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October 27, 2015

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Bowen, 344725 vs. State of SC
2014-CP-45-117

Dear Sir or Madam:

Enclosed herewith you will find the Notice of Appeal, Order of Dismissal, along with a Proof of Service in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,

Charles T. Brooks, III
CTB/srw

Enclosed as stated
cc: Daniel Gourley, Office of Attorney's General
South Carolina Office of Appellate Defense
Kelvin Bowen, #344725

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY

Court of Common Pleas
Honorable Steven H. John Circuit Court Judge

Case No: 2013-CP-45-373

Kelvin Michael Bowen, Jr.....Appellant

S.C.D.C. 344725

v.

The State.....Respondent

NOTICE OF APPEAL

Kelvin Michael Bowen, Jr., appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable Steven H. John, August 4, 2015, which I, Charles T. Brooks, III, received on October 23, 2015.

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Dated: 10/27/2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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OCT 29 2015

S.C. SUPREME COURT

APPEAL FROM WILLIAMSBURG COUNTY

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S.C.D.C. 344725

v.

The State.....Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 27th of October, 2015, I served the foregoing **Notice of Appeal, Order of Dismissal,** as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on October 27th, 2015, addressed to the following as indicated below:

South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
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Office of Attorney's General
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Mr. Kelvin Bowen, 344725
Perry Correctional Institution/SMU-CY 2
430 Oaklawn Road
Pelzer, SC 29669

Dated: October 27, 2015

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STATE OF SOUTH CAROLINA COUNTY OF WILLIAMSBURG	)	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT
Kelvin Bowen, #344725, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2014-CP-45-117 **ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on March 4, 2014 and amended on September 9, 2014, September 26, 2014, and February 10, 2015. Respondent made its return on December 2, 2014. An evidentiary hearing in to the matter was convened on July 13, 2015, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. The Applicant was true bill indicted at the July 2009 term of the Williamsburg County Grand Jury for murder, burglary—first degree, conspiracy, and possession of a weapon during a violent crime (2009-GS-45-180). William E. Jenkinson, III, Esquire and Amanda Shuler, Esquire, represented Applicant. Applicant proceeded to a jury trial and was

convicted as indicted. The Honorable Clifton Newman sentenced Applicant to a ninety nine year term of imprisonment for murder, a thirty year term of imprisonment for burglary—first degree, a five year term of imprisonment for possession of a weapon during violent crime, and a five year term of imprisonment for criminal conspiracy with all charges running consecutively.

A timely Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Bowen, 2013-UP-452 (Filed December 11, 2013). The Remittitur was issued on December 30, 2013.

ALLEGATIONS

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Appellate Counsel
    a. Appellate Counsel "failed to raise and brief the issue that Applicant's sixth and fourteenth amendment rights to a trial by an impartial jury was violated by the presence of a biased and partial juror because the trial court erred in refusing to remove juror for cause."
    b. Appellate Counsel "failed to raise and brief the issue that Applicant's constitutional right to confrontation under the Sixth Amendment was violated when the prosecution, over Applicant's objection, introduced the inculpatory statement of a non-testifying co-defendant who had previously been tried and sentenced in a separate trial and, who had invoked her fifth amendment right to remain silent, to impeach another testifying co-defendant testimony."
    c. Appellate Counsel "failed to raise and brief the issue that the trial court abused its discretion in allowing previously suppressed statement of a non-testifying co-defendant, who had previously invoked her fifth amendment right to remain silent, to impeach another testifying co-defendant's testimony in violation of Applicant's sixth and fourteenth amendment rights to a fair trial and, due process of law."
    d. Appellate Counsel "failed to raise and brief the issue that Applicant was denied due process of law in violation of the fifth, sixth, and fourteenth amendments to the united states constitution when the prosecutor failed to disclose, until the middle of Applicant's trial, to the defense, material exculpatory evidence."

e. Appellate Counsel "failed to raise and brief the issue that the trial court abused its discretion when it allowed the state to improperly admit evidence of a general criminal intent by the inference of gang activity, when neither gang activity was not an allegation against applicant nor any evidence that Applicant was a gang member and only worked to prejudice applicant, creating an inference of guilt from bad character, in violation of Applicant's sixth and fourteenth amendment to a fair trial and due process of law."
f. Appellate Counsel "failed to raise and brief the issue that Assistant Solicitor Kimberly Barr ordered that Applicant's person be searched and his person be stripped and photographed without a warrant or court order in violation of Applicant's right to be free from unreasonable invasions of privacy in violation of South Carolina Constitution, Article 1 § 10 and due process, § 3 and the fourth, fifth, sixth, and fourteenth amendments to the united states constitution to be free from warrantless, illegal and unlawful searches and seizures and being forced to strip and his body art photographed without a search warrant or court order."
g. Appellate Counsel "failed to raise and brief the issue that prosecutorial misconduct permeated Applicant's trial and, denied him a fair trial and due process of law in violation of the fifth, sixth, and fourteenth amendment."

Applicant filed his first amendment on September 9, 2014, alleging the following allegations:

1. Ineffective Assistance of Counsel
    a. Counsel failed to adequately investigate the facts and circumstances surrounding the death of the victim. Trial Counsel's failure to conduct such an investigation deprived the Jury of critical information relevant to an accurate assessment of the Applicant's guilt or innocence.
    b. Trial Counsel failed to object on all possible grounds to inflammatory and irrelevant evidence presented by the solicitor.
2. Due Process Violation
    a. The conviction and sentence was in violation of the Constitution of United States and South Carolina Constitution.
3. Subject matter jurisdiction
    a. Court was without jurisdiction to impose sentences.
4. Newly Discovered Evidence.
5. Prosecutorial Misconduct
6. Trial Judge abuse his discretion
7. Ineffective Assistance of Appellate Counsel.

Applicant filed his second amendment on September 26, 2014, alleging the following allegations:

1. Ineffective Assistance of Appellate Counsel
2. Trial Court abused his discretion.

Applicants filed his third amendment to his application on February 10, 2015, alleging the following allegation:

1. Ineffective assistance of counsel

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Applicant also presented testimony from Billy Jenkinson, Esquire. (hereinafter "Trial Counsel") and Assistant Solicitor Kimberly Barr (hereinafter "Assistant Solicitor"). This Court also had before it a copy of the trial transcript, the Williamsburg County Clerk of Court records, Applicant's South Carolina Department of Correction records, appellate records, the PCR application, and return.

During the evidentiary hearing, Applicant stated that he met with Trial Counsel numerous times prior to trial. Applicant recalled reviewing discovery material with Trial Counsel prior to trial. Applicant recalled discussing various defenses with Trial Counsel prior to trial. Applicant testified that he was convicted of murder. Applicant stated that the State alleged that he drove down from Maryland with Twanda Allen (hereinafter "Co-Defendant Allen"). Applicant stated the State alleged that he was texting with Ronald Mack (hereinafter "Co-Defendant Mack") while driving down from Maryland. Applicant stated Anotonio McClary (hereinafter "Co-Defendant McClary") testified against him at trial. Applicant stated that he was arrested in Maryland with Co-Defendant Mack. Applicant stated that he originally was not a suspect in the crime. However, Applicant stated that he had a California identification and Co-Defendant McClary alleged that a person nicknamed "Callie" participated in the murder. Applicant stated

that the police emailed his identification photo to the Williamsburg police at which point Co-Defendant McClary identified him as "Callie."

Applicant stated that he and Co-Defendant Mack were arrested at Co-Defendant Allen's car. Applicant stated that the police did an inventory report that identified various items in the car. Specifically, Applicant noted that the pre-towing report revealed that there was a T-Mobile Samsung cell phone, black leather wallet, a GPS and grey Motorola cell phone. Applicant stated that he has not seen the Samsung cell phone. Applicant stated that they had a hearing on the Motorola cell phone and it was discovered that the Motorola cell phone was purchased after the murder occurred. Applicant stated that no one knows where the Samsung Cell phone is located. Applicant stated that the State alleged that he was using the Samsung Cell phone when the crime took place. Applicant stated that if he had the Samsung Cell phone he would be able to prove that he was not in South Carolina.

Applicant stated that it was his understanding that everything made it to the Williamsburg County Sheriff's office except for the Samsung Cell phone. Applicant recalled that Trial Counsel had a second hearing about the Samsung Cell phone. Applicant noted that he presented alibi witnesses as a defense at trial. Applicant stated that he was at home with his wife and child. Applicant stated that he called his cousin Nay Newton to wish her a happy birthday. Applicant stated Trial Counsel should have called Nay Newton as an alibi witness at trial. Applicant stated Nay Newton lives in Texas and was not present for the PCR hearing.

Applicant stated he felt the way the police allowed Co-Defendant McClary's identification of him was improper. Applicant argued that the police only showed a picture of himself to Co-Defendant McClary. Applicant stated that the single photo was suggestive.

Applicant stated he took and passed a polygraph examination on December 1, 2009. Applicant claimed that Trial Counsel should have introduced the results of the polygraph during trial.

Applicant stated Trial Counsel was ineffective for failing to object to Assistant Solicitor's closing arguments. Applicant specifically referenced page 681 lines 17-25 and page 685 line 1-5.

Applicant stated Appellate Counsel was ineffective for failing to brief the issue of whether the Trial Court erred in allowing Lt. Collins to introduce Co-Defendant's Mack statement at trial. Applicant stated Appellate Counsel was ineffective for failing to brief the issue of whether the Trial Court erred in allowing the jury to hear Co-Defendant's statement after the jury was excused for deliberation. Applicant stated Appellate Counsel was ineffective for failing to brief the issue of whether the State committed a Brady violation regarding the missing Samsung Cell phone. Applicant stated Appellate Counsel was ineffective for failing to brief the issue of whether the Trial Court erred in allowing the State to introduce exhibit #82 – Co-Defendant Mack's composition notebook.

Following Applicant's testimony, Trial Counsel was called to testify by Applicant. Trial Counsel stated that he has been practicing law for forty-four years. Trial Counsel stated that he was retained to represent Applicant at trial. Trial Counsel stated that he met with Applicant multiple times prior to trial. Trial Counsel recalled reviewing the discovery material with Applicant prior to trial. Trial Counsel stated that he recalled the information about the case. Trial Counsel stated that the State had various pieces of evidence and testimony against Applicant. Specifically, Trial Counsel noted that Co-Defendant McClary testified against Applicant at trial. Trial Counsel noted that Co-Defendant Mack and Co-Defendant Allen did not

testify against Applicant. Trial Counsel stated that he objected to the fact that Co-Defendant McClary identified Applicant via a single photo lineup. Trial Counsel stated that there was circumstantial evidence against Applicant in Co-Defendant Allen's apartment in Maryland. Trial Counsel noted that the shotgun used in the murder and a second weapon was found in Co-Defendant Allen's apartment.

Trial Counsel recalled the issue about two cell phones. Specifically, Trial Counsel stated that there was a Samsung and Motorola Cell phone. Trial Counsel stated that there was an evidence bag that listed a GPS, Motorola phone, and leather wallet. Trial Counsel stated some of the material made it to Williamsburg. Trial Counsel stated that the Samsung Cell phone did not make it to Williamsburg. Trial Counsel stated that he had no written documentation that the Samsung Cell phone was ever recovered. Trial Counsel opined that the text message and data on the Samsung Cell phone would have been crucial for the case. Trial Counsel further recalled that an officer from Lake City showed up with Co-Defendant Mack's cell phone during the course of trial. Trial Counsel stated that they raised the defense of Alibi at trial. Trial Counsel could not specifically recall whether Applicant mentioned Nay Newton as a potential alibi witness.

Following Trial Counsel testimony, Assistant Solicitor Barr was called to testify. Assistant Solicitor Barr testified that she had received a list of various items that were received from Maryland sheriff's office. Assistant Solicitor Barr stated that she did not receive a Motorola Cell Phone, she did not receive a wallet, she did not receive a Samsung Cell phone, nor did she receive a GPS. Assistant Solicitor Barr stated that the items mentioned by Applicant in the pre-tow inventory sheet were only listed for record keeping purposes so the sheriff's office knew what was in the vehicle prior to towing. Assistant Solicitor Barr stated the various items

were not important at the time the Applicant was arrested. Assistant Solicitor Barr stated there was a hold on the vehicle, because it was allegedly used in the murder.

Assistant Solicitor Barr stated that the Motorola cell phone was listed on Applicant's inmate inventory list. Assistant Solicitor Barr stated Applicant requested that the Motorola cell phone be turned over to Trial Counsel. Assistant Solicitor Barr stated the jail turned over the Motorola cell phone to Trial Counsel. Assistant Solicitor Barr stated there was a signed letter showing that Trial Counsel received the Motorola cell phone from the jail.

Assistant Solicitor Barr stated the Co-Defendant Mack's cell phone came up through a Lake City police officer. Assistant Solicitor Barr stated that she and Trial Counsel took time to review the cell phone prior to it being discussed at trial. Assistant Solicitor Barr stated the Co-Defendant Mack's IPhone was seized during a traffic stop in Lake City. Assistant Solicitor Barr stated Co-Defendant's Mack's cell phone did not contain any contact information for Applicant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Specifically, this Court finds Trial Counsel's testimony credible and Applicant's testimony not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

1. Ineffective assistance of counsel for failing to introduce the Applicant's polygraph examination.

This Court finds Trial counsel was not ineffective for failing to introduce the Applicant's polygraph examination. This Court finds this allegation has no merit as the results of the polygraph test are inadmissible at trial. State v. Wright, 322 S.C. 253, 471 S.E.2d 700 (1996).

2. **Ineffective assistance of counsel for failing to present potential alibi witness, Nay Newton.**

This Court finds Applicant's allegation that he received ineffective assistance of counsel for failing to call Nay Newton as a witness at trial is meritless. Applicant claims that Ms. Newton would have furthered corroborated his alibi defense. Specifically, Applicant claimed that he, his wife, and child, all called Ms. Newton to wish her a happy birthday. Since Ms. Newton did not testify at the PCR hearing, this court cannot consider any testimony she might have given at trial to determine whether failure to call her constitutes ineffective assistance of counsel. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (Holding the Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice).

3. **Ineffective assistance of counsel for failing to properly argue a motion to suppress the single photo lineup shown to Co-Defendant McClary, where he identified Applicant as "Callie."**

The Applicant seems to complain ineffective assistance on the ground that Trial Counsel failed to properly argue a motion to suppress the single photo shown to Co-Defendant's McClary's when he identified Applicant as "Callie." This Court finds Trial Counsel put forth the proper argument and objections during pre-trial and trial. Notably, this very issue was briefed and addressed by the South Carolina Court of Appeals. State v. Bowen, 2013-UP-452 (Filed December 11, 2013). The Court of Appeals affirmed Applicant's conviction and sentence,

finding the single photo was valid and any error was harmless. Based off of the foregoing this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Trial Counsel's performance.

4. Ineffective assistance of counsel for failing to object to Assistant Solicitor Barr's closing argument.

This Court finds Applicant's allegation that he received ineffective assistance of counsel for Counsel's failure to object to Assistant Solicitor Barr's closing argument is meritless. This Court notes "closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." State v. Mouzon, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995), aff'd, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing Herring v. New York, 422 U.S. 853 (1975)). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609–10, 602 S.E.2d at 744. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not

receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

This Court, having reviewed the entire argument, finds it not to have been objectionable. This Court finds that Assistant Solicitor Barr made a valid argument regarding credibility. Based off of the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Trial Counsel's performance.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

"Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is 'difficult to demonstrate that counsel was incompetent.'" United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not deficient performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

"To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a

particular issue on appeal, he would have prevailed on his appeal." United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

Here, appellate counsel argued Applicant's federal and state constitutional rights to due process of law were violated by the admission of a witness's identification of Applicant where the out-of-court identification process was unnecessarily suggestive and conducive to irreparable mistaken identification. See Brief of Appellant. Appellate Counsel took issue with the single photograph array identification procedure with McClary. Appellate Counsel specifically pointed out that Investigator Lail's preliminary hearing testimony directly contradicted her testimony during the suppression motion. Id. Appellate Counsel argued that the single photograph array was inherently unreliable and unduly suggestive. Id.

As an initial matter, this Court notes that appellate counsel did not testify at the PCR hearing. This Court finds that a presumption of effectiveness applies and that it is Applicant's burden to prove that appellate counsel was ineffective in failing to raise stronger issues that would have resulted in a reversal of Applicant's conviction. This Court cannot speculate as to whether appellate counsel considered raising these issues or believed they would have any merit. See Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809. Applicant alleges appellate counsel was ineffective in failing to raise four separate issues on appeal. The Court will review each in turn.

1. **Ineffective assistance of Appellate Counsel for failing to brief whether the Trial Court erred in allowing Lt. Collins to introduce Co-Defendant's Mack statement at trial due to a confrontation issue.**

Applicant alleges appellate counsel was ineffective in failing to brief whether the Trial Court erred in allowing Lt. Collins to introduce Co-Defendant's Mack statement at trial over his objection based on the confrontation clause. This Court finds this allegation without merit. This issue is not clearly stronger than the single photograph array issue raised by appellate counsel.

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). An appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). "An abuse of discretion occurs when the conclusions of the trial court

either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

If a witness makes a statement on a particular issue and then subsequently contradicts that prior statement during the witness' trial testimony, the prior contradictory statement is important evidence tending to discredit the witness' trial testimony. State v. Suber, 82 S.C. 159, 161, 63 S.E. 684, 685 (1909). As a result, a prior inconsistent statement can be admitted as evidence to impeach the declarant of the statement. See, e.g., State v. Lynn, 277 S.C. 222, 224, 284 S.E.2d 786, 788 (1981) ("If a witness admits a prior inconsistent statement, he has impeached himself, and further evidence is inadmissible."). Furthermore, such a statement can also be "admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination." State v. Stokes, 381 S.C. 390, 398-399, 673 S.E.2d 434, 438 (2009); see State v. Copeland, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982) ("Henceforth from today, we will allow testimony of prior inconsistent statements to be used as substantive evidence when the declarant testifies at trial and is subject to cross examination. . . . We believe the adoption of this rule will more effectively aid in the discovery of the truth, and more adequately insure the freedom of the innocent and the conviction of the guilty.").

Rule 613 of the South Carolina Rules of Evidence governs issues involving the admissibility of prior inconsistent statements. State v. Carmack, 388 S.C. 190, 201, 694 S.E.2d 224, 229 (Ct. App. 2010). Pursuant to the rule, extrinsic evidence of a prior inconsistent statement is admissible if a witness – after being advised of the substance of the statement, the time and place the statement was made, and the person to whom it was made – does not admit making the statement after being given an opportunity to explain or deny it. Rule 613(b), SCRE;

see State v. Galloway, 263 S.C. 585, 591, 211 S.E.2d 885, 888 (1975) ("The requirement of notice is met when the cross-examiner advises the witness of the substance of the prior statement and the time when, the place where and the person to whom it was made.").

Furthermore, the Sixth Amendment's Confrontation Clause guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. In Crawford v. Washington, 541 U.S. 36, 53–54 (2004), the United States Supreme Court held that testimonial hearsay statements are not admissible under the Confrontation Clause unless the declarant is unavailable to testify at trial and the accused had a prior opportunity to cross-examine the declarant. "However, the Confrontation Clause places no constraints at all on the use of the declarant's prior testimonial statements when the declarant appears for cross-examination at trial." State v. Hill, 394 S.C. 280, 291, 715 S.E.2d 368, 374–75 (Ct.App.2011) (citing State v. Stokes, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009)). "The Confrontation Clause 'does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.' " Stokes, 381 S.C. at 401, 673 S.E.2d at 439 (quoting Crawford, 541 U.S. at 59 n. 9). "The Confrontation Clause 'guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" Id. at 401–02, 673 S.E.2d at 439–40 (quoting United States v. Owens, 484 U.S. 554, 559 (1988)). "Indeed the opponent's opportunity for cross-examination has been deemed the 'main and essential purpose of confrontation.'" Id. at 402, 673 S.E.2d at 440. Thus, it is the opportunity to cross-examine that is constitutionally protected." Id.

This Court finds the issue would not have resulted in a reversal of Applicant's conviction. It is not likely that the appellate court would have found the trial court abused his discretion by

allowing the State to play Co-Defendant Mack's statement through Lt. Collins. Clearly, the State laid the proper foundation for the admission of the extrinsic evidence of the written statement. See Rule 613(b), SCRE. The State advised Co-Defendant Mack of the substance of the statement by showing him the transcript of the state while on the stand; Co-Defendant Mack was also advised of the time and place the statement was allegedly made, and the person to whom it was made. (Tr. p. 191 line 21—p. 193 line 25). Co-Defendant Mack was given the opportunity to explain or deny the statement and he chose to deny making the statement. (Tr. p. 191 line 21—p. 193 line 25). Thus, the statement was admissible under Rule 613(b), SCRE, and no Confrontation Clause violation resulted from this admission. See Stokes, 381 S.C at 401, 673 S.E.2d at 439.

Based off of the foregoing, this Court finds that Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds that Applicant has failed to show that appellate counsel's performance was deficient in any regard, where there is no standard requiring appellate counsel to brief every possible meritorious issue and counsel appropriately raised a stronger, meritorious issue on Applicant's behalf. Second, this Court finds that Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal had the issue address above been raised.

2. Ineffective assistance of Appellate Counsel for failing to brief the issue of whether the Trial Court erred in allowing the jury to hearing Co-Defendant's statement after the jury was excused for deliberation.

Applicant alleges appellate counsel was ineffective for failing to brief the issue of whether the Trial Court abused its discretion when it allowed Co-Defendant's Mack statement to

be played to the jury after it had begun deliberations. This Court finds this allegation without merit. This issue is not clearly stronger than the single photograph array issue raised by appellate counsel.

"The trial judge, in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after beginning their deliberations." State v. Plyler, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). "The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request." Id. The court is not required to submit evidence to the jury for review beyond that specifically requested but in its discretion may have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested. Id. In Plyler, the trial court allowed the jury to hear a tape of the testimony of the defendant's ex-wife in response to the jury's request to have her testimony read back to them. Id. In that case, the court found there was no abuse of discretion where only the direct examination was played and the trial judge denied the defendant's motion that the jury be required to also hear the cross-examination to prevent overemphasis of the portion reheard. Id.

In this case, during jury deliberations, the jury sent the judge a question asking if they could hear a portion of exhibit # 65, Co-Defendant Mack's statement. (Tr. p. 711 line 25—p. 712 line 2). Specifically, the jury requested to hear the portion of the taped statement where Co-Defendant Mack identified Applicant as "Callie." (Tr. p. 711 line 25—p. 712 line 2). Trial Counsel argued that the statement was only played for impeachment purposes and was not to be considered in the guilt or innocence of Applicant. (Tr. p. 712 lines 3-20). The Trial Court replayed Co-Defendant Mack's statement where he identified Applicant as "Callie" for the jury

in the courtroom. (Tr. p. 714 lines 12-20). This was done in the Applicant's presence at the request of the jury. Thus, the trial judge properly exercised proper discretion and committed no error in allowing the jury to listen to the portion of Co-Defendant Mack's statement where he identified Applicant as "Callie."

Based off of the foregoing, this Court finds that Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds that Applicant has failed to show that appellate counsel's performance was deficient in any regard, where there is no standard requiring appellate counsel to brief every possible meritorious issue and counsel appropriately raised a stronger, meritorious issue on Applicant's behalf. Second, this Court finds that Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal had the issue address above been raised.

3. Ineffective assistance of Appellate Counsel for failing to brief the issue of whether the State committed a Brady violation regarding the missing Samsung Cell phone.

Applicant alleges appellate counsel was ineffective for failing to brief the issue of whether Assistant Solicitor Barr violated Brady by failing to turn over the Samsung Cell phone. This Court finds this allegation is without merit. This issue is not clearly stronger than the single photograph array issue raised by appellate counsel.

Initially, this Court finds Applicant's allegation that the Solicitor failed to turn over any required evidence is without merit. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). A Brady

violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been differ-ent." Id., 434 S.E.2d at 268.

This Court finds credible Assistant Solicitor Barr's testimony that the Samsung Cell phone was never in the possession of Williamsburg County Sheriff's office. Furthermore, this Court notes Applicant failed to present any evidence that the State possessed the Samsung Cell phone at any point in time. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

Based off of the foregoing, this Court finds that Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds that Applicant has failed to show that appellate counsel's performance was deficient in any regard, where there is no standard requiring appellate counsel to brief every possible meritorious issue and counsel appropriately raised a stronger, meritorious issue on Applicant's behalf. Second, this Court finds that Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal had the issue address above been raised.

4. **Ineffective assistance of Appellate Counsel for failing to brief the issue of whether the Trial Court erred in allowing the State to introduce exhibit #82 – Co-Defendant Mack's composition notebook.**

Applicant alleges appellate counsel was ineffective for failing to brief the issue of whether the court abused its discretion in allowing exhibit #82 – Co-Defendant Mack's composition notebook into evidence. This Court finds this allegation without merit. This issue is not clearly stronger than the single photograph array issue raised by appellate counsel.

This Court notes Applicant failed to provide State's Trial Exhibit 82 for this Court's review. This Court will not speculate as to the contents contained in this exhibit. See Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809. This allegation is readily denied and dismissed with prejudice.

Based off of the foregoing, this Court finds that Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds that Applicant has failed to show that appellate counsel's performance was deficient in any regard, where there is no standard requiring appellate counsel to brief every possible meritorious issue and counsel appropriately raised a stronger, meritorious issue on Applicant's behalf. Second, this Court finds that Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal had the issue address above been raised.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to

present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

[signature block to follow]

CONCLUSION

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

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 11th day of August, 2015.

STEVEN H. JOHN
Presiding Judge
Third Judicial Circuit

Clarendon, South Carolina

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

RECEIVED
OCT 29 2015
S.C. SUPREME COURT

KELVIN MICHAEL BOWEN, JR., #344725 Applicant,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

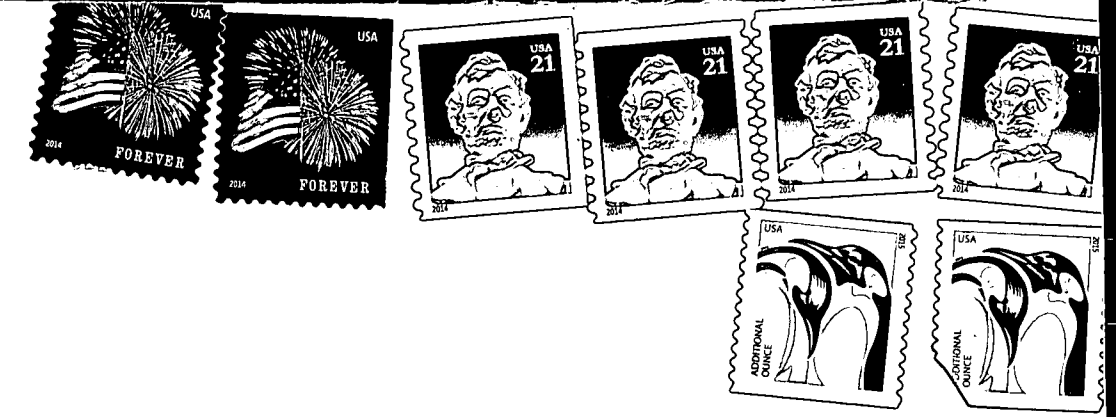
Charles Thomas Brooks, III, Esquire
Law Office of Charles T. Brooks, III
309 Broad St.
Sumter, SC 29150

This 21st day of October, 2015.

DANIEL GOURLEY
Attorney for Respondent

SWORN to before me this 21st day of October, 2015.

Notary Public for South Carolina.
My Commission Expires: 5/20/2025



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