STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Beaufort County
Honorable J. Ernest Kinard, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

ANTONIO COLLINS,

Appellant.

Appellate Case No. 2013-002343

INITIAL BRIEF OF RESPONDENT AND DESIGNATION OF MATTER

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

1. The trial judge allowed the admission of improperly obtained DNA and/or blood evidence, and erred in denying the Appellant's motions to exclude the improperly obtained DNA and/or blood evidence.

2. The trial court committed reversible error when it admitted DNA and/or blood evidence , despite conflicting testimony which demonstrated improper sample collection and a tainted crime scene, which demonstrated probable tampering or altering of the samples.

3. There was no probable cause for the arrest of the appellant.

STATEMENT OF THE CASE

Appellant, Antonio Collins, murdered Ronald Coleman on June 22, 2009 in Beaufort County. Appellant was arrested on a fugitive from justice warrant in Florida two (2) years later. He was extradited to South Carolina and formally arrested for Coleman's murder on November 9, 2011. (Extradition Packet & Arrest Warrant). On December 15, 2011, the Beaufort County grand jury indicted appellant for murder, burglary 1st degree, kidnapping, and possession of a weapon during a violent crime (Ind. #s 2011-GS-07-2279, 2378, 2379 & 2403). Appellant was represented on the charges by Trasi Campbell and Arie Bax, Esquires. Appellant proceeded to a jury trial from October 21-24, 2013 before the Honorable Ernest Kinard, Jr., Circuit Court Judge. At the trial's conclusion, the jury found appellant guilty of murder, burglary 1st degree, and possession of a weapon during a violent crime. Judge Kinard sentenced appellant to thirty-three (33) years confinement for murder, thirty-three (33) years for burglary 1st degree, and five (5) years for possession of a weapon during a violent crime. The sentences on each indictment were ordered to run concurrently. (Tr. pp. 1, 13-17, 148-51, 174-90, 603, 609-10). This appeal followed raising three (3) issues. (BOA).

RESPONDENT'S STATEMENT OF FACTS

On the night of June 22, 2009, appellant Antonio Collins ("Collins") murdered Ronald Coleman ("the victim") during a burglary of the victim's home on Seabrook Road on Seabrook Island in Beaufort County. Collins was assisted by an unknown male; however, Collins was the shooter or trigger-man in the murder. Collins was not from South Carolina but Miami, Florida. (Tr. pp. 175-201, 241-48, 316-21, 384-91, 415-429, 444-66, 603).

The victim lived in a rural area of Beaufort County that was sparsely populated, and his residence was surrounded by the homes of many of his relatives. The victim was a "small time" marijuana dealer. On the night of June 22, 2009, the victim's cousin and childhood friend, Enrekae Miles ("Miles"), was going to visit the victim. The victim and Miles "hung out" together regularly and played *Madden NFL* video games, and Miles wanted to attempt to console the victim whose brother had died recently. At approximately 9:00 p.m., Miles walked from his residence, which was nearby, to the victim's residence located at 46 Seabrook Road. To get there, Miles walked a regular footpath that took him behind an uncle's residence and which eventually came out behind the victim's residence in the victim's backyard. (Tr. pp. 175-201, 224-27, 253-54).

As Miles arrived in the victim's back yard, he saw two (2) men standing near the back door of the victim's residence, and they appeared to be fidgeting or nervous. Miles had never seen the two (2) men before. Miles hollered at the two (2) men. The two (2) men turned and walked toward Miles. As the two (2) men approached Miles, one (1) of the men [Collins] drew a pistol. Miles immediately fell down on the ground and begged Collins not to shoot him. Collins and the other man patted Miles down for weapons. Miles was unarmed. (Tr. pp. 175-201; 241-48, 316-21, 384-91, 415-429, 444-66, 603).

Collins put the gun to the back of Miles' head and told Miles that he [Miles] was going to help the two (2) men lure the victim out of his home. Collins then pushed or forced Miles at gun point to the front of the victim's residence and up onto the front porch. The other man stayed on the front porch steps or at the foot of the steps. Collins then tried to get Miles to persuade the victim to come out the front door of the residence, but Miles signaled the victim that danger was afoot. Collins was unaware the victim only used his back door *and* the victim's front door was nailed shut. (Tr. pp. 175-201; 241-48, 316-21, 384-91, 415-429, 444-66, 603).

Collins then pushed Miles out of the way and kicked the front door of the victim's residence in. Collins stepped into the doorway of the victim's home armed with the handgun and a shot was fired, apparently by the victim. Miles heard a "ping" and someone say "ah." Collins then raised his gun and fired his gun multiple times into the victim's home. The victim returned fire. The victim suffered four (4) gunshot wounds. (Tr. pp. 175-201; 241-48, 316-21, 384-91, 415-429, 444-66, 603).

Miles fled from the porch during the gunfire but not before seeing the gun Collins was shooting was a semi-automatic with a clip and seeing the two (2) men, including the gunman Collins, flee up Seabrook Road. Miles ran to an aunt's house and told her what had occurred and then ran to another relatives' home and asked an uncle for a shotgun to protect himself. One (1) relative of the victim, who lived nearby, had already called 911 as soon as the gunshots were fired.[1] (Tr. pp. 175-201; 224-27; 241-48, 316-21, 384-91, 415-429, 444-66, 603).

When police arrived, they found the victim face down, inside his home, but near the front

[1] The 911 caller, who lived next to the victim, reported there were two (2) perpetrators involved in the shooting. She saw two (2) black males running down the road in front of her home immediately after the gunshots. She overheard one (1) of the men state he had been shot or shot in the leg, and then the two (2) men got into a car and left the area. (Tr. January 25, 2012, p. 10; Tr. September 19, 2013, p. 45).

door, with his .45 caliber semi-automatic pistol still in his hand. The victim was dead. He had died from the gunshot wounds inflicted by Collins. Police found blood just outside the victim's bedroom door in the living room. Police also found numerous fired .45 caliber shell casings inside the victim's residence where the victim had returned fire when Collins kicked in the front door and started shooting. These fired shell casings were later forensically matched to the victim's gun. (Tr. pp. 141-45; 148-51; 159-65, 241-48, 316-21, 384-91, 415-429).

On the front porch itself, police found blood droplets. Collins had been struck by one (1) of the bullets the victim fired when Collins' forced his way into the victim's home. Police collected samples of these blood drops to develop a D.N.A. profile. (Tr. pp. 312-23, 329).

Police also found numerous *.40* caliber fired shell casings that were ejected from the burglar's [shooter's] gun when he [Collins] shot the victim. These casings, including some inside the victim's home and two (2) on the front porch, were collected for later comparison if a murder weapon was located. (Tr. pp. 245-49).

The following day, approximately sixty (60) additional blood drops or bloody foot-impressions were found on Seabrook Rd. leading away from the victim's residence. The blood drops or impressions stretched from near the victim's residence for approximately 700 feet and then stopped in the middle of Seabrook Road. Police believed the perpetrator and the individual with him had gotten into a vehicle at this location, and fled the scene. Immediately across the road from where the blood trail stopped, police found a *.40* caliber semiautomatic pistol with blood stains on it lying in the grass. Police seized the discarded weapon and collected samples from the bloody shoe impressions on Seabrook Rd. and from the discarded *.40* caliber pistol for later D.N.A. testing. (Tr. pp. 268-82, 285-93, 368-69, 542-44).

The State Law Enforcement Division (SLED) forensic lab compared the fired *.40* caliber

shell casings found at the victim's residence to test casings fired from the *.40* caliber weapon recovered where the blood trail ended on Seabrook Road. It was determined the fired *.40* caliber shell casings were fired by the *.40 caliber* gun found near where the blood trail ended. (Tr. pp. 415-429).

In the days following the murder, witnesses who lived in the area, including Miles, informed police they had seen a strange car in the area before the murder. The car was traveling up and down Seabrook Rd. before the murder, or was seen stopped in the area. The witnesses described the vehicle as being a beige or cream colored Cadillac Deville. Miles, while he was near his uncles' residence after the murder, had also seen this vehicle slow down and pause and then take off. (Tr. pp. 224-26, 191-94).

Several months later, police developed a suspect in the case, Antonio Collins, with the assistance of the Drug Enforcement Administration (DEA) and the Hampton County Sheriff's Office. These agencies had an informant, Gussie Goldwire, who was related to appellant Collins; Goldwire and Collins are cousins. Goldwire informed police Collins committed the murder.[2] Police also received information from Goldwire that the vehicle used in the crimes belonged to another individual who lived in Jasper County, Jeremy Murphy. (Tr. pp. 293-99, 300-04, 330-31, 337-39).

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[2]Goldwire was cooperating under a written federal plea agreement. Goldwire informed law enforcement he witnessed Collins come to his home on the night of the victim's murder with another individual, Jeremy Murphy, and they were in Murphy's car. Collins had been shot in the lower leg, was bleeding profusely, and had to be helped from the car. Goldwire also informed law enforcement he overheard the men discussing what happened. The men stated they had been to Beaufort to commit a crime; Collins was shot; they jumped back in the car, came to Goldwire's house, and they didn't know what to do. Goldwire stated Murphy and Collins ended up leaving that night because Goldwire had to leave. Goldwire told police both Murphy and Collins were involved in the crime, and a third person was involved, not Goldwire, but Murphy and Collins had dropped that 3rd person off before arriving at his residence. (Tr. Jan. 25, 2012, pp. 1-37; Tr. September 19, 2012, pp. 38-39).

Murphy's residence was staked out, and Murphy was stopped in the vehicle as he left his residence. The vehicle, a Cadillac Deville, was similar in color to that described by witnesses who lived near the victim, and the vehicle was seized by police. Police obtained a search warrant for the Cadillac and processed it. Inside the car, police located blood stains that had soaked through the back seat of the vehicle into the cushion of the back seat and some into the carpet at the bottom of the seat. Samples were taken from the interior of this car and forwarded to SLED to see if SLED could find human blood and D.N.A. (Tr. pp. 305-09, 330-37, 369-72, 403, 406, 444-66).

Police interviewed Jeremy Murphy. Murphy informed police he had loaned his car [the Cadillac Deville] to a man named Antonio from Florida and another man named George Savage. According to Murphy, the two (2) men were supposed to just use the car to go buy something illegal, and they would return the car in an hour. According to Murphy, an hour came and went and the vehicle was not returned. Then he noticed the car just appeared back in his yard. He went out to feed his dogs and looked in the car, and there was blood all over the car. Murphy said he later talked to George Savage and Savage said they went to "do a lick" but it went bad. (Tr. September 19, 2012, pp. 39-40).

Through further investigation, using names of relatives of Collins provided by Goldwire, including the names of Collins' father and mother, Beaufort County police determined Collins was Antonio Eugene Collins and he was a resident of Miami, Florida.[3] At the time Collins was developed as a suspect, which was months after the murder, Collins was detained in the Miami /

[3] Although Goldwire was a cousin of Collins, he referred to Collins as Tonio or Antonio Wilson. Goldwire informed police his cousin, the person who was shot, was a resident of Miami, Florida. Goldwire gave police the name of Levi Tyson as Collins' father and Collins' mother went by the name of Mel. Using the information Goldwire provided, including the names of relatives and residence of Collins, and using law enforcement computer databases, police determined Collins was actually Antonio Eugene Collins. (Tr. p. 338-39).

Dade County Jail on unrelated charges [burglary, felonious assault/CDV charges]. At the request of Beaufort County authorities, police in Miami requested a D.N.A. sample from Collins [a buccal swab], which he consented to and provided. When Collins was returned to South Carolina for prosecution, another D.N.A. sample [a buccal swab] was taken pursuant to a Schmerber[4] Order. Both of these samples were submitted to S.L.E.D. for D.N.A. analysis. (Tr. September 19, 2012, p. 41; Tr. pp. 338-42, 363, 412-15, Schmerber Order, 444-66,).

SLED's D.N.A. laboratory was able to develop a D.N.A. profile from the blood drops on the front porch of the victim's home. SLED was also able to develop a D.N.A. profile from the bloody shoe impressions found on Seabrook Rd. leading away from the victim's residence. SLED was also able to develop a D.N.A. profile from the swab of the *.40* caliber gun found beside Seabrook Rd. near where the blood trail stopped. And, SLED was also able to develop a D.N.A. profile from the blood that soaked through the seat cushions of the Cadillac recovered in Jasper County. The D.N.A. profile developed from each of the above locations was determined to be that of one (1) and the same person. (Tr. pp. 444-66).

SLED also subsequently developed a D.N.A. profile from the buccal swabs taken from appellant Collins' mouth. It was determined all of the D.N.A. samples listed above, i.e. from the porch, Seabrook Rd., the *.40* caliber pistol, and the Cadillac, matched the D.N.A. profile of appellant Antonio Collins. (Tr. pp. 444-66).

After hearing the evidence listed above, the jury convicted Collins of the victim's murder, the burglary of his home, and the weapon charge. (Tr. pp. 603).

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[4] Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966).

ARGUMENT I.

The lower court did not err in admitting the D.N.A. evidence from Collins' buccal samples because Collins voluntarily consented to the giving of the D.N.A. sample in Florida, and the second buccal sample was obtained pursuant to a lawful Schmerber order.

Background

Through the course of the investigation into the death of the victim Ronald Coleman, law enforcement received information regarding the men involved with the murder. This information led police to interview Jeremy Murphy, who owned a 1995 cream or tan colored Cadillac, as the possible getaway driver. Murphy informed police he had loaned his car [the Cadillac Deville] to a man named Antonio from Florida and another man named George Savage. According to Murphy, the two (2) men were supposed to just use the car to go buy something illegal, and they would return the car in an hour. The vehicle was not returned timely. Then Murphy noticed the car just appeared back in his yard. He looked in the car, and there was blood all over the car. Murphy said he later talked to George Savage and Savage said they went to "do a lick" but it went bad. (Tr. September 19, 2012, pp. 39-40). Police obtained a search warrant for Murphy's car, and observed what appeared to be blood stains in the back seat of the car and collected samples. The samples matched neither Murphy nor the victim Ronald Coleman's DNA.

Gussie Goldwire, a federal informant, revealed the name of appellant as the person who killed the victim. Goldwire did so pursuant to a federal plea agreement. Goldwire informed law enforcement he witnessed Collins come to his home on the night of the victim's murder with another individual, Jeremy Murphy, and they were in Murphy's car. Collins had been shot in the lower leg, was bleeding profusely, and had to be helped from the car. Goldwire also informed police he overheard the men discussing what happened. The men stated they had been to Beaufort to commit a crime; Collins was shot; they jumped back in the car, came to Goldwire's

house, and they didn't know what to do. Goldwire stated Murphy and Collins ended up leaving. Goldwire told police both Murphy and Collins were involved in the crime, and a 3rd person was involved but Murphy and Collins had dropped that person off before arriving at Goldwire's residence. (Tr. pp. Tr. Jan. 25, 2012, pp. 1-37; Tr. September 19, 2012, pp. 38-39). Goldwire referred to Collins as Antonio Wilson, and provided identifying information including names of family members and his state and city of residence, Miami, Florida.

Based on the information provided by Goldwire and Murphy, including names of relatives of Collins, police through further investigation and research were able to determine Collins was in fact Antonio Eugene Collins. Police also determined that he was in fact a resident of Miami, Florida.

In the fall of 2010, appellant Collins was detained in the Miami – Dade County Jail in Miami, Florida on unrelated charges. After Collins was developed here as the prime suspect in the murder and after police discovered Collins was detained in Miami, Sgt. Jeff Purdy of the Beaufort County Sheriff's Office contacted Detective Juan Segovia with the Miami-Dade Police Department, informed him he was investigating a homicide, and requested Segovia see if he could obtain a buccal sample from Collins. In pre-trial hearings and filings, there were allegations that in their conversation, Purdy suggested that Segovia tell Collins that he was a suspect in a series of brutal rapes to secure Collins' consent to a buccal swab.[5] However, even if this did occur, Segovia did not do so. (Tr. September 19, 2012, pp. 19-36).

On March 13, 2011, Segovia met with Collins. He advised Collins of his rights regarding giving or not giving a DNA sample and asked him to consent to a buccal swab. Segovia did not ask Collins about the murder, burglary, and kidnapping in Beaufort County or interrogate him.

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[5] Purdy testified at the suppression hearing, and he did not testify that this took place. (Tr. September , 2012, pp. 7-19).

No mention of the crime for which he was submitting the DNA was made. When Collins asked what this was about, Segovia only stated that police were investigating a series of crimes. Collins told Segovia how long he had been incarceratd in the Dade County Jail, and Segovia stated: "Well I guess you have nothing to worry about, then."[6] Further, Segovia provided Collins with a written "Consent to Provide DNA Specimen for Laboratory Analysis" contemporaneously with collecting his buccal swab. (Court's Exhibit 1). The form stated as follows:

> I, Antonio Collins, hereby freely and voluntarily consent to provide Miami-Dade Police Department Police Officers with a mouth swab specimen for investigative purposes.
> I have been fully informed that the specimen will be entered into a - - DNA database after analysis. I have been fully informed that the information may be available to my physician upon my request, and it will remain confidential and be used for no purpose other than investigation, which may lead to criminal prosecution.
> I fully understand that I have a right to refuse to give the specimen.
> I have read and understand the above statement and I consent to provide the specimen of my own free will, without any threats or promises being made to me.
> Additionally, in the event I cannot provide proper identification, I voluntarily agree to provide my thumb print at the time of the swab collection to Miami-Dade Police Department Police Officers.

(Tr. September 19, 2012, pp. 24-25). Segovia testified he made no allusions or direct statements to Collins that he was a suspect in a series of molestations or rapes, and he did not lie to Collins to obtain his consent. Their meeting lasted six (6) minutes. Segovia testified Collins read the Consent Form, executed the Consent Form, and consented to the taking of the buccal swab. After obtaining the buccal swab from Collins, Segovia sent it via Federal Express to the Sheriff's Office in Beaufort County. (Tr. September 19, 2012). The sample was then taken to SLED where it was determined by the D.N.A. Lab this sample matched the blood samples taken from Murphy's car, the *.40* caliber pistol, and the blood samples taken from Seabrook Rd. and the

[6] There is no evidence in the record that at the time Segovia requested the buccal swab he was aware of the date the homicide occurred in South Carolina.

front porch of the crime scene. (Court's Ex. 2, SLED DNA Report).

Prior to trial, at a motion hearing on January 25, 2012, the State sought a Schmerber[7] Order from Circuit Judge Markley Dennis to obtain another buccal sample or swab from appellant Collins. (Tr. Jan. 25, 2012 pp. 1-37). The State's justification or need for a 2nd buccal sample was threefold: (1) The State was asking for a 2nd sample so the state could assure that the person who gave the sample in Florida, that matched that at the crime scene, was in fact Antonio Collins, the person who was present to be tried; (2) to confirm that Collins' D.N.A. does in fact match the DNA left at the crime scene, on the murder weapon, and in the getaway vehicle; and (3) the defense was challenging the consent to search Collins gave police in Florida to take the 1st swab raising allegations of misrepresentations by police; and the State was seeking a 2nd buccal swab to obtain the defendant's D.N.A. profile from an independent source to present the D.N.A. results at trial should the 1st buccal swab be suppressed. (Tr. January 25, 2012, pp. 1-6). Collins attorney confirmed they were challenging the consent to the 1st buccal swab taken in Florida. (Tr. January 25, 2012, pp. 5-6). Judge Dennis determined he could decide the appropriateness of a Schmerber order if probable cause existed independent of what occurred in Florida; however, since Collins objected to proceeding only on the affidavit of the investigating officer, Judge Dennis required testimony, including cross-examination, be taken on the whether a Schmerber Order should be issued. (Tr. January 25, 2012, pp. 7-9).

The State called the chief investigating officer who testified under oath to the investigation of the murder of the victim and the eventual identification of Collins as a suspect and the discovery of his being located in Miami, Florida.

The investigating officer, Investigator Christine Wilson, testified to the following: Police

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[7] Schmerber v. California, 394 U.S. 757, 86 S.Ct. 1826 (1966).

received a 911 right after the murder in which the 911 caller, who lived near the victim, stated there were two (2) black males involved and one (1) of them stated before getting in a car and leaving the area that he had been shot or shot in the leg. There was an eyewitness to the murder itself, and murder involved an exchange of gunfire between the victim and the perpetrator, and the victim was killed as a result. Police discovered blood drops at the crime scene, on the road leading away from the victim's residence, on the *.40* caliber pistol found in the grass where the blood trail ended, and in the Cadillac Deville recovered in Jasper County and samples were taken from each location for later DNA comparison. Antonio Collins was developed as a suspect in this case from interviewing a named federal informant, Gussie Goldwire, who was related to Collins and witnessed Collins and Jeremy Murphy arrive at a residence in Jasper the night of the victim's murder and Collins was shot in the leg and was being helped from the car, a Cadillac, and into the residence. Goldwire also informed police another individual was involved but he had been dropped off before the two (2) men came to Goldwire's residence. Goldwire informed police Collins was from Florida and gave police the names of Collins' father and mother. Goldwire referred to Collins as Tonio or Antonio Wilson. Police also located Jeremy Murphy, the owner of the car [the Cadillac Deville from which blood stains were found]. Murphy informed police that Collins, who he referred to as "Antonio" from Florida, and another man had his car the night Ronald Coleman was murdered. The investigating officer testified how Goldwire's initial information about the car involved in the crime was corroborated by the fact police found the car, a Cadillac, it contained blood stains, and those stains, of which police took samples, were matched to the stains found at or near the crime scene. The investigating officer testified to her further investigation and identifying Collins as the person both the named informant Goldwire and Jeremy Murphy identified and were referring to was in fact Antonio

Eugene Collins, through relatives names and the use of law enforcement databases or intelligence searches. The investigator also testified that each of the blood stains collected from the crime scene, the *.40* caliber weapon, and the seized Cadillac were determined to be from the same person. The investigator testified that her investigation led to her determining Collins was in fact a resident of Florida, as Goldwire and Murphy had told her, and he resided in Miami, as Goldwire informed her, and was detained in the Miami-Dade County Jail. The investigating officer also testified to the fact the buccal swab taken in Miami from Collins matched the blood stains found at and around the victim's residence and the Cadillac. The investigating officer also testified the officers in Miami took photographs of Collins' legs, which were not good quality, but the investigator did see markings on Collins' legs that could have been a scar on either leg which could have come from a gunshot wound. At the conclusion of the hearing, Judge Dennis found there was probable cause to issue the Schmerber Order based on the blood evidence found at the scene and nearby, which the police found, and the information provided by Goldwire, and it was reasonable to grant the Schmerber Order to either include or exclude Collins as the perpetrator, and the least intrusive means to do so was by a buccal swab being taken in the courtroom. (Tr. Jan. 25, 2012, pp. 1-37). Judge Dennis subsequently issued a written Schmerber Order granting the State's request for a buccal sample from Collins. (Order of Judge Markley Dennis, January 25, 2012). That sample was taken from Collins and sent to SLED. Collins' DNA profile was developed from that sample, and it was determined Collins' DNA profile from that sample matched that of the individual who left all of the blood/DNA samples at or near the crime scene in Beaufort County, the *.40* caliber weapon, and in the getaway vehicle recovered in Jasper County.

What Occurred Below

Prior to trial, on September 19, 2012, pursuant to Collins' Motion to Suppress the two (2) buccal swabs collected from his person, a suppression hearing was held before Circuit Court Judge Stephanie P. McDonald. (Tr. September 19, 2012, pp. 1-69) After taking testimony and evidence on the Motion, and taking the matter under advisement, on October 9, 2012, Judge McDonald issued a seven (7) page written Order denying the Motion to Suppress and finding the buccal samples and the DNA profiles developed from them were admissible at trial. (Order Denying Defense Motion to Suppress Buccal Swabs, pp. 1-7).

Standard of Review

The standard of review of Fourth Amendment search and seizure issues on appeal is deferential and is limited to determining whether any evidence supports the trial court's finding, with this Court only being able to reverse the ruling of a trial judge where there is clear error. State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013).[8] As a result, if there is any evidence to support the trial judge's ruling as to the validity of a search, with or without a warrant, it will be affirmed on appeal. Id.; State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012).[9]

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[8] State v. Tynes, 402 S.C. 211, 740 S.E.2d 512 (Ct. App. 2013); State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000)(whether a search violated the 4th Amendment depends upon "a number of antecedent determinations, each of which is inherently fact-specific" and "entails an inquiry into the totality of the circumstances" and an this court must affirm if there is "any evidence" to support the ruling); State v. Thompson, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct. App. 2005)(deferential standard of review applies in a challenge to a trial court's fact-driven affirmation of probable cause.).

[9] State v. Cheeks, 400 S.C. 329, 733 S.E.2d 611 (Ct. App. 2012); State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459-60 (2002)(appellate court may conduct its own review of the record to ascertain if there is any evidence to support the ruling). In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law. Tynes, *supra*, *citing* State v. Asbury, 328 S.C. 187, 193, 493

The Lack of Merit of Collins' Argument

First, this Ground was waived and abandoned by Collins when he argues this issue under Issue One of his appeal without any citation to authority. (See BOA, pp. 6-7).[10] Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993)(an issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority). This appellate ground must be dismissed with prejudice. Id. Further, this issue is not preserved because Collins did not object to this evidence when admitted at trial. State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001). Regardless, there is no merit to this appellate issue.

The 1st Buccal Swab was Properly Obtained

A DNA buccal swab constitutes a search and under the Fourth Amendment. "Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent." State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005). It is well established that one of the well-delineated exceptions to the search warrant requirement is a search conducted pursuant to a valid consent given by the proper party. Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256 (1946); Zap v. United States, 328 U.S. 624, 66 S.Ct. 1277 (1946); Palacio v. State, 33 S.C. 506, 511 S.E.2d 62 (1999). When the prosecution seeks to rely upon the consent of the defendant to justify the search, they have the burden of proving that the consent was, in fact, freely and voluntarily given. Scheckcloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973); Bumper v. North

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S.E.2d 349, 352 (1997).

[10] The only citation to authority in Collins' brief is under Issue III. of his appeal where he alleges there was no probable cause for his arrest warrant. (BOA, pp. 8-12).

Carolina, 391 U.S. 543, 88 S.Ct. 1788 (1968); State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct. App. 2001). Whether a defendant voluntarily consents to a search is a question to be determined by the trial judge based on the totality of the circumstances. United States v. Mendenhall, 446 U.S. 544, 558-59, 100 S.Ct. 1870, 1879 (1980); State v. Harris, 277 S.C. 274, 286 S.E.2d 137 (1982); State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (1981); State v. Adams, 377 S.C. 334, 339, 659 S.E.2d 272, 275 (Ct. App. 2008). When the issue of voluntary consent is contested by contradictory testimony, it is an issue of credibility for the trial judge to resolve. State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977); State v. Greene, 330 S.C. 551, 499 S.E.2d 817 (Ct. App. 1997).

Here, given the totality of the circumstances, Judge McDonald properly found the State had proven Collins had freely and voluntarily consented to the taking of the buccal sample at the Miami/Dade County Jail. (Tr. September 19, 2012, pp. 1-61; Court's Exhibit 1 (Consent Form); Order Denying Defense Motion to Suppress Buccal Swabs). Schneckloth v. Bustamonte; United States v. Mendenhall. The credible testimony at the suppression hearing showed Collins was not threatened or coerced by Detective Segovia. Schneckloth. No physical punishment or threat of punishment was used to by Segovia to obtain consent. Id. Collins was not misled by Detective Segovia to get him to give the buccal sample. Segovia testified the only thing he informed Collins of was he was being investigated for a series of crimes. Although police were not required to, Collins was fully informed of his right to deny consent to the buccal swab. Id.; State v. Forrester, 334 S.C. 567, 514 S.E.2d 332 (Ct. App. 1999)(though not required, whether defendant was informed and knew he had the right to deny consent is a factor to be considered in determining if the consent was freely and voluntarily made), *reversed on other grounds*, 343 S.C. 637, 541 S.E.2d 837 (2001); State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977)(same);

State v. Newman, 261 S.C. 352, 200 S.E.2d 82 (1973)(similar). The meeting between Collins and Segovia lasted six (6) minutes. Schneckloth. Collins reviewed and executed a Voluntary Consent to give his buccal sample. (Court's Ex. 2). Collins was informed in the notice that he had the right to refuse consent [Schneckloth]; but, he did not refuse and signed the waiver form.[11]

Collins' custody status at the time does not negate his ability to give consent to a search. United States v. Watson, 423 U.S. 411, 96 S.Ct. 820 (1976); State v. Wallace, 269 S.C. 547, 238 S.E.2d 765 (1977)(where defendant had been arrested and was in police custody, he was still able to give a free and voluntary consent to search); State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct. App. 2001)(even though defendants were detained and handcuffed because of fear of flight, evidence found after they signed a written consent to search their car was admissible); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003)(defendant in a custodial type setting gave a voluntary consent to search his person).

[11] At the suppression hearing before Judge McDonald, Collins claimed he was informed by Segovia that he was a suspect in several rapes and Segovia needed his DNA to clear him of these rapes. Segovia specifically denied this. Collins testified he thought Segovia was from the public defender's office, even though Segovia showed him some type of badge. Segovia testified he identified himself as a police officer. Collins also testified he felt coerced into signing the waiver because Segovia told him if he did not consent, Segovia would seek or obtain a court order for the buccal sample. Segovia testified he had already made the decision to seek a court order if Collins did not consent, but he did not testify he informed Collins of this. As Judge McDonald's Order shows, she did not find Collins' testimony on these issues to be credible. She found Segovia's version of events to be what actually occurred. (See Order Denying Motion to Suppress Two Buccal Samples). This was within her discretion. State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977); State v. Greene, 330 S.C. 551, 499 S.E.2d 817 (Ct. App. 1997). Further, even if Segovia had misled Collins in some way, this would only be one (1) factor to consider in the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973)(analogizing a defendant's consent to search with a defendant's voluntary statement); Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420 (1969); State v. Rabon, 275 S.C. 459, 272 S.E.2 634 (1980); State v. Goodwin, 384 S.C. 588, 683 S.E.2d 500 (Ct. App. 2009). And, informing a defendant police will seek or obtain a warrant if he does not consent does not obviate consent. State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977); State v. Battle, 304 S.C. 191, 403 S.E.2d 331 (C.t App. 1991).

Pursuant to Nix v. Williams and its progeny, the protections of Miranda do not apply to collection of non-testimonial evidence. Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984). As the collection of bodily fluids is non-testimonial, Collins was not required to be informed of his Fifth Amendment right against self-incrimination. Further, as Collins was not interrogated and did not make any statements, either inculpatory or exculpatory, Miranda was inapplicable to the case at bar. Further, the right to counsel is offense-specific, and the mere fact that an attorney was appointed in one (1) matter [the Florida Burglary and CDV charges] does not invoke the right to counsel in an unrelated matter. State v. Harvin, 345 S.C. 190, 547 S.E.2d 497 (2001). Police can even interrogate a suspect after Miranda on an investigation of a related but not yet charged offense. Texas v. Cobb, 532 U.S. 162, 121 S.Ct. 1335 (2001). Here, Collins was being detained in the Miami-Dade Detention Center on burglary and domestic violence charges completely unrelated to the murder investigation in South Carolina, which was un-charged at the time of the buccal swab collection. As such, the Defendant's Sixth Amendment right to counsel was not violated. The record shows under the totality of the circumstances the consent to the buccal sample was voluntary. United States v. Mendenhall, 446 U.S. 544, 558-59, 100 S.Ct. 1870, 1879 (1980); Scheckcloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973); State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004).

Once consent is given for a buccal swab, the privacy of the DNA is relinquished when given "without any limitation on the scope on consent." State v. McCord, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002). In McCord, this Court cites Bickley v. State, 277 Ga. App. 413, 489 S.E.2d 167 (Ga. App. 1997), which states "DNA results are like fingerprints which are maintained on file by law enforcement authorities for use in further investigations." McCord, 349 S.C. at 484, 562 S.E.2d at 693 (Ct. App. 2002). As a result, there is no merit to the

challenge of the 1st buccal swab.

The 2nd Buccal Swab was Properly Obtained

Standard of Review
(Issuance of a Schmerber Order)

A Schmerber Order, like a search warrant, is a court order permitting law enforcement to conduct a search and to obtain evidence. Search warrants are constitutionally preferred; and, in determining whether they should issue, judges are concerned with probabilities, not certainties. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976). As a result, a reviewing appellate court gives great deference to a judge's determination of probable cause. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000).[12]

When determining the propriety of the issuance of a warrant or court order to conduct a search, the duty of this Court is simply to determine whether the issuing court had a substantial basis for concluding probable cause existed. State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009). In making such a decision, this Court must consider the totality of the circumstances. Jones, *supra* (under this test, a reviewing court considers all circumstances, including status, basis of knowledge, and veracity of informant, in determining whether probable cause existed to issue a search warrant); State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003).[13]

[12] The Fourth Amendment evidences a "strong preference for searches conducted pursuant to a warrant. Illinois v. Gates, 462 U.S. 213, 236 (1983). Searches based on warrants or court orders will be given judicial deference to the extent an otherwise marginal search may be justified if it meets a realistic standard of probable cause. Bowie, *supra, citing* State v. Bennett, 256 S.C. 234, 241, 182 S.E.2d 291, 294 (1971); State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995).
[13] "The Fourth Amendment by its terms prohibits [only] unreasonable searches and seizures." McHam v. State, 404 S.C. 465, 480, 746 S.E.2d 41, 49, (2013), *quoting* New York v. Class, 475

A search warrant or Schmerber Order may issue only upon a finding of probable cause. State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997). The affidavit or testimony at a Schmerber hearing must contain sufficient underlying facts and information upon which the judge may make a determination of probable cause. Dupree.[14] "[T]he duty of a reviewing court is simply to ensure that the magistrate [or circuit court] had a 'substantial basis' for ... conclud[ing] that probable cause existed." Weston, 329 S.C. at 290-91, 494 S.E.2d at 802-03. However, all that is necessary for the issuance of a warrant or Schmerber Order is probable cause. State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009).

Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 136, 317 S.E.2d 744 (1984).[15] South Carolina has adopted the "totality of the circumstances" test of Illinois v. Gates, in determining whether sufficient probable cause exists to issue a search warrant or Schmerber order. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999).

U.S. 106, 116 (1986). The touchstone of an analysis under the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *See* Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977), *quoting* Terry v. Ohio, 392 U.S 1, 19 (1968). "Reasonableness, of course, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" Id. at 109 (citation omitted).

[14] To show probable cause, an affidavit or testimony must state facts so closely related to the time of the issuance of the warrant or order as to justify a finding of probable cause at the time. State v. Winborne, 273 S.C. 62, 254 S.E.2d 297 (1979). The court should determine probable cause based on all of the information available to it at the time the warrant is issued. State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996). In determining the validity of warrant or court order, a reviewing court may consider only information brought to the court's attention. State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001).

[15] Probable cause is a flexible, common-sense standard. Texas v. Brown, 460 U.S. 730 (1983). It is a fluid concept-turning on the assessment of probabilities in a particular factual context–nor readily, or even usefully, reduced to a neat set of legal rules. Maryland v. Pringle, 540 U.S. 366 (2003); Gates. It is incapable of precise definition or quantification into percentages, because it deals with probabilities and depends on the totality of the circumstances. Id. In dealing with determinations of probable cause, as the very term implies, a just determination must deal with **probabilities**, which are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, 338 U.S. 160 (1949); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995).

The task of the issuing court is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit or testimony before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Gates, 462 U.S. at 238 (emphasis added); *accord* Herring, 387 S.C. at 212, 692 S.E.2d at 495-96; State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)(adopting Gates test). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), *quoting* Brown, 460 U.S. at 742.[16] In determining whether a warrant or Schmerber order should issue, judges are concerned with probabilities not certainties. Bowie, supra, citing Sullivan, 267 S.C. at 617, 230 S.E.2d at 624.

Information in support of a search warrant or Schmerber order may be based on hearsay information and need not reflect the direct personal observations of the affiant. Sullivan, 267 S.C. at 614-15, 230 S.E.2d at 623 (search warrant can be supported by information given to the affiant by other officers); *see* Jones v. United States, 362 U.S. 257 (1960);[17] United States v. Ventresca, 380 U.S. 102, 108 (1965)(same); State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967)(same); United States v. Weiebir, 498 F.2d 346 (4th Cir. 1974).[18]

The decision to issue a search warrant or Schmerber order must include consideration of

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[16] "Under this formula, veracity and basis of knowledge are treated 'as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." Gates, 462 U.S. at 230; Weston, 329 S.C. at 290-91, 494 S.E.2d 802-03.

[17] *Overruled on other grounds* United States v. Salvucci, 448 U.S. 83 (1980).

[18] Observations by fellow officers engaged in an investigation with the search warrant affiant are a reliable basis for a warrant. Ventresca, 380 U.S. at 111; State v. Pearson, 356 N.C. 22, 566 S.E.2d 50 (2002); State v. Hage, 568 N.W.2d 741 (N.D. 1997); United States v. Morales, 238 F.3d 952 (8th Cir. 2001)(probable cause may be based on collective knowledge of all officers involved in an investigation and need not be based solely on information within knowledge of officer on scene if there is some communication).

the veracity of the person supplying the information and the basis of the affiant's knowledge. State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994). "The 'experience of a police officer is a factor to be considered in the determination of probable cause.'" Dupree, 319 S.C.at 459, 462 S.E.2d at 282, citation omitted.[19] Eyewitnesses and non-confidential informants are often given a higher level of credibility when supplying information to support probable cause to search. *See* State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct.App.1996).

To determine probable cause exists to obtain nontestimonial identification evidence the State must show there is "(1) probable cause to believe the suspect has committed the crime, (2) clear indication that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable." State v. Baccus, 367 S.C. 41, 53-54, 625 S.E.2d 216, 222-23 (2006), *quoting* In re Snyder, 308 S.C. 192, 195, 417 S.E.2d 572, 574 (1992); State v. Jenkins, 398 S.C. 215, 224, 727 S.E.2d 761, 766 (Ct. App. 2012). *See also* State v. Register, 308 S.C. 534, 538, 419 S.E.2d 771, 773 (1992). Additional factors to be weighed are the seriousness of the crime and the importance of the evidence to the investigation. Register, 308 S.C. at 538, 419 S.E.2d at 773; State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (2009). The circuit court is required to balance the necessity for acquiring involuntary nontestimonial identification evidence against constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures. Id.

Probable cause merely requires that:

> [T]he facts available to the officer would 'warrant a man of reasonable caution in the belief,' that certain items may be ... useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, non-technical" probability that incriminating evidence is involved is all that is required.

[19] *See* Taylor (recognizing well-settled principle courts must give due weight to common sense judgments reached by officers in light of their experience and training), *citing* United States v. Perkins, 363 F.3d 317, 321 (4th Cir. 2004).

State v. Geer, 391 S.C. 179, 705 S.E.2d 441 (Ct. App. 2012), *quoting* Texas v. Brown, 460 U.S. 730, 742, 103 S.Ct. 1535 (1983), *quoting* Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302 (1949). "Probable cause may be found somewhere between suspicion and sufficient evidence to convict. Geer, 391 S.C. at 197; State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). "[T]o show that a suspect's DNA is relevant under the second element of Baccus, the State must show there is other DNA evidence in the case to which it can be compared, or some other manner clearly indicate the relevance of the DNA sought." State v. Jenkins, 398 S.C. 215, 224, 727 S.E.2d 761, 766 (Ct. App. 2012).

The Lack of Merit of Collin's 1st Argument

There is no merit to Collins' argument the Schmerber Order is not valid. At the Schmerber hearing before Judge Dennis, the State produced sufficient evidence that probable cause existed to obtain the 2nd buccal sample of appellant Collins. (App. pp. 9-30). Gates. Even independent of the information developed from the 1st buccal swab, the State established probable cause to obtain the 2nd buccal swab.

At the hearing Investigator Christine Wilson, the case detective, testified to the fact that she was an investigator with the Beaufort County Sheriff's Office and was familiar with the investigation of the murder of Ronald Coleman. She testified under oath to the investigation of the murder of the victim and the eventual identification of Collins as the shooter and the discovery of his person being located in Miami, Florida. (Tr. January 25, 2012, pp. 9-30).

Investigator Wilson testified to fact there was an *eyewitness* to the murder, *Enrekae Miles*, and the fact that Miles was forced at gunpoint by *two (2) men* to the victim's front porch. She testified to the fact there was a shootout between the victim and the shooter, including shell casings from *two (2) different guns* found at the scene in *two (2) different locations*. She testified

to the fact the victim died from the gunshot wounds inflicted by the shooter who forced his way into the victim's house before the exchange of gunfire. The investigator testified to the substance of the 911 call received the night of the murder by Beaufort police in which the 911 caller, who lived near the victim, stated there were *two (2) black males* involved and *one (1)* of them stated before getting in a car and leaving the area that he had been shot in the leg. The investigator testified to the *identification of the car* involved in the crime as being a beige or crème colored *Cadillac Deville* by witnesses in the area of the crime. The investigator testified to the discovery of the *blood drops* at the crime scene, *on the road leading away from the victim's residence*, on the *.40* caliber *pistol* found in the grass where the blood trail ended, and in the *Cadillac Deville* recovered in Jasper County, and how police determined the shooter/perpetrator was wounded during the exchange of gunfire with the victim, from the blood drops, the blood trail, and the blood in the car. *She testified to the fact samples from the above described locations were taken and forwarded to SLED for D.N.A. analysis.* She testified to the fact it was determined through D.N.A. analysis that the *same individual* left the blood drops at the crime scene, on the road leading away from the victim's residence, on the *.40* caliber pistol, and in the back seat of the Cadillac Deville. The investigating officer testified how police identified Antonio Collins, as a suspect in this case, from interviewing a named federal informant, Gussie Goldwire, who was related to Collins, and knew him by Antonio Wilson, and witnessed Collins and Jeremy Murphy arrive at Goldwire's residence in Jasper the night of the murder in *Murphy's Cadillac* and Collins had *recently been shot in the leg and was being helped from the car* and into the residence. Goldwire also informed police Collins was from Florida. The investigating officer testified how police also interviewed Jeremy Murphy, *the owner of the car* [the Cadillac Deville from which blood stains were found], who informed police Collins had

his car the night of the murder. Murphy knew Collins as Antonio from Florida. The investigating officer testified to her further investigation and research and how she identified Collins as the person both the named informant [Goldwire] and Murphy identified and were referring to was in fact appellant Antonio Eugene Collins by using the names of relatives of Collins whose names Goldwire had provided to the investigator and those same relatives names showed up in Collins' police intelligence reports. The investigator also testified to the fact Collins was determined to be a resident of Florida, as Murphy had informed police, and he was located in the Miami – Dade County jail and that Miami police approached Collins and obtained a buccal swab from him, that swab was sent to SLED, and it matched the DNA of the blood found on the victim's front porch, on the road leading away from the crime scene, on the gun found near the end of the blood trail, and in Murphy's Cadillac Deville. And, she testified to the scars she saw on Collins' legs in photos taken by Miami police which could be attributable to a gunshot wound. (Tr. January 25, 2012, pp. 9-30).

At the conclusion of the hearing, Judge Dennis determined there was probable cause to issue the Schmerber Order (Tr. January 25, 2012, pp. 33-37), and Judge McDonald also made a separate finding, at a separate hearing, that Judge Dennis found probable cause existed to obtain the 2nd buccal sample and as a result, Collins' motion to suppress that sample must be denied. (Order Denying Defense Motion to Suppress Buccal Swabs, pp. 1-7).

The findings of fact and conclusions of law of both Judge Dennis and Judge McDonald are fully supported by the record. Each of the three (3) elements set forth in State v. Baccus, In re Snyder, State v. Register, and State v. Jenkins, were met: (1) There was sufficient evidence in the record of a substantial basis from which Judge Dennis could make a practical, common sense decision, given all the circumstances set forth before him, including the 'veracity' and 'basis of

knowledge' of persons supplying hearsay information, there was a fair probability that evidence of a crime would be found in a particular place, Collins' person [his D.N.A.]. Gates, 462 U.S. at 238 (emphasis added); *accord* Herring, 387 S.C. at 212, 692 S.E.2d at 495-96; State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)(adopting Gates test). And, (2) there was evidence recovered at the crime scene and surrounding area from which a D.N.A profile had been developed to compare Collins' D.N.A. to. Jenkins, 398 S.C. at 224, 727 S.E.2d at 766. Finally, (3) the intrusion was safe, reliable, and minimal "[a] gentle rub long the inside of the cheek does not break the skin, and it 'involves virtually no risk, trauma or pain." Maryland v. King, 133 S.Ct. 1958, 1979 (2013)("nothing suggests a buccal swab poses any physical danger [to the defendant] whatsoever"). Additional factors the lower court had to weigh were the seriousness of the crime [murder & burglary 1st degree] and the importance of the evidence to the investigation [the evidence was critical to the investigation to identify or eliminate Collins as the perpetrator, to determine if he was the same person from whom the buccal swab was taken by Miami authorities, and Collins was challenging the validity of the consent swab obtained by Miami police]. Register, 308 S.C. at 538, 419 S.E.2d at 773; Simmons, *supra*. As required, Judge Dennis balanced the necessity for acquiring involuntary nontestimonial identification evidence against constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures. Id. As a result, there is no merit to this appellate issue.

Furthermore, the 2nd buccal swab was a lawful search incident to arrest. Maryland v. King, 133 S.Ct. 1958 (2013). When Collins appeared before Judge Dennis for the Schmerber hearing, he had already been arrested for murder, a dangerous and violent crime. (arrest warrant). He had also been indicted by the Beaufort County grand jury. The 2nd buccal swab was taken after the Schmerber hearing. In Maryland v. King, the United States Supreme Court recognized

that when police take a buccal swab from a defendant arrested for a dangerous felony, the search is no different than police taking the fingerprints of an arrested subject or taking a booking photograph. It is a lawful search incident to arrest, and individualized suspicion is not necessary. As a result, the taking of the 2nd buccal swab did not violate the Fourth Amendment. Id.[20]

Finally, Collins' DNA would have been inevitably discovered. Id. The United States Supreme Court decided Maryland v. King, *supra* on June 3, 2013. Collin's trial did not begin until October 24, 2013. As a result, the State would have inevitable discovered Collins' DNA in any event. Id.; Nix v. Williams, 467 U.S. 431 (1984); United States v. Allen, 159 F.3d 832 (4th Cir. 1998). *See* S.C. Code Ann. Section 23-3-620 (effective January 1, 2009).[21] This appellate ground has no merit and must be dismissed.

The Exclusionary Rule Should Not Apply

Even assuming *arguendo* error below, the exclusionary rule should not apply. The United States Supreme Court and our appellate courts have recognized the exclusionary rule should only apply as a last resort, only after balancing the deterrence value verses the societal costs, and only when there is flagrant police misconduct. Davis v. United States, 131 S.Ct. 2419 (2011); State v. Brown.[22] Police practices trigger the harsh sanction of exclusion only when they

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[20] *See also generally* S.C. Code Ann. Section 23-3-620 (effective January 1, 2009), (*See Notes: Implementation of the procedures in this section is contingent upon SLED receiving funds necessary to implement these procedures*).

[21] *See* United States v. Whitehorn, 813 F.2d 646 (4th Cir. 1987); State v. Brown, 289 S.C. 58, 347 S.E.2d 882 (1986) (inevitable discovery is an exception to the exclusionary rule); State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012)(remanding to determine if inevitable discovery applied); State v. Bruce, 402 S.C. 621, 741 S.E.2d 590 (Ct. App. 2013)(recognizing exception but finding exception not met); State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011)(evidence may be admitted "if the government can prove the evidence would have been obtained inevitably."

[22] *See* Herring v. United States, 555 U.S. 135 (2009); Hudson v. Michigan, 547 U.S. 586 (2006); State v. Jenkins, *supra*; Weston, 329 S.C. at 293, 494 S.E.2d at 804; State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471 473 (1987); Sachs 264 S.C. at 566, 216 S.E.2d at 514; State v. Spears,

are deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system. Davis; Herring, 555 U.S., at 144. The conduct of the officers here was neither of these. Under the circumstances of this case, exclusion would not further the purposes of the exclusionary rule, and suppression is not proper. Id.; State v. Harvin, 343 S.C. 190, 194, 547 S.E.2d 497, 500 (2001)(main purpose of the exclusionary rule is deterrence of police misconduct). The conduct of the investigators here did not violate Collins' 4th Amendment rights deliberately, recklessly, or with gross negligence. Herring, *supra.*[23] The evidence should not be excluded. Id.

In addition, judicially created exceptions have been established to ameliorate the harsh effects of the judicially-created exclusionary rule. Id.; Brown.

The 1st Buccal Swab would have been inevitably discovered

Detective Segovia testified at the suppression hearing that if Collins had not consented to the taking of the 1st buccal swab, he would have sought and obtained a court order for the same. He had already talked to the local Miami prosecutor regarding the same. As previously set forth, law enforcement had probable cause to obtain a Schmerber order to obtain Collins' D.N.A. even without the results of the 1st buccal swab based on the information developed by police during the investigation of this murder including the statements from two (2) named individuals, Gussie Goldwire and Jeremy Murphy, which had been corroborated by physical evidence, and their follow up investigation which determined the person Goldwire and Murphy were referring to was appellant Antonio Eugene Collins. As a result, the 1st buccal swab would have been

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393 S.C. 466, 482, 713 S.E.2d 324 (Ct. App. 2011).

[23] Further, under the facts of this case, suppression would make no sense where there is no evidence of police misconduct at the Schmerber hearing; they did not conduct a warrantless search, but obtained a Schmerber order from a neutral and detached circuit judge [Judge Dennis] before conducting the 2nd buccal swab. *See* Illinois v. McArthur, 531 U.S. 326 (2001); Davis, *supra*; Brown, *supra*.

inevitably discovered. United States v. Whitehorn, 813 F.2d 646 (4th Cir. 1987); State v. Brown, 289 S.C. 58, 347 S.E.2d 882 (1986) (inevitable discovery is an exception to the exclusionary rule); State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012)(remanding to determine if inevitable discovery applied); State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011)(evidence may be admitted "if the government can prove the evidence would have been obtained inevitably.").

The Evidence from the 2nd Buccal Swab is Admissible under the Good Faith Exception

Furthermore, the evidence recovered as a result of the Schmerber order is admissible under the "good faith" exception to the warrant requirement. Herring, 555 U.S. 135; Leon, 468 U.S. 897; United States v. Williams, 548 F.3d 311 (4th Cir. 2008); State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). In Leon, the Court held the exclusionary rule does not ban evidence obtained by officers acting in reasonable reliance on a search warrant [or court order] issued by a neutral magistrate [or circuit judge] but later found to be invalid for lack of probable cause. Id. As the Court made clear in Herring v. United States:

> These principles are reflected in the holding of Leon: When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted "in objectively reasonable reliance" on the subsequently invalidated warrant. 468 U.S., at 922, 104 S.Ct. 3405.

Id., 555 U.S. at 142. The Fourth Circuit has addressed the "good faith" exception at length:

> As the Supreme Court instructed in Leon, "a court should not suppress the fruits of a search conducted under the authority of a warrant, even a 'subsequently 'invalidated' warrant, unless 'a reasonable well-trained officer would have known that the search was illegal despite the magistrate's authorization.'" United States v. Byrum, 293 F.3d 192, 195 (4th Cir. 2002) (*quoting* Leon, 468 U.S. at 922, n. 23, 104 S.Ct. 3405). The Leon Court explained "that the deterrence purpose of the exclusionary rule is not achieved through the suppression of evidence obtained 'by an officer acting with objective good faith' within the scope of a search warrant issued by a magistrate." United States v. Perez, 393 F.3d 457, 461 (4th

> Cir. 2004)(*quoting* Leon, 468 U.S. at 920, 104 S.Ct. 3405, 82 L.Ed. 2d 677). "Hence, under Leon's good faith exception, evidence obtained pursuant to a search warrant issued by a neutral magistrate does not need to be excluded if the officer's reliance on the warrant was 'objectively reasonable.'" Id. (*quoting* Leon 468 U.S. at 922, 104 S.Ct. 3405, 82 L.E.2d 677).

Williams, *supra* at 317.[24] South Carolina also recognizes a good faith exception to evidence seized pursuant to a warrant defective under S.C. Code Ann. Section 17-13-140, if the officers made a good faith attempt to comply with the affidavit requirement under S.C. Code Ann. Section 17-13-140. Sachs. *See* McKnight, 291 S.C. at 112-13, 352 S.E.2d at 472 (refusing to apply exception where officers failed to attempt to comply in good faith to the affidavit requirements), *and* State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), *Toal, C.J. concurring in result.* Recently, the Court again recognized a good faith exception to the search warrant requirement and the requirements of Section 17-13-140 in State v. Herring.

> Recently, however, we recognized that there is a "'good faith'" exception to the statute's [S.C. Code Ann. 17-13-140] requirements where the officers make a good faith attempt to comply with the statute's affidavit procedures." State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), *citing* McKnight.[fn 6] [In Covert, we left open the question of whether a good faith exception applies when "the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid." Id. at 209, 675 S.E.2d at 743. Given our recognition of an exception for

[24] Leon admonished searches conducted "pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." 468 U.S. at 922 (internal quotation marks omitted). An officer's reliance on a warrant would not qualify as "objectively reasonable," however, in 4 circumstances: (1) the magistrate in issuing the warrant was misled by information in an affidavit the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) the magistrate acted as a rubber stamp for the officers and so wholly abandoned his detached and neutral judicial role; (3) a supporting affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) a warrant is so facially deficient, i.e., in failing to particularize the place to be searched or the things to be seized, the executing officers cannot reasonably presume it to be valid. Williams, 548 F.3d at 317; Weston; State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990); Adolphe; State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991).

> an officer's good faith attempt to comply with the affidavit requirement, we find no reason not to extend such a good faith exception to a warrant reasonably believed to be valid, but later determined invalid. Accordingly, even if we were to determine the affidavit was improper, we would find the SLED agents acted in good faith and reasonably believed the warrant valid, Such that the search should be upheld.]

Herring, 387 S.C. at 215. Here, Beaufort police did not search Collins without a warrant or court order, but obtained what they believed to be a valid Schember order from a neutral and detached circuit judge, who independently determined probable cause existed; and, in reliance on that Order, police obtained the 2nd buccal swab. On this record, none of the 4 circumstances listed above barring the application of the "good faith" exception apply: (1) There is no evidence Judge Dennis was misled by knowingly false or recklessly false information; (2) There is no contention Judge Dennis was not neutral and detached; (3) The testimony at the Schmerber hearing was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" (4) The Schmerber Order particularly describes the place to be searched and the items to be searched for. The good faith exception should apply and the exclusionary rule should not be enforced. There is no merit to this appellate issue and it must be dismissed.

ARGUMENT II.

The trial judge did not err in admitting the DNA evidence because the allegation of possible cross-contamination went to the weight of the evidence not its admissibility.

What Occurred Below

Prior to the beginning of the trial itself, Collins moved before Judge Kinard to suppress the D.N.A. evidence collected by police from the victim's front porch, Seabrook Rd., the *.40* caliber pistol found in the grass, and the back seat of the Cadillac Deville. Collins alleged the evidence was sloppily gathered by police and there was the danger of cross-contamination or transference. Judge Kinard conducted an *in camera* hearing to determine whether this motion had any merit. (Tr. pp. 50-51). Numerous officers testified to; responding to the crime scene, preservation of the scene, collection of blood evidence, returning to the scene and collection of further blood samples, recovery and processing of the *.40* caliber firearm, processing of the Cadillac Deville, and the preservation of evidence. (Tr. pp. 51-102). At the conclusion of the hearing, Judge Kinard denied the motion to suppress finding Collins' arguments went to the weight of the evidence, which he could bring out before the jury and argue, but not its admissibility. Judge Kinard determined the testimony established the collection and preservation of the evidence by Beaufort police was sufficient to allow its admissibility and overruled Collins objection to this evidence on this basis. (Tr. pp. 102-105).

Standard of Review

In criminal cases, an appellate court sits to review errors of law only. State v. Lee-Grigg, 374 S.C. 388, 398, 649 S.E.2d 41, 46 (Ct. App. 2007) *cert. granted*; State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.; State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 504 (Ct. App. 2004).

On appeal, the appellate court is limited to determining whether the trial court abused its discretion. State v. Walker, 366 S.C. 643, 653, 623 S.E.2d 122, 127 (Ct. App. 2005). The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982); State v. Patterson, 367 S.C. 219, 230, 625 S.E.2d 239, 245 (Ct. App. 2006) *cert. pending*.

Standard of Review/the Admission of Evidence

The admission or exclusion of evidence is within the sound discretion of the trial judge and is reversible only for an abuse of discretion. State v. Pagan, 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); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). Where an appellant challenges the admissibility of an expert's testimony on the grounds that it is unreliable pursuant to Rule 702 SCRE, the appellate court reviews the admission of such testimony under an abuse of discretion standard. State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001), *citing* Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998).

Issue Raised on Appeal

Collins argues on appeal the DNA evidence should not have been admitted because the evidence was "sloppily gathered" and preserved by the Beaufort County Sheriff's Office resulting in a great danger of cross-contamination and therefore unreliable under Rule 702 SCRE. (See Brief of Appellant) He argues, therefore, the evidence should have been excluded under Rule 702, SCRE.

Analysis

Collins' contention on appeal, that he should be given a new trial because this evidence was "sloppily gathered" and preserved by Beaufort police and therefore unreliable is without merit. First, Collins makes this assertion in his brief without any citation of legal authority on this issue and without any citation to the trial record anywhere in his brief. (See Brief of Appellant). This appellate ground must be dismissed. Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993)(an issue is abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority). Further, there was no objection when the evidence was entered; this issue is not preserved for appellate review. State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001).

Further, most of Collins' complaints under this appellate issue are regarding how the police conducted their investigation of this murder, not the integrity of the D.N.A. evidence. This appellate issue has no merit and must be dismissed.

Additionally, if Collins' contention is that the D.N.A. evidence should have been excluded under Rule 702, his argument is completely misplaced. Rule 702 SCRE deals with the admissibility of the science of DNA testing. Our Supreme Court rejected a similar contention in State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001). In Ramsey, the Court first noted that like appellant here, Ramsey did not challenge the procedure of DNA testing used by the expert. Ramsey did not demonstrate the procedure used by SLED was unreliable, much less so unreliable as to warrant exclusion. Second, the Court noted the testimony concerning DNA evidence complied with the requirements set forth in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). The Court held: "Any evidence concerning contamination, therefore went to the weight of the testimony, not its admissibility." Ramsey. 345 at 616. The Court finally noted that

the mixture of DNA evidence is not a basis for the exclusion of the DNA testing. Id., *referencing* Oregon v. Lyons, 124 Or. App. 598, 863 P.2d 1303 (1993)(finding the potential for DNA contamination presents an "open field" for cross examination at trial, but does not indicate the PCR method of DNA testing is inappropriate for forensic use).

Under the Rule 702 analysis used by the Court in Ramsey, Collins' has not shown that possible contamination or cross-contamination indicates *the method of DNA testing used in this case* is inappropriate for forensic use. *DNA testing* whether PCR or STR is scientifically reliable. *See* Ramsey; State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990). Collins does not contend otherwise.[25] As a result, Collins' contention on appeal is misplaced, and his appeal must be dismissed with prejudice.

Furthermore, in State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2005), *reversed on other grounds* Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006)(reversed on issue of 3rd party guilt evidence), our Supreme Court held: "[T]he fact the forensic evidence may have been compromised by the unprofessional manner in which the evidence was collected goes to the weight of the evidence, not its admissibility." State v. Holmes, 361 S.C. at 343, fn 8, *citing* State v. Carter, 344 S.C. 419, 544 S.E.2d 835, (2001); State v. Smith, 326 S.C. 39, 482 S.E.2d 777 (1997). Given Collins' assertion on appeal, this appeal must be dismissed with prejudice. State v. Holmes.

In fact, Collins' cannot overcome the holding of State v. Ramsey, *supra*. In Ramsey, the defendant contended the evidence admitted at trial should have been excluded because of the

[25]Collins does not even argue the type of DNA testing used in this case was scientifically unreliable under the factors enunciated in Council and State v. Jones, 273 S.C. 723, 259 S.E.120 (1979). *See also* State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009)(setting forth the factors enunciated in Council and Jones, *supra*). Such an argument would fail in any event. *See* Maryland v. King, *supra*.

possibility of cross-contamination of DNA evidence. Ramsey maintained blood on a boot could have been contaminated by the way police handled the evidence, while the police testified they were careful and complied with procedures. The Ramsey Court stated: "We find these issues relate to the weight of the evidence." Id. at 615. Therefore, this appeal must be dismissed.

Furthermore, there is no testimony in this case that there was cross-contamination during the collection process, only Collins' conjecture of the possibility of contamination or cross-contamination. Such matters are peculiarly within the province of the jury regarding the weight to be given to the evidence and are the subject of cross-examination and argument to the jury. State v. Holmes; State v. Ramsey. While Ramsey and Ford also hold that evidence may be so tainted that it is unreliable and should be excluded, there is no testimony in this case that this occurred during the gathering, collection, or preservation process.

The jury was fully aware of the collection process of the evidence in this case including that of the blood drops from the front porch, the shoe impressions in the road, the discarded *.40* caliber pistol, and that in the back of the getaway vehicle. The jury was also aware of who seized the evidence, what type of containers they were in, who they were turned over to at different points in time, in what condition they were in, and how they were transported to the Sheriff's Office and SLED. In fact, Collins' argued the possibility of cross-contamination of this evidence to the jury in his closing argument. As the Court held in Ramsey, whether there was a possibility of contamination or cross-contamination was clearly a matter of what weight the jury would give to the evidence. Id.

Further, there is no contention the DNA buccal swabs taken from Collins person were sloppily gathered or there was a danger of cross-contamination to them or from them. Collins did not raise this issue below, and he does not raise it on appeal. There is no contention the DNA

profiles developed from his buccal samples are inaccurate. Collins' DNA profile is what it is.

It is also undisputed, that before SLED ever received Collins' buccal samples, the SLED DNA analyst found no mixture of DNA in any of the samples submitted to her from Beaufort County, i.e. the samples taken from the victim's front porch, from Seaport Rd., from the murder weapon, or from the back seat of the getaway vehicle. Before receiving Collins' buccal samples, SLED independently determined the only contributor to the samples taken from each of these locations was one (1) and the same person.

Further, it is undisputed that after SLED received Collins' buccal swabs, and developed his DNA profile from the same, it was determined by SLED that Collins' [a Miami, Florida resident's] DNA profile matched the DNA profiles previously developed from the four (4) locations at or near the crime scene [located in Beaufort County, South Carolina]. Collins has failed to prove there was cross-contamination.

For the above stated reasons, Collins has failed to show Judge Kinard abused his discretion in admitting this evidence. As a result, this appellate issue has no merit. State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001), *citing* Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998).

Harmless Error

Even assuming *arguendo* the trial judge erred in admitting some of the DNA evidence, the admission of the evidence was harmless given the overwhelming evidence of Collins' guilt. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." Pagan, 369 S.C. at 212, 631 S.E.2d at 267 (*citing* Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)); State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002).

In making a determination regarding harmless error, this Court will look at the entire

record. State v. Miller, 367 S.C. 329, 626 S.E.2d 328 (2006). This Court will not set aside a conviction for an insubstantial error not affecting the result when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached. State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995). The evidence against Collins was overwhelming.[26] Guilt was conclusively proven, and no other rational conclusion could have been reached.

There is no contention the DNA buccal swabs taken from Collins' person were sloppily gathered or there was a danger of cross-contamination to them or from them. Collins did not raise this issue below and he does not raise it on appeal. There is no contention the DNA profiles developed from his buccal samples are inaccurate. They are his.

It is also undisputed the SLED DNA analyst found no mixture of DNA in any of the samples submitted to her for comparison from at or near the crime scene, i.e. the samples taken from the victim's front porch, from Seaport Rd., from the murder weapon, or from the back seat of the getaway vehicle. S.LE.D. independently determined the only contributor to the samples taken from each of these locations was one (1) and the same person.

Further, it is undisputed Collins' DNA profile, developed later from his two (2) buccal samples, matched those previously developed from the four (4) locations in Beaufort County just described.

"[A]n insubstantial error not affecting the result of the trial is harmless where 'guilt' has been conclusively proven by competent evidence such that no other rational conclusion can be reached." Pagan, 369 S.C. at 212, 631 S.E. 2d at 267 (quoting State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)); State v. Adams, 354 S.C. 361, 381, 580 S.E.2d 785, 795 (Ct. App. 2003). In this case, no other rational conclusion could have been reached by the jury given the

[26] Collins did not testify. He called no alibi witnesses.

overwhelming evidence of Collins' guilt.

"There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted." State v. Griffin, 339 S.C. 74, 77-78, 528 S.E.2d 668, 670 (2000). "Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial." State v. Sherard, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991); State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003)(admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); *see also* State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996)(instructing that error in admission of evidence is harmless where it is cumulative to other evidence which was properly admitted); State v. Douglas, 367 S.C. 498, 520, 626 S.E.2d 59, 71 (Ct. App. 2006). *See also* **State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (Ct. App. 2006)(holding error in admission of some DNA evidence was harmless given other properly admitted DNA evidence and additional evidence of defendant's guilt),** *referencing* State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996)("[W]here a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed."), *other citations omitted.* The admission of one (1) or even two (1) pieces of DNA evidence, even if somehow erroneous, was harmless given the other overwhelming DNA evidence of Collins' guilt. Baccus, *supra.*

ARGUMENT III.

Collins was properly indicted, tried, and convicted for these crimes based on evidence presented to the jury in his trial; it is therefore irrelevant whether there was probable cause to arrest him for this charge, because his person is not fruit of the poisonous tree; regardless, there was probablecause to arrest Collins.

Lack of Preservation of this Issue

Collins argues there was no probable cause for his arrest. This issue was not raised below, and as a result, it is not preserved for appellate review. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003)(for an issue to be preserved for appellate review, the issue must have been raised to and ruled on by trial judge); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Mazzone v. Miles, 341 S.C. 203, 532 S.E.2d 890 (Ct. App. 2000)(defendant cannot raise issue for first time on appeal); Jones v. Daley, 363 S.C. 310, 609 S.E.2d 597 (Ct App. 2005)(argument not raised below or raised for the first time on appeal is not preserved); State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Jean Hoefer Toal et al.*, Appellate Practice in South Carolina 57 (2d ed. 2002). Collins has met none of these requirements. To preserve an issue for appellate review, a contemporaneous objection must be made when the evidence is offered. State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (2006). Since this issue was never raised to the trial judge, it is not preserved for appellate review. This appellate ground must be dismissed.

The Lack of Merit of this Ground

Collins argues there was no probable cause for his arrest; and, as a result, his convictions and sentences should be vacated. Collins is wrong.

Collins is essentially arguing that his prosecution and conviction is barred because his

extradition was improper because there was no probable cause for his arrest. There is no merit to this argument. State v. Walker, 232 S.C. 290, 101 S.E.2d 826 (1958); State v. Waitus, 226 S.C. 44, 83 S.E.2d 629 (1954).

As previously set forth, there is no merit to Collins' argument the arrest warrant was not sufficiently supported by probable cause. The victim was murdered on the night of June 22, 2009 in his residence on Seabrook Road. An eyewitness informed police two (2) men committed the crime, one (1) of the two (2) having a pistol. The eyewitness informed police the armed man went up onto the victim's front porch and kicked the front door in and started shooting. The victim returned fire. The physical evidence found at the scene by police corroborated these facts. The victim was found shot to death in his own home. The victim had his own .45 caliber weapon still in his hand and there were fired .45 caliber shell casings nearby in the home. Also found in the home and on the porch were fired *.40* caliber shell casings but in a different area from the .45 caliber shell casings. On the front porch police found blood drops. Subsequently, police found 60 blood impressions going down Seabrook Rd. and terminating in the middle of the road. Nearby, police found a discarded *.40* caliber pistol with blood on it. A neighbor, who called 911, informed police she overheard one (1) of the two (2) men state out loud that he had been shot in the leg, before the two (2) men got into a getaway vehicle and left the scene. Neighbors or relatives of the victim informed police the getaway vehicle was a cream or beige Cadillac Deville.

Several months later, a named federal informant, Gussie Goldwire, informed police he was present at his home in nearby county on the same night as the victim's murder, and Collins and Jeremy Murphy arrived at the residence in Murphy's Cadillac. Collins was injured. He had been shot in the leg and was bleeding. Goldwire informed police another individual was also

involved but he had been dropped off earlier. Goldwire informed police that he was told Collins and Murphy were involved in some kind of crime and Collins got shot. Goldwire knew Collins as Antonio Wilson, but he was Collins' cousin and provided police with Collins' residence as Miami, Florida and the names of relatives including his father and mother.

Jeremy Murphy also informed police that Collins, who he knew as Antonio from Florida, had his vehicle on the night in question with another individual. Police seized Murphy's vehicle which matched the description given by witnesses near the crime scene. Police searched Murphy's vehicle and discovered blood in the back of the vehicle. D.N.A. testing confirmed the same individual that bled in Murphy's Cadillac Deville bled on the victim's front porch, down the road from the victim's home, and on the *.40* caliber weapon found on the side of Seabrook Road.

Through further investigation, using the information Goldwire supplied, along with police computer databases, police were able to determine that Collins was in fact the same individual that Goldwire and Murphy had identified as being involved in the murder of the victim. Police determined Collins was from Miami, Florida, had previously been in South Carolina during the time of the murder, and was now located in the Miami / Dade County Jail. Police obtained a buccal swab from Collins, and his DNA matched the blood samples found at the scene, on the *.40* caliber pistol, and in Murphy's car. As a result, there was probable cause to arrest Collins.

Further, the magistrate determined there was probable cause and issued an arrest warrant for Collins. (See Extradition Packet). Collins was also indicted by the Beaufort County grand jury for murder, burglary 1st degree, kidnapping, and possession of a weapon during a violent crime. (Indictments).

Further, even assuming *arguendo* the arrest was not supported by probable cause, it would not bar Collins prosecution and conviction for murder, burglary, and possession of a weapon during a violent crime; the illegality of an arrest will not bar a person's subsequent prosecution and conviction. State v. Biehl, 271 S.C. 201, 246 S.E.2d 859 (1978); State v. Carpenter, 257 S.C. 162, 184 S.E.2d 715 (1971); State v. Holiday, 255 S.C. 142, 177 S.E.2d 541 (1970); State v. McCoy, 255 S.C. 160, 177 S.E.2d 601 (1970); State v. Swilling, 246 S.C. 144, 142 S.E.2d 864 (1965); State v. Waitus, 226 S.C. 44, 83 S.E.2d 629 (1954). A defect in the arrest may be cured by an indictment by a grand jury having proper jurisdiction. State v. McCoy, 255 S.C. 160, 177 S.E.2d 601 (1970); Thompson v. State, 251 S.C. 593, 164 S.E.2d 760 (1968); State v. Swilling, 246 S.C. 144, 142 S.E.2d 864 (1965); State v. Walker, 232 S.C. 290, 101 S.E.2d 826 (1958). *See also generally* Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509 (1952); State v. Waitus, 226 S.C. 44, 83 S.E.2d 629 (1954).

Collins was indicted by the Beaufort County grand jury for murder, burglary 1st degree, kidnapping, and possession of a weapon during a violent crime, a separate finding of probable cause. State v. McCoy, 255 S.C. 160, 177 S.E.2d 601 (1970); Thompson v. State, 251 S.C. 593, 164 S.E.2d 760 (1968); State v. Willing, 246 S.C. 144, 142 S.E.2d 864 (1965); State v. Walker, 232 S.C. 290, 101 S.E.2d 826 (1958)(when the initial process which is used to effect an arrest has been improperly issued, such impropriety or irregularity may be cured by an indictment by a grand jury having proper jurisdiction). The indictments were what Collins was tried on not the arrest warrant.

Further, if a person is arrested out of state, and brought back in violation of extradition laws, it will not invalidate the subsequent prosecution of the defendant. State v. Waitus, 226 S.C.

44, 83 S.E.2d 629 (1954).[27] This is consistent with views expressed by the United States Supreme Court in Frisbee v. Collins, 342 U.S. 519, 72 S.Ct. 509 (1952). *See also* Ker v. Illinois, 119 U.S. 436, 444, 7 S.Ct. 225 (1886). The principle rests on the sound basis due process of law is satisfied when one present in court is convicted of a crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional safeguards. *C.f.* Ramirez. v. Indiana, 471 U.S. 147, 105 S.Ct. 1860 (1985)(per curiam). There is no merit to Collins' argument. Mahon v. Justice, 127 U.S. 700, 8 S.Ct. 1204 (1888); Pettibone v. Nichols, 203 U.S. 192, 27 S.Ct. 148 (1906); Lascelles v. Georgia, 148 U.S. 537, 13 S.Ct. 687 (1893); Cook v. Hart, 146 U.S. 183, 13 S.Ct. 30 (1892); State v. Smith, 1 Baily 283 (S.C. 1829). *See also* 7 S.C. Dig. 409.

The exclusionary rule, when it is applied, only applies to evidence seized in violation of the Fourth Amendment, and does not apply to the person. United States Crews, 445 U.S. 463, 474, 100 S.Ct. 1244 (1980)("Respondent is not himself suppressible fruit, and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by police misconduct."); Gerstein v. Pugh, 420 U.S. 103, 119, 95 S.Ct. 854 (1975)(similar). As a result, this appellate ground has no merit and must be dismissed.

Further, even excluding the 1st DNA buccal swab, based on the investigation, there was probable cause to arrest Collins. Both Gussie Goldwire and Jeremy Murphy identified Collins as the perpetrator of the crime. Further police investigation, using relatives of Collins provided by Goldwire, determined Collins was the person identified by Goldwire and Murphy.

Finally, the State obtained a 2nd buccal swab pursuant to a Schmerber Order and that

[27] Collins did not object or argue below that he was improperly extradited. Further, even if he had raised this issue, he has not shown his extradition was improper.

DNA matched the blood drops from the crime scene porch, the bloody impressions on the road leading away from the victim's residence, the murder weapon, and that found in the getaway car. As a result, there is no merit to this issue and this appeal must be dismissed with prejudice.

CONCLUSION

For the above stated reasons, Collins' convictions and sentences for murder, burglary 1st degree, and possession of a firearm during a violent crime, must be affirmed and this appeal dismissed.

Respectfully submitted,

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ANTHONY MABRY

June 23, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUN 23 2015
SC Court of Appeals

Appeal from Beaufort County
J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2013-002343

THE STATE,

Respondent,

vs.

ANTONIO COLLINS,

Appellant.

CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the Initial Brief of Respondent and Designation of Matter by depositing copies in the United States Mail to M. Rita Metts, Esquire, Metts Law Firm, LLC, 3531 River Drive, Columbia, SC 29201 and by InterAgency mail to Robert M. Dudek, Chief Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201 this 23rd day of June, 2015.

ANTHONY MABRY
Assistant Attorney General

RECEIVED
JUN 23 2015
SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

June 23, 2015

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Antonio Collins
Appellate Case No. 2013-002343

Dear Ms. Kitchings:

Enclosed please find the Initial Brief of Respondent and Designation of Matter in the above-captioned matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Anthony Mabry
Assistant Attorney General

/lbb
Enclosure

cc: M. Rita Metts, Esquire
Robert M. Dudek, Esquire
Isaac McDuffie Stone, III, Solicitor
Trish Allen, Victims Assistance

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