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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

COURT OF COMMON PLEAS

THE HONORABLE PAUL BURCH, CIRCUIT COURT JUDGE

2015-CP-40-0241

Frankie Lee McGee,.....Petitioner.

vs

The State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Frankie Lee McGee appeals the Honorable Paul Burch's November 9, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on November 19, 2018. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

Anna R Browder

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December 6, 2018

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PROOF OF SERVICE

I, Anna Browder, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, J. Anthony Mabry, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 6th day of December 2018.

Respectfully submitted,

Anna R Browder

Anna R. Browder, Esquire
PO Box 7284
Columbia, South Carolina 29202

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Frankie Lee McGee, #241658, Applicant, v. State of South Carolina, Respondent.	2015-CP-40-0241 **(Proposed)** **ORDER OF DISMISSAL**

This matter is before this Court on an Application for Post-Conviction Relief (PCR) filed by Applicant on January 13, 2015. The State filed its Return to the Application on June 11, 2015 denying the allegations of the Application. An evidentiary PCR merits hearing was held on August 30, 2017 before this Court at the Richland County Courthouse. Applicant was present at the hearing and represented by Anna Good Browder, Esquire. Respondent was represented by Jessica E. Kinard, Assistant Attorney General.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted in April 2010 by the Richland County grand jury for the crimes of murder (Ind. # 2010-GS-40-0121) and burglary first (1st) degree (Ind. # 2010-GS-40-0124). Specifically, Applicant was charged with the murder of eighty-seven (87) year old Reverend Tryon Eichelberger and the burglary of his home which occurred on May 3, 2009 in Richland County. Applicant was represented on the charges by Douglas Strickler, Fielding Pringle, and Jennifer Davis, Esquires. The case was prosecuted by Katherine Luck Campbell, Dolly Justice Garfield, and Nicole B. Simpson, Assistant Solicitors.

Facts

The following relevant facts were recited in the appellate court's opinion in the direct appeal in this case:

> On the night of May 3, 2009, Temika Ashford was visiting Reverend Tryon Eichelberger at his home in Columbia. They heard a noise in another part of the home, and Eichelberger went to investigate. Ashford heard Eichelberger ask, "[H]ow did you get in here?" and then a "commotion" and "hollering." Because Ashford was afraid, she left the home, got in her car, and drove away. She drove around the block, and when she could not reach Eichelberger by phone, she returned to his house. She saw a husky man with a potbelly and receding hairline standing on the porch. He was dressed in a white shirt and jeans, wearing white gloves, and holding a metal pipe. She called 911, left the house, and drove down Farrow Road to wait on the police. While she was waiting, she noticed the man she had seen on the porch walking along the road, no longer carrying the pipe nor wearing the gloves. Once the police arrived at the home, Ashford returned there.
>
> Officer Chauncey Duckett of the Columbia Police Department was dispatched to the scene. On his way there, while traveling on Farrow Road, he saw a light skinned black man walking, wearing a white or light gray t-shirt and jeans. Once at the scene, he found Eichelberger lying on the floor bleeding heavily. Eichelberger's skull was cracked, he had a brain injury, and he lost a lot of blood. He died three months later as a result of his injuries.
>
> The police determined a metal tool had been used to pry open a side door to Eichelberger's home. Officer Duckett found a steel rod across the street from Eichelberger's home, in Larry Harp's yard. Officer Duckett also found a pair of white tube socks next to a light pole about twenty-five to thirty yards from the steel rod in the direction of Farrow Road. The socks and rod had blood on them. DNA analysis initially identified the blood on the items as Eichelberger's. Further testing revealed McGee's DNA inside the socks as well. The rod was consistent with the tool marks found at Eichelberger's home.
>
> On the day of the attack, Harp saw a man he later identified as McGee in Eichelberger's yard at 3:00 p.m., talking on the phone and pacing. He saw him again in the yard at about 5:30 p.m. with a plate, napkin, and cup in his hand and eating, while Eichelberger worked in his garden. Harp testified McGee was wearing an athletic jersey and denim shorts and had a medium heavy build and light brown skin. Around midnight on the night of the attack, the police woke Harp because they discovered the rod in his yard. Harp informed the police the rod was not his and he did not know how it got there. The police later determined the rod was a winch rod, which is commonly used to tighten straps on a flatbed trailer.

After Ashford gave the police a description of the man she observed on the front porch, the police began looking for the suspect. Police found two men walking together, and one of them matched the description Ashford had given. Ashford said the man looked like the person she saw but he was not wearing the same clothes. However, the man was eliminated as the perpetrator through more police investigation and DNA testing. Later, Ashford was shown a series of photographic line-ups. In them, she saw two pictures she believed looked like the suspect; one of the two pictures was of McGee. She identified McGee's picture as the one that most resembled the man she saw on Eichelberger's porch.

In March 2010, officers visited Michelle Perry, who was a dispatcher with the cab company at which Eichelberger had worked. Eichelberger held church services in a building attached to the cab company's office. Officers showed Perry a picture of McGee and asked if she recognized him. She told them she had seen him two different times about a year before Eichelberger was attacked. The first time she saw him, he came to one of Eichelberger's church services too early one morning and waited about twenty-five minutes outside the office. She saw him again a few days later when he returned for a Bible study.

On May 2, 2009, the day before Eichelberger was attacked, a red Peterbilt tractor trailer truck was stolen from a business in Camden, where McGee lived. The truck was found the following day about one mile from Eichelberger's home. The theft was recorded by video surveillance, which was later broadcast on local news programs. Officer Sandra Thomas of the Columbia Police Department, McGee's sister, saw the video, recognized McGee, and contacted Crime Stoppers' anonymous tip line. The owner of the truck testified it was used to haul a flatbed trailer and would have contained a winch bar in its tool box.[1] Police learned McGee had a commercial license to operate a tractor trailer that could pull a flatbed trailer, like the one stolen.

On March 17, 2010, officers interrogated McGee while he was incarcerated on an unrelated offense. McGee denied attacking Eichelberger but admitted he had been in that area of Columbia that night. He also said he had gone by Eichelberger's house that day and been on the porch of the house. He told the police that due to an athlete's foot condition, he had taken his socks off while in the area and left them by a dumpster at a store. He then said he left the socks by a light pole. McGee denied stealing the truck from Camden but said he moved a red Mack tractor-trailer truck[2] while in Columbia. McGee told police he did not know what a winch rod was. He also admitted he had told his wife that after a drug dealer pointed a pistol at him, he hit the drug dealer with it on the night of Eichelberger's attack. The police were unable to locate the drug dealer McGee said that he hit.

State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014).

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[1] An inventory was never performed to determine if the winch rod was missing from the truck.
[2] Peterbilt and Mack are both makers of trucks that are used to pull tractor trailers.

The Trial

Applicant proceeded to a jury trial on August 1, 2011 before the Honorable Clifton Newman, Circuit Court Judge. At the conclusion of the trial on August 10, 2011, Applicant was convicted as indicted. Judge Newman sentenced Applicant to life imprisonment for murder and thirty (30) years for burglary 1st degree.

The Direct Appeal

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Kathrine Haggard Hudgins, Esq. On April 30, 2014, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences in a published opinion. State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014). Applicant filed a petition for rehearing on May 15, 2014, which was denied on June 19, 2014. Applicant filed a petition for writ of certiorari in the South Carolina Supreme Court and Respondent filed a return to the petition for writ of certiorari. On December 4, 2014, the South Carolina Supreme Court denied certiorari. The Remittitur was issued December 10, 2014.

First PCR Application (2014-CP-40-3323)

Applicant filed an application for Post-Conviction Relief (PCR) on May 18, 2014, alleging:

1. "Insufficient, Ineffective Councel [sic]."
    a. "Trial councel [sic] failed to enter and [sic] objection to evidence presented by the solicitor. During trial."

(Am. Appl.). Respondent filed a Return and Motion to Dismiss Without Prejudice on the basis that Applicant's direct appeal was still pending at the time. On June 11, 2014, the Honorable L. Casey Manning signed an Order dismissing the application without prejudice.

The 2nd or Current PCR Application

As previously stated, Applicant filed the present PCR application on January 13, 2015 and the State filed its Return. Thereafter, this Court held an evidentiary hearing on August 30, 2017 into the allegations of the application.

This Court also had before it the records of the Richland County Clerk of Court regarding the subject conviction(s), the transcript from Applicant's trial, Applicant's records from the Department of Corrections, Applicant's prior PCR records, and Applicant's appellate records.

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

(1) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendment of the U.S. Constitution and South Carolina laws and as a result was prejudiced when counsel failed to object to all the inadmissible evidence introduction before and during trial in the presence of the jury.

(2) Trial counsel failed to enter an objection when the Solicitor introduced inadmissible evidence during trial against Applicant.

(a) A stolen truck found parked at a towing impound yard – 1 mile away from the victim's home.

(b) A metal bar found across the road away from the victim's house in the neighbor's back yard inside a fenced area on the ground in the grass

(c) Applicant was not seen or identified as a suspect by anyone on the night the incident happen or the year and no D.N.A. from the Applicant was on the object neither at the victim's house or property.

(d) A pair of socks found on the ground across the road on a foot path in a field.

(e) During trial, counsel withheld evidence from the jury- a recorded interview on the witness at the victim's house when the incident happen 3 days later at the police department she said she did not see no one inside or outside the victim's house neither did she see anyone who committed the crime at the victim's house. She also said in the recorded interview it was dark and she did not see the person's face in the victim's yard. That night she said she only saw white plastic gloves.

(f) Counsel withheld evidence from the jury concerning a recorded interview on other suspects that told the police who had committed the crime and where to find the evidence used in the crime and also who had it.

(g) Counsel failed to object to the inconsistent statements from the witness stand during trial. The incident happened on (May 3, 2009) (11:40 p.m.) the witness (Tamika Ashford) said in a police report the person she saw in the victim's yard that night at (11:45 pm) was wearing a white shirt and blue jeans during trial on stand she testified and said the suspect in the victim's yard was wearing khakis – inconsistent statements- about clothing during trial.

(h) Counsel failed to object to the erroneous statements during trial from the prosecutor to the jury speculating on what happened, when she was not present at the crime- scene when it happened, misleading the jury.

(i) Counsel failed to object to the statements from Investigator Thomas while on the stand for committing perjury about where the socks were found. The Columbia Police Dept. Incident Report on (5-3-09) indicated that the pictures taken of the socks when found were across the road in a vacant field on the ground next to an abandoned yellow house. During trial Investigator Thomas lied on the stand and said the socks were found next to a light pole. He committed perjury. Neither was Investigator Thomas present at the crime scene that night. SLED incident reports he was not present.

(j) Counsel failed to object to the prosecutor using a secretly hidden tape recorder. During the interrogation of the Applicant 11 months after the incident happened, the Applicant did not know he was being secretly recorded against his will. Also during trial it was proven the tape recorder was being turned on and off only recording parts of the interrogation of Applicant.

(k) Counsel failed to object to Investigator Reese committing perjury during trial. Investigator Reese lied and said he and Investigator Thomas was on the crime scene at the victim's house for hours on the night the incident happened on (5-5-09) at 11:45 p.m.. The Columbia Police Incident Reports that Reese was at the crime scene for 4 minutes and left. Officer Thomas was not at the crime scene until the next day. Perjury on stand during the trial.

(l) During trial, Tameka Ashford, the witness at the victim's house, testified she did not see the burglary and she did not see the assault on the victim. She only heard a noise then she ran down the street to her car. She said she did not see no-one in the house or outside the house when she left. And ran to her car down the street on a side road

(m) The witness (Tameka Ashford) (5-3-09) lied to uniform police at the crime scene minutes after the incident happened. She said that she was not inside the victim's house when the incident happened. False statements to Police. She was there to have sex for money. The witness (Tameka Ashford) did positively identify (David Williams) as the suspect she saw in the victim's yard wearing blue jeans

and a white shirt with white plastic gloves on his hands with a long stick or pipe. She also took a sworn oath to tell the truth and wrote a 2 page handwritten statement in detail and she said it was him she saw (David Williams). He was also arrested by the Columbia Police Department the same night matching clothes description the arresting officer testified on the stand to the police reports.

(n) Applicant did not commit this crime. Neither was he present in the area or neighborhood when the incident happened on (5-3-09) at (11:45 p.m.). Wrongful conviction.

(o) During trial, Investigator Reese while on the stand under oath reviewed by reading handwritten statements from the witness at the scene of the crime minutes after the incident happened. She wrote the person she positively identified as the suspect in the victim's yard wearing blue jeans and a white shirt with white plastic or rubber gloves on his hands holding a long object in his hands was arrested the same night by the Columbia Police Department after he ran home and was found hiding in the closet. She said he was wearing different clothes but it was him. His name is (David Williams). The other suspect walking with him was never identified or arrested. Inside the victim's house on the floor was a bloody shoe print. The police don't know who it belongs to. No clothing was taken from the suspect's home to be tested for D.N.A. He was found hiding at home.

(3) During trial counsel withheld evidence from the jury concerning the stolen truck from Camden, S.C.

(a) The owner testified during trial that when he received the truck back nothing was reported missing inside or outside the truck. The initials on the metal bar did not belong to anyone at the company where the truck came from. Camden Police Dept. did not charge Applicant with a truck theft. Columbia Police Dept. did not charge Applicant with a truck theft. Applicant's D.N.A. was not on or in the truck when found parked at the towing company impound yard office. No one was seen in or around the truck when found in Columbia at the towing impound yard office. The police reports indicate Applicant was already in Columbia at the metal recycling plant on the same day before the truck was stolen from Camden, S.C., 1 and ½ hours away from Columbia, S.C.

(4) During trial, counsel failed to object to the metal bar that was used against Applicant.

(a) The Columbia Police Dept. Incident Report on (5-3-09) indicates the only person positively identified by the witness at the scene (Tamika Ashford) was (David Williams). In a handwritten statement after she swore to tell the truth she positively identified (David Williams) that night as the suspect in the victim's yard that night at 11:45 p.m. with a long metal object in his hands wearing white plastic or rubber gloves on his hands. He was also arrested based on the clothing description given to the police from the "911" call. Also the "911" call was lost before trial started. Applicant was not identified or seen in that neighborhood the

night of the incident neither that year it happened. The uniform police testified on the stand that David Williams was wearing a white shirt and blue jeans or dark pants when he foot chased him home.

(5) During trial, counsel failed to object to the prosecution's opening statement speculating about what happened when she was not present at the crime scene that night the incident happened. There was no police incident report and no witness to testify on the stand to prove the allegations said by the prosecutor during trial misleading the jury with false statements in opening and closing statements about what happened at the incident on (5-3-09) at the victim's house.

(6). Counsel failed to advise the judge before trial that the Columbia Police Dept. Investigators interrogated Applicant and charged Applicant with a warrant dated May 6, 2009. Applicant was also transported from S.C.D.C. to the Richland County Detention Center on the same wrong warrant. The burglary and assault happened in Columbia on May 3, 2009-Sunday. Applicant was served with a warrant dated May 6, 2009-Wed.

(7) During trial, counsel failed to advise the judge that on a capital murder charge the investigator must serve the suspect with the correct warrant properly dated. Columbia Police Dept. Investigators did not serve Mr. McGee with the correct warrant before nor during trial. Applicant was charged and convicted and sentenced to prison on the wrong warrant indicating the incident happened on (May 6, 2009-Wed.). Also the interrogation was concerning what happened on May 6, 2009-Wed. The burglary and assault happened on (May 3, 2009-Sunday).

(8) Before trial, the prosecutor instructed the judge that the only witness at the crime scene the night of the incident will not be able to do any kind of in-court identification of Applicant. Also, she had already positively identified a suspect the same night at the crime scene minutes after the incident happened.

(9) Interrogation of Applicant. The incident at the victim's house happened on May 3, 2009 in Columbia, S.C. On March __, 2010, 3 Columbia Police Dept. Investigators interrogated Applicant while incarcerated on an unrelated charge in prison at Wateree River Correctional in Sumter County, S.C. During this interrogation, Investigator Kevin Reese forged Applicant's name on the Miranda rights papers because Applicant refused to sign any papers. Also, Investigator Reese threatened to physically assault Applicant by punching his fist into the chair and table close to Applicant's face and head. Also, Reese asked Applicant to shake hands with him. While doing so, Reese squeezed Applicant's hand and twisted his arm and Reese started shouting at Applicant, confess, confess. The 2 hidden tape recorders was also turned on and off with a remote control during the interrogation.

(10) Interrogation of Applicant- Columbia Police Dept. Investigators interrogated Applicant on March __, 2010, 11 months after the incident happened. The investigators secretly recorded the interrogation without Applicant knowing he was being recorded. They used 2 digital remote control tape recorders. Also it was proven during trial the

hidden tape recorders were being turned on and off during the interrogation only to record parts of the interrogation. Also, during the interrogation, Investigator Reese threatened to have Applicant killed while in prison.

(11) Investigator Reese called S.C.D.C. to have Mr. McGee put on solitary confinement 3-days before the interrogation. No food, no water, no mental health medicine, no blanket. Mr. McGee was threatened and forced to talk to the investigator by S.C.D.C. officers.

(12) Counsel failed to object to 4 witnesses on the stand during trial.

(a) Tamika Ashford testified that she did not see anyone inside or outside the victim's house during the burglary or the assault. She only heard a commotion and noise. She also positively identified a suspect the same night minutes after the incident happened and she wrote statements of truth on him in detail his name was David Williams. He was wearing blue jeans and a white shirt.

(b) Larry Harp, the next door neighbor, testified he saw Applicant at the victim's house at 3:30 and 5:30 the same day talking to the victim in his yard. Applicant was wearing a football jersey and denim shorts with a plate of food in 1 hand and a cup in the other. He testified that after Mr. McGee left then he went over to talk to the victim and nothing was wrong. The incident happened at the victim's house at 11:45 p.m. The witness, Larry Harp, testified he did not see no one at the victim's house that night at 11:45 p.m.

(c) Ivan Moore testified on the stand to say he saw the Defendant Mr. McGee in the neighborhood the month of the incident. He lives two miles away from the victim and he did not see the Defendant at the victim's house neither did he see the Defendant the night of the incident. Ivan moore has seven convictions of drugs and guns. He also has seven more charges pending for court trial. Before he testified on the stand against Defendant for the prosecutor.

(d) Michelle Perry testified on the stand to say she saw the Defendant attend church with the victim 3-months before the incident happened. The police showed her a single photo of the Defendant for identification purposes. She testified that she had never been in that church and the photo of the Defendant was a mug-shot picture of the Defendant. She said she had never seen the Defendant at the victim's house. She works next door to the church. No one attends the church. Cannot identify the Defendant- as being at the church. The witness did not see the Defendant the month of the incident. She said she saw the Defendant three-months before the incident happened.

(13) Counsel failed to object- During trial, there were no witnesses and no police incident reports to say Applicant committed any crime. No one testified during trial to say

Applicant was at the victim's house that night when the incident happened at 11:45 p.m. The witness, Tamika Ashford, did positively identify a suspect named David Williams, minutes after the incident happened at the victim's house. She also wrote a 2 page statement of truth in detail. She said it was him. Also a description of suspect (6 ft, 1"- Tall 180 or 200 lbs) white shirt and blue jeans wearing white plastic gloves on hands. She testified she did not see the face or could not see the face because it was real real dark and no lights to see.

(14) Applicant is 5 ft 8 " and 230 lbs. Neither was Applicant identified that night or that year of the incident as committing any crime.

(15) During trial, the witness Tamika Ashford testified that the person in the victim's yard that night at 11:45 p.m. was wearing khakis and she did not see his face or could not see a face. It was "real real" dark and no street lights on.

(16) Counsel failed to object the D.N.A extracting procedure used on the socks found across the road in a field on a foot path near an abandoned house 1 street over from the victim's residence. No one was seen with or using any socks that night. Also the D.N.A. expert testified 3 people's D.N.A. was on the socks. Also, David Williams, a suspect positively identified and arrested the same night after he ran from the police on scene, his DNA is on the socks and the witness Tamika Ashford positively identified him as the suspect in the victim's yard that night and she wrote a 2 page statement in detail and said that he was the person she saw that night in the yard.

(17) Counsel failed to object to the touch DNA extracting procedures used to extract DNA from the socks found on the ground across the road in a field. The first DNA test for touch DNA was negative on the Applicant. This was May of 2009. 11 months later (3-12-10) a procedure was used to extract touch DNA when the protocol manual for extracting procedures does not list the procedure used for obtaining touch DNA. There is no manual listed for extracting touch DNA. Also expert testified 3 people's touch DNA was present on the socks including a suspect named David Williams. He was also positively identified by the witness Tamika Ashford the same night minutes after the incident happened at the victim's house. He was also arrested that same night by the uniform police in the neighborhood funning from the police on the crime scene. Minutes after the incident happened.

(18) Counsel failed to object to the prosecutor using the Clerk of Court from Kershaw County to testify on the stand in Richland County concerning Applicant's pleading guilty to a Burglary 2nd and 3rd in Kershaw County 2 years prior before he was charged with Burglary 1st in Columbia, Richland County. Applicant did not testify at trial. Also, the burglary 2nd and 3rd Applicant pleaded guilty to in Kershaw County years before he was charged with the burglary 1st in Richland County were not connected in no way.

(19) No one was seen burglarizing the victims' house. No one was seen inside or outside at the time of the incident. Applicant's DNA is not inside or outside the victim's house. Applicant's DNA is not on the object used in the crime. Applicant was not identified by

anyone that year. Also the witness at the crime scene, Tamika Ashford, positively identified a suspect on the same night and she wrote statements on him of truth in detail on him at the crime scene.

On November 2, 2015, Applicant filed an Amended Application alleging the following grounds in addition to the prior grounds stated in the original Application:

(1) Ineffective assistance of trial counsel – trial counsel failed to have warrants dismissed/quashed, as amended warrants were never served on Applicant;

(2) Ineffective assistance of trial counsel – counsel failed to retain eye witness expert on defendant's behalf;

(3) Ineffective assistance of trial counsel—trial counsel failed to object to sentencing judge's belief of facts of the case and sentence;

(4) Ineffective assistance of trial counsel - - trial counsel failed to object to statements regarding witness Tameka Ashford in opening statements; and

(5) Ineffective assistance of appellate counsel - - trial counsel failed to argue the appropriate issues on appeal, including witness Tameka Ashford's testimony being admissible and the admissibility of nearby truck.

At the PCR evidentiary hearing held before this Court on August 30, 2017, Applicant testified in his own behalf. Applicant's trial counsel Douglas Strickler and Fielding Pringle also testified at the hearing after being called by Respondent. Applicant's appellate counsel, Katherine Hudgins, also testified at the hearing, after being called by Respondent.

At the PCR hearing, Applicant proceeded on and offered evidence only on the following grounds:

(1) Counsel was ineffective for not reviewing discovery, specifically the 911 tape and the audio-tape of Tamika Ashford, with him prior to trial:

(2) Counsel should have objected when the Solicitor referenced the forthcoming testimony of Tamika Ashford in her opening statement;

(3) Counsel was ineffective in failing to object to the arrest warrants he was served with because the wrong date for the murder and burglary, May 6th, and not May 3rd and he was never served with the warrants containing the correct date of May 3rd;

(4) Counsel should have objected when the Solicitor argued in her closing argument that:

(a) Applicant caused the head injury to the victim depicted in an autopsy photograph admitted in evidence;

(b) Applicant wielded the murder weapon like a baseball bat; and

(c) Applicant committed the crime; and

(5) The State used improper scientific DNA extraction procedures in obtaining Applicant's DNA from inside the white socks admitted in evidence;

(6) Appellate counsel was ineffective for not raising on appeal the admissibility of Tamika Ashford's testimony *and* the admissibility of stolen truck from Camden, S.C.

III.

Testimony at the PCR hearing

At the PCR hearing, Applicant testified that his trial and appellate counsel were ineffective in representing him. Applicant testified: (1) counsel was ineffective for not reviewing discovery, specifically the 911 tape and the audio-tape of Tamika Ashford, with him prior to trial; (2) counsel should have objected when the Solicitor referenced the forthcoming testimony of Tamika Ashford in her opening statement; (3) counsel should have objected when the Solicitor mentioned in her opening statement that Applicant's blood was found at the crime-scene; (4) counsel was ineffective in failing to object to the arrest warrants he was served with because the wrong date for the murder and burglary, May 6th, and not May 3rd and he was never served with the warrants containing the correct date of May 3rd; (5) counsel should have objected when the Solicitor argued in her closing argument that (a) Applicant caused the head injury to the victim depicted in an autopsy photograph in evidence; (b) Applicant wielded the murder weapon like a baseball bat; and (c) Applicant committed the crime; (6) the State's DNA expert

used unscientific methods to extract Applicant's DNA from the white socks found near the crime scene; and (7) appellate counsel was ineffective for not raising on appeal the admissibility of Tamika Ashford's testimony *and* the admissibility of stolen truck from Camden, S.C.

Counsel, Mr. Strickler and Ms. Pringle, testified they met with Applicant numerous times prior to the trial. Mr. Strickler testified he did not remember allowing Applicant to review the tape recorded statement of Ms. Ashford given to police after the night after the crimes, because he had no recollection of taking his computer with him to the Detention Center during any of his numerous meetings with Applicant. However, at the PCR hearing, Applicant contradicted himself and testified he had reviewed with Mr. Strickler "CD's" containing at least one (1) recorded statement of one (1) witness. Ms. Pringle testified either she or Mr. Strickler would have reviewed the audio-tape of Ms. Ashford's interview with Applicant prior to his trial. Ms. Pringle and Mr. Strickler testified they obtained all of the discovery from the State, and Ms. Pringle testified they reviewed the substance of all of the discovery with Applicant prior to trial.

Mr. Strickler testified at the PCR hearing he did not object to the mention of Ms. Ashford in the Solicitor's opening statement, but he probably should have. Mr. Strickler testified he did object to the admission of her testimony pre-trial and again after a Neil v. Biggers hearing later in the trial. Mr. Strickler testified that it was his theory or belief that if Ms. Ashford could not identify Applicant her entire testimony was irrelevant and inadmissible. Both counsel, Mr. Strickler and Ms. Pringle, and Applicant testified Ms. Ashford was an eyewitness in the case. Ms. Pringle testified it was any attempt by Ms. Ashford to make an out-of-court or in-court identification of Applicant that counsel objected to; and, the State stipulated Ms. Ashford did not make a positive out-of-court identification and would not make an in-court identification, which she did not. Appellate counsel, Ms. Hudgins testified she did not agree with Mr. Strickler that

Tamika Ashford's testimony was irrelevant because she could not identify Petitioner out-of-court or in-court and that in her opinion the appellate court with not agree with Mr. Strickler's theory either.

Mr. Strickler testified he did not object to the arrest warrant dates or the fact that applicant was not served with the arrest warrant dated May 3rd because Applicant was tried on the indictments not the arrest warrants. Mr. Strickler testified he reviewed the indictments and there was nothing improper about them. Mr. Strickler testified that if there had been something improper or deficient about the indictments, he would have objected to or moved to quash the indictments.

Mr. Strickler testified he did not object to the Solicitor's statements in closing argument because the prosecutor is allowed to argue the evidence and reasonable inferences from the evidence and that is what the Solicitor did in her closing argument. Counsel testified the Solicitor was arguing all of the evidence and all the reasonable inferences from the evidence, not specific testimony of an eyewitness, when she made certain comments during her closing argument. Therefore, her arguments were not objectionable.

Appellate counsel testified she raised those issues she considered the most meritorious in Applicant's direct appeal. She did not raise the issue of the admissibility Tamika Ashford's testimony as Ashford's testimony was relevant and admissible; there was no merit to this issue on appeal; Ashford did not positively identify Applicant or make an in-court identification; and, Ashford's testimony was helpful or favorable to Applicant as she identified someone else immediately after the crime as being the perpetrator. Appellate counsel also testified **she did** raise the issue of the admissibility of the stolen truck from Camden on direct appeal, but the Court of Appeals ruled against Applicant.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant's claims are allegations of ineffective assistance of trial and appellate counsel. Respondent contends Applicant's trial and appellate counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. *See* Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Standard of Review

In a post-conviction relief (PCR) proceeding, the Applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. Id. Where ineffective assistance of trial counsel is alleged as a ground for relief, Applicant must prove "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, 104 S.Ct. 2052, 2064 (1984); Butler, 334 S.E.2d 813.

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

A two-pronged test is used in evaluating allegations of ineffective assistance of trial counsel. First, Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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.

Applicant also alleges ineffective assistance of appellate counsel. A criminal defendant is entitled to the effective assistance of appellate counsel; however, appellate counsel may make a reasonable strategic choice not to appeal every non-frivolous argument requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983). The Court noted "the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible." Id. at 751. *See also* Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990). Counsel is not ineffective for failing to file a "kitchen sink" brief. Smith v. Stewart, 140 F.3d 1267, 1274 n. 4 (9th Cir. 1988). Appellate counsel's representation will not be deemed ineffective if she makes an informed decision based on reasonable professional judgment not to pursue a particular issue on appeal. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Further under the two (2) part test of Strickland, *supra*, a defendant must show not only counsel's performance was deficient, but also this deficiency prejudiced his defense. Applicant must show that had counsel acted as he alleges she should have acted there is a reasonable probability he would have prevailed on appeal. Smith v. Robbins, 528 U.S. 259, 285 (2000); Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir. 2000).

A PCR applicant has the burden of proving his appellate counsel was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented from a review of the record, but rather has the duty to choose among potential issues according to their merit. Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004); Jones, 463 U.S. at 752. In order to prove that appellate counsel was ineffective, a PCR applicant must show his appellate counsel was objectively unreasonable in failing to identify, argue, and present significant and obvious issues on appeal and, but for appellate counsel's errors,

the applicant would have prevailed on appeal. Smith v. Robbins, 528 U.S. 259, 285 (2000); Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir. 2000). This is a difficult burden for an applicant to meet, as it requires a showing that "the ignored issues are clearly stronger than those presented" during the appeal. Id.

(A) ***The Alleged Failure to Review Certain Discovery with Applicant***

At the PCR hearing, Applicant alleged counsel was ineffective in failing to review certain discovery with him; specifically, not allowing him to listen to the 911 call of Tamika Ashford, an eyewitness, and Ms. Ashford's tape recorded statement to police given after the night of the crimes. Applicant admitted at PCR that counsel met with Applicant numerous times and reviewed all of the rest of his discovery with him. Applicant also admitted counsel reviewed the States' evidence with him prior to trial. Applicant also admitted at PCR that the 911 tape was lost by Emergency Medical Services (EMS) prior to his trial and therefore it was not counsel's fault that the 911 tape could not be reviewed with him.

Mr. Strickler testified he did not remember allowing Applicant to review the tape recorded statement of Ms. Ashford given to police after the night after the crimes, because he had no recollection of taking his computer with him to the Detention Center during any of his numerous meetings with Applicant. However, at the PCR hearing Applicant testified he had reviewed with Mr. Strickler CD's of at least one (1) recorded statement of one (1) witness.

Ms. Pringle testified either she or Mr. Strickler would have reviewed the audio-tape of Ms. Ashford's interview with police with Applicant prior to his trial. She also testified she and co-counsel reviewed the substance of all of the discovery provided by the State with Applicant prior to trial.

This Court had the opportunity to view the testimony of each witness on this issue at the PCR hearing. This Court finds credible only that portion of Applicant's testimony that the 911 tape was lost by EMS prior to his trial. Therefore, this Court finds counsel could not have been ineffective in failing to allow Applicant to review the 911 tape prior to trial. Strickland v. Washington.

This Court finds credible the testimony of Ms. Pringle that either she or Mr. Strickler would have reviewed the audio-tape of Ms. Ashford's interview with police with Applicant at some point prior to trial. Furthermore, Ms. Pringle and Mr. Strickler credibly testified they met with Applicant numerous times, went over the State's evidence against Applicant with him, and prepared with Applicant for trial. This Court finds credible the testimony of Ms. Pringle that she and co-counsel reviewed the substance of all discovery with Applicant prior to trial. This Court finds even if counsel had not allowed Applicant to actually listen to the audio-recorded statement of Ms. Ashford, counsel would have reviewed with Applicant the substance of her recorded statement. This Court finds Applicant's testimony regarding this particular issue to be not credible.

Regardless, this Court finds Applicant has failed to meet his burden of proof to show ineffective assistance of counsel. Strickland. At the PCR hearing, Applicant did not introduce the audio-tape of Ms. Ashford's interview with police. Applicant did not show through any credible testimony how counsel's not reviewing the audiotape itself with him, was deficient or prejudicial. Applicant did not show how the failure to review the audio-tape of Ms. Ashford with him prejudiced his defense at trial; or that had counsel reviewed the audio-tape with him there is a reasonable probability the result of his trial would have been different. Id. In fact, Applicant does not argue counsel did not review the audio-tape themselves, or that they did not

use it at trial, but only that they did not review the same with him. The record of Applicant's trial shows counsel did fully and completely cross-examine and impeach Ms. Ashford's testimony including bringing out her identification of a different person on the night of the crimes, her written statement to police, and her recorded statement given to police after the night of the crimes. (See Trial Tr. Aug. 8, 2011 pp. 61-132). As a result, Applicant has failed to show deficient performance or resulting prejudice in this regard. Strickland. Therefore, this ground has no merit and must be denied and dismissed with prejudice.

Alleged Failure to Object to Solicitor's Reference in Opening Statement

At the PCR hearing, Applicant alleged counsel should have objected when the Solicitor referenced the upcoming testimony of Tamika Ashford in her opening statement. (See Trial Tr. pp. 271-88). Applicant alleged Ashford's testimony was inadmissible and the trial judge had not yet ruled on the admissibility of her testimony and therefore counsel should have objected when the Solicitor mentioned her in opening statement. There is no merit to this ground for the following reasons.

Opening statements are not evidence. The purpose of an opening statement is to give the jury a roadmap or an overview of where the case or presentation of evidence is going. United States v. Dinitz, 424 U.S. 600 (1976)(Burger, C.J., concurring); State v. Brown, 277 S.C. 203, 284 S.E.2d 777 (1981); State v. Harris, 275 S.C. 463, 272 S.E.2d 636 (1980). The purpose of an opening statement is to assist the jury in understanding the presentation of evidence, and the position of each side in the case. Id. When the prosecution refers to facts in its opening statement, there is no error as long as the solicitor introduces evidence to reasonably support

statements made in an opening argument. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). *See also* State v. Sims, 348 S.C. 16, 558 S.E.2d 515 (2002).

Ms. Ashford's Testimony

As set forth in the Court of Appeals' published opinion in this case, Tamika Ashford was present at the victim's residence on the night of and at the time of the burglary of the victim's home and deadly assault of the victim. *See* State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014). Ms. Ashford was inside the victim's residence talking with the victim [Reverend Tryon Eichelberger] in his den or living room, which was located in the front of the victim's house, at approximately 11:00 p.m. While Ms. Ashford and the victim were talking, they both heard a noise coming from the back of the victim's house. The victim went to investigate the noise and Ms. Ashford stayed in the den or living room. She then heard the victim state out loud: "How did you get in here?" Ms. Ashford then heard noises that sounded like a struggle between the victim and another person in the back of the house. Afraid, Ms. Ashford fled from the house out the front door, got in her car, and drove around the block. While she did so, she used her cell phone to call police.

She then drove back around the block and saw a man on the front porch of the victim's residence with a metal pipe in his hand and wearing white gloves. She could describe the man generally and what he was wearing. He was a husky man with a pot belly and receding hair line and he was wearing a white shirt and blue jeans. After seeing the man on the porch with the pipe in his hand, afraid, she immediately left the scene again and shortly thereafter saw the same man on foot walking down Farrow Road but no longer wearing white gloves or carrying the metal

pipe. She then waited on police and when they arrived she drove back to the victim's residence and eventually gave police a description of the man she had seen on the porch.

Later that night, she was driven to an area near the crime scene and asked to identify a man [not applicant] in a one (1) person show-up. She informed police that the person looked like the man she had seen on the victim's front porch, but he was wearing the wrong clothes. This man was later eliminated as a suspect by police through further investigation and DNA testing. Months later, Ms. Ashford was shown a six (6) person photo line-up or array. She was asked if she recognized anyone in the array. She identified two (2) photos in the line-up as looking like the person she saw on the front porch of the victim's residence the night of the burglary and deadly assault, and she identified one (1) of those two (2) photos, the photo of Applicant, as looking most like the person she saw on the front porch of the victim's residence. However, Ms. Ashford could not make a positive identification of Applicant as the perpetrator out-of-court and did not do so in-court. Id. She only testified Applicant's physical characteristics met the general physical characteristics of the person she saw the night of the deadly assault.

Other Relevant Evidence

On the night of the burglary and deadly assault, police responded to Ms. Ashford's 911 call. They found the victim lying on his kitchen floor in a pool of blood. He was unresponsive and unable to identify the person who broke into his home and assaulted him. The victim later died and it was determined that he died from blunt force trauma to the head from a blow to the head with a solid object inflicted at the time Ms. Ashford heard the struggle in the back of the victim's house.

The night of the burglary and assault, based on Ms. Ashford's description of the direction of travel of the perpetrator, across the street from the victim's residence, police found a metal pipe [later identified as a winch rod], with the victim's blood on it. Police also found damage to the back door of the victim's residence, the point of entry of the burglary, consistent with being caused by the winch rod. Further on from where the winch rod was found, in the direction of Farrow Road, in a vacant lot, police found a pair of white socks which were on the ground next to a tree. These white socks contained the victim's blood [DNA] on the outside of them. Applicant's DNA was found on the inside these white socks.

Another eyewitness also placed Applicant at the victim's residence the afternoon before the victim was murdered walking around the residence on foot and walking down the street. It was also established at trial through surveillance video and the testimony of Applicant's sister that Applicant stole a tractor trailer truck from Camden, S.C. and abandoned it near the victim's residence earlier *the day of the victim's murder* and that Applicant was a licensed tractor trailer truck driver who had experience using a winch rod which is contained in a tractor trailer's tool box. Applicant had also previously been convicted of two (2) prior burglaries. *See* State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014).

Applicant was questioned about the victim's murder while incarcerated on other unrelated charges. While Applicant denied he committed the burglary and murder, Applicant admitted he was in the area of the victim's residence on the day and night of the burglary and deadly assault. Applicant admitted he knew the victim; and, he admitted he had been to the victim's church previously and to the victim's residence the day of the burglary and assault. Applicant admitted he removed a white pair of socks from his person that same day or night and left them next to a light pole. Applicant alleged he removed the socks and left them by the pole

on the night of the victim's assault because of an athlete's foot condition. *See* State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014).

PCR Testimony

Both trial counsel Ms. Pringle and appellate counsel Ms. Hudgins testified at the PCR hearing that Tamika Ashford's testimony was admissible because she was an eyewitness and her testimony was relevant; but, it was any attempt by her to make an *out-of-court* or *in-court identification of Applicant* that was inadmissible or objectionable. It was for this reason that counsel did object to the admission of Ms. Ashford's testimony as far as an out-of-court or in-court identification. This Court finds the testimony of Ms. Pringle and Ms. Hudgins on this issue to be credible and supported by case law.

This Court does not find credible or valid Mr. Strickler's testimony at the PCR hearing that it was his belief or theory that simply because Ms. Ashford could not make an out-of-court or in-court identification of Applicant it made her testimony irrelevant and inadmissible. Ms. Ashford's testimony was relevant and admissible because she was an eyewitness and ear-witness to what occurred that night in and outside of the victim's residence at the time of the burglary and murder. *Rule 401, SCRE* ("Relevant evidence" means evidence having any tendency to make, the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence); *Rule 402, SCRE* (All relevant evidence is admissible, except as otherwise provided by the U.S. Constitution, the S.C. Constitution, and the statutes and rules of the S.C. Supreme Court); *Rule 403, SCRE* (Although relevant, evidence may be excluded if its probative value is substantially outweighed by the

danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence).

Her testimony, if believed by the jury established: (1) where the deadly assault took place, (2) the time of the burglary and deadly assault, (3) where the perpetrator entered the victim's home, (4) the victim died as a result of a struggle with an intruder who entered from the back of the victim's home, (5) a general description of the intruder/assailant, (6) as the intruder/assailant left the victim's residence he was holding a metal rod or pipe and wearing what appeared to be white gloves, and (7) when she saw the intruder/assailant again he was walking on Farrow Road and he no longer had the metal pipe or rod in his hand and was no longer wearing the white gloves.

Ms. Ashford, as an eyewitness could testify to what she saw and what she heard that night and to her role in the police investigation that followed. In fact, she was the *only* "eyewitness" to many of the facts she testified to or her testimony was inextricably linked to the other evidence in the case and necessary to prove the identity of the victim's killer. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991)(evidence is relevant and admissible if it tends to establish and make more or less probable some matter in issue upon which it directly or indirectly bears); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991)(evidence which assists a jury at arriving at the truth of an issue is relevant and admissible, unless otherwise incompetent); State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989)(the evidence in question need not be sufficient in itself to establish the whole or any definite portion of a parties contention).

This Court also does not find credible Mr. Strickler's testimony that he should have objected when the Solicitor mentioned Ms. Ashford in her opening statement. The State

stipulated before opening statements that Ms. Ashford did not make an out-of-court identification of Applicant and would not make an in-court identification of Applicant. She did not. The remainder of her testimony was relevant and admissible. This Court believes it was for these reasons that counsel did not object at the time to the mention of Ms. Ashford in opening statement. (See Tr. pp. 271-88). Furthermore, the Solicitor admitted in her opening statement to the jury that Ms. Ashford identified the wrong person on the night of the crimes, and only later picked out Applicant's picture as a possible person who committed the crime. (See Tr. pp. 271-88).

The record shows Applicant was represented by trial counsel, Mr. Strickler and Ms. Pringle, who were well experienced in the trial of criminal cases in South Carolina including murder cases. Counsel was well aware of the appropriate motions to make regarding the admissibility of Ms. Ashford's testimony and made them.[3]

The record shows counsel raised the admissibility of Ms. Ashford's testimony as far as an out-of-court or in-court identification pre-trial and there was a hearing on this issue. (Tr. pp. 169-99; 201-07; 208-10; Tr. Aug. 3, 2011, pp. 7-43). A Neil v. Biggers[4] hearing was conducted before Judge Newman where it was shown and conceded by the State that Ms. Ashford would

[3] Where there is an issue as to whether or not ***an out-of-court identification*** was unduly suggestive, or whether ***an in-court identification*** by a witness **is of independent origin based upon a witness' observations**, a defendant is entitled to an *in camera* hearing to determine the admissibility of such identification. Neil v. Biggers, *supra*; State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992); State v. Williams, 258 S.C. 482, 189 S.E.2d 299 (1972); State v. Cash, 257 S.C. 249, 185 S.E.2d 525 (1971); State v. Cheatham, 349 S.C. 101, 117, 561 S.E.2d 618, 627 (Ct. App. 2002); State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999); Rule 104(c), SCRE. Questions regarding admissibility of identification evidence are left to the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of abuse of discretion. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999).

[4] Neil v. Biggers, 409 U.S. 188 (1972).

not make *an in-court identification of Applicant*, and she had *not positively identified Applicant out-of-court.* (Tr. Aug. 3, 2011, pp. 7-43). In fact, the testimony showed she had tentatively identified the wrong person in an improper show-up [not Applicant] the night of the crime, except for stating this person was wearing the wrong clothes. This person was later eliminated as a suspect through investigation and DNA testing. And then, months later when shown a six (6) person photo line-up identified Applicant's photograph as 1 of 2 photographs in the line-up that most resembled the person who she saw standing on the porch of the victim's home after the crime and Applicant's photograph of those 2 photographs looked the most like the perpetrator she saw the night of the crime. (Tr. Aug. 3, 2011, pp. 7-43).

As Judge Newman correctly found and as the record shows, there was nothing improper or suggestive about this six (6) person photo line-up.[5] As previously stated, trial counsel *objected to the admission of the testimony of Ms. Ashford* [or at least any out-of-court identification of Applicant **and** any in-court identification of Applicant], and a Biggers hearing

[5] *See* State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987)(the reliability of an identification procedure depends upon the consideration of a totality of the facts and circumstances of each particular case); State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984)(same); State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981)(similar); State v. Johnson, 318 S.C. 372, 458 S.E.2d 49 (Ct. App. 1995)(same); Stovall v. Denno, 388 U.S. 293 (1967)(irrespective of the means by which a witness may make an identification, be it by a show up, physical line-up, or photographic line-up, the test for the admissibility of an identification is whether the method was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process); State v. Dixon 284 S.C. 526, 328 S.E.2d (Ct. App. 1985)(same); State v. Ford, 278 S.C. 384, 296 S.E.2d 866 (1982)(same); Manson v. Brathwaite, 432 U.S. 98 (1977)(Factors to consider in evaluating the likelihood of misidentification include: (1) the opportunity of the witness to view the accused; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the time of the identification confrontation; and (5) the length of time between the crime and the confrontation (identification); State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980)(same); State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 91987); State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984)(similar); State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981).

was held before Judge Newman in camera. (Tr. Aug. 3, 2011 pp. 7-43). After hearing testimony from several witnesses including Ms. Ashford and police and the stipulations and arguments of counsel, Judge Newman eventually ruled that Ms. Ashford could testify. (Tr. Aug. 3, 2011, pp. 7-43).

However, she did not and could not positively identify Applicant out-of-court. Nor was she going to make an in-court identification of Applicant. Judge Newman ruled she could testify to what she saw and heard that night at the victim's residence at the time of the murder and shortly thereafter and would be allowed testify to exactly what occurred during the investigation as far as what she knew and what she informed police of. Thereafter, Ms. Ashford testified before the jury. (Tr. Aug. 8, 2011, pp. 61-134). And, Ms. Ashford did not make an in-court identification of Applicant at trial. She merely testified to what she saw and heard that night in and around the victim's residence, who she identified that night [which was not Applicant], and to the picking out of Applicant's picture along with another person's photograph from the 6 picture line-up as the persons most resembling the person she saw on the victim's front porch after the burglary and deadly assault and applicant's picture more resembled the person on the front porch than the other picture she picked out. And, finally that Applicant's general characteristics were consistent with the general physical characteristics of the person she saw on the front porch of the victim's residence the night of the murder. However, she readily admitted to the jury she could not positively identify Applicant as it was dark and she did not see his face clearly.

As a result, this Court finds counsel was neither deficient nor was Applicant prejudiced by counsel's *alleged* failure to object to the mention of Ms. Ashford's forthcoming testimony by the Solicitor in her opening statement. Strickland v. Washington. Ms. Ashford's testimony was

relevant and admissible because she was an eyewitness and ear-witness to what occurred that night in and outside of the victim's residence at the time of the burglary and murder. *Rule 401, SCRE*; *Rule 402, SCRE*; *Rule 403, SCRE*. Ms. Ashford, as an eyewitness could testify to what she saw and what she heard that night and to her role in the police investigation that followed. In fact, she was the *only* "eyewitness" to many of the facts she testified to or her testimony was inextricably linked to the other evidence in the case and necessary to prove the identity of the victim's killer. Alexander, 303 S.C. 377, 401 S.E.2d 146; Sims, 304 S.C. 409, 405 S.E.2d 377; Finley, 300 S.C. 196, 387 S.E.2d 88. As her testimony was ultimately admissible, and she did testify, counsel's choosing not to object to mention of her in opening statement was neither deficient nor prejudicial. Strickland. Counsel's performance did not fall below an objective standard of reasonableness. Id.

And, Applicant cannot show any resulting prejudice, i.e. had counsel objected there is a reasonable probability the result of his trial would have been different. Strickland. As Ms. Ashford's testimony was relevant and ultimately admissible on the points previously discussed, and she did testify pursuant to Judge Newman's ruling, there is no reasonable probability that Applicant would have been acquitted had counsel objected during the opening statement. Id. As a result, there is no merit to this ground and it must be denied and dismissed with prejudice.

Applicant further argued because Ms. Ashford initially identified the wrong person [not Applicant] at a show-up shortly after the crimes, that Ms. Ashford's testimony was inadmissible in his trial. And, because she did not positively identify Applicant from the photo-array containing his photograph, that her testimony was not admissible. As previously shown, this fact went to the weight or credibility of her testimony and description of the assailant not to the admissibility of her testimony. The jury could determine, given all of the circumstances,

whether her description of the assailant was accurate. Furthermore, a review of the trial transcript shows trial counsel cross-examined, impeached, or called into question the reliability of Ms. Ashford's description of the perpetrator through the use of her misidentification on the night of the crimes and her inconsistent statements given to police. (Trial Tr. Aug. 8, 2011 pp. 61-132). As a result, there was no ineffective assistance of trial counsel. Strickland.

As a result, this Court finds counsel was neither deficient nor was Applicant prejudiced by the opening statement of the Solicitor (See Trial Tr. pp. 271-88) or counsel's failure to object to this portion of the Solicitor's opening statement. Strickland v. Washington. Again, opening statements are not evidence. The purpose of an opening statement is to give the jury a roadmap or an overview of where the case or presentation of evidence is going. Dinitz, 424 U.S. 600 (Burger, C.J., concurring); Brown, 277 S.C. 203, 284 S.E.2d 777; Harris, 275 S.C. 463, 272 S.E.2d 636. It is to assist the jury in understanding the presentation of evidence, and the position of each side in the case. Id. When the prosecution refers to facts in its opening statement, there is no error as long as the solicitor introduces evidence to reasonably support statements made in an opening argument. Kornahrens, 290 S.C. 281, 350 S.E.2d 180. *See also* Sims, 348 S.C. 16, 558 S.E.2d 515. This is exactly what the Solicitor did in her opening statement, provided the jury with an overview or roadmap of where the evidence was going to take the jury and her statements were later supported by testimony actually introduced during the trial of the case.

Alleged Failure to Object to Reference in Opening Statement to Crime Scene

At the PCR hearing, Applicant also alleged counsel was ineffective in failing to object when the Solicitor allegedly stated in her opening statement that Applicant's Blood [DNA] was found at the crime scene. This Court has reviewed the entire opening argument of the Solicitor

(Tr. Trans. Aug. 1, 2011, pp. 271-88) and finds this ground of ineffective assistance of counsel to be without merit.

Opening statements are not evidence. The purpose of an opening statement is to give the jury a roadmap or an overview of where the case or presentation of evidence is going. United States v. Dinitz, 424 U.S. 600 (1976)(Burger, C.J., concurring); State v. Brown, 277 S.C. 203, 284 S.E.2d 777 (1981); State v. Harris, 275 S.C. 463, 272 S.E.2d 636 (1980). It is to assist the jury in understanding the presentation of evidence, and the position of each side in the case. Id. When the prosecution refers to facts in its opening statement, there is no error as long as the solicitor introduces evidence to reasonably support statements made in an opening argument. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). *See also* State v. Sims, 348 S.C. 16, 558 S.E.2d 515 (2002). This is exactly what the Solicitor did in her opening statement, provided the jury with an overview or roadmap of where the evidence was going to take the jury and her statements were later supported by testimony actually introduced during the trial of the case.

The Solicitor did not state as Applicant alleges that Applicant's blood was found at the crime scene, i.e. inside Reverend Eichelberger's home. (Tr. Trans. Aug. 1, 2011, pp. 271-88). The Solicitor in her opening statement laid out a road map of what the evidence would show, including that the victim's blood was found in his kitchen, on the winch rod, on the white socks found in the vacant lot, and Applicant's DNA was found inside the same white socks. (Tr. Trans. Aug. 1, 2011, pp. 271-88). The Solicitor did misstate at one (1) point that Applicant's blood was found on the socks found in the vacant lot, but she immediately corrected herself and stated the blood on the socks came back to the victim: "I mean, I apologize, to the victim, and the blood on the winch rod bar came back to the victim. (Tr. Trans. Aug. 1, 2011, pp. 275-76). She again misstated the blood on the socks was the defendant's when explaining that further

DNA testing showed Applicant's DNA was found not on the outside of the socks but on inside the socks. (Tr. Trans. p. 277, ll. 1-14). The Solicitor continued summarizing all of the evidence in her opening statement including Applicant' incriminating statements including one (1) later admitting that the white socks were his and he had taken them off near a dumpster and then changing his story and stating he took them off near a light pole. (Tr. Trans. Aug. 1, 2011, p. 280, ll. 15-25). The Solicitor then corrected her previous misstatement again stating the blood on the white socks belonged to the victim, but Applicant admitted he had worn the white socks and sweated in them. (Tr. Trans. Aug. 1, 2011, p. 280, ll. 15-25).

Furthermore, this Court has reviewed the trial record including the testimony of the DNA analyst before the jury. During that testimony, it was fully explained to the jury that the victim's blood was found on the outside of the white socks and Applicant's DNA was found on the inside of the socks. (ROA pp. 542-59, 561-629, 629-40). This was re-emphasized in the closing argument of the Solicitor.

As a result, this Court finds Applicant has failed to show counsel was ineffective for failing to object to the Solicitor's opening argument that allegedly stated Applicant's blood was found at the crime-scene. Strickland v. Washington. As shown above, the Solicitor did not argue or state in her opening statement that Applicant's blood was found at the crime-scene [Reverend Eichelberger's house]. While the Solicitor misstated Applicant's blood was found on the white socks approximately two (2) residential lots away from the crime-scene, the Solicitor corrected herself and informed the jury it was the victim's blood that was found on the outside of the socks and Applicant's DNA that was found on the inside of the socks. The testimony of the DNA analyst at trial also fully explained to the jury that Applicant's blood was not found in Reverend Eichelberger's home, and that the victim's blood was found on the outside of the white

socks and Applicant's DNA was found on the inside of the white socks. Furthermore, the Solicitor's closing argument reflected the same correct information. As a result, Applicant has failed to show deficient performance in this regard. Strickland. Given this record, Applicant has also failed to show resulting prejudice, i.e. but for counsel's failure to object in this regard, there is a reasonable probability Applicant's trial would have resulted in a different outcome. Id.

Alleged Ineffective Assistance of Counsel for Failing to Object to Arrest Warrants

Applicant alleges counsel was ineffective in failing to object to the arrest warrants he was served with because they were dated the wrong date, May 6th, 2009 and not May 3rd, 2009 and Applicant claims he was never served with the warrants containing the correct date of May 3rd. Applicant alleges this violated his civil rights under the United States Constitution and counsel should have objected or moved to quash the arrest warrants. Applicant was not arrested for this murder and burglary in the 1st degree until approximately one (1) year after the crimes and while Applicant was incarcerated in the South Carolina Department of Corrections for a different offense.

Counsel, Mr. Strickler, testified at the PCR hearing that based on his memory he believed he was aware of the issue with the arrest warrants but he did not raise an objection to them because Applicant was tried on the indictments not on the arrest warrants. Mr. Strickler testified he reviewed the indictments prior to trial and there was nothing deficient about them. Mr. Strickler testified if there had been something wrong or deficient with the indictments, he would have objected to them or made a motion to quash them.

This Court observed the testimony of both Applicant and Mr. Strickler on this issue. This Court finds the testimony of Mr. Strickler on this issue to be credible and the testimony of

Applicant on this issue to be not credible. This Court also finds there is no legal merit to Applicant's contention.

Even if Applicant was not served with the arrest warrants containing the correct date of the burglary and murder of the victim, it makes no significant legal difference. A deficient arrest warrant or a defect in an arrest warrant will not defeat, excuse, or bar a subsequent prosecution of the defendant on an indictment. 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); 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. Waitus, 226 S.C. 44, 83 S.E.2d 629 (1954). It is the indictment or indictments on which the defendant is tried, not the original arrest warrants. State v. Castineira, 341 S.C. 619, 535 S.E.2d 449 (Ct. App. 2000), *affirmed on writ of cert.*, 351 S.C. 635, 572 S.E.2d 263 (2003); State v. Cody, 180 S.C. 417, 186 S.E. 165 (1936). The subsequent indictment cures any defect in the arrest warrant. 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* State v. Bowman, 43 S.C. 108, 20 S.E. 1010 (1895). Further, the original warrants stated the victim was murdered *on or about* the 3rd day of the month and the subsequent warrants stated the victim was murdered *on or about* the 6th day of the same month. As a result, regardless of what warrants Petitioner was served with, Petitioner was on notice of the crime he was charged with, the murder of Reverend Tryon Eichelberger and the burglary of his home at night. *See* Magazine v. State, 361 S.C. 610, 606 S.E.2d 761 (2004). Furthermore, **the indictments** correctly stated the date of the murder and burglary in the 1st degree and were sufficient. State v. Gentry, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005);

Locke v. State, 341 S.C. 54, 533 S.E.2d 324 (2000); State v. Jones, 333 S.C. 6, 507 S.E.2d 324 (1998); Granger v. State, 333 S.C. 2, 507 S.E.2d 322 (1998); State v. Wade, 306 S.C. 70, 409 S.E.2d 780 (1991); State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987); State v. Hardee, 279 S.C. 409, 308 S.E.2d 521 (1983); State .v Tabory, 262 S.C. 136, 202 S.E.2d 852 (1974); State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952); State v. Perry, 87 S.C. 535, 70 S.E. 304 (1911). Therefore, even if any error in the arrest warrants, the error was cured by the indictments. 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). As a result, Petitioner has failed to prove either prong of the Strickland analysis. Counsel was neither deficient for not objecting to the service of the arrest warrants nor has Petitioner shown any resulting prejudice. Strickland. Even had counsel objected or moved to quash the arrest warrants on this basis, the result of Applicant's proceeding would not have been different as Applicant was tried and convicted on the valid indictments. Strickland. The objection to the arrest warrants would have been overruled. As a result, Applicant has failed to show resulting prejudice. Strickland.

Alleged Failure to Object to the Closing Argument

At the PCR hearing, Applicant alleged counsel should have objected to the Solicitor's closing argument: (a) that Applicant caused the head injury to the victim depicted in an autopsy photograph that was admitted in evidence (b) when the Solicitor held up the winch rod before the jury and argued Applicant wielded the murder weapon like a baseball bat; and (c) when the Solicitor argued Applicant committed the crimes against the victim. Counsel testified at the PCR hearing that he did not object to the Solicitor's closing arguments above because the Solicitor is allowed to argue the evidence and the reasonable inferences therefrom; and that is what the

Solicitor was doing at these points in her closing argument. Counsel testified the Solicitor was not referencing the testimony of one (1) particular witness in this regard, as Applicant alleges, but arguing all of the evidence in the case and the reasonable inferences therefrom. As a result, counsel testified these arguments of the Solicitor were not objectionable and an objection would have been overruled.

This Court had the opportunity to observe the testimony of counsel and Applicant on this issue. This Court also had the opportunity to review the closing argument of the Solicitor. This Court finds counsel's testimony on this issue to be credible and supported by the record and case law. And, this Court finds Applicant's allegations in his testimony in this regard are not credible and without merit.

Courts must review an alleged improper argument in the context of the entire record. State v. Patterson, 324 S.C. 5, 482 S.E.2d (1997); State v. Rice, ___ S.E.2d ___, 2007 WL 2914651 (Ct. App. Oct. 5, 2007), *citing* Patterson. Considerable latitude is generally allowed in matters of drawing and arguing inferences and deductions from evidence. Johnson v. Life Ins. Co. of Ga., 227 S.C. 351, 88 S.E.2d 260 (1955). A lapse of good taste will rarely constitute prejudicial error nor will robust language introduce an arbitrary factor. State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984). Arguments must be confined to the evidence in the record and reasonable inferences therefrom, although failure to do so will not automatically result in reversal. State v. Huggins, 325 S.C. 103, 481 S.E2d 114 (1997). A new trial will not be granted unless the comments so infected the trial with unfairness so as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868 (1974); State v. Bennett, 369 S.C. 219, 632 S.E.2d 281(2006); Patterson. "[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the

utterances and the circumstances under which they were made." Bennett, *quoting* South Carolina State Highway Dep't. v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1971).

The Solicitor may argue the evidence in the record and the reasonable inferences from that evidence, especially in a circumstantial evidence case. State v. Cooper, 334 S.C 540, 514 S.E.2d 584 (1999); State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). The Solicitor may argue his version of the testimony and comment on the weight to be given to the testimony of the witnesses. State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995); State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976); State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971). The Solicitor may argue that the evidence shows beyond a reasonable doubt that the defendant is guilty of the crimes charged. State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976)(a prosecutor may argue to a jury to return a verdict that she conceives it is their duty to return based upon the evidence presented in the trial); State v. Caldwell, 330 S.C.494, 388 S.E.2d 816 (1990)(a prosecutor may argue her case vigorously and give her version of the testimony, and what weight or credibility should be given to the evidence); State v Cannon, 220 S.C. 614, 93 S.E.2d 880 (1956). It is also proper for the Solicitor in closing arguments to hold up an exhibit to the jury or play tapes or recordings admitted into evidence. State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979); State v. Mishoe, 198 S.C. 215, 17 S.E.2d 142 (1941). In closing argument, the prosecutor may take an alleged murder weapon and demonstrate the use of such weapon and how it might have been used in the murder. State v. Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996); State v. McIver, 238 S.C. 401, 120 S.E.2d 393 (1961). *See also* State v. Ash, 526 N.W.2d 473 (ND 1995)(having sheriff lie on floor while counsel held rifle to ear, consistent with pathologist testimony, not improper demonstration of how death occurred); People v. Bush, 430 N.E.2d 514 (Ill. App. 1981)(closing argument

demonstration using live model held proper); State v. Kroll, 558 P.2d 173 (Wash. 1976)(demonstration by prosecutor using one other than accused not improper where prosecutor was showing jury manner in which the crime might have been committed, prosecutor was demonstrating a reasonable inference from the evidence, the trial court placed restrictions on the demonstration, and the jury was instructed the demonstration was not evidence); People v. Caldaralla, 329 P.2d 137 (Cal. 1958)(closing argument demonstration using live model held proper); Herron v. Commonwealth, 64 SW 432 (Ky. 1901)(closing argument demonstration using live model held proper); Jacob Stein, Closing Arguments 2d, Section 1:64, © 2008 Thompson Rueters/West.

In the present case, in her closing argument, the Solicitor was not referencing or arguing the testimony of a specific witness that saw Applicant kill the victim, but arguing based on all of the evidence in the case, including the circumstantial evidence, Applicant was the person who committed these crimes. This was proper argument based on all of the evidence in this case. Further, the Solicitor's demonstration with the winch bar how Applicant killed the victim was entirely proper based on all of the evidence in the case. Brisbon; McIver. The argument was not objectionable and any objection would have been overruled. As a result, counsel was not deficient in failing to object to this portion of the Solicitor's closing argument, nor was Applicant prejudiced by any failure to object. Strickland v. Washington.

Alleged Ineffective Assistance of Appellate Counsel

Applicant specifically alleges his appellate counsel, Katherine Hudgins, was ineffective in failing to raise the issue of the admissibility of Tamika Ashford's testimony on direct appeal. This Court had the opportunity to observe the testimony of Ms. Hudgins and Applicant on this issue. This Court also had the opportunity to review Ms. Ashford's testimony before Judge

Newman and before the jury. This Court finds that Ms. Hudgins testimony on this issue was credible and Applicant's testimony on this issue was not credible. This Court also finds Ms. Hudgins testimony is corroborated by the record and her appellate brief.

As the record reflects, Tamika Ashford was an eyewitness [and ear-witness] to the facts surrounding the murder of Reverend Eichelberger, the victim in this case. *See* State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014). Ms. Ashford was present in Reverend Eichelberger's home when she and the victim heard a noise at the back of the victim's house. Ashford saw the victim go to the back of the house to investigate the noise and then heard the victim state out loud to someone in the back of the house: "how did you get in here." She then heard noises similar to a scuffle or struggle. Afraid, Ms. Ashford ran from the home and to her car and drove around the block and upon returning to the victim's residence saw an individual, standing on the victim's front porch or in the victim's front yard, who was holding a metal pipe in his hand and wearing what appeared to be white gloves. Ms. Ashford called the police and waited nearby until police arrived. While waiting nearby, Ms. Ashford saw the same individual walking down Farrow Road but without the metal pipe or the white gloves on. Ms. Ashford returned to the victim's home when police arrived and gave them a general description of the suspect. Ms. Ashford did not make an in-court identification of Applicant. It was brought out that she actually identified the wrong person in a show-up procedure shortly after the crime and then picked Applicant's picture out of a line-up at a later date as one (1) of two (2) persons in the line-up who looked most like the person she saw in the victim's yard the night of the murder. She stated Applicant's picture looked most like the perpetrator of the two (2) individuals she identified in the photo line-up; however, again she did not make a positive identification of

Applicant and did not make an in-court identification of Applicant. She testified Applicant met the general physical characteristics of the person she saw on the victim's front porch.

As Ms. Ashford's testimony surrounding the events the night of the victim's assault were relevant and admissible for several different reasons, appellate counsel was not ineffective for failing to raise the admissibility of her testimony on direct appeal. Jones v. Barnes; Strickland v. Washington. *See also* Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001)(ineffective assistance of counsel claims based on a failure to object to the admission of certain evidence are tied to the admissibility of the underlying evidence; if the evidence was admissible in any event, then the claims fails both prongs of Strickland as it was neither deficient nor prejudicial not to object).

Ms. Ashford was an eyewitness [and ear-witness] to the events surrounding the victim's murder and could describe for the jury exactly what she saw and heard and describe for the jury what the man she saw in the victim's front yard looked like, what he was wearing, and what he was holding. This testimony was highly relevant, probative, and admissible to the State's case on both murder and burglary in the 1st degree. Her testimony of how Reverend Eichelberger was murdered was corroborated by other evidence presented by the State in its case in chief, including the discovery of a metal pipe [a winch rod] in a neighbor's yard which contained the victim's blood and the discovery of two (2) white socks near a light pole in a nearby vacant lot that also contained both the victim's blood and also Applicant's DNA inside the white socks. And, Ms. Ashford established at what time Reverend Eichelberger was murdered and that the murder occurred in his home in Richland County. Simply because she could not positively identify Applicant as the perpetrator does not make her testimony inadmissible. Her testimony was relevant and admissible on several different issues in the case and any objection to the admissibility of her testimony at trial was properly overruled by the trial judge, Judge Newman.

Further, her testimony was so relevant and probative on these different issues that its probative value outweighed any prejudicial effect. Rule 403, SCRE. In fact, she was *the only eyewitness* to the crimes against Reverend Eichelberger.

On appeal, the South Carolina appellate courts would have reviewed Judge Newman's admission of Ms. Ashford's testimony under an abuse of discretion standard. *See* State v. McWee, 433 S.C. 307, 472 S.E.2d 235 (1996)(whether evidence is relevant and admissible is in the sound discretion of the trial judge): State v. Babb, 299 S.C. 451, 385 S.E.2d 827 (1989)(a trial judge's determination of admissibility of evidence will not be disturbed on appeal absent a showing of abuse of discretion that has resulted in prejudice to the complaining party). And great deference is given to a trial judge's decision regarding the comparative probative value and prejudicial effect of evidence with the judgment of the trial judge only being reversed in exceptional circumstances. State v. Douglas, 359 S.C. 187, 597 S.E.2d 1 (Ct. App. 2004), *affirmed in part, reversed in part* 369 S.C. 424, 632 S.E.2d 845 (2006); State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004); State v. Horton, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).

As a result, appellate counsel was not ineffective in failing to raise the admissibility of Ms. Ashford's testimony on direct appeal. Having reviewed the appellate court records, including the direct appeal briefs, the issue Applicant alleges appellate counsel should have raised on appeal is not clearly stronger than the issues that were raised by appellate counsel for the reasons stated previously above. Smith v. Robbins, 528 U.S. 259, 285 (2000); Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir. 2000). Nor has Applicant established prejudice from appellate counsel's performance. Because Ms. Ashford's testimony was relevant and admissible, its probative value outweighed any prejudicial effect, and given the standard of review on appeal,

there is no reasonable probability Applicant would have prevailed on appeal had appellate counsel raised this issue. Id.

Applicant also alleges appellate counsel was ineffective in failing to raise on direct appeal the admissibility of the theft of the truck from Camden. As this issue was raised on direct appeal by appellate counsel and decided by the South Carolina Court of Appeals adverse to Applicant [*see* State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014)], there is absolutely no merit to this allegation and it must be denied and dismissed with prejudice. Smith v. Robbins; Bell v. Jarvis.

Alleged Failure of DNA Lab to Follow Scientific Protocol

Finally, at the PCR hearing Applicant alleged the DNA Lab did not follow proper scientific protocol when it extracted his DNA from the inside of the white socks found near the crime scene. This claim is not cognizable on post-conviction relief. This is a claim of trial court error in the admission of evidence and as a result may not be raised in PCR and must be dismissed with prejudice. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)(citations omitted)("Allegations of trial court error are not cognizable on PCR. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993)(issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel), *citing* S.C. Code Ann. Section 17-27-20(b) (1985); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975), *also referencing* Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Ashley v. State, 260 S..C. 436, 196 S.E.2d 501 (1973);

Sellers v. Boone, 261 S.C. 462, 200 S.E.2d 686 (1973). As a result, Applicant's complaints against the trial judge, Judge Newman, are denied and dismissed with prejudice.

Furthermore, even if this claim was cognizable, or Applicant is raising a claim of ineffective assistance of counsel for failing to object to the admission of the DNA evidence for this reason, there is no merit to this argument. This Court finds based on its hearing Applicant's testimony and reviewing the entire record, that Applicant's testimony in this regard is not credible. Further, the record of the trial proceeding shows the DNA laboratory followed its protocol's in extracting and developing the DNA samples and DNA profiles in this case including those of the victim, the Applicant, and from the evidence recovered in the case. (ROA pp. 542-59, 561-629, 629-40). This was confirmed by two (2) different witnesses at trial, John Barron and Gray Amick, the DNA experts. (ROA, pp. 542-640). And, counsel extensively cross-examined the DNA experts about whether or not they followed the laboratory's protocol's in extracting and developing the DNA samples and DNA profiles and determining who they matched and who they did not match. (ROA, pp. 542-59, 561-629, 629-40). This Court finds based on the trial record, the State laid a proper foundation for the admission of the DNA evidence, and any objection by trial counsel in this regard would have been overruled. Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001)(ineffective assistance claims based on failure to object are tied to the admissibility of the underlying evidence; if the evidence admitted without objection was admissible in any event, then the complaint fails both prongs of the Strickland test, as it was neither deficient nor prejudicial not to object). As a result, Applicant has failed to show deficient performance or resulting prejudice on any ineffective assistance of counsel claim. Strickland.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this manner and not specifically addressed in this order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has waived and abandoned any such allegations, and Applicant failed to meet his burden of proof regarding them. Rule 71.1, SCRCP; Strickland; Butler v. State.

CONCLUSION

For the above stated reasons, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. 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 intent to appeal within thirty (30) days from receipt of this Order ot secure the appropriate appellate review. See Rule 203, SCACR, Rule 71.1(g) SCRCP; Bray v. State, 446 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

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

2. Applicant is remanded to the custody of Respondent for the completion of his sentences.

IT IS SO ORDERED.

The Honorable Paul M. Burch
Presiding Judge
Richland County

November 9, 2018