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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Charleston County
Court of Common Pleas

Honorable George M. McFaddin Jr., Circuit Court Judge

Case No.: 2019-CP-10-02108

VALENTINO M. HAYWARD, # 366107 ..... Appellant,

v.

THE STATE ..... Respondent.

NOTICE OF APPEAL

Valentino M. Hayward, #366107, appeals the order dated July 11, 2025, of the Honorable George M. McFaddin Jr. granting the State's Motion to Reconsider and denying his Post-Conviction Relief application. Appellant received written notice of entry of this order on July 30, 2025.

July 31, 2025

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Valentino M. Hayward, #366107, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2019–CP–10–02108 **ORDER GRANTING RESPONDENT'S MOTION TO RECONSIDER PURSUANT TO RULE 59(e), SCRCP, AND DENYING POST-CONVICTION RELIEF**

The matter before this Court is an action for post-conviction relief (PCR) application filed on April 23, 2019, by Valentino M. Hayward (Applicant). Respondent, the State of South Carolina, made its Return, dated October 28, 2019, requesting an evidentiary hearing. An evidentiary hearing was convened at the Charleston County Courthouse on February 10, 2023, before the Honorable George M. McFaddin, Jr. Applicant was present and represented by James K. Falk, Esquire (PCR Counsel). Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented Respondent. Applicant presented the testimony of Aaron C. Mayer (Trial Counsel). Applicant did not testify. Thereafter, by filed Order dated January 10, 2024, this Court granted Applicant post-conviction relief.

On January 25, 2024, Respondent filed a timely Motion to Reconsider Alter, or Amend Pursuant to Rule 59(e), SCRCP. On May 31, 2025, Applicant filed his Reply to Motion to Reconsider.

After thoroughly reviewing the record once again, along with motions, returns, the testimony and evidence presented at the evidentiary hearing, the evidentiary transcript, and the arguments made within the motion to reconsider, alter, or amend, this Court hereby grants Respondent's motion to reconsider the judgment, rescinds and vacates the order granting post-

conviction relief, and finds Applicant has failed to establish any constitutional deprivations entitling him to relief on any of the grounds raised, and accordingly, denies the application in full.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. In May 2014, the Charleston County Grand Jury indicted Applicant for murder (2014-GS-10-03322). Aaron C. Mayer[1] represented Applicant. Ninth Circuit Assistant Solicitors Benjamin Chad Simpson and Lauren Mulkey Frierson prosecuted the case.

On November 9, 2015, Applicant proceeded to a jury trial before the Honorable Deadra L. Jefferson. The jury found Applicant guilty as indicted. Judge Jefferson sentenced Applicant to thirty-eight (38) years imprisonment for murder.

Applicant filed a timely notice of appeal. On May 5, 2017, Appellate Defender Susan B. Hackett, of the Office of Appellate Defense, perfected the appeal by filing an Anders[2] brief. By order dated April 9, 2018, the Court of Appeals directed the parties to brief the issue of the admissibility of the two photographs from Applicant's cell phone. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Hayward, Op. No. 2019-UP-l 12 (S.C. Ct. App. filed March 20, 2019). The Remittitur was returned on April 5, 2019.

CURRENT ACTION BEFORE THIS COURT

In his initial PCR application, Applicant alleged he is being held in custody unlawfully based on the following:

1. Ineffective Assistance of Counsel

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[1] Mr. Mayer is currently suspended from the practice of law in South Carolina. See In Re Aaron Cole Mayer, Sup. Ct. Order 2018-08-24-01 (Decided August 24, 2018).
[2] Anders v. California, 386 U.S. 738 (1967).

On March 4, 2022, Applicant filed an amended PCR application with the following allegations:[3]

1. Trial Counsel made the following objections to but failed to preserve the record thereby making appellate review of the Court's decisions impossible.
   a. ~~Trial Counsel submitted proposed voir dire questions that the trial court did not use. The record reflects that Trial Counsel objected to the court's refusal to ask his proposed voir dire questions, 20, 23, 24, 26, and 28. However, by failing to submit his proposed voir dire as an exhibit, the trial court's decision was not preserved for review. (Record page 34)~~
   b. ~~Once the jury was empaneled, there was a bench conference (Record page 51). Other than the notation in the record, there is no record of the issues addressed at the bench conference. Trial Counsel should have challenged the State's preemptory strikes pursuant to Batson v Kentucky. If Trial Counsel raised the Batson issue during the bench conference he provided ineffective assistance of counsel by not ensuring that the record was preserved. If Trial Counsel did not make a Baston challenge during this bench conference, his failure to do so would amount to ineffective assistance of counsel.~~
   c. Trial Counsel failed to preserve his objection to Marian Campbell's testimony. (Record page 287 lines 11-19).
   d. Trial Counsel failed to preserve his objection to Richard Holmes's testimony, (record page 334 lines 24-25).
   e. ~~Trial Counsel abandoned his response to the State's objection to counsel's question to Richard Holmes regarding a polygraph test. (Record page 343 lines 1-1-25)~~
2. ~~Trial Counsel failed to object to the state's leading questions during its direct examination of Latoya Carson (Record page 206 line 5 through 210 line 5)~~
3. Trial Counsel was ineffective in failing to properly impeach Laytoya Carson's prior inconsistent statements as allowed under Rule 613 SCRE. (Record p. 214 line 22 - 25; page 215 line 5-11; page 221 lines 18-20).
4. Trial Counsel was ineffective in not challenging Latoya Carson's invocation of her 5th Amendment Right and by not having the witness proffer her testimony. (Record page 220 line 2-3).
5. Trial Counsel failed to object to prejudicial hearsay testimony from David Osborne. (Record 237 lines 9-15).
6. Trial Counsel was ineffective in failing to object to allowing Nada Kerstein testify to the results of a fingerprint analysis performed by Kathleen Butler. (See State v. McCray, 413 S.C. 76 (Ct. App. 2015); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); United States v. Palacios, 677 F.3d234 (4th Cir. 2012).

[3] At the outset of the hearing, PCR Counsel indicated that Applicant was abandoning allegations 1(a), 1(b), 1(e), 2, and 8. Testimony was only provided by Trial Counsel at the hearing. During Trial Counsel's testimony, PCR Counsel moved to amend and add the allegation that the Trial Counsel was ineffective for failing to review all of the jailhouse calls.

7. Trial Counsel was ineffective in failing to object to allowing James W Green to testify to the results of a firearms/ ballistics analysis performed by Ken Whittier. (See State v. McCray, 413 S.C. 76 (Ct. App. 2015); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); United States v, Palacios, 677 F.3d234 (4th Cir. 2012).
8. ~~Trial Counsel provided ineffective assistance of counsel by failing to move to suppress the results of the "digital dump" of Applicant's cell phone records including the introduction of State's exhibits 32 and 33.~~
9. Trial Counsel failed to review all the jailhouse calls entered at trial. (See fn. 3).

An evidentiary hearing was held on February 10, 2023, before the Honorable George M. McFaddin, Jr. During Trial Counsel's testimony, PCR Counsel moved to amend and add the allegation that the Trial Counsel was ineffective for failing to review all of the jailhouse calls.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[4] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v.

[4] S.C. Code Ann. §§ 17-27-10 to -160.

Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. 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).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). 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; accord 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)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When

analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n 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." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325

S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S.at 112.

Finally, 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 689–90. 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. Id. 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"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the

record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witness, which allowed the Court to evaluate and scrutinize his credibility. See, e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of fact and conclusions of law as required by § 17-27-80 of the South Carolina Code:

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Allegation 1c: Trial Counsel failed to preserve his objection to Marian Campbell's testimony. (Record page 287 lines 11-19).

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to preserve his objection to Marian Campbell's (Campbell) testimony at page 287, lines 11-19 of

the trial transcript. For the reasons set out below, this Court vacates its former ruling on this issue and now finds that Applicant failed to satisfy his burden of proving any prejudice with regard to this allegation.

In the order granting relief, this Court found Trial Counsel was "deficient for failing to place his objection on the record." (Order Granting PCR Relief p. 10). Additionally, this Court held that Applicant was prejudiced by Trial Counsel's alleged deficiency because:

> If counsel had properly placed his objection on the record, there is a reasonable probability appellate counsel would have raised the issue on direct appeal and the appellate court would have held the trial judge abused his discretion by admitting the evidence. Campbell was permitted to testify over objection that on the day of the shooting [Applicant] texted her and stated "he was talking to somebody about" robbing another person. This evidence was not relevant and was inadmissible hearsay. See Rule 401, SCRE, and Rule 802, SCRE. The error in its admission was not harmless because the testimony was in direct contradiction to the defense."

(Order Granting PCR Relief p. 10). This Court then concluded that it "cannot say beyond a reasonable doubt that its erroneous admission did not contribute to the verdict." (Order Granting PCR Relief p. 10).

Respondent argued that the Court's order granting relief erroneously found Applicant was prejudiced and further speculated that had it been preserved for appeal, the introduction of this evidence would have been reversed as an abuse of discretion.

The admission or exclusion of evidence is within the trial judge's sound discretion and is reversible only for an abuse of discretion. State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008); State v. Paean, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. State v. Pittman, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007); State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The relevance, materiality, and admissibility of evidence are matters within the trial

court's sound discretion, and a ruling will be disturbed only upon a showing of an abuse of discretion. State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999).

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Also, "[a]n 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." Strickland, 466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

When an issue was unpreserved for appellate review, a PCR court must examine whether Applicant suffered prejudice from the lack of preservation by analyzing the merits of the issue and considering whether Applicant has established that the outcome would have been different had the issue been preserved. See Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant' s claim that counsel failed to preserve an issue for appellate review by viewing "the trial court's ruling through

the same lens that would be applied on appeal . . . ") (emphasis added) (citation omitted). "The likelihood of a different result **must be substantial, not just conceivable**." Harrington v. Richter, 562 U.S. 86, 112 (2011) (emphasis added).

In this Court's order granting PCR relief, the Court cited York v. Conway Ford Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) to support its finding that the issue was not preserved. This Court's order granting PCR found, citing York, "An objection made during an off-the-record ***bench*** conference which is not made part of the record does not preserve the objection for appellate review." (Order Granting PCR p. 10) (emphasis added). However, after further review of the record, this Court finds that Trial Counsel did object and the trial judge held a bench conference on the objection. The following occurred with the trial court:

> Q. Did the defendant ever text you he was about to rob someone?
> A. Yes. He was – no, he didn't say he was about to. He said, I'm talk to somebody –
>
> MR. MAYER: Judge, objection.
> THE COURT: Basis?
> MR. MAYER: May we approach?
> (Bench conference was had; following proceedings were had in open court.)
> THE COURT: The objection is overruled. **It is relevant, probative. In addition to that, it is an admission against interest**. And you need to lay the appropriate foundation to this line of questioning as to time and place. You may proceed.

(Trial Tr. p. 287) (emphasis added).

After a careful review of the record and consideration of the arguments of the parties, this Court finds that while Trial Counsel did not place the precise reason for his objection on the record, the trial court's ruling on the objection made it apparent what the context of the objection was and therefore this objection was preserved. See Rule 103(a)(1), SCRE ("In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context."); see also State v.

Bowers, 428 S.C. 21, 832 S.E.2d 623 (Ct. App. 2019) ("The failure to raise specific grounds for an objection will not prevent the appellate court from addressing an issue when the record indicates that the trial court and the State understood the basis for the objection. State v. Hendricks, 408 S.C. 525, 531, 759 S.E.2d 434, 437 (Ct. App. 2014) (citing State v. Kromah, 401 S.C. 340, 353, 737 S.E.2d 490, 497 (2013)).").

Turning to whether the evidence was relevant and admissible. Rule 401, SCRE, provides that "[r]elevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The trial court held that the evidence Campbell testified to was relevant and probative. Rule 802, SCRE, provides "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Upon this Court's review of the record, this Court finds the trial court was correct when it found Campbell's testimony relevant and admissible under the hearsay exception of an admission against interest. The text messages Campbell testified to were from Applicant, and Campbell was the recipient of those text messages, which makes them admissible pursuant to Rule 801(d)(2), SCRE.

In summation, this Court finds 1) Campbell's testimony was relevant and probative; 2) Campbell's testimony was admissible as an admission against interest; and 3) the issue was preserved for appellate review and would not have been reversed on appeal. Thus, Applicant has failed to prove how he was prejudiced when this was not hearsay; it was admissible under Rule 801(d)(2), SCRE, and it was properly preserved for appeal, but would not have been reversed had it been raised on appeal.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1d: Trial Counsel failed to preserve his objection to Richard Holmes's testimony, (Record page 334 lines 24-25).

Applicant briefly addressed this allegation on direct examination of Trial Counsel; however, instead of addressing the merits of the allegation, PCR Counsel stated on the record that "We're not going to go any further" and moved on. Based on the record, this Court deems this allegation abandoned. "When a party provides no legal authority regarding a particular argument, the argument is abandoned, and the court will not address the merits of the issue." Palmer v. State, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (citing State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011).

Allegation 3: Trial Counsel was ineffective in failing to properly impeach Latoya Carson's prior inconsistent statements as allowed under Rule 613 SCRE. (Record p. 214 line 22-25; page 215 line 5-11; page 221 lines 18-20).

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to properly impeach Latoya Carson's prior inconsistent statements as allowed under Rule 613 SCRE. (R. p. 214 ll. 22-25; p. 215 ll. 5-11; p. 221 ll. 18-20). For the reasons set out below, this Court vacates its former ruling on this issue and now finds that Applicant failed to satisfy his burden of proving any deficiency by Trial Counsel and any resulting prejudice from the alleged deficiency with regard to this allegation.

Upon review, trial counsel's actions are given great deference because "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. Furthermore, the court in Strickland makes clear that "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. In addition to this approach against second-guessing the tactics of counsel, where there exists an articulable reason for employing their strategy, "such conduct is not ineffective assistance of counsel." Whitehead v. State. 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977). "Impeachment tactics are generally held to be matters of trial strategy which are to be afforded deference." Gustave v. United States, 627 F.2d 901, 906 (9th Cir. 1980).

In the order granting relief, this Court found Trial Counsel "was ineffective for failing to properly impeach Latoya Carson with her prior inconsistent statements as allowed pursuant to Rule 613, SCRE." (Order Granting PCR Relief p. 10). This Court further found, "[Trial] Counsel's knowledge of the Rules of Evidence was not within the range of competence for a criminal defense attorney and rendered his performance deficient. [Trial] Counsel's deficient performance prejudiced [Applicant] because Carson's credibility was crucial to the state's case against [Applicant], and counsel failed to properly impeach her credibility in front of the jury. If the jury had learned Carson provided inconsistent testimony, there is a reasonable probability the outcome of [Applicant]'s trial would have been different." (Order Granting PCR Relief p. 12). .

At the evidentiary hearing on direct examination of Trial Counsel, the following colloquy occurred:

A. Yes, sir. Let's just talk briefly about Latoya Carson's testimony.
Q. I'll bring up Page 220. Look at Page 214, Lines 22 to 25.
A. Yes, sir. Thank you. Yes, sir. I've got it.
Q. All right. So you were trying to -- that's actually on your cross-examination, right?
A. Let me just double-check. Yes, sir. This is during my cross. Yes, sir.

Q. All right. And so had she testified to something different than what she reported on the police reports?
A. Oh, boy. Possibly.
Q. It looks like you're trying to -- it looks like you said there was a prior statement made.
A. It's entirely possible. I remember I was trying to nail her down on this whole, you know, supposedly there was a call made and this kind of thing.
Q. So you were trying to assert that she was being, she was providing conflicting testimony or inconsistent testimony?
A. I think that's right. Yes, sir.

(PCR Tr. pp. 23-24).

On cross-examination, the following colloquy occurred:

Q. So let's move on to Number 3. You were ineffective for properly, or for failing to properly, impeach Latoya Carson's inconsistent statements. And that's on Page 214.
A. Okay. I've got 214 here.
Q. And that's going to be Line 22 to 25.
A. Yes, sir. I see it.
Q. And you are answering these, if you could just skim through this through Page 216, I believe his allegation is all the way up to 221.
A. Yeah. I'm laying the groundwork to impeach her. That's right. And then we had another binge conference based on Mr. Simpson's objection, and then the judge is telling me how to impeach a witness but didn't have prior testimony from her. It was just this -- it was -- it was just this police report, I think. So I don't know if it even would have been proper for impeachment. I don't know. I hadn't practiced law in a while, so I'm a little rusty on the rules here.

(PCR Tr. pp. 26-27).

As an initial matter, this Court finds that it erred in finding "Trial [C]ounsel admitted that the judge told him how to properly impeach the witness, that he did not know how to impeach the witness at the time, and that he was a little rusty on the rules." (Order Granting PCR p. 12). After thoroughly reviewing the record, this Court finds Trial Counsel did not testify that he did not know how to impeach a witness; instead, Trial Counsel answered the question as he read what was happening at trial. This Court further finds Trial Counsel was referring to his knowledge of the Rules of Evidence at the evidentiary hearing and not at trial.

Furthermore, the record provides that Trial Counsel did impeach Carson with her prior inconsistent statements during the following exchange at trial:

> Q: Do you recall telling the police that the person who walked up to the car had on a short-sleeved shirt?
> A: No.
> Q: You told the police it was a dark shirt, but you said it was short sleeved. You don't recall doing that??
> A: No.
> Q: And you told police that whoever walked up put their left hand on the car; do you recall doing that?
> A: I don't know exactly if I said which hand it was. I just know that he walked up on the passenger side and touched the car, like, and leaned in.
> Q: When your memory was a lot fresher?
> A: Yeah. My memory was fresher, but I had a lot of thoughts going through my head.
> Q: But if you had said at the time it was a left hand, there wouldn't be any reason to think that was wrong?
> MR. SIMPSON: May we approach?
>
> (Bench conference was had; following proceedings were held in open court.)
>
> THE COURT: Objection is withdrawn, you may proceed. And before you can impeach the witness, you need to ask the exact question and give her the opportunity to admit or deny the statement to establish that it is inconsistent.

(Trial Tr. p. 214, ll. 22-15; p. 215, ll. 1-25, p. 216, ll. 1-4).

> Q: Okay. At some point when you were being interviewed by the police, you and the officer went through the details of these calls and you guys came up with a time frame, right?
> A: Yeah, because I didn't know exactly what time. I couldn't give him any times, but by me being on, that chat site and it being prerecorded, the time that I mentioned that I heard the gunshot, it was all prerecorded. You could play it back and hear it and see the time.

(Trial Tr. p. 217, ll. 9-18).

> Q: So on the night that this happened with Chucky, isn't it true that on the way there it was you who was giving him directions?
> A: No.
> Q: And it was you who was on the phone setting up someone to meet you there?
> A: No.
> Q: And that's all because of some kind of outside beef that you guys were involved in?

A: No.
Q: Somebody named Raphael Ward'?
A: No.
Q: Raphael Ward being a friend of yours'?
A: I don't even know who that is.
Q: So you've lied to the cops before and you lied to them again on this night, didn't you?
A: No.
Q: But there's nobody else who can say whether Chucky was getting directions from somebody on the phone or getting directions from you'?
A: No.
Q: We just have to take your word for it; huh'? Is that right'?
A: I'm pretty sure his phone records show who he been on the phone with and the calls were made and placed to somebody within the time frame, so his phone can say. I'm the only person -that I can say that I was in the car when he was on the phone with somebody getting directions, yes.
MR. Mayer: Court's indulgence?
BY MR. Mayer:
Q: Do you recall giving a recorded statement to the police?
A: I guess.
MR. Mayer: Okay. No further questions.

(Trial Tr. p. 220, ll. 12-25; p. 221, ll. 1-22).

Further, Carson's credibility was already in question at the time of her testimony, as was highlighted during Trial Counsel's cross-examination of the witness. This fact was again noted by Trial Counsel's testimony during Applicant's PCR hearing. Trial Counsel explained the issue of credibility he saw pertaining to Carson's testimony as follows:

> ...[I]t's one thing, right, to hear it from a woman who was accused of murder herself to say, well, you know, I think he was on the phone and well, might have been the other hand, you know, there were holes in her-- there were potential holes in her story that I wanted to exploit....

(PCR Tr. p. 28).

Moreover, Carson was questioned about issues regarding her credibility during direct (Trial Tr. p. 209) and cross-examination (Trial Tr. p. 213) of Applicant's trial. Accordingly, the Court's holding that, because Carson's credibility was crucial to the State's case, "If the jury had learned

Carson provided inconsistent testimony, there is a reasonable probability the outcome of Hayward's trial would have been different," [5] is not supported by the record.

This Court finds the record provides that Trial Counsel did cross-examine Carson on her inconsistent statements in accordance with Rule 613(a), SCRE. Thereby presenting to the jury that Carson had previously made inconsistent statements. Trial Counsel's cross-examination of Carson concerning her prior statements to the police provided the jury the opportunity to observe the declarant and make a determination on the credibility of the witness on that point. Thus, Trial Counsel cannot be found deficient.

Lastly, Applicant has failed to prove any prejudice from the alleged deficiency, where Applicant failed to present evidence of what information would have additionally been gained from impeaching Carson with her prior inconsistent statements to police. Notably, those statements were not presented to this Court. Therefore, Applicant cannot establish that Trial Counsel's alleged deficient representation prejudiced him in accordance with the requirements of Strickland. Thus, whether impeaching Campbell's testimony would have changed the trial's outcome is mere speculation. See Clark, 315 S.C. at 388, 434 S.E.2d at 267 (concluding pure conjecture fails to establish prejudice).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

[5] Order Granting PCR Relief p. 12.

Allegation 4: **Trial Counsel was ineffective in not challenging Latoya Carson's invocation of her 5th Amendment Right and by not having the witness proffer her testimony. (Record page 220 line 2-3).**

Applicant alleged Trial Counsel's representation was constitutionally ineffective for not challenging Latoya Carson's invocation of her 5th Amendment Right and by not having the witness proffer her testimony. (R. p. 220, ll. 2-3). For the reasons set out below, this Court vacates its former ruling on this issue and now finds that Applicant failed to satisfy his burden of proving any deficiency by Trial Counsel and any resulting prejudice from the alleged deficiency with regard to this allegation.

Both the United States Constitution and the South Carolina Constitution provide that no person shall "be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; S.C. Const. art. I, § 12. Further, "[n]o person shall be required to answer any question tending to incriminate himself." S.C. Code Ann. § 19-11-80 (2014). The Supreme Court of South Carolina "has explained that the Fifth Amendment is an assurance that an individual will not be compelled to produce evidence or information which may be used against him in a later criminal proceeding." State v. Lawrence, 439 S.C. 611, 617, 889 S.E.2d 557, 561 (2023) (citing Grosshuesch v. Cramer, 377 S.C. 12, 22, 659 S.E.2d 112, 117 (2008) (internal quotation marks omitted). Further, the privilege extends not only beyond incriminating answers or information but also "to answers furnishing a link in the chain of evidence needed to prosecute an individual." Id. (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)).

The protections of the Fifth Amendment are not limitless: "[I]t is well-settled that an invocation of the privilege is confined to instances where a person has reasonable cause to apprehend danger from his answer." Id. (citing Hoffman, 341 U.S. at 486). Moreover, a trial court is limited to compel a person's testimony if it is "perfectly clear" the testimony will not result in

criminal liability, and the testimony "cannot possibly have [a] tendency to incriminate." Hoffman, 341 U.S. at 486 (internal quotation marks omitted). Furthermore, the Fifth Amendment privilege remains applicable not just during an individual's own criminal trial but during "any other proceeding, civil or criminal, formal or informal," in which the testimony or answers being sought from the individual could conceivably be self-incriminating in some way. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

When confronted with a witness's invocation of the privilege, the trial judge is tasked with determining whether the witness's silence is justified. Hoffman, 341 U.S. at 486. In making that determination, the trial judge must generally consider and answer the following two questions: (1) whether the information is incriminating in nature; and (2) whether there is a sufficient possibility of criminal prosecution to trigger the privilege. Grosshuesch, 377 S.C. at 23, 659 S.E.2d at 117; see United States v. Sharp, 920 F.2d 1167, 1170 (4th Cir. 1990) (explaining there are "essentially two things" for a trial judge to consider when analyzing whether a sufficient hazard of incrimination exists to justify an invocation of the privilege against self-incrimination).

In the order granting PCR, this Court found Trial Counsel "was ineffective for failing to challenge Latoya Carson's invocation of her Fifth Amendment right and by not proffering her testimony." (Order Granting PCR Relief p. 12). This Court further found that "Trial [C]ounsel should have requested to proffer Carson's testimony and allowed the trial court to determine on a question-by-question basis whether Carson could assert the privilege. See State v. Lawrence, 439 S.C. 611, 889 S.E.2d 557 (2023). [Applicant] was prejudiced by [T]rial [C]ounsel's deficient performance because Carson was a crucial witness for the state, and her excluded testimony could have negatively impacted her credibility." (Order Granting PCR Relief p. 13).

At trial, the relevant testimony referenced by this Court's order took place between Trial Counsel and Carson as follows:

> Q: Now, this murder that you're currently in jail for, that you're accused of, who was the decedent in that case?
> A: I invoke my right, the Fifth Amendment. I don't want to talk about my case.
> Q: Somebody named Happy, though, right?
>
> THE COURT: She's invoked her right. You need to move on to your next question.
>
> BY MR. MAYER:
> Q: Are you aware that that person was Chucky's best friend?
> A: I'm invoking my right. I don't want to speak about my case.

(Trial Tr. p. 219, ll. 24-25; p. 220, ll. 1-11).

After careful reconsideration, this Court finds the requirement of Trial Counsel to request a proffer of Carson's testimony and determine on a question-by-question basis whether Carson could assert the privilege was not warranted because Carson did not assert a "blanket" invocation of the Fifth Amendment, but instead only invoked the Fifth Amendment where it was "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." See Hoffman, 341 U.S. at 486–87.

Here, Carson faced a real risk of self-incrimination if compelled to provide the requested substantive testimony or answers about the incident that led to the murder charges for which she had been indicted, as she was awaiting trial on those pending criminal charges. As the Solicitor (Trial Tr. p. 210) and Trial Counsel (Trial Tr. pp. 219-220) referenced during direct and cross-examination of Carson, she was charged with, incarcerated for, and awaiting trial on her indictment of murder in a separate case. Accordingly, Carson only invoked the Fifth Amendment on those questions which sought an analysis of the substantive issues regarding her pending charges. See Lawrence, 439 S.C. 611, 889 S.E.2d 557 (2023).

Under the circumstances, Carson could not legally be compelled in any proceeding to provide substantive testimony or answers about what occurred during the incident that led to her criminal charges due to the obvious potential for such information to be self-incriminating. Therefore, when the trial judge correctly informed Trial Counsel to "move on to [his] next question" (Trial Tr. p. 220) following Carson's invocation, doing so was reasonable. Carson's invocation of the Fifth Amendment was proper under these circumstances, as it was not perfectly clear her testimony or answers could not possibly have a tendency to be self-incriminating. Trial Counsel did not render deficient representation by failing to proffer Carson's testimony as she was awaiting trial on the charges at the time of Applicant's trial.

Further, pursuant to the requirements of invoking the Fifth Amendment in this context, the witness only refused to answer those questions referencing her pending murder charges, where she faced a significant risk of self-incrimination in those matters. See Hoffman, 341 U.S. at 486–87, 71 ("To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."); State v. McGuire, 272 S.C. 547, 550–51, 253 S.E.2d 103, 105 (1979) ("[I]n any case, it is well settled that a witness who is not also a defendant can invoke that privilege only after the incriminating question has been put.").

Additionally, even if Trial Counsel requested an *in-camera* hearing to proffer Carson's testimony, Applicant's desire for Carson to answer specific questions could not trump Carson's constitutional right not to be compelled to incriminate herself. See United States v. Mabrook, 301 F.3d 503, 506 (7th Cir. 2002) (emphasizing a defendant's constitutional right to compulsory process does *not* trump a witness's constitutional right against self-incrimination). Critically, that

fact is "one consequence" of the constitutional privilege against self-incrimination, which is of fundamental importance to our country's justice system.

Lastly, Applicant did not call Carson as a witness at the PCR hearing and provided no evidence of what Carson's testimony would have been. Applicant provided nothing about what information could have been gained through Carson's potential answers. Therefore, Applicant cannot establish that Trial Counsel's alleged deficient representation prejudiced him in accordance with the requirements of Strickland. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (An 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 from the witness's failure to testify at trial.).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 5: Trial Counsel failed to object to prejudicial hearsay testimony from David Osborne. (Record 237 lines 9 -15).

Applicant alleged Trial Counsel's representation was constitutionally deficient for failing to object to prejudicial hearsay testimony from David Osborne. (R. p. 237, ll. 9-15). For the reasons set out below, this Court vacates its former ruling on this issue and now finds that Applicant failed to satisfy his burden of proving any deficiency by Trial Counsel and any resulting prejudice from the alleged deficiency with regard to this allegation.

In the order granting PCR, this Court found Trial Counsel was ineffective for failing to object to prejudicial hearsay testimony from David Osborne (Osborne). (Order Granting PCR Relief p. 13). The Court's order granting PCR further held that "Osborne's testimony was inadmissible hearsay pursuant to Rule 802, SCRE, and trial counsel was deficient for failing to

object. The State sought to admit Osborne's testimony for the truth of the matter asserted. More specifically, it was used by the state to show a person spoke to the decedent shortly before his death and gave him directions to a location where he was ultimately shot and killed. Accordingly, if counsel had properly objected, there is a reasonable probability the trial judge would have sustained the objection and excluded the inadmissible hearsay testimony. This Court further finds Hayward was prejudiced by counsel's deficient performance. Trial counsel admitted Osborne's testimony bolstered and vouched for Carson's credibility. Osborne's testimony was also used by the State to establish Hayward's involvement in the murder as the state later alleged Hayward was the person on the other line giving the decedent directions." (Order Granting PCR Relief p. 14). However, after a thorough review of the record and arguments by counsel, this Court finds that Osborne's testimony was not inadmissible hearsay and was admissible under Rule 803(1), SCRE, and this Court vacates and reverses its ruling and denies relief on this allegation.

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Also, "[a]n 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." Strickland,

466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

The relevant testimony at trial occurred between the Solicitor and Osborne as follows:

> Q: And on December 11th of 2013, how did that involvement come to be?
> A: I was off, I got a phone call stating that we'd had a shooting in the Ardmore subdivision, it was possibly going to end up being a murder. I responded to the scene. While on the way, I started trying to figure out what our personnel was like, manpower issues, who we would need to call out to help with the investigation.
> Q: And so you did go to the scene that night?
> A: I did.
> Q: And, again, you were the supervisor. You were sort of running the investigative wing of this investigation at the time?
> A: Yes.
> Q: Were you in your role as a supervisor, were you briefed or apprised of the statements given by Latoya Carson?
> A: Yes, I was.
> Q: And where -- as an investigator, where did that information lead you?
> A: It was my understanding when I got there that Latoya was with the victim. The victim had -- was speaking on the phone prior to the murder. The person that he was speaking to was directing him, giving him turn-by-turn directions to a location that he would end up being shot and killed. So my main focus at that point was to try to identify the number, then the person, that the victim was speaking to just prior to his death.

(Trial Tr. p. 236, ll. 12-25; p. 237, ll. 1-18).

Hearsay is a statement made by someone other than the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. See Rule 801(c), SCRE. In the instant case, this Court finds Osborne was not reiterating a statement made to him by any other party in his testimony. Instead, Osborne testified to his understanding of the events in question when he led the investigation into this matter and how that understanding influenced his areas of focus at that point. Osborne's testimony was permissible under Rule 803(1), SCRE,

as an exception to the hearsay rule. Under Rule 803(1), SCRE, a statement describing or explaining an event or condition is admissible if "made while the declarant was perceiving the event or immediately thereafter." As the statement was permissible, Trial Counsel had no legal basis to object to Osborne's statement. Trial Counsel cannot be deficient for failure to object when there is no legal basis for the objection.

Further, this Court finds that even if Osborne's statement had been hearsay, the result of the proceeding would not have been different. This case was not merely a circumstantial evidence case—this case had incontrovertible DNA and palm print evidence directly linking Applicant to the murder.

Additionally, this Court find that the testimony did not bolster and vouch for Carson's credibility and Applicant has failed to prove any prejudice flowing from the alleged deficiency. See State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001) (improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a jury supports the testimony.). Osborne's statements do not amount to bolstering Carson's credibility as they do not convey to the jury the credibility of the State's witnesses based upon the prosecutor's personal knowledge or information outside of the evidence presented at trial.

At the time that Osborne rendered this testimony, Carson herself had already stated this same version of events. (Trial Tr. pp. 190-209). Additionally, Osborne testified that the victim's phone records had also been analyzed to show that the victim had been on the phone for approximately eleven minutes before his murder with an individual under the contact name "Tino." (Trial Tr. pp. 241-243). Therefore, Applicant's involvement in the case had been established

through the aforementioned testimony and by evidence, including but not limited to Applicant's handprint on the hood of the victim's car and his DNA, which was positively identified.

Accordingly, for the reasons set forth *supra*, this Court vacates and reverses its prior ruling on this issue and finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 6: **Trial Counsel was ineffective in failing to object to allowing Nada Kerstein testify to the results of a fingerprint analysis performed by Kathleen Butler. (See State v. McCray, 413 S.C. 76 (Ct. App. 2015); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); United States v. Palacios, 677 F.3d234 (4th Cir. 2012).**

Allegation 7: **Trial Counsel was ineffective in failing to object to allowing James W. Green testify to the results of a fire arms/ ballistics analysis performed by Ken Whittier. (See State v. McCray, 413 S.C. 76 (Ct. App. 2015); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); United States v. Palacios, 677 F.3d234 (4th Cir. 2012).**

Applicant alleged Trial Counsel's representation was constitutionally deficient for failing to object to Nada Kerstein testifying to the results of the fingerprint analysis performed by Kathleen Butler and James W. Green testifying to the ballistics analysis performed by Ken Whittier. For the reasons set out below, this Court vacates its former ruling on this issue and now finds that Applicant failed to satisfy his burden of proving any deficiency by Trial Counsel and any resulting prejudice from the alleged deficiency with regard to these allegations.

In Brewer, the South Carolina Supreme Court found that the pathologist who testified from another expert's report and findings of opioid pain medication in a cup when the pathologist did not perform the analysis violated the right of confrontation provided by the Sixth Amendment. In essence, "the Confrontation Clause mandates that an individual who actually performed the

forensic testing be subject to cross-examination." State v. Brewer, 438 S.C. 37, 55, 882 S.E.2d 156, 165 (2022).

In McCray, the South Carolina Court of Appeals held that a DNA expert who peer-reviewed another expert's report but did not conduct the DNA testing could not testify to the other expert's report because he "did not offer any independent opinions regarding the results of the tests or produce an original product that could be tested through cross-examination." State v. McCray, 413 S.C. 76, 90-91, 773 S.E.2d 914, 922 (S.C. Ct. App. 2015).

In Palacios, the Fourth Circuit Court of Appeals explained that "[t]he touchstone for determining whether an expert is giving an independent judgment or merely acting as a transmitter for testimonial hearsay is whether an expert is applying his training and expertise to the sources before him, thereby producing an original product that can be tested through cross-examination." United States v. Palacios, 677 F.3d 234, 243 (4th Cir. 2012) (quoting United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009)) (internal quotation marks omitted).

Nada Kerstein's Testimony Regarding the Print Analysis

At trial, Nada Kerstein (Kerstein) testified in her capacity as a latent prints examiner with the City of Charleston Police Department. Kerstein explained to the trial court what peer review is and that the body of another expert's work is looked at to ensure "that the information is correct, that [the] reports are correct, that [the] worksheets are correct, that the information that [is being put] out is correct, that [the] conclusions are in line." (Trial Tr. p. 452). Kerstein testified that her recently retired co-worker Kathleen Butler (Butler) had originally done the print analysis. (Trial Tr. p. 452). Kerstein then testified to the following:

Q: In the present case, however, did you peer review her work?
A: Yes, I did.
Q: And if we look at the reports in this case, will we see your signature?
A: No.

Q: Whose signature will we see?
A: Well two of the reports are signed by Kathleen, **one of the reports was signed by me.**
Q: Okay. And one signed by Kathleen, can you testify today that you looked at the same things she did?
A: Yes. I was the verifier for Kathleen's envelopes that she- worked on.
Q: And did you do the same — would you have done the same analysis that she did?
A: Yes.
Q: And you came to the same conclusions that she did?
A: Yes.
Q: And so you have personal knowledge of the work done in this case?
A: Yes.
Q: And you, in fact, repeated that?
A: Yes, I did.
Q: Okay. Ms. Kerstein, I'm handing you what's been marked as State's Exhibit 18.

. . . .

Q: Take a moment and look at that envelope and review that item.

. . . .

Q: Have you had a moment with State's Exhibit 18?
A: Yes.
Q: Do you recognize that item?
A: Yes.
Q: And what is that item?
A: This is the latent print card that was in envelope number 2 on case number 1320144.
Q: Is that the case we're here on today?
A: Yes.
Q: Who submitted that item to your lab?
A: Jennifer Wooley.
Q: And how is it described in that submission?
A: You want to know what she wrote on the note card?
Q: Yes.
A: TMobile cell phone 301.
Q: And is that a latent lift card?
A: Yes, it is.
Q: Did you analyze that lift?
A: Yes, I did.
Q: What were your conclusions?
A: Latent fingerprint A was identified to the number one finger, which is the right thumb of the ten-print card bearing the name of Valentino Hayward.

. . . .

Q: Ms. Kerstein, I'm handing you what was entered as State's Exhibit 24.
A: I need the scissors again.
Q: Do you recognize those items?
A: Yes, I do.
Q: And what are they? '
A: These are the five latent lift cards that were submitted in envelope 3 on case 1320144.
Q: Is that the case we're here about today?
A: Yes.
Q: And who submitted those cards to you?
A: Mary Phillips.
Q: And I would like to ask you about the card containing the label, print one.
A: Okay.
Q: Can you locate that card?
A: Yes.
Q: Did you analyze that card?
A: Yes, I did.
Q: Describe your conclusions in that analysis to the jury.
A: Do you want everything?
Q: Sure.
A: Latent lift B was identified to the right palm of the ten-print card bearing the name Valentino Hayward. Latent lift A and C were identified to the eight and nine finger of the ten-print card bearing the name of Anna Dobson.

(Trial Tr. pp. 453-457) (emphasis added).

Here, the record conclusively provides that Kerstein had personal knowledge of the work done because she performed the work herself to confirm that Butler's findings were correct. Unlike Brewer and McCray, Kerstein's testimony was subject to cross-examination based on her own findings because she repeated the tests, which satisfied the touchstone test outlined in Palacio. Notably, on cross-examination at trial, the following occurred:

Q: So you're not the person who did the full analysis on these, is that correct?
A: It was not my original case. I was the verifier on the case which means I repeated all of the steps, the analysis, the comparison, and the evaluation. And it also means that I reviewed her report, I reviewed her worksheet, so I reviewed the entire body of her work.

. . . .

Q: Do you recall or do you have knowledge of whether Valentino Hayward's fingerprints are of the arch variety, the loop variety, or the whirl variety?
A: If I can look at my notes, I can look at what I used as the ten-print card.
Q: Do you have them there?
A: Yes, I do.
Q: Please.
A: He has a combination of loops and whirls.

(Trial Tr. pp. 458-459; p. 462).

The record before this Court provides that Kerstein repeated the tests that Butler performed—compared the results—and came to her own conclusions. Also, Trial Counsel had the opportunity to cross-examine Kerstein on her knowledge of the analysis she conducted. Based upon the record before this Court, this Court finds Applicant has failed in his burden of proving Trial Counsel was deficient for failing to object to the testimony of Kerstein when her testimony is remarkably clear that she performed the analysis of the prints herself, she wrote her own report, and she did not just merely testify from another expert's report. This Court further finds from the record that Kerstein's testimony did not violate the Confrontation Clause of the Sixth Amendment. Therefore, any objection by Trial Counsel would have been non-meritorious because there was no basis for an objection.

Accordingly, for the reasons set forth *supra*, this Court vacates and reverses its prior ruling on this issue and finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

James Green's Expert Ballistics Testimony

At trial, James Green (Green) testified in his capacity as a ballistics expert with the South Carolina Law Enforcement Department. Green testified that his co-worker, Kenneth Whitler (Whitler), had retired about a year prior to the trial. (Trial Tr. p. 579). Green explained the peer review process in the following colloquy:

Q: Can you explain to the jury -- we've had a bit of this, it's kind of a theme we have going, but explain what peer review is and why it's important in any scientific endeavor?
A: Peer review is basically the fact that if I do something, somebody can come behind me and replicate what I do. That's one of the hallmarks of science is reproducibility and can be replicated. At the SLED Lab, particularly the firearms department, we have a 100 percent peer review or micro verification policy. That means for any report that's given out to a community agency, before any phone calls are made, if it's a rush case sometimes the investigators call and say, we can't wait for the report, we need to know the answer now. Before any of that information can be given out, another second court qualified firearms examiner comes in and looks at the evidence and — and — like I would go to Ken if he was still there and say, I need you to micro verify a case. He would come down to my microscope, look at my evidence, and he would formulate his own opinion on it.
Q: And that information isn't released or reported until both people agree on the conclusions?
A: Yes, sir. No conclusions are given out to anyone, not even our supervisor, until my initials, or whoever the micro verifier's initials are, are on the worksheet saying that we agree with what the results are.
Q: Now, if we look into the report that your department gave on this case, would we see the name Ken Whitler's name? •
A: Yes.
Q: Do you, nevertheless, have personal knowledge of the results in this case?
A: Yes, sir. I did the micro verification in this case and I also did the technical administrative review of his case file.
Q: Just to be clear, this is not just you reading someone else's report. You did the same work in this case?
A: Yes, sir.

(Trial Tr. pp. 580-581) (emphasis added).

After a thorough review of the record, this Court finds that while Whitler's report was used, Green testified that he performed all of the analysis that Whitler did on the same evidence and came to the same conclusions. To be clear, Green testified that he was "not just reading from someone else's report" and that "he performed the same work in this case." (Trial Tr. p. 581). Nevertheless, Trial Counsel was able to cross-examine Green on the evidence that Green had personal knowledge of and had personally performed the analysis, thereby satisfying the

Confrontation Clause of the Sixth Amendment. Thus, there was no basis for Trial Counsel to object to Green's testimony.

Accordingly, for the reasons set forth *supra*, this Court vacates and reverses its prior ruling on this issue and finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

Allegation 9: Trial Counsel failed to review all the recorded jail calls entered at trial.

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to review all the recorded jail house calls. For the reasons set out below, this Court vacates its former ruling on this issue and now finds that Applicant failed to satisfy his burden of proving any prejudice with regard to this allegation.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Likewise, in order to prevail on a claim that counsel did not review discovery with applicant, the applicant must demonstrate prejudice by showing what evidence could have been discovered or what other defenses could have been pursued. Id.

Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is insufficient

to support a relief grant. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

In the order granting relief, this Court found Trial Counsel "was deficient for failing to thoroughly review the discovery, specifically the recorded jail calls, and [Trial Counsel's] deficient performance prejudiced [Applicant]. The recorded conversations published to the jury were evidence of consciousness of guilt and highly incriminating. See State v. White, 437 S.C. 490, 879 S.E.2d 21 (Ct. App. 2022). Trial Counsel testified that had he known about the existence of this recorded conversation, he would have advised [Applicant] to plead guilty and attempted to secure a favorable plea offer from the State." (Order Granting PCR Relief pp. 8-9). The Court's order found Trial Counsel's testimony credible on this issue.[6] (Order Granting PCR Relief p. 8).

Respondent argued in its Rule 59(e), SCRCP, motion that this Court's finding that Applicant was prejudiced by Trial Counsel's alleged deficiency was erroneous because Trial Counsel's assertion that had he known about the jailhouse calls published to the jury, he would have advised Applicant to plead guilty and sought a plea deal from the Solicitor was mere speculation, and the record refuted Trial Counsel's claim. This Court agrees with Respondent.

Here, the alleged deficiency of Trial Counsel lies in the claim that he did not thoroughly review all of the jailhouse calls. Trial Counsel testified that had he been aware of the content of those calls presented to the jury, he would have pursued a plea deal with the Solicitor's Office and advised Applicant to plead guilty. However, the record does not substantiate Trial Counsel's

[6] This Court now clarifies its finding of credibility of Trial Counsel's testimony. This Court finds Trial Counsel credible in that at the moment of the evidentiary hearing, Trial Counsel believed he would have sought a plea deal from the Solicitor's Office. However, it is evident from Trial Counsel's testimony at the evidentiary hearing that he had not reviewed the entire record before his testimony at the evidentiary hearing.

assumptions, and therefore, his speculation does not meet the requirements for demonstrating prejudice.

In fact, the record refutes Trial Counsel's assertions as to what he would have done had he known the substance of the jailhouse calls because the record provides that the Solicitor was never open to Applicant pleading to anything but murder. At trial, the Solicitor was asked by the trial court whether there had been any definitive offers made to Applicant that he rejected, and the Solicitor replied:

> **No formal offers were made**. We had some discussion and **we made it clear that any sort of offer would include a plea to the charge of murder, and that was a nonstarter** —

(Trial Tr. pp. 74, l. 19 – 73, l. 8) (emphasis added). The record provides that the Solicitor's Office was never open to Applicant pleading to anything but murder, and that was a "nonstarter." Id. Furthermore, aside from the record before this Court, Applicant presented no evidence to the Court that the Solicitor's Office had extended any plea offers, nor any evidence that the Solicitor's Office was willing to extend a plea offer to Applicant.

Assuming, *arguendo*, Trial Counsel discovered the jailhouse calls and decided to negotiate with the Solicitor's Office, it is mere speculation that 1. Applicant would have accepted the plea offer; 2. The plea would have been entered without prosecution canceling it or the trial court would have accepted it; and 3. The results would have been more favorable to Applicant. See generally Collins v. State, 422 S.C. 250, 263, 810 S.E.2d 871, 878 (2018); Missouri v. Frye, 566 U.S. 134 (2012) and Lafler v. Cooper, 566 U.S. 156, 174 (2012). While not directly on point, the analysis of the Collins, Missouri, and Lafler cases and remedy discussions is applicable in the present case, in which Applicant claims he would have sought a plea offer had he been fully aware of the substance of the jailhouse calls.

Specifically, the Court's holding in Collins, directly addresses this issue in their analysis as follows:

> Here, Collins proceeded to trial rather than plead guilty. At the PCR hearing, Collins testified only that after he became aware of the expired plea offer, he told trial counsel he wanted more information about the offer. Consequently, **the record is void of any testimony that Collins expressed a desire to accept the expired offer**. More importantly, even if Collins wanted to plead guilty, **there is no evidence or testimony from the solicitor that the expired offer was still available before trial, nor is there any evidence or testimony that a new offer existed for Collins to accept.** Thus, Collins failed to demonstrate a reasonable probability that he would have accepted any offer, new or expired. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (holding the PCR applicant bears the burden of proving the allegations in their application). Therefore, we conclude the record does not support the PCR judge's finding that Collins suffered any prejudice from trial counsel's handling of the expired plea offer.

Collins v. State, 422 S.C. 250, 262–63, 810 S.E.2d 871, 877–78 (2018) (emphasis added). Before this Court is Trial Counsel's testimony and the record—and the record provides that Applicant pleading to murder was a "non-starter." (Trial Tr. p. 74). Furthermore, Applicant was present for his evidentiary hearing and chose not to testify; therefore, the record is devoid of any testimony indicating that Applicant expressed a desire to accept any plea offer. Instead, the record is uncontroverted that no appreciable plea offers were made to Applicant, and nothing other than murder would have been offered. Id.

Accordingly, for the reasons set forth *supra*, this Court vacates and reverses its prior ruling on this issue and finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his

application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE**.

This Court 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), an 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 PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be **DENIED and DISMISSED WITH PREJUDICE**; and

2. The Order granting relief filed January 10, 2024, is hereby **RESCINDED AND VACATED**.

3. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 11th **day of** July **, 2025.**

GEORGE M. MCFADDIN, JR.
Presiding Judge
Ninth Judicial Circuit

Sumter, South Carolina