) must be dismissed.

Allegation that Counsel was ineffective in failing to object to the lineup as suggestive.

During the testimony of the Applicant during the hearing he contended that counsel was ineffective in failing to object to the line-up as suggestive. This Court must reject that claim as lacking a factual basis.

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Id.

In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S.Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).

Contrary to the Applicant's assertion, the trial court held a hearing pursuant to Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). At the conclusion of the hearing, defense counsel Madsen argued that the line-up was suggestive. Tr.p. 114-116; R. 133-135.

Counsel argued that while all the photographs were of black males, there was difference in facial hair and the Applicant's photograph was the only one with a thin mustache and that Mancine, in his identification, had focused on the lips. Madsen contended this made the lineup suggestive. Concerning the various Biggers factors, counsel argued that the witness's brief viewing the perpetrator was for less than 5 minutes on May 7 and then less than 10 minutes on the day of the incident. Although close to the perpetrator, counsel argued that his description was extremely generic because it only described that it was a black male with a height and weight. Counsel asserted there was no indication about facial features, such as nose, lips, or other matters. As to the degree of attention, counsel pointed out the witness was excited, felt a rush, and lightheaded at the incident. As to the accuracy of the prior descript, counsel pointed out within hours after the incident, the witness gave concerning both height and weight varying in 30 pounds. Id. In addition, counsel questioned the accuracy of the identification when it occurred 6 months after the incident. He urged its exclusion as unduly suggestive, particularly where was evidence that he was wearing sunglasses covering a portion of his face. Tr.p. 116; R. 135.

The trial court rejected that argument that the lineup itself was unduly suggestive. Although the trial court recognized concerns about cross-racial identification, he determined that the photographs were substantially similar and particularly that two photos had similar eye structures. This was enhanced by the fact that Officer Wade confirmed that there was no indication the defendant's photograph was in the lineup. Tr.p. 119, R. 138.

The trial court then addressed the identification process by the victim. Tr.p. 120-122; R. 139-141. The court found that the opportunity to view the perpetrator was heightened because he had seen him in the store two days earlier. The court found the odd activity of him casing the store previously added to the attention of the owner when he saw the assailant came in two days

when the store was robbed. The court found that the store was well lit and allowed for a one on one identification because there was no crowd at that time, in addition to the gun being pointed at him. The court found Mancine to be credible as to his attention to the facial hair of the perpetrator. The court found that the description did not vary substantially and to be credible. In addition, Mancine's certainty in his almost immediate identification adds to the degree of certainty. As to the length of time between the incident and identification, the trial court relied upon State v. Cheeseboro, 346 S.C. 526552 S.E.2d 300 (2001) where five months was not an unduly long period of time. The trial court overruled the defense counsel objection. Tr.p. 122; R. 141.

Further, as noted above, Frank Mancine was the first witness at the trial. Contrary to the assertions of the Applicant at the hearing, defense counsel objected to the admission of the lineup, State Exhibit 1, based upon his motion *in limine*. Tr.p. 198-199; R. 217-218. The trial court overruled the motion.

This Court must deny the allegation of the Applicant at the PCR hearing. This Court finds that counsel did object to the photographic lineup as being unduly suggestive. His factual assertion lacks factual merit. Further, counsel's argument about the line-up was within the standards of competence demanded of lawyers practicing criminal law. Applicant has failed to prove either deficient performance or prejudice under Strickland. His assertion is without merit and must be denied.

Alleged Use of Mugs Shots in Lineup.

In his *pro se* application, ground one, the Applicant contended that trial counsel was ineffective in not objecting to the use of "mug shots" in the lineup. The record shows that trial counsel did not specifically assert that the photographs in the lineups were identifiable as a "mug

shot" and therefore suggestive. However, this Court must conclude that the Applicant failed in his burden of proof on that issue to show either deficient performance or prejudice.

The record shows that the photographic lineup was prepared by SLED. In addition, all the photographs appeared to have the same background images and appeared to come from the same source. Tr.p. 54-55; R. 73-74. All photographs in the lineup are from the same race. Id.

The introduction of a "mug-shot" of a defendant is reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication. State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986); State v. Robinson, 274 S.C. 198, 262 S.E.2d 729 (1980); State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977)[18]; State v. Traylor, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004).

In Tate, the State introduced a photographic lineup which included a mug shot of the Tate. 288 S.C. at 105, 341 S.E.2d at 381. Unlike the case before this Court, the mug shot included "a small board with the date 11-20-82 and the words 'SPTBG. CO. SHERIFF' [ ] hanging around [the] appellant's neck." Id. Under these circumstances, our supreme court found "the markings on

[18] In State v. Denson, the defendant challenged the trial court's admission of three photographs of him, arguing the photos suggested to the jury that he had a prior criminal record. 269 S.C. at 410, 237 S.E.2d at 763. Our supreme court found the State had a demonstrable need to introduce the photos because the defendant's absence from trial made an in-court identification impossible. Id. at 412, 237 S.E.2d at 764. Additionally, the court found the photos did not imply that the defendant had a prior criminal record because they "were not the juxtaposed full face and profile photographic display normally associated with 'mug shots,' " and although one of the photos included the words "Richland County," the jury likely assumed the picture was taken when the defendant was arrested for his current charge. Id. at 412–13, 237 S.E.2d at 764. The court further noted the record did not show "the admission of the photographs in any way focused the jury's attention on the source of the pictures." Id. at 413, 237 S.E.2d at 764. Although the jury was informed that the photos came from police files, the supreme court found this testimony "only explained the source of the photographs, it did not draw particular attention to the source or implications of the photographs." Id. (internal quotation marks omitted).

the photographs, particularly the date, which was almost one year prior to the trial of this case, would clearly infer to the jury that [the] appellant had a prior criminal record." Id. at 106, 341 S.E.2d at 381. The court reversed and remanded for a new trial. Id.

In State v. Stephens, the appellant argued the State's use of his "mug shot" in a photographic lineup implied he had a prior criminal record. 398 S.C. 314, 321, 728 S.E.2d 68, 72 (Ct. App. 2012). The Court of Appeals disagreed with the notion that the photograph implied he had a criminal record because the photographs in the lineup showed only each person's "head and neck against a blank background." Id. at 322, 728 S.E.2d at 72. The Court explained, although the photograph was a mug shot, there was nothing in the photograph to actually imply it was a mug shot, and the "photographs at issue here could have come from driver's licenses, employee identification badges, or other sources." Id.; see State v. Ford, 334 S.C. 444, 450, 513 S.E.2d 385, 388 (Ct. App. 1999) (finding use of a mug shot in a photographic lineup was not improper character evidence because they were displayed "in such a way as to hide any indication of their origin" and no testimony "reveal[ed] the origin of the photographs"); State v. Lawson, 424 S.C. 51, 58–59, 817 S.E.2d 509, 512–13 (Ct. App. 2018).

The Applicant has failed in his burden of proof to show that counsel was deficient in failing to object to the particular photographs in the lineup asserting that they were mug shots. The Applicant has failed to show that there was any evidence in the photograph of the Applicant that indicated that he had a criminal background. To the contrary, the record shows that the photographs appeared to have the same background images and from the same source. The Applicant has failed to show this Court credible evidence that there was anything about the Applicant's photographs that suggested a criminal record similar to the setting in Tate. He has failed to show the existence of such criteria evident in the photograph that counsel Madsen and every other reasonable counsel

would have objected. Absent such a showing, this Court must find that counsel failed in the burden of proof in showing deficient performance under Strickland.

As to whether the Applicant has further shown the existence of Sixth Amendment prejudice, there is a reasonable probability that had counsel objected, the result of the proceeding would have been different. This Court must find that Applicant similarly failed. In addition to not showing the suggestion from the photograph of a prior criminal record, the record also shows that the surveillance videos reflected that the perpetrator was wearing the abandoned fedora hat at the scene, that the hat was found with the Applicant's DNA, and the located van that belonged to the Applicant had damage consistent with being shot and attempted to be disguised after being reported missing. The allegation must be denied.

CODIS Issue - Failure to object to the testimony of Investigator Wade when he informed the jury about the notice from SLED of the Applicant's DNA in the CODIS database, which was prejudicial to the Applicant's case because of how DNA gets into that database. See Tr.p . 331 (R. 350)

In the second amended application, ground 2, the Applicant complains that counsel was ineffective in failing to object to the testimony by Investigator Wade of the West Columbia Police Department in his reference to the CODIS database.[19] This Court finds that Patterson failed in his burden of proof to show counsel was deficient in how he handled the relevant testimony regarding the CODIS database.

Patterson's counsel objected to the DNA database testimony on the grounds it constituted evidence of a prior bad act under Rule 404(b), SCRE. Specifically, counsel argued the evidence implied he had a prior record because that would be the only reason his DNA would be in a

[19] CODIS stands for Combined DNA Information System. It is a national database shared by law enforcement offices to assist with criminal investigations.

database in the first place.[20] The trial court overruled the objection, finding the inclusion of DNA in a database was not indicative of a prior record as DNA can be collected for a variety of reasons and from various sources. Tr.p. 321; R. 340. Also Tr.p.523; R. 542.

In the direct appeal in this case, Patterson, through appellate counsel, raised an issue to the Court of Appeals, arguing the trial court erred in admitting testimony regarding the CODIS DNA database search because it implied Patterson had a prior criminal record in violation of Rule 404(b), SCRE. See State v. Pagan, 369 S.C. at 211, 631 S.E.2d at 267 (stating under Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged"). Relying on our supreme court's decision in State v. Hill, 409 S.C. 50, 760 S.E.2d 802 (2014), Patterson asserts the State's reference to the database was highly prejudicial and outweighed any probative value.

In rejecting the argument, the Court of Appeals addressed it in the following manner:

> In State v. Hill, the court held that the admission of a law enforcement letter in which references were made to the CODIS database, while irrelevant and inadmissible, was not reversible error. 409 S.C. at 58, 760 S.E.2d at 806. The court noted that the publication of the letter—which referred to Hill as a "suspect" and stated that if he was charged, "an additional biological specimen must be submitted for court purposes"—could "have created an inference in a juror's mind that [Hill] had a criminal record." Id. at 57-58, 760 S.E.2d at 806. The court held, however, that its admission did not amount to reversible error due to it being cumulative to the other evidence of the CODIS database admitted without objection, and furthermore, the State did not attempt to admit evidence as to why Hill's DNA was in the database in the first place. Id.
>
> We believe the trial court did not err in admitting the testimony regarding the database search. Initially, we believe the case at hand differs from the error in Hill because (1) the State did not place a letter into evidence; (2) the reference to the database did not contemporaneously refer to Patterson as a "suspect"; and (3) the State did not mention the type of database that the match came from. Here, the State's witnesses referred to the database as "the database" or "our database," rather than the "CODIS database." The State did not attempt to solicit testimony regarding

[20] Patterson has an extensive criminal record, although no evidence of his prior convictions were admitted at trial.

> the purpose of the database, nor did it bring up Patterson's prior record. Moreover, although SLED is a law enforcement agency, given the prevalence in which personal data is shared with public and private agencies for various purposes, e.g., military records and private commercial enterprises, **we do not believe the testimony necessarily implied Patterson had a criminal record. See S.C. Code Ann. § 23-3-610 (2007) (instructing SLED to "develop DNA profiles on samples for law enforcement purposes and for humanitarian and non[-]law enforcement purposes").**
>
> Furthermore, we believe the reference to the database was relevant and highly probative because it explained a critical step in the investigation. Specifically, the database testimony explained how Patterson came to be identified as a suspect in the first place. Without the testimony, the jury would have been left to speculate as to the means law enforcement used to initially place Patterson at the crime scene. See State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) ("Evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears."). Additionally, based on the fact the jury was presented with only limited information regarding the DNA database search, and given that Patterson's DNA was independently matched with the DNA found on the fedora, we believe any prejudice to Patterson was minimal. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("[E]ven where the evidence is shown to be relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, the evidence must be excluded." (emphasis added)); State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (noting that an inadvertent vague reference to defendant's prior record will not amount to prejudicial error). Accordingly, we do not believe the trial court abused its discretion in admitting the DNA database testimony.

State v. Patterson, 425 S.C. 500, 509–10, 823 S.E.2d 217, 222–23 (Ct. App. 2019)(emphasis added).

The Applicant, in this PCR proceeding complains that counsel failed to object to Investigator Wade's testimony about CODIS, citing Tr. 331; R. 350. Prior to that testimony, however, the jury was advised that the fedora hat was sent to SLED for DNA analysis which was routinely done in other cases. Investigator Wade declared it normally takes months to get results back. He testified that he received notification from SLED DNA Database on November 12, 2012 that James Bubba Patterson was a suspect in the case. No objection was made to that statement. Tr.p. 331, R. p. 350.

However, prior to that testimony, there were *in camera* proceedings . Tr. 319-325; R. 338-343. During those proceedings the following occurred:

> THE COURT: All right. What's the objection?
>
> MR. MADSEN: Judge, I object. There was a CODIS hit on this. It's my understanding that the solicitor has indicated through this witness that that's kind of what they plan to get out I've got a document to Investigator Wade signed by a Lieutenant David McClure. **The solicitor has indicated that they are not going to refer to CODIS, but call it a database.** Your Honor, my DNA is not in a database, yours or Solicitor Mayes, so **I think referring to that is going to basically be a comment on the fact of saying his DNA has been placed in there and that he has a prior record and I don't think that is appropriate.**

Tr.p. 319; R. 338 (emphasis added). Solicitor Mayes urged that the fact of the CODIS hit was probative on the development of Patterson as a suspect to connect the dots as opposed to a random photo put into a lineup. She stated that the SLED employee that tested the material will confirm that the SLED DNA database sent the notification to the police department that had developed Patterson as a suspect. Mayes stated that Patterson will not be referred as an offender, but as a suspect based upon the profile match from the DNA database and she will not refer to it as CODIS. Tr.p. 322; R. 341.

A review of the record reveals, as noted by the Court of Appeals, that "database" rather than CODIS was used and it was never explained to the jury how DNA samples were collected for the CODIS database. Compare Tr.p. 519-529 with Tr.p. 524-528).

Moreover, based on the fact the jury was presented with only limited information in regard to the DNA database search that simply conveyed Appellant was identified as a suspect after his Appellant's DNA profile was determined to match the DNA profile developed from the robber's

hat, the admission of that evidence was not unduly or improperly prejudicial to Appellant.[21] See Scales v. State, 310 Ga. App. 48, 52, 712 S.E.2d 555, 561 (Ga. Ct. App. 2011) ("[E]vidence of a matching DNA profile in a government database does not, in and of itself, constitute impermissible character evidence when no reference is made as to why the matching sample was collected or stored and when no reference is made linking the defendant's DNA profile to other criminal activity."); see also McMillian, 295 S.W.2d at 540 ("[T]he mere fact that McMillian's DNA profile was present in a statewide database did not constitute an improper reference to other, uncharged crimes."). Significantly, that is true because the jury was presented with **no** evidence suggesting Appellant's DNA profile was in the database based on a prior conviction or arrest, and neither the solicitor nor anyone else ever asked the jury to draw such a negative inference from that evidence at any point during Appellant's trial. See Harland, 251 P.3d at 517-518 ("Agent Arndt's testimony [regarding DNA database searches] did not create any significant danger of unfair prejudice. Agent Arndt only mentioned the databases briefly, and did not testify as to how [Harland]'s DNA profile came to be in the second database. No evidence was presented as to how any individual's DNA profile might come to be in either DNA database, and no evidence was presented that [Harland] had previously engaged in any criminal activity. We therefore reject [Harland]'s assertion that Agent Arndt's testimony mentioning the DNA databases necessarily led the jury to speculate that [Harland] had prior criminal convictions. Under the circumstances here, any

[21] Importantly, the evidence related to the DNA database search was limited to the extent the letter regarding the match discovered as a result of the search was **not** admitted into evidence during Appellant's trial as was found to be improper by our Supreme Court in an earlier decision. See State v. Hill, 409 S.C. 50, 57-58, 760 S.E.2d 802, 806 (2014) (finding the trial judge erred by admitting a letter regarding a DNA database match discovered as a result of a search of SLED's DNA database but concluding the trial judge's error was entirely harmless under the circumstances). Consistent with the court ruling CODIS was not referred to in front of the jury and the evidence was limited to the term "database" or "SLED DNA database." Tr.p. 331, R.p. 350; Tr 345, R.p. 364; Tr.p. 458, R.p. 477; Tr.p. 494, R.p. 513.

inference of such prejudice is itself speculative."); Atteberry v. State, 911 N.E.2d 601, 609 (Ind. Ct. App. 2009) (rejecting Atteberry's claim the jury could have inferred he had previously been convicted of a crime from evidence his DNA profile was contained in a national database as "nothing more than speculation" in light of the fact the evidence presented did not suggest only convicted offenders' profiles were included in that database). Similarly, as SLED's DNA database contains DNA profile's from a wide variety of sources, it is highly unlikely the jury would have drawn any adverse inference from the limited evidence presented during Appellant's trial in regard to the DNA database search.[22] See Jackson, 232 Ill. 2d at 271-272, 903 N.E.2d at 401-402 ("[J]ust as the AFIS database also contains fingerprints of government employees and police officers, the Combined DNA Index System (CODIS) database contains several different indexes, not all of which are criminally based. The CODIS database includes the Forensic Index, containing DNA profiles from crime scene evidence; the Offender Index, containing DNA profiles of individuals convicted of felonies; the Missing Person Index, containing DNA records from individuals that have been reported missing; the Relatives of Missing Person Index, consisting of DNA records from the biological relatives of individuals reported missing; and the Unidentified Human (Remains) Index, containing DNA records from recovered living persons, e.g., children and others who cannot or will not identify themselves, and recovered dead persons whose identities are not known. ... In addition to the indexes listed above, the jurors, in the light of their own observations and experiences in life, could also infer that defendant's DNA profile might be contained in a state database for medical reasons, such as transplant recipients, blood donors or for genetic-testing

---

[22] Demonstrating the low likelihood the evidence related to the DNA database search would have been invariably viewed as evidence of Appellant's prior criminal record by the jury, even the experienced trial judge involved in Appellant's case did not believe the fact Appellant's DNA profile was included in the database necessarily meant Appellant had previously been arrested or convicted. (Tr. p. 321; R. p. 340).

purposes. Thus, contrary to the Applicant's contention, the conclusion that the use of the term CODIS in popular crime dramas to refer to the means of identifying suspects from a DNA database, without other information, argument or evidence that the singular source of the DNA was convicted criminals, is completely unwarranted."); see also Whatley v. State, 146 So. 3d 437, 466 (Ala. Crim. App. 2010) (holding "testimony of the mere existence of a defendant's DNA profile in the CODIS database does not '*per se*' imply the existence of a criminal history"). As a result, the potential for undue prejudice that could have resulted from the evidence related to the DNA database search was very minimal and did not substantially outweigh the evidence's high probative value. See United States v. Jenkins, 887 A.2d 1013, 1025, n. 2 (D.C. Cir. 2005) ("[C]onveying to the jury that the defendant was first identified through a search of an offender database has not been deemed so substantially prejudicial as to outweigh the probative value of such evidence.").

The ameliorating effect of the database testimony is reflected in the testimony of SLED Analyst Maryann Boehm. During her testimony, she indicated that SLED had a database which consisted of profiles of known individuals as well as profiles developed from evidence at the crime scene. Tr.p. 494; R.p. 513. She testified that if the item of evidence that she is testing is eligible to enter the database, she will put it in to see if there is a match with a known individual or crime scene. When asked if she was able to determine a match, defense counsel Madsen approached the Court for an off the record conference. . Agent Boehm then clarified that in September 2012 she was able to develop a profile that was entered into the database. She stated that following that

event, she was able to secure samples of DNA from the Applicant which had been collected from a buccal swab, State Exhibit 50. Tr.p. 495 - 498; R.p. 514 – 517. [23]

In addition, SLED Agent Rhonda Fields also testified, initially in camera, about the SLED DNA Database. Tr.p. 513-521; R.p. 532-540. She identified that when subjects are placed into the SLED database that thumbprints are taken and included in the database with the DNA profile. Counsel Madsen objected to admissibility of her testimony in front of the jury under SCRE Rules 401,402, and 403. Madsen indicated it was more prejudicial than probative. He contended that the thumbprint identification was not relevant and that there was no chain of custody shown on the sample. He further made a 404(b) and Rule 609 as improper evidence of a prior crime and was cumulative to the DNA evidence. He argued that someone else took the thumbprint and it was Lt. McClure who is not here. The State urged that under State v. Anderson, 386 S.C. 120, 128, 687 S.E.2d 35, 39 (2009) admission is similar to AFIS in analogy. Solicitor Mayes argued it was probative to establish how Patterson was initially developed as a suspect and what led Patterson to be put in the lineup. And the taking of the secondary DNA sample for the comparison. She urged this was a part of the link between the robbery and how he was developed as a suspect. She confirmed that she was not offering evidence as to who was in that database, or how people enter that database or the fact it contains convicted offenders. Tr.p. 523; R.p. 542. Judge Cooper overruled the objection, with the testimony limited as indicated. Id.

In Agent Fields's testimony before the jury, she testified that SLED had access to a DNA database. Tr.p. 524; R.p. 543. She indicated that in 2012 a DNA profile was developed from swabs and a black hat. At that point, defense counsel Madsen renewed his objection, which Judge Cooper

[23] According to the transcript, the buccal swab of the Applicant was taken on December 14, 2015 by West Columbia Detective Paige McCraw. The swabs were carried to SLED the same day. Tr.p. 425-429; R.p. 446-448. Also, Tr.p. 452-453, R.p. 471-472.

overruled. Tr.p. 525; R.p. 544. Agent Fields indicated the profile from the black hat and the suspect was entered into the SLED DNA database by Maryann Boehm and as a result a suspect was developed. Then, as a result, SLED sent a notification to the West Columbia Police Department to Investigator Bruce Wade on November 6, 2012 that the suspect was James Patterson. Tr.p. 525-526; R.p. 544-545. On cross-examination by counsel Madsen, Agent Fields confirmed that she did not send the letter, but it was sent by former SLED Agent David McClure. She further confirmed that she had found a mistake in the letter the day before (April 12, 2016).

Ineffective Assistance of Counsel Not Shown Related to CODIS or SLED DNA Database

This Court finds, on the basis the DNA evidence was that was actually presented at trial, the jury they would have understood that the DNA match evidence was developed from a buccal swab taken from the Applicant after the DNA profile had been developed off the black hat. This evidence before the jury did not indicate that Applicant's DNA was already in the SLED DNA database. It also did not indicate that he had a prior criminal history or record in the evidence presented to the jury. Rather than being deficient, counsel took reasonable steps in his earliest objections in the *in camera* proceeding to insure that the State would be limited in presenting testimony about CODIS or the Applicant's possible inclusion based upon any prior record. Further, counsel insured that the testimony before the jury would only reflect that any reference to the database would be connected to the SLED DNA database without any reference to whether Applicant's DNA was already in the database based upon a prior criminal record. Tr.p. 319-322; R.p. 338-341. (pretrial); Tr.p. 522-524; R.p. 541-542 (trial). The Applicant has failed to show to this Court any other steps that reasonable defense counsel would have done. Counsel was not deficient in failing to additionally object to the SLED DNA Database evidence presented by Agent Boehm.

Further, Sixth Amendment prejudice has not been shown since Applicant failed to show a reasonable probability that the result of the proceeding would have been different and result in a not guilty verdict had counsel addressed the CODIS database issue differently. He has not met that burden. This allegation must be denied.

Ineffective Assistance of Counsel in Allegedly Failing to Adequately Meet with Client.

This Court concludes as a matter of law that the Applicant has failed to prove deficient performance or prejudice related to Applicant's assertion at the hearing that counsel Madsen failed to meet with him sufficiently to discuss the case and his defense in preparation for the trial. This Court further finds as a fact, based upon counsel Madsen credible testimony that counsel met with the Applicant fourteen (14) times, went over the discovery with the Applicant and discussed his varying versions of his involvement and non-involvement in the case. This Court further finds that counsel retained an investigator to investigate Applicant's claims of working with the victim in an insurance scam, of working as an agent with the FBI and ATF, and pursued alleged leads for an alibi defense.

Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. Campbell v. Polk, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency); United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with his client twice before trial as long as counsel devoted sufficient time to insure an adequate defense

and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.).

South Carolina case law has established that even if Trial Counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter) ("First, there is no question that counsel met with [Applicant] on several occasions prior to the first trial. Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation.") Mere speculation and conjecture is insufficient to substantiate allegation that counsel's deficient performance was prejudicial. See Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008), abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

During the PCR hearing, the Applicant testified that counsel Rob Madsen met with him only three to four times. He claimed that counsel made mention of a case investigator and that he was investigating the case in their meetings, but failed to explain what was going on in his case. Applicant complained that he did not know the law and needed counsel's assistance in understanding his case. He complained that during the trial evidence was coming in that he had not heard about. He claimed that he wanted to see the video , the lineup and the video of the alleged incident.

Counsel Madsen testified, contrary to the Applicant's version, that he met with the Applicant fourteen (14) times during his representation, beginning on January 17, 2013. Counsel acknowledged that he went over the discovery with the Applicant. Counsel testified he received the discovery from the State on January 31, 2013 and specifically reviewed the discovery with him on May 5, 2013. However, the Applicant did not want a copy of the discovery. In the May 2013 meeting, counsel had not received the DNA evidence or results yet from the State. The DNA

evidence results were received and disclosed to the Applicant at later meeting. Counsel also indicated that at one meeting he met with the Applicant and went over the plea offer made by the State to plead to armed robbery straight up and dismiss the kidnapping charge on September 4 and face 10 to 30 years. Madsen stated that the Applicant rejected the offer at that time, claiming he did not do the crime at that time. Madsen stated in his meetings with the Applicant his versions varied from his involvement being an inside job for an insurance scam, a claim that he was working with ATF and the FBI, to a later version that he had an alibi. Counsel Madsen stated Applicant advised him about the alibi, it was very vague and he had an investigator attempt to follow-up on the information Applicant gave his without success and was unable to substantiate it.

This Court finds that counsel is credible as it relates to the number of meetings they had and that he reviewed the discovery in detail with the Applicant and discussed potential defenses, theories, and ultimately an unsubstantiated alibi. This Court must conclude that the Applicant's testimony in this allegation was not credible as set forth previously.[24]

In addition, the Applicant has failed to credibly show that there was any deficiency other than Applicant's speculation that more could have been done. "[C]riminal defense attorneys have a duty to conduct a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." 397 S.C. 226,235, 723 S.E.2d 610,615 (Ct. App. 2012), overruled on other grounds, Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). "Failure to conduct an independent investigation does

[24] In his initial allegation of ineffective assistance of counsel in his *pro se* application, Applicant alleged that counsel was ineffective in failing to request to view the video surveillance tape of victim Frank Mancine's viewing of the line-up on November 15, 2012. During the trial, counsel pointed out that the interview with Mancine on November 15, 2012 was recorded. Tr.p. 65; R.p. 84. The trial record reflects the video of the lineup interview of Mancine was not introduced into evidence at trial by either party. The Applicant has failed to show any deficiency of the part of counsel in failing to present the video, either in the pretrial hearing or trial before the jury.

not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 2535 (2003).

This Court concludes that the Applicant has failed to show any deficiency on the part of counsel's investigation based on counsel Madsen's credible testimony and a review of the trial record which supports counsel's knowledge and preparation in the case.

Ineffective Assistance in Failing to Challenge the Chain of Custody

In his *pro se* application and during his testimony, the Applicant claimed that counsel was ineffective in failing to challenge the chain of custody presented at trial. In particular, he speculated that in the application that the chain of custody related to the hat was deficient because the trial testimony did not include "the time frame" the hat was left in the West Columbia Evidence Repository after it was logged in nor any mention in the record when it was dropped off at SLED. He further contended that the evidence related to the two buccal swabs taken from the Applicant on December 14, 2015 did not include who Detective Paige McCraw left the swabs with at SLED and how long they remained at SLED.

The record supports that counsel Madsen initially objected to the chain of custody related to the hat. Tr.p. 276-277; R.p. 295-296. However, the trial judge overruled the objection and admitted State Exhibit 9 into evidence. In that earlier testimony, Investigator James Sullivan testified that that he picked up the hat after he photographed it at the scene. Tr.p. 274; R.p. 293. He stated that he placed it in a paper bag, filled out information on the bag and then sealed it. At

that point Detective Sullivan stated he placed it in his locked vault in his vehicle that only he has access to. He testified that he transported it to the West Columbia Police Department and logged it in to the West Columbia Evidence Room. He stated later he logged it and transported the sealed bag to SLED for further processing. Tr.p. 274-275; R.p. 293-294. Detective Sullivan described how he made the bag tamper-proof and identified the hat as what he recovered at the scene. Id.

Concerning the buccal swab of the Applicant, Detective Paige McCraw testified that she took the buccal swab of the Applicant on December 14, 2015 after a court hearing and gave the swab a tracking number and sealed the items to make them tamper-proof and transported them to SLED on that day. Tr.p. 427-428; R.p. 446-447. She declared the items were solely in her possession, custody and control that day until she took them to SLED for processing. Id. The State offered the packages of the swabs for identification as State exhibits 49 and 50. Tr.p. 429; R.p. 448.

The defense made an objection to the introduction at that time which was overruled. The State cited State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013) and State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). In addition, the State had indicated that the DNA swabs taken from the hat listed Detective Wade and Investigator Otterbacher on the chain of custody sheet. The state suggested it intended at that time to indicate who they were and what they did with the evidence. The State indicated that the swabs from the hat were actually done by SLED Agent Betty Butler and after they were swabbed by Butler, Investigator Sullivan picked them up and returned them to West Columbia Police Department and that the swabs from the hat were analyzed before being returned to SLED. Tr.p. 431-34; R. 450-453.

As to the DNA swabs from the hat, her records indicated in the chain of custody sheet that the date of collection of the hat was May 9, 2012, it was initially checked into the evidence custody

system on February 5, 2013 by Investigator Sullivan and logged into the system on February 7, 2013. Tr.p. 438-439; R.p. 457-458. Her records showed the next date that item was touched was on September 20, 2013 by Investigator Wade.

SLED Evidence Technician Jennifer Aycock testified that State Exhibit 9 (Item 1 at SLED) was received by SLED Technician Doris Yarborough from Sullivan on May 29, 2012. Counsel Madsen objected to foundation under Crawford v. Washington, which the court overruled. Tr.p. 450; R. 469.

SLED Technician Aycock further testified that after it was placed on Evidence Shelf 25, it was pulled off the shelf on June 15, 2012 and provided to SLED Forensic Technician Betty Butler. Tr.p. 450; R.p. 469. State 49 (DNA swab – hat, item 1.1) was entered as 1.1 on June19, 2012 and placed on DNA intake shelf on June 25, 2012 when it was returned to Nikki Perry Hughes. The item was subsequently taken off the shelf by SLED technician Patricia Crooks and transferred to SLED Analyst Maryann Boehm of the DNA Department. Tr.p. 451-452; R.p. 470-471.

Aycock further testified related to item 5 that it was submitted by Paige McCraw on December 14, 2015 to Aycock and she placed it in the DNA Intake shelf 86 on that date. Tr.p. 452; R.p. 471. Aycock testified the chain sheet indicated that it was retrieved by technician Jackie Davis from that shelf and transferred it to Maryann Boehn. She indicated that the notes indicated that the seal had not been broken or tampered with prior to the transfer. Tr.p. 453; R.p. 472.

Aycock confirmed that her report indicates that the hat swabs were produced from the hat by Betty Butler, not Investigator Sullivan Tr.p. 455; R.p. 474.

Betty Butler testified that she received, item 1, the fedora hat on June 19, 2012. Tr.p. 475; R.p. 494. Butler testified that from that item she produced a swab from the hat on June 19, 2012 which she placed in a sealed envelope on that date as item 1.1. Tr.p. 476-477; R.p. 495-496. Butler

indicated that she then provided it directly to Boehm for analysis. Tr.p. 478; R.p. 497. She stated that she had completed her testing of the hat once she collected the swabs, sealed item, put her initials and lab number on the hat and box and returned it to SLED evidence control, where it could be returned to West Columbia.

Maryann Boehn testified that she received item 1.1 from Betty Butler, which were in a heat sealed pouch. Tr.p. 490-491; R.p. 509-510. It did not indicate any evidence of tampering. Boehm stated she was only one who opened the pouch with the swab. She indicated that she took custody of the swab on September 12, 2012 to perform her analysis. Tr.p. 492-493; R.p. 511-512. She completed her analysis of the swab from the hat on September 16, 2012after comparing it to a swab taken from James Patterson. Tr.p. 497-498; R.p. 516-517. The State moved to introduce the State Exhibit 49 (DNA swab from hat) and State 50 (SNA buccal swabs). Tr.p. 498; R.p. 517. The defense renewed his earlier objections, which Judge Cooper overruled. Counsel renewed his objections on Tr.p. 529, 538, and 589; R.p. 548, 557, 608.

This Court must conclude that the Applicant has failed in his burden of proof related to the defense counsel's performance related to the chain of custody of the hat and the DNA swabs. Counsel made timely objections throughout the trial related to these items.[25] This court must find that he was not deficient in his performance. His allegation to the contrary must be dismissed.

---

[25] See State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." (quoting State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002))); State v. Hatcher, 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011) ("Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts."); State v. Joseph, 328 S.C. 352, 364, 491 S.E.2d 275, 281 (Ct. App. 1997) ("A party offering into evidence fungible items such as drugs or blood samples must establish a chain of custody as far as practicable."); State v. Taylor, 360 S.C. 18, 22-23, 598 S.E.2d 735, 737 (Ct. App. 2004) ("Where the analyzed substance has passed through several hands, the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis."); id. at 25, 598 S.E.2d at 738 ("[I]f the identity of each

Ineffective Assistance and Deceased Officer Chuck Bramlet.

Prior to trial West Columbia Crime Scene Investigator died on July 21, 2015. The record reveals that Bramlet was involved in the crime scene investigation in this matter. During the pretrial hearing, it was brought to the trial court's attention by the State concerning the original DNA samples from the Applicant that were taken at the initial Schmerber hearing on May 13, 2013. The State, in the pretrial hearing sought to remedy the loss of Bramlet to allow the taking of a new sample from the Applicant. The defense indicated it would object to the new DNA swabbing as a Fourth Amendment violation and indicated it would object to the use of the samples previously collected. R.p. 36-37. The trial court allowed the taking of the new samples after a hearing. Concluded the State had established probable cause to retake the sample from the Applicant. R.p. 50-51.

At the outset of the trial, the Applicant objected to the evidence seized from the search warrant because it was executed by Chuck Bramlet, the deceased officer, on November 19, 2012. Tr.p. 123. R.p. 142. The affiant on the warrant was not Bramlet, but Lt. Odom with the Richland County Sheriff's Department. This involved the search of the van pursuant to the search warrant and Bramlet's collection of items from inside the van. Tr.p. 123-124; R.p. 142-143. The defense objection was based upon "the Constitution and Section 17-13-40." The State, through Assistant Solicitor Bell, asserted that the warrant was initially drafted by Captain Wade of the West Columbia Police Department, but because the van was located at the time in Columbia, it was ultimately prepared and presented by Lt. Odom with Richland County to a Richland magistrate for

---

person in the chain handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion is shown in the admission, absent proof of tampering, bad faith, or ill-motive."); S.C. Dep't of Soc. Servs. v. Cochran, 364 S.C. 621, 629 n.1, 614 S.E.2d 642, 646 n.1 (2005) ("Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case.").

the warrant, along with providing supplemental information. Tr.p. 125; R.p. 144. The state urged the denial of the motion to suppress because Lt. Odom was present during the entire search and available to testify and the return to the search warrant was made timely on November 26, 2012. Tr.p. 126. Captain Joseph Odom testified at the pretrial hearing consistent with the proffer. Tr.p. 127- 143; R.p. 146-162. The defense urged suppression because under their assertion, the information given the magistrate was not based upon Lt. Odom's personal knowledge but on Bramlet's personal knowledge. The defense urged that any reference to Bramlet's statements about what he retrieved would be hearsay. After taking the matter under advisement, Tr.p. 152; R.p. 171, the trial court allowed the evidence from the search to be presented. Tr.p. 156-158, R. p. 175-177.

During trial, defense counsel Madsen made an objection to the evidence of the search coming in due to the unavailability of Bramlet. Tr.p. 392-393; R.p. 411-412. During trial Captain Odom acknowledged he was at the scene and present when the photographs were taken and fairly and accurately represent the way it looked on the day they were taken. During Captain Odom's testimony, the defense renewed his objection based upon hearsay and foundation. The trial judge admitted the evidence from the search and photographs, State Exhibits 39-48, into evidence over the defense objection. Tr.p. 404-405; R.p. 423-424. On cross-examination, the defense developed through Captain Odom that Chuck Bramlet was present with him and that Bramlet took the photographs and did everything. Odom also acknowledged that he did not recall every photograph, but he did recall the majority. Tr.p. 417; R.p. 436. On re-direct, Captain Odom acknowledged that he filled out the return to the search warrant which he noted the VIN number of the vehicle that

was searched. He acknowledged that the photos were taken during the search. Tr.p. 421-422; R.p. 440-441.[26]

This Court must conclude that counsel was not deficient in matters related to the unavailable testimony of the deceased crime scene investigator Chuck Bramlet. Counsel objected to the admission of any matters related to the search of the 1995 Plymouth Voyager van due to the deceased investigator's involvement in the preparation of the search warrant and his actions as the search was executed. Counsel renewed his objections on Tr.p. 529, 538, and 589; R.p. 548, 557, 608. The Applicant has failed to show any additional steps trial counsel could have taken to address or limit the impact of the deceased involvement in the case that any reasonable counsel would have done. His allegation to the contrary must be dismissed. This Court finds that counsel Madsen performed within the standard of competency demanded of lawyers practicing criminal law. The Applicant has failed in his burden of proof to show otherwise.

Counsel's Failure to object to alleged evidence that was not admitted into evidence – the victim's gun and the Plymouth Voyager Van.

In the *pro se* application, the Applicant alleged that counsel failed to object to portions of the opening and closing arguments of the State. He contended that the prosecutors were referring to evidence that was not admitted in the "abuse of discretion" portion of his allegations. In particular, the Applicant referred to Tr.p. 168 in the opening statement and pages 539 and 540 in

[26] There was also a brief reference at trial that Bramlett also advised Investigator Sullivan that the latent prints taken off the countertop at the jewelry store was of insufficient quality to submit to the database. However, it was determined that they would be retained for comparison purposes if a possible suspect was determined. Tr.p. 297, 316-317; R.p. 316, 335-336. No objection was made to this reference. However, later at trial, fingerprint expert Jim Hickman testified that two latent prints that Investigator Sullivan took from the jewelry store countertop on May 9, 2012, that latent print 1 was of insufficient quality to compare and latent print 2 did not belong to the Applicant. Tr.p. 462-464.; R.p. 481-484. Tit was determined that latent print 2 belonged to the mother of the owner of the store. Tr.p. 470; R.p. 489.

the closing statement of the prosecution. *Pro Se* Application, po. 16-19. He complains that the gun owned by the victim was never introduced into evidence and the White Plymouth Voyager van was not admitted into evidence. He essentially contends that had counsel objected the trial court could have allowed the jury to personally view the van at the Eagle One Towing Lot and further complains that the state was allowed to publish "illegal" photographs into evidence and allowed witnesses to testify about the van. *Pro Se* Application, p. 18. Similarly, Applicant contended that counsel should have objected to testimony from the victim, Frank Mancine about the gun which was never admitted into evidence. *Pro Se* Application, p. 19.

This Court finds that he has failed in his burden of proof to show either deficient performance or prejudice.

During the State's opening statement at page 168 (R.p. 187), Assistant Solicitor Bell made the following comment in describing the event which the Applicant challenges:

> Now after he stuffs all the gold in the sack, Bubba starts retreating out of the store, but Frank isn't totally unprepared. Fearing for himself, his mother, his customers, his store, he retrieves his own firearm and fires one shot at Bubba as he's leaving, but he misses and the gun jams. He clears the jam from the firearm and the pursues Mr. Patterson out of the building and as he comes out of the building and starts running into the direction that he saw the suspect run, he runs over the top of a hat, the same kind of hat that he saw the robber with. He then crosses the corner of the building and as he gets around the corner of the building he sees the same person who just robbed him at gunpoint hurriedly pulling an older model gray van or silver van out of the parking lot and heading away from him. In that instant, he fires one more shot and strikes the rear of the vehicle shattering out the back glass . Out of the ordinary.

Tr.p. 168, l. 8-24; R.p. 187.

During the State's closing argument by Deputy Solicitor Mayes, she made the following comments about the weapon of the victim:

> Again, he thought he had it all car just a block away. But the one thing that he wasn't banking on planned out was that the store owner, Frank Mancine, would respond when that weapon was pulled in his face and in the face of his customers,

> and Frank Mancine responded in self-defense because he fired a shot as James Patterson fled that store, and when he fired that shot, the Defendant took off running at full speed and that's what he wasn't banking on.

Tr.p. 539, l. 12-19; R.p. 558. Deputy Solicitor Mayes further argued:

> So he makes it up the block, gets in that van, the light gray van that Jennifer Hubbard saw him in, and then what happens? The back window gets shot out and the glass goes all the way into the roadway. So now we've got a van with no back window and a damaged back hatch and that, ladies and gentlemen, brings us to exactly where we are.

Tr.p. 540, l. 11-16; R.p. 559.

In State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975), the Supreme Court set forth the parameters of permissible prosecutorial argument. So long as the prosecutor stays within the record and its reasonable inferences, he may legitimately appeal to the jury to do their full duty. Id. at 92, 212 S.E.2d at 590. A solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony. State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976). A review of the closing argument is based upon the standard of "whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hawkins, 292 S.C. 418, 421, 357 S.E.2d 10, 12 (1987). Accord, State v. Caldwell, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990). See Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Alternatively, even if the solicitor's comments were improper, such comments do not automatically mandate reversal if they do not result in prejudice to the defendant. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999).

This Court concludes that trial counsel was not deficient in failing to object to the opening or closing statements to the jury. In the opening statement, the State asserted that the victim of the robbery used a weapon and fired at the Applicant. The State had a sound basis for the argument in anticipation of the testimony of Frank Mancine. As noted above, Mancine specifically testified about grabbing his own weapon and firing at the robber which was also shown to the jury in the surveillance video. Tr.p. 178-179, 184-185; R.p. 197-198, 203-204. Further, Mancine testified about firing the weapon at the white van as he chased after the perpetrator which shattered the window of the van. Tr.p. 192-194; R.p. 211-213.

This Court finds that counsel was not deficient in failing to object to these comments during the State's Arguments because they were reasonable inferences based upon the testimony in the record. His assertion to the contrary is without merit.

Further, the argument that defense counsel was deficient in not seeking a jury view of the Plymouth Voyager is equally without merit because a reasonable lawyer would not have done so. The evidence presented at trial involved reasonable testimony by Lt. Odom about his own viewing of the van and photographs of the van that were determined to be admissible. Counsel was under no constitutional duty to seek a jury view of the van, assuming arguendo that it was still located at the same location in the same condition as described in the evidence at trial. He has failed to show ineffective assistance by either deficient performance or prejudice. It must be denied.

Allegations of Ineffective Assistance of Appellate Counsel.

In his *pro se* application, the Applicant alleged four allegations related to ineffective assistance of appellate counsel. Prior to the hearing, Applicant's PCR counsel informed the Respondent and ultimately the Court, that the Applicant was not pursuing allegations in the initial application that appellate counsel Katherine H. Hudgins of the South Carolina Office of Appellate

Defense was ineffective under the Sixth Amendment. This Court concludes that the four grounds set forth in the *pro se* applicant related to the failure to raise on appeal, including competency to stand trial and the adequacy of the Blair hearing, rights to confrontation and chains of custody related to a lab report or the results of the lab report, and issues related to the absence of witness Chuck Bramlett and the DNA analysis were abandoned prior to the hearing. The claims of ineffective assistance of appellate counsel are dismissed for lack of prosecution.

Free-Standing Due Process and Confrontation Clause claims

In his *pro se* application, the Applicant also raised a series of free standing constitutional claims including an alleged violation of Due Process. These claims as alleged related to the State not making Chuck Bramlett available, yet allowing the defense to present evidence through Captain Odom that Bramlett did everything related to the search of the vehicle, that Jennifer Aycock testified that Nikki Perry Hughes and Doris Yarborough received evidence as part of the chain of custody without having them testify, and evidence about Investigator Sullivan picked up and transported the hat from the crime scene to SLED for further testing and questioned the sufficiency of the presentation as it relates to the time frame the hat was in the custody of the West Columbia Police Department, and that the DNA swabs taken from the Applicant by Detective McCraw did not mention who she let perform the swabs and did not indicate how long they remained at SLED. This free standing constitutional must be dismissed as not cognizable in this PCR proceeding.

Trial court error does not constitute an appropriate basis for the finding of ineffective assistance of counsel, and is not a cognizable claim for post-conviction relief. See Wolfe v. State, 326 S.C. 158, 162 n.2, 485 S.E.2d 367, 369 n.2 (1997). Direct appeal issues which could have been reviewed on appeal and were not objected to at trial or during guilty plea proceeding may

only be presented to support a claim of ineffective assistance of counsel, not as a separate ground for relief. Hyman v. State, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983). See Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (noting that allegations of trial court error are not cognizable on PCR); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) (finding that alleged trial errors and sufficiency of evidence are direct appeal issues that are not cognizable PCR claims); Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (same).

This Court finds that these free standing constitutional claims must be dismissed because PCR is not a substitute for a direct appeal.

Claims about the Trial Court's Abuse of Discretion.

In his *pro se* application, Section E, p. 15-19, the Applicant further raised claims about "abuse of discretion." The Applicant raised claims that the trial court abused its discretion in allowing the State to comment on evidence that was not admitted to the jury, citing the State's opening statement at Tr.p. 168 and the State's closing argument at Tr.p. 539 and 540. This was addressed above in the ineffective assistance of counsel claim related to the arguments of counsel. Alternately, the ground as abuse of discretion by the trial court must be denied pursuant to Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) (finding that alleged trial errors and sufficiency of evidence are direct appeal issues that are not cognizable PCR claims).

CONCLUSION

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

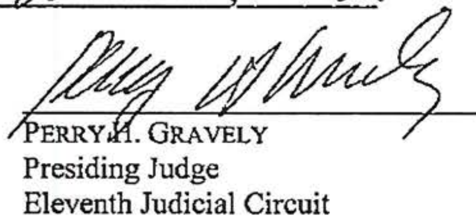
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty

(30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 27th **day of** March, 2025.



PERRY H. GRAVELY
Presiding Judge
Eleventh Judicial Circuit

Greenville, South Carolina